

THE DEFENCE LAWYER IN THE MODERN ERA

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Acknowledgements	8
Abstract	10
Chapter One - Introduction	12
1.1 Why explore this?	14
1.2 Research Questions	17
1.3 Chapter Outline	18
1.4 Analytical Models	21
1.5 Methodological Overview	22
Chapter Two - Traditional Adversarial and Inquisitorial Ideology	26
2.1 Models of Criminal Procedure	31
2.2 The Purpose(s) of the Criminal Trial	34
2.3 The Search for the Truth	34
2.4 The Trial and Finality	35
2.5 Deterrence or Rehabilitation? The Inquisitorial Trial	36
3. The Actors in the Criminal Justice Process	38
3.1 The Adversarial Prosecutor	39
3.4 The Inquisitorial Prosecutor	40
4. The Role of the Judiciary	41
4.1 Judicial Questioning	42
4.2 The Myth of the Impartial Umpire?	44
4.3 The Inquisitorial Judiciary	45
5. Conclusion	47

Chapter Three - From the accused speaks to the 1990s: The changing Role of the Criminal defence lawyer	49
1.1 The Altercation: The Victim v Accused	51
1.2 Cases of High Treason	52
2. Enter the Lawyer: From Lawyer Free to Lawyer Dominated Trials	54
2.1 Departure from the Prohibition of Defence Counsel	56
2.2 Lifting the Restrictions on the Role of the Defence Lawyer	57
2.3 The Accused Speaks Again?	59
3. The Twentieth Century Defence Lawyer	61
3. 4 A Theoretical Conception of the Defence Lawyer	64
4.1 The Defence Lawyer's Role: The Zealous Advocate?	65
4.2 The Overarching Responsibilities of the Defence Lawyer	67
4.3 The Duty to the Client	67
4.3.1 The Partisan Defence Lawyer	68
4.4 The Duty to the Court and the Administration of Justice	70
4.5 The Duty to the Public	72
5. Conclusion	73
Chapter Four - The Criminal Procedure and Investigations Act 1996, The Criminal Procedure Rules and Disclosure	75
4.1 The Evolution of Disclosure	76
4.2 The Political Context and the Drift from Due Process to Crime Control.	90
4.3 The Efficient Criminal Process: The Birth of the CPIA 1996	96
4.4 Empirical Evidence on the Disclosure Regime	99

4.5 The Auld Review and Evolution of CPIA: The Rise of Managerialism	103
4.6 Justice for All and the CJA Reform	106
4.7 The New Regime: The Criminal Procedure Rules	110
4.8 Conclusion.	119
Chapter Five - The New Regime: Implications for the Defence Lawyer	120
5.1 The Obligations of the Modern Defence Lawyer	121
5.2 The Conflicts with the Traditional Role of the Defence Lawyer	123
5.2 The Matrix of obligations	125
5.4 Disclosure and the Impact on the Defence Lawyer	134
5.4.1 Witness Disclosure	137
5.5 Potential Conflicts with the CrimPR	138
5.6 Further Disclosure under the CrimPR	141
5.7 Enforcement Mechanisms for non-compliance with the CPIA or CrimPR	144
5.7.1 Inferences	144
5.7.2 Costs	145
5.7.3 The Refusal of an application or adjournment	148
5.7.4 Professional Censure	149
5.7.5 Professional Censure	150
5.7.6 Sanctions: Conclusion	151
5.8 Professional Guidance	152
5.9 The implications of the CPIA and CrimPR for the defence lawyer	154
Chapter 6 - Fieldwork Methodology	163

6. Introduction	164
6.1 Methods of Data Collection	164
6.1.2 Focus Groups	165
6.1.3 Ethnography and Case Studies	166
6.1.4 Case Studies	167
6.1.5 Interviews	167
6.1.6 Unstructured Interviews	168
6.1.7 Semi-Structured Interviews	169
6.2.1 <i>Proforma</i> Construction	172
6.3 The Research Sample	173
6.3.1 Attracting the Participants	174
6.4 Target Respondents	178
6.5 Ethics	179
6.6 Application of the Data	181
6.6.1 Limitations of the semi-structured interview	181
6.6.2 Coding of Interviews	183
6.7 Conclusion	185
Chapter 7 - The Defence Lawyer in the Modern Era	188
7.1 Introduction	189

7.2 Role Confusion	190
7.3 The Hierarchy of Duties	191
7.4 The Overriding Objective	199
7.5 Tension in the era of co-operation	207
7.5.1 The Case Management Form	208
7.5.2 Identifying the Real Issues and a Lack of Time	208
7.5.3 Strategies and Tactics: Advancing the Client's Best Interest	213
7.5.4 The Case Progression Officer	220
7.5.5 Advance Disclosure of Witnesses	223
7.5.6 Conclusions	227
7.6 The Implications for the Lawyer-Client Relationship	228
7.6.1 The obligation to inform the court of significant failures	228
7.6.2 (In)Effective Sanctions for Failing to Comply with the Rules	234
7.6.3 The Implications of the CrimPR for the lawyer-client relationship	236
7.7 Does the Adversarial Lawyer actually exist?	237
7.7.1 The Role(s) of the Defence Lawyer	242
7.7.2 Tension in the Modern Era	244
7.7.3 The Lawyer-Client Relationship	246
 Chapter 8 - The 'Efficient' Criminal Justice Process and the Dilution of Adversarialism	
8.1 The Current Political Context	256
8.2 The Efficient Process: Better Case Management and the Early Guilty Plea	258
8.3 Undue Pressure	261
8.4 Robust Case Management and the Intervening Judge	263

8.5 Truth or Proof: The dilution of the Adversarialism in Pursuit of the Overriding Objective.	265
8.6 The Current State of the Adversarialism: A theoretical analysis	271
8.7 The Culture of the New Regime and the Lawyer-Client Relationship	274
8.8 Conclusion	279
Appendix One - The Matrix of Obligations	279
Appendix Two - The Case Management Form	291
Appendix Three - The Defence Case Statement	298
Appendix Four - Interview Consent Form	301
Appendix Five - Interview <i>Pro Forma</i>	302
Bibliography	305
Books	305
Journal Articles	315
Legislation – England and Wales	329
Professional Standards and Advice	330
Cases	331
Websites	334
Miscellaneous	335

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Thank you all.

Ed
July 2019

To Jacob,

Never stop being curious.

Abstract

A fundamental cornerstone of the adversarial legal system is the criminal defence lawyer. Traditionally, there was a minimal defence disclosure regime which was limited to alibi and expert evidence. However, over the last twenty five years, these obligations have increased at a rapid rate. For the purposes of this thesis, the ‘modern era’ is from 1996-present day. This timeframe ignores a fundamental change to adversarialism, the erosion of the right to silence via the Criminal Justice and Public Order Act 1994. The constraints of the word limit would not allow the thesis to consider both the changes to the right to silence and disclosure regimes. Therefore, for the purposes of this thesis, the modern era centers on 1996 disclosure provisions created by the Criminal Procedure and Investigations Act 1996.

The adversarial defence is often viewed as a ‘gladiator’ of the accused and acts as a protector ‘shield from the oppressive state.’ However, this perspective is out of date as since the explicit shift in the criminal justice process and Lord Justice Auld’s 2001 *Review of the Criminal Courts* provided the catalyst for this change. The adversarial culture that permitted the defence lawyer to zealously defend his client in an adversarial manner is diluted. The rise of a ‘managerialist’ culture now underpins the criminal justice system and the role of the defence lawyer is changing and thus requires re-examination.

This thesis establishes a classic conception of the role of the defence lawyer that centers on three interwoven duties: to the client, to the court and to the public and the administration of justice. The thesis examines how the pre-trial disclosure obligations impact both the role of the defence lawyer and their approach to these obligations. The thesis aims to establish how the defence lawyer perceives themselves through the use of a semi-structured interview, the interviews explore their thoughts on the increased disclosure obligations. Furthermore, the thesis examines how the changed obligations impact both lawyer-client relationship and the wider connotations for adversarialism. The research found that three types of lawyers exist in the modern era:

1. *The Classic Adversarial Lawyer* – The lawyer identifies their role as being to advance the best interest of the client.
2. *The Conflicted Adversarial Lawyer* – The lawyer maintains that their primary obligation is to the client but recognizes that, in a culture of cooperation, they are required to satisfy more than one duty.

3. *The Procedural Adversarial Lawyer* – The lawyer sees no conflict between their obligations; any conflict encountered by the lawyer is viewed as an occupational hazard that requires careful navigation. By following the rules, there is no clash of duties.

As well as identifying these three types of lawyers, the thesis argues that the adversarial criminal process is reverting back to a regime which is reminiscent of the 16th and 17th Century. This regime was called the ‘accused speaks trial’ whereby the accused had a limited understanding of the charges laid before him and by compelling him to speak at the trial, the truth of an accusation would be established. The thesis concludes that the pre-trial disclosure obligations since 1996 are forcing the accused to ‘speak;’ albeit through the pre-trial disclosure as opposed to the oral testimony at trial. This pursuit of an efficient ‘truth’ means that fundamental adversarial safeguards, such as the presumption of innocence and the privilege against self-incrimination are eroded. Thus, the criminal justice process puts in place obstacles to defeat traditional adversarialism as it is arguably inimical to pursuit of the truth. As such, the ‘modern era’ of criminal procedure is populated by a defence lawyer who is less than zealous in his representation. Finally, the defence lawyer in the modern era is one that is conflicted by his duties, he desires to be a ‘white knight’ for his client but is hamstrung by a number of competing duties that permits the process to prioritise both efficiency and economy over the interests of the accused. Ultimately, in the modern criminal a duty of co-operation permeates the trial process and has fundamentally altered the culture of criminal procedure.

Chapter One

Introduction

1. Introduction

What are the duties of the criminal defence lawyer? Is the lawyer the ‘mouthpiece for his client, is he an officer of the court or is he¹ the zealous protector of their rights?’² This thesis seeks to answer this very question. The criminal defence lawyer and access to a defence lawyer are considered vital components of an accused person’s right to a fair trial.³ If a person is arrested in England and Wales they are likely to presume that they will have a right to a defence lawyer who will defend them. The thesis aims to examine the role of the defence lawyer in the modern era. For the purpose of this thesis, the modern era will be defined as post-1996. The thesis has adopted 1996 as the genesis of the ‘modern era’ as it was then that defence disclosure obligations were overhauled and enhanced. Prior to 1996, the defence had to disclose little to the prosecution in advance of trial, save for alibi witness evidence⁴ and the evidence of any expert witnesses⁵ the defence intended to call at trial. However, CPIA 1996 placed an obligation on the defence to disclose a defence case statement which outlined the nature of the accused’s case, including any defences he wished to rely on.⁶ This obligation is mandatory in the Crown Court but merely voluntary in the magistrates’ court.⁷ However, the advent of the Criminal Procedure Rules (CrimPR) in 2003⁸ effectively circumvents this statutory provision and places an obligation on the defence to assist in satisfying the overriding objective of ‘dealing with cases justly’⁹ by identifying ‘the real issues.’¹⁰ This effectively renders the defence disclosure obligations compulsory. However, a strong argument exists that the modern era should start two years earlier with the advent of the silence provisions of the Criminal Justice and Public Order Act 1994. Quirk suggests that the provisions represent the ‘price’ paid for the due process

¹ This thesis follows the convention in many law publications and that ‘he’ refers to both male and female lawyers unless indicated otherwise.

² M. Blake and A. Ashworth, ‘Ethics and the Criminal Defence Lawyer,’ [2004] *Legal Ethics* Vol 7 167-190, 167.

³ Article 6 of the ‘European Convention on Human Rights’ has legislative effect through the Human Rights Act 1998 and guarantees access to a defence lawyer.

⁴ S.11 Criminal Justice Act 1967.

⁵ S.2(1) Criminal Justice Act 1987.

⁶ S.5 Criminal Procedure and Investigations Act 1996.

⁷ S. 6 Criminal Procedure and Investigations Act 1996.

⁸ The Criminal Procedure Rules were first introduced in 2003. Since then, they have been revised on a number of occasions. Unless stated otherwise, the use of CrimPR makes reference to the current Rules which were introduced in October 2016.

⁹ Rule 1.1 Criminal Procedure Rules 2016.

¹⁰ Rule 3.2(2)(a) Criminal Procedure Rules 2016.

safeguards afforded to suspect in the Police and Criminal Evidence Act 1984.¹¹ However, the scope and length of this thesis does not allow for a thorough examination of the changes to both silence and disclosure, in sufficient detail. As such, this thesis is concerned with the post-charge, pre-trial disclosure obligations which manifest itself in the CPIA 1996 and CrimPR. Furthermore, the thesis argues that the CPIA 1996 allowed for the creation of what is referred to in this thesis as a ‘new regime’. This is a term coined for this thesis; it encapsulates the rise of a defence disclosure regime under both the CPIA 1996 and CrimPR. This regime has managerialist goals at its heart and looks to ensure the criminal justice process eliminates waste and focuses on efficiency.

Whilst it is arguable that the silence provisions were the genesis for this efficiency driver, the CPIA1996 re-invented the disclosure regime. This new regime¹² was also extended to the magistrates’ court where the disclosure provisions were previously only voluntary. This change represents a serious threat to adversarialism and have a far reaching effect for all connected to the criminal justice process. As such, for the purposes of this thesis, this is the start of the modern era is 1996.

Arguably, the disclosure developments have led to a culture of co-operation and notification has led to a departure from traditional adversarial values. This thesis aims to examine the role of the defence lawyer by critically exploring academic expressions of the role and empirically exploring the competing duties and tensions faced by this fundamental part of the adversarial criminal justice process. Furthermore, this thesis will explore the arena in which the defence lawyer practices. Arguably, this arena is one that has become distinctly non-adversarial; the ramifications of which will be explored throughout this thesis.

1.1 Why explore this?

The culture of defence work has undergone significant change over the course of the last twenty years. These changes may have generated confusion and uncertainty concerning the role of the defence lawyer in the modern era. If the lawyer is confused as to his role, is it possible to zealously advance the best interests of his client? Furthermore, if the lawyer is confused, how does he reconcile any confusion? The advent of the CrimPR and the

¹¹ H. Quirk, ‘Twenty years on, the right of silence and legal advice: the spiraling costs of an unfair exchange’, 2013;64(4):465-484 at 466.

¹² The notion of the new regime is discussed at length at sub-chapter 4.7 on p.110.

implicit creation of a criminal justice process that prioritizes the managerialist aims of economy, efficiency and effectiveness has gone relatively under-researched.¹³ Whilst the role of the defence has been explored through the culture of their law firms, the individualised role of the defence lawyer is something that has not been exposed to scrutiny. The work of Michael McConville,¹⁴ Max Travers¹⁵ and Daniel Newman¹⁶ all examined how lawyers interact with and treat their clients. This thesis differs from the aforementioned studies, exploring how lawyers view their own individual role in the context of the changed obligations introduced by the CPIA 1996 and the CrimPR. These views will be examined through the lens of a theoretical conception of an adversarial defence lawyer, which will be established in this thesis. This approach will permit the thesis to draw conclusions regarding the role of the defence lawyer in the modern era.

It has been argued that the changes made over the last twenty years have led to a departure from traditional adversarial values. McConville and Marsh argue that the CrimPR place pressure on role of defence lawyer that ultimately leads to the erosion of the adversarial criminal justice process.¹⁷ If criminal justice is in transition¹⁸ what are the implications for the defence lawyer? Taking as the starting point of the adversarial criminal trial, the notion of ‘The Accused Speaks’, whereby the accused is unaware of the charge laid against him and he ‘speaks’ to assist the court in discovering the truth of the allegation. The thesis aims to illuminate the idea that adversarialism in England and Wales is returning to the ‘accused speaks’ format; whereby the defence lawyer plays almost no role in the trial process. However in the modern era, the accused speaks via the medium of his disclosure obligations rather than making oral admissions at trial and as such dilute the adversarial criminal trial. The focus of this thesis is centered on the defence lawyer in the magistrates’ court. Primarily, this is because the vast majority of cases take place in the magistrates’

¹³ With the exception of Professor McEwan’s work, research on the impact of the CrimPR is scant. See J. McEwan, ‘Truth, Efficiency and Co-operation in Modern Criminal Justice’, [2013] *Current Legal Problems*, Vol 1. 66(1), 203-232 Oxford University Press; J. McEwan and F. Garland, ‘Embracing the Overriding Objective: Difficulties and Dilemmas in the New Criminal Climate’, [2012] *International Journal of Evidence and Proof*, Vol 16(3), Vathek, 233-262 and J. McEwan, ‘From Adversarialism to Managerialism: Criminal Justice in Transition’, [2011] *Legal Studies*, Vol 31(3), Wiley, 519-546.

¹⁴ M. McConville, J. Hodgson, L. Bridges and A. Pavlovic, *Standing Accused* (1994), Oxford University Press: Oxford.

¹⁵ M. Travers, *The Reality of Law*, (1997) Ashgate: Dartmouth.

¹⁶ D. Newman, *Legal Aid Lawyers and the Quest for Justice*, (2013), Hart: Oxford.

¹⁷ M. McConville and L. Marsh, ‘Adversarialism Goes West: Case Management in Criminal Courts’, [2015] *E&P*, 19(3) 172-189.

¹⁸ J. McEwan, From Adversarialism to Managerialism: Criminal Justice in Transition, [2011] *Legal Studies*, Vol 31(3), Wiley, 519-546.

court.¹⁹ The changes to the disclosure provisions have led to a new regime, whereby it is now a normative expectation that the defendant will disclose his defence prior to trial. Whilst the CPIA had a voluntary disclosure regime in the magistrates' court, the defendant is now co-opted into the process by completing the case management forms under the umbrella of dealing with cases justly. This significantly alters the culture and nature of the criminal trial.

The magistrates' court is the central arena for the analysis undertaken by this thesis. With the vast majority of cases²⁰ taking place in the magistrates court and governed by the expectations of the new regime. This Regime requires the defendant to be an active participant and having to divulge more information than ever before; as such it was clear that the new regime and the efficiency goals would have a greater impact on the magistrates' court. Whilst described in detail in Chapter Four,²¹ Lord Justice Auld's *Review of the Criminal Courts of England and Wales* provided the cornerstone in the drive for efficiency. He stated that 'fairness, efficiency and effectiveness of the criminal justice system demand that its procedures should be simple, accessible and so far as practicable, the same for every level and type of criminal jurisdiction.'²² A fundamental element of this uniformed approach is the case management provisions. However, in the post-*Review* era, the Courts had already started 'managing' cases²³ but the framework contained within the Rules co-opts the defendant into active participation, allows the court to sanction non-compliance and effectively redesigning the culture of the adversarial criminal trial. The case management provisions extended the CPIA 1996 disclosure regime and the new regime pose a great threat to the very notion of adversarialism and fundamental fair trial rights. The thesis explores these points and finds that there has been a departure from the traditional model of adversarialism and has given rise to a new form of process that is anchored by managerialist goals.

¹⁹ s.6 CPIA 1996 states that disclosure in the magistrates' court is voluntary.

²⁰ The Courts and Tribunals Judiciary estimate that 95% of all cases take place in the magistrates' court. See <https://www.judiciary.uk/you-and-the-judiciary/going-to-court/magistrates-court/> [Last Accessed 3rd September 2018].

²¹ See pages 76-119.

²² R. Auld, *A Review of the Criminal Courts of England and Wales*, (2001) Chapter Ten, Paragraph 271..

²³ The thesis will analyse the impact of *Chaaban* [2003] EWCA Crim 1012, *Jisl* [2004] EWCA Crim 696 and *Gleeson* [2004] 1. Cr. App. R 29.

1.2 Research Questions

The thesis has one overarching question:

What is the role of the defence lawyer in the modern era?

However, to comprehensively answer this question, the thesis has three guiding research questions:

1. *What relevant legislation has changed over the last twenty years?*

The thesis will concentrate on the following changes; the evolution of the rules of disclosure,²⁴ the explicit pre-trial obligations on both the defence and the accused and finally, the changing function of the judiciary. All three aspects of change have potential implications for the role of the defence lawyer and for the adversarial nature of the criminal process in England and Wales.

2. *What are the theoretical and practical consequences of the changing legislation for the defence lawyer?*

The traditional role of the defence lawyer is to be his client's mouthpiece, an officer of the court and a zealous protector of the defendant's rights.²⁵ It is of paramount importance to permit the defence lawyer to act in a fearless manner; in *Rondel v Worsley* it was held that 'Counsel has a fearless duty to raise every issue, advance every argument, ask every question...that will advance his client's case. But as an officer of the court, he has an overriding objective to the standards of his profession and to the public...'.²⁶ Effectively, the defence lawyer operates on the 'horns of a trilemma'²⁷ in which he has to balance the three competing duties espoused by Lord Reid. This question leads to an examination of whether the classic conception of the role of the lawyer exists in practice today or whether it has been eroded by the legislative changes.

²⁴For the purpose of this thesis it is important to distinguish prosecution from defence disclosure. The primary focus will be the evolution of defence disclosure. The distinction will enable the thesis to analyse the impact of the changing legislation on both the role of the defence lawyer and the legal system in England and Wales.

²⁵M. Blake and A. Ashworth, *Ethics and the Criminal Defence Lawyer*, (2004) (7 No 2) *Legal Ethics* 167.

²⁶[1969] 1 AC 191 HL.

²⁷M. Freedman 'Professional Responsibility and the Criminal Defence Lawyer' (1966) 64 *Mich. L. Rev.* 153

3. *What are the implications of the developments for both the lawyer-client relationship and the notion of adversarialism in England and Wales?*

This final question will examine how the legislative changes have impacted on the lawyer-client relationship. If a culture of co-operation exists between the two opposing sides, does this alter the lawyer-client relationship? Does the very nature of co-operation create tension between the lawyer and his client? Furthermore, how have these changes impacted the notion of adversarialism in England and Wales? The adversarial process in England and Wales has been characterized as a ‘legally regulated debate between the [two] parties, with the trial as its centerpiece.’²⁸ The adversarial process has two opposing parties who gather and select the pre-trial evidence before each side presents their evidence at trial. The court is adjudicative in nature rather than possessing any investigative function.²⁹ Zander described the traditional role of judge as ‘a passive umpire, as in a tennis match...’.³⁰ Can it be claimed that this sufficiently represents the adversarial trial process in the modern era? This thesis will address this question and provide a comprehensive account of the modern day adversarial criminal justice process.

1.3 Chapter Outline

Chapter I: Introduction

This chapter will include background information on the topic; this will include the rationale that underpins the thesis and a brief account of the methodology adopted.

Chapter Two: Traditional Adversarial and Inquisitorial Theory and the English Legal System.

An in-depth analysis of the classic conception of adversarial and inquisitorial theory. The chapter will examine and explore the differing traits in each approach. This chapter will

²⁸ J. Hodgson *Conceptions of the Trial in Inquisitorial and Adversarial Procedure* in A. Duff, *The Trial on Trial Volume 1, Truth and Due Process*, (1st edition, Hart, Oxford, 2001).

²⁹ *Ibid* at p.224.

³⁰ M. Zander, *Cases and Materials on the English Legal System* (10th Edition, Cambridge University Press, Cambridge) 2007.

also provide an analysis of the classic conception of the adversarial notion of the legal system in England and Wales.

Chapter Three: The Traditional Role of the Defence Lawyer

A theoretical overview of the traditional role of the defence lawyer. This chapter will draw on academic and judicial opinion on the role of the lawyer. The chapter will also analyse the professional conduct rules to assist in the exploration of the modern day defence lawyer's role and responsibilities. This chapter will offer an analysis of the obligations placed upon the defence lawyer. This will include the original obligation to disclose alibi evidence, the Attorney General's guidelines on disclosure throughout the 1980s, CPIA 1996 and the CrimPR.

Chapter Four: The Criminal Procedure and Investigations Act 1996, the Criminal Procedure Rules and Disclosure

This chapter will examine the evolution of the disclosure regime in England and Wales. Historically, the notion of disclosure primarily centered on the prosecution, in order to even out the imbalance between prosecutorial and defence resources. As such, the defence had no obligations to disclose any evidence prior to 1967. From 1967-1987 piecemeal and non-contentious changes were made to the regime. In 1996, a vast overhaul of the defence disclosure regime was instigated by the Criminal Procedure and Investigations Act 1996. As such, the explicit obligations on both the defence lawyer and the accused were fundamentally altered. The impact of the changes and their effect on the defence lawyer's role will be examined in this chapter. Furthermore, the chapter will examine how any conflict between the lawyer's duties to his client and to the court and the administration of justice role are resolved.

Chapter Five: The Legislation: The Theoretical Impact for the Role of the Defence Lawyer.

This chapter will examine the implications of the legislation for the classic conception of the role of the defence lawyer. Previous chapters established that the defence lawyer has three core duties: to his client, the court and the public.³¹ Despite having no relative weighting attached to them, these duties establish the core elements of the obligations of the defence lawyer.

The chapter will also examine any problematic ethical situations the lawyer may find himself in. For example, what are the theoretical implications should the accused wish not to disclose a case statement or not to assist the lawyer to fulfil the overriding objective? Furthermore, the chapter will examine various enforcement mechanisms available to the court, such as wasted costs orders and adverse inferences.

Chapter Six: Fieldwork Methodology

Semi-structured interviews were conducted with defence lawyers to ascertain their perceptions of the CPIA 1996 and the CrimPR. Whilst theoretically the legislation may appear to be problematic, in practice the problems identified in Chapter V may not arise. This chapter explores the ways in which lawyers perceive the impact of the legislation on both the ways in which they work and on the adversarial nature of the criminal justice system.

Chapter Seven: The Defence Lawyer in the Modern Era.

This chapter will examine, in light of the findings of the empirical research, whether the classic conception of the role of the defence lawyer provides an accurate picture of the 'defence lawyer in the modern era.' The results of the empirical fieldwork will be examined and three differing 'types' of defence lawyer will be shown to exist. The vast majority of the lawyers stated that their primary duty was to their client, however their further responses indicated that this duty is somewhat tempered by the competing duties.³² The difference in response suggested was a primary factor in creating a typology of three types of lawyer; *the classic adversarial lawyer, the conflicted adversarial lawyer, and the*

³¹ As stated by Lord Reid in *Rondell v Worsley* [1969] 1A.C. 191.

³² 23 of 24 participants indicated this.

procedural lawyer. The analysis of the empirical findings allows the thesis to offer an elucidation of the role of the defence lawyer in the modern era.

Chapter Eight – The ‘Efficient’ Criminal Justice Process and the Dilution of Adversarialism

With the role of the defence lawyer evolving, this chapter examines the changing arena in which he practices. The changes to the disclosure regime over the last twenty years is only a single component part of the piecemeal departure from adversarialism. The drive to have a more economic and efficient criminal justice system is underpinned by the disclosure regime. However, there are other important factors that power this agenda. This chapter examines the *Better Case Management Initiative*³³ which looks to assist courts in fulfilling the overriding objective of dealing with cases justly by imposing robust case management, a reduction in the number of hearings, increasing co-operation and engagement with every participant and ensuring the efficient compliance with the CrimPR.³⁴ Whilst the objective of dealing with cases justly is commendable, the objective appears to be a mere veneer to mask the rise of managerialism in England and Wales. The disclosure obligations on the defence, and case management provisions, effectively influence the defendant to make admissions regarding any alleged offence. This dilutes the adversarial protections of the presumption of innocence and the right to silence; and thus returns England and Wales to the pre-adversarial forms of trial which were ominously described as ‘accused speaks’ trials. This chapter concludes that the fundamental fabric of adversarialism in England and Wales is torn, and this has changed the place of the defence lawyers in the modern era.

1.4 Analytical Models

During both the empirical analysis in Chapter Seven and the conclusions contained within Chapter Eight, the thesis will use both existing studies and analytical models to examine the changing obligations faced by the defence lawyer. The seminal text on how the defence lawyer operates can be found in Mike McConville’s *Standing Accused*.³⁵ However, there are distinct differences between that work and this study. As such, the

³³ Courts and Tribunals Judiciary, *Better Case Management* available at www.judiciary.gov.uk/publications/better-case-management.

³⁴ Rule 1.1 Criminal Procedure Rules.

³⁵ M. McConville, J. Hodgson, L. Bridges and A. Pavlovic *Standing Accused* (Clarendon Press: Oxford 1994).

work is used as a lens for analysis as opposed to a direct comparative tool. McConville's work described the working practices, values systems and organization of solicitors who are engaged in criminal defence work. In essence, his study examined 'the nature and quality of the legal defence and 'representation' they provide to their clients...'.³⁶ This thesis is rather different but the influence of McConville's work will permeate the thesis. Whereas McConville examined the nature and quality of the work and the organizational influence of the defence firm, this thesis will examine how the defence lawyer operates on a daily basis and seeks to examine what influences their prioritisation of duties. This prioritisation is thematically coded and differing categories of lawyer shall emerge; all of which will have, to some degree, different prioritizes and goals.

Further to McConville's work, the work of Herbert Packer will be used to examine the impact the changed legislation and obligations has had for the traditional notion of adversarialism in England and Wales. Packer created two models of the criminal process and they represent 'an attempt to abstract two separate value systems that compete for priority in the operation of the criminal process.'³⁷ Whilst the Crime Control and Due Process models should not be viewed as absolute, one can ascertain where on a spectrum, between the two models, the current criminal process resides. By analyzing the piecemeal changes to the disclosure obligations since the introduction of alibi provisions in 1967,³⁸ the thesis can examine the values that underpin the changes and ascertain whether there has been a drift from due process values to a more crime control focused agenda or vice versa. This examination will underpin the findings in Chapter 8 where both notions of adversarialism in England and Wales are examined.

1.5 Methodological Overview

To answer the questions posed by the thesis, a mixed methodological approach was used. To adequately answer the overarching question, the study required a full examination of both current and past legislation relevant to the defence lawyer in defending a client in criminal proceedings. In order to do this, a doctrinal approach is employed. However, in order not to be 'disadvantaged by the intellectual straight-jacket that is the traditional legal

³⁶ M. McConville, J. Hodgson, L. Bridges and A. Pavlovic *Standing Accused* (Clarendon Press: Oxford 1994) at p.1.

³⁷ H. Packer, *The Limits of the Criminal Sanction* (Stanford University Press: California, 1968) at p.153.

³⁸ s.11 Criminal Justice Act 1967.

method'³⁹ the thesis will also adopt a socio-legal approach to research. The empirical research will take the form of semi-structured interviews. The interviews will offer insights into the effect of the changing legislation; the actual impact of the changes may alter somewhat from the theoretical concerns advanced earlier in the thesis. The empirical research will provide insight into how their role as perceived by lawyers themselves.

The study has been an evolving project. In the first instance, it was envisaged that it would examine the modern-day role of all the actors in the criminal justice process. However, early on it became clear that examining the role of the prosecutor, judiciary and defence lawyer would be almost impossible to undertake taking into account the time and resources available, and the word limit. With that in mind, the study centered on the role of the defence lawyer. There were two distinct stages of research. Firstly, desk based research was undertaken. The first research question seeks to examine what legislation has changed over the last twenty years. The disclosure regime first introduced by the CPIA 1996 was a highly significant change and this was chosen to be the start point of the modern era. Until 1996, the defence had to make minimal disclosure in advance of trial.⁴⁰ The era of minimal prosecution disclosure faded; the CPIA 1996 insisted, for trials on indictment, that the defendant outline the general nature of his defence, what issues he takes with the prosecution's case and why he takes issue.⁴¹ This was then amplified by the CrimPR, requiring the defendant to disclose a defence case statement in both Crown Court and magistrates' court cases.

The desk based research yielded a picture of substantial change to the relevant legislation over the last twenty years. I could now focus on the second research question, concerning the theoretical and practical consequences of the disclosure legislation. Prior to answering this question it was important to understand what was meant by the term 'defence lawyer'. As such, a classic conception of the defence lawyer was developed. This conception was built from a wealth of academic literature which highlighted the core functions and traits illustrated by the defence lawyer. This conception highlighted that there were three core duties of the lawyer - the duty to the client, to the court and to the administration of justice - But no clear priority existed between them. Whilst no priority existed between them, conflict clearly did. Once the theoretical consequences of the legislative changes were

³⁹ A. Bradney, *How to Study Law* (5th edition, Sweet and Maxwell, London, 2005) p.47.

⁴⁰ s.11 Criminal Justice Act 1967 compelled the defence to disclose any alibi evidence they intended to use. This was further enhanced by Criminal Justice Act 1987.

⁴¹ S.6(a)-(c) Criminal Procedure and Investigations Act 1996.

established, I could create the interview *pro forma* which would tease out the practical consequences of the disclosure legislation.

With the completion of the first part of the desk based research and the creation of the research instrument, the empirical aspect of the study could be undertaken and the answer to both the theoretical and practical implications of the changes could be answered. The semi-structured interview was chosen because the primary goal of the study was to obtain an understanding of the processes, thoughts and perceptions of defence lawyers.⁴²

With the completion of the empirical study, a return to desk based research would answer the final research question. By examining both the theoretical and practical implications of the CPIA 1996 and CrimPR, the thesis can draw conclusions about both the impact on the lawyer-client relationship and the impact for the traditional notion of adversarialism in England and Wales.

⁴² S. Arber, *Designing Samples*, in N. Gilbert (ed.) *Researching Social Life*, (Sage, 1993) at p.73.

CHAPTER TWO

The English Legal System and Adversarial and Inquisitorial Theory

1. Introduction

This chapter will examine the evolution of the adversarial criminal process in England and Wales up until the mid-1990s. By using the mid-1990s as a stopping point, the chapter aims to establish a foundation for answering two of the three research questions: *What are the theoretical and practical consequences of the changing legislation for the defence lawyer;* and *what are the implications for the development of the notion of adversarialism in England and Wales?* To analyse the position of the criminal justice process until the mid-1990s, two key aspects will be examined. Firstly, the chapter will examine adversarial and inquisitorial theory, before examining the purpose of the criminal trial, the role of the judiciary within the criminal trial process and, finally, the role of the prosecutor. Chapter eight will examine whether the roles and purpose have altered in the modern era. Each aspect will be examined on an independent level. Whilst the predominant focus of the chapter is the adversarial nature of the criminal justice process, the inquisitorial ideology will be used as a foil to the adversarial ideology. Whilst the models in this chapter are based on theory, the make-up of each model will permit an analysis to ascertain whether the legislative changes have led to deviation from the traditional concept of adversarialism in England and Wales. The increased pre-trial obligations on the defence lawyer raises the question of whether we are returning to the ‘accused speaks’ trial in which the accused is compelled to speak and disclose information. Even if this is not the case, but accept that the adversarial nature of criminal procedure is changing; the question remains what is the procedure changing to? This chapter will consider whether there is an emergence of a new form of procedure, the managerialist approach. In order to answer questions about the notion of adversarialism, this chapter will lay the foundation for the later analysis by establishing the purpose of the criminal trial and the roles of the different actors in both adversarial and inquisitorial approaches.

The role of the defence is omitted from analysis in this chapter. The defence lawyer’s role will be examined in chapter three.⁴³ The purpose of the trial, and the roles of the judge and prosecutor, provide a contextual element for examining the role of the

⁴³ See p.49-73.

defence lawyer. They assist in understanding the framework in which the defence lawyer operates and will support the thesis in establishing how any post-1996 changes have impacted the notion of adversarialism in England and Wales.

2. Traditional Adversarial and Inquisitorial Ideology

There are two main approaches to criminal procedure:⁴⁴ the adversarial and inquisitorial approaches.⁴⁵ However, these terms merely refer to the model of each approach; no system of criminal procedure is a pure embodiment of either model.⁴⁶ Concerns have been raised that the models are somewhat outdated.⁴⁷ Despite the reservations concerning the contemporary value of the models, they provide a useful starting point for this chapter. The chapter will utilize the classic concept of the adversarial criminal process as its starting point to ascertain whether England and Wales has departed or deviated from this classic concept.

In 1993, the Royal Commission on Criminal Justice described the adversarial legal system of England and Wales as: ‘...a system which has the judge as an umpire, who leaves the presentation of the case to the parties (prosecution and defence) on each side. They separately prepare their case and call, examine and cross-examine witnesses.’⁴⁸

⁴⁴ It is important to note that there are other approaches to criminal justice that exist outside the scope of adversarialism and inquisitorialism. However, the French approach is generally seen as the exemplar of the procedural tradition and as such that is why the inquisitorial procedure is viewed through the French lens. For further reading on alternative models of criminal procedure see R. Vogler, *A World View of Criminal Justice* (Ashgate Publishing, 2005) See Part III (p.197) The Popular Justice Tradition, the model depends upon common sense understanding rather than upon law or regulation and it is a collective practice. The model is informal and the lack of procedural and evidential norms facilitates the direct involvement of the participants. The modern popular tradition can be divided into two broad categories, the *unmediated* and *mediated*. In the former, the power of the community to investigate and punish deviancy is absolute and uncontrolled by external influences. The *unmediated* is operated in a framework derived from other traditions such as adversarialism and inquisitorialism. For further examples see F. Pakes *Comparative Criminal Justice* (2nd Edition), (Willan Publishing, 2010) Chapters 5 & 6, P.L. Reichel, *Comparative Criminal Justice Systems: A Topical Approach* (4th Edition) (Prentice Hall, 2004) Chapter 4, J Griffiths, 'Ideology in Criminal Procedure or a Third model of criminal process. 1970 79 Yale LJ 359 and K, Roach, 'Four Models of Criminal Process', (1999) 89 J Crim law and Criminology 671.

⁴⁵ CM Bradley, *The Convergence of the Continental and Common Law Model of Criminal Procedure* (1996) 7 Criminal Law Forum 471 at p.471.

⁴⁶ L. Ellison, *The Adversarial Process and the Vulnerable Witness*, Oxford University Press (2001) p.142.

⁴⁷ See Louise Ellison's comments in 'The Protection of Vulnerable witnesses in Court: An Anglo-Dutch Comparison' (1999) 3 International Journal of Evidence and Proof p.1.

⁴⁸ Royal Commission on Criminal Justice, *Report*, (London: HMSO, 1993) para 10.

The adversarial process in England and Wales has been characterized as a ‘legally regulated debate between [two] parties with the trial as its centerpiece’.⁴⁹ The adversarial process has two opposing parties who gather and select the relevant pre-trial evidence before each side presents their evidence at trial. Traditional adversarial ideology is centered on the notion that ‘the truth is best discovered by powerful statements on each side of the argument’.⁵⁰ Both the prosecution and defence are responsible for gathering their evidence, building and presenting their case at trial, in a light that best favours their desired result - a conviction for the prosecution or an acquittal for the defence.⁵¹

The court is adjudicative in nature and does not possess any investigative function. Zander described the traditional role of the adversarial judge as ‘a passive umpire, as in a tennis match...’;⁵² he will listen to the evidence offered by both sides and ensure that the rules and procedures of the court are adhered to. In order to maintain a passive and neutral stance, the decision-makers do not conduct an active role in proceedings. If the neutral decision-maker does become overtly active in proceedings, he runs the risk of compromising his ability to ‘neutrally evaluate the adversaries’ presentations’.⁵³ The pre-trial preparation is motivated by self-interest rather than public interest and the preparation is geared toward mounting the evidence in the best possible light to achieve each side’s desired result. Adversarial theory holds that by allowing both sides to fully investigate the issue and permitting both sides to present their own interpretation of the facts the real truth will emerge.⁵⁴

In an archetypal adversarial system the accused is armed with tools to defend himself from the ‘oppressive state’; these tools include his right to refuse to testify or to co-operate.⁵⁵ The adversarial model appears to be content to sacrifice speed and efficiency in order to

⁴⁹ J. Hodgson *Conceptions of the Trial in Inquisitorial and Adversarial Procedure* in A. Duff, *The Trial on Trial Volume 1, Truth and Due Process*, (1st edition, Hart, 2001) p. 224

⁵⁰ As per Lord Eldon LC in *ex p Lloyd* (1822) *Mont* 70 at 72

⁵¹ Although in certain instances the defence will not seek an acquittal but a conviction for a lesser offence. For example, in the case of homicide, the defence may attempt to seek a conviction for involuntary manslaughter rather than murder.

⁵² M. Zander, *Cases and Materials on the English Legal System* (10th Edition, Cambridge University Press 2007).

⁵³ S. Landsman ‘The Decline of the Adversary System: How the Rhetoric of Swift and Certain Justice has Affected Adjudication in American Courts’ *Buffalo Law Review* (1980) 487-529 at p.491

⁵⁴ L. Fuller ‘The Forms and Limits of Adjudication’ (1978) 92 *Harv LR* 353 at p.383

⁵⁵ *Ibid* at p.48

enhance the integrity of the deliberations.⁵⁶ In theory, the system is happy to allow each side to have an opportunity to present their facts. Upon resting their case, the neutral adjudicator can take his time in order to reach a satisfactory and correct conclusion on the defendant's guilt or innocence.

Both the adversarial and inquisitorial model seek to ascertain the truth. However, the two models employ vastly different mechanisms to reach the point of deciding upon the 'truth.' In the inquisitorial model, the onus does not fall on the partisan parties to conduct the pre-trial investigation; instead the responsibility falls on a 'central judicial authority whose role is to act in the wider public interest in the search for the truth.'⁵⁷ As Ellison states, '[t]he trust in the adversary system on partisan parties, to bring facts to light, is replaced by faith in the integrity and capacity of public officials to pursue the 'truth...'.⁵⁸ In theory, the person who conducts the pre-trial investigation is a member of the judiciary, either an examining magistrate or a prosecutor. The judiciary will investigate all the evidence, both exculpatory and inculpatory. The model is based on the concept that the truth can only be discovered from an investigative procedure.⁵⁹ As it may be in the best interests of each party to conceal the truth, the inquisitorial process is premised on the notion that it is the state that is best equipped to carry out the investigation. An examining judge or prosecutor creates a dossier. The dossier is passed to a judge in preparation for trial; it will be for the judge to decide on what witnesses to call and it is the judge who will also conduct any examination of the witnesses. The role of the prosecution and the defence is less significant than their adversarial counterparts and both sides play a subsidiary role to the judge.

In general, pre-trial investigation of the most serious offences will be the responsibility of an examining magistrate. However, in most other cases the police, under the supervision of the prosecutor, will conduct the pre-trial investigation. Inquisitorial theory holds that that best person equipped to conduct the investigation is the benevolent state⁶⁰ and the judicial supervision is a safeguard from abuse of power by state officials. The pre-trial investigation by the judiciary culminates in the creation of a dossier of evidence; it is this

⁵⁶ *Supra* n 47 at 501

⁵⁷ *Supra* n.2 at p224

⁵⁸ *Supra* n 40 at p.142.

⁵⁹ W. H. Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, *Wis LR* (29) (1978) at p.43

⁶⁰ *ibid.*

dossier and pre-trial investigation that is the centerpiece of the inquisitorial model.⁶¹ Writing in 1977 Goldstein and Marcus claimed that uncontested inquisitorial trials merely serve as perfunctory proceedings and often, in the French Correctional Court, not a single corroborating witness is called. The accused makes his statement, the lawyers make their speeches and sentencing swiftly follows.⁶² Essentially, the public trial element of the inquisitorial process is an evaluation of the evidence in the dossier, rather than a forum for an oral contest.⁶³

Both the adversarial and inquisitorial models reflect the ideology of their respective society's stance on the allocation of power. This illustrates that the adversarial process attaches less weight to the goal of fact-finding.⁶⁴ The weighting is not because adversarial ideology values fact-finding as unimportant but because it acknowledges the importance of other aims, such as the protection of the citizen from the over-zealous state.⁶⁵ There are various safeguards in place to prohibit the state from abusing its powers. The use of lay people in the criminal justice system and the passivity of the judge are examples of the safeguards afforded to the accused against oppressive or abusive behaviour from state officials. Further safeguards are afforded to the suspect at the investigative stage. These safeguards include a limitation on the duration of time the suspect can remain in police detention without charge, the right not to incriminate oneself and the right to legal representation.

Whereas the adversarial model embodies the belief that state power is best kept in check, the inquisitorial model believes that the state is best equipped to carry out the investigation and as such, state officials should be provided with broad tools of investigation. The adversarial safeguard of the defence lawyer plays a reduced role in the inquisitorial model. It is the duty of the inquisitorial defence lawyer to ensure that the state's representatives adhere to the procedural rules of investigation. The defence can suggest to the prosecutor certain avenues of investigation that benefit the case of the accused, but he cannot conduct

⁶¹ G. S. Moohr Prosecutorial Power in an Adversarial System: Lessons from Current White Collar Cases and the Inquisitorial Model, *Buffalo Law Review*, Vol 8, 2004 at p. 193

⁶² A. S. Goldstein and M. Marcus, The Myth of Judicial Supervision in Three "Inquisitorial" Systems: France, Italy and Germany, 87 *Yale Law Journal* 240 at 268

⁶³ N. Jorg, S. Field and C. Brants, Are Inquisitorial and Adversarial Systems Converging? in *Criminal Justice in Europe: A Comparative Study*, Clarendon Press, Oxford, 1995 at p.50

⁶⁴ A Sanders and R Young, *Criminal Justice* 3rd Edition, Oxford, Oxford University Press 2007 at p.14

⁶⁵ *Supra* n 58 at p.48

his own investigation. The dossier has also been described as a safeguard: it not only forms of the basis of the trial, but also a coherent system of supervision and control.⁶⁶

2.1 Models of Criminal Procedure

The adversarial and inquisitorial models of criminal process are not universally accepted as providing a comprehensive account of the differing approaches to the criminal process. Whilst the thesis will not examine the alternative frameworks in great detail, it is appropriate to briefly mention them. In order to analyse the shifts in procedural ideology, it is important to use analytical models to examine any particular shifts in the justice system. The models are helpful because they provide a useful way to examine and understand complex procedural ideals. Ericson suggests that multiple models are helpful because they represent multiple versions of what is occurring and they can account in different ways for the system's operation.⁶⁷ Models can also provide a normative account of what values ought to influence the criminal justice process.⁶⁸ The five models that will assist with the analysis are Packer's Crime Control and Due Process models, Damaska's Co-ordinate and Hierarchical Models and Summers' theory of a European Tradition. Whilst the models are introduced here, the analysis of using the models to analyse the contemporary state of the adversarial process will be undertaken in chapter eight.

In 1964, Herbert Packer created arguably the most influential models of criminal procedure; the crime control and due process models. The crime control models holds that the repression of criminal activity is the most important function that the criminal process undertakes and very little should stand in the way of this goal.⁶⁹ In order to successfully achieve this goal the model requires that full trust is given to investigators and guilt is largely assumed. The model intends to achieve a high rate of both detection and conviction. There is a premium on efficiency and the process should effectively resemble a conveyor belt. Limited challenges to the court's decision should be allowed and the pre-trial investigation should be prioritized. It is here where the facts can be discovered and

⁶⁶ For discussion, see J. Hodgson *Conceptions of the Trial in Inquisitorial and Adversarial Procedure* in A. Duff, *The Trial on Trial Volume 1, Truth and Due Process*, (1st edition, Hart, 2001)

⁶⁷ See R. Ericson, *The State and Criminal Justice Reform in State Control: Criminal Justice Politics in Canada*, 1987, (R. Ratner and J. McMullan Eds)

⁶⁸ K. Roach, *Four Models of the Criminal Process*, *Journal of Criminal Law and Criminology*, 1999 (89) 2 at 672.

⁶⁹ H. L. Packer, *The Limits of the Criminal Sanction*, (California: Stanford University Press), 1968 at 158-63.

guilt established. The model rejects the importance of the actual trial. Unsurprisingly, the Due Process model represents the other end of the spectrum. If the crime control model is like a conveyor belt, the due process model represents an obstacle course, with a number of hurdles in the way of a successful prosecution holding that there is no presumption of guilt. The model holds that there is a chance of a high degree of error in the pre-trial investigation and as such, it emphasises the importance of safeguards and the criminal trial.

Whilst Damaska does not reject the traditional adversarial or inquisitorial ideologies, he believes the understanding of their intricate workings can be better understood if they are explored in more explanatory terms. As such, he created two explanatory models; the Co-ordinate and Hierarchical models. The Co-ordinate model is likened to the adversarial model. It places great reliance on oral testimony and use of lay officials, and the process concludes in a trial that is 'packed with excitement and drama... surprises and unpredictable turns of events are commonplace.'⁷⁰

The Hierarchical model is likened to the inquisitorial approach to criminal procedure that is favoured in parts of Europe. The hierarchical ideal is multi-layered and consists of a number of different levels in a pyramid of authority; each stage is allotted a different task or responsibility. One stage may be responsible for the gathering and organization of the relevant material, another responsible for the initial decision-making, and another stage for hierarchical review. The completion of each stage is merely one episode in a continuing sequence. The hierarchical review is both comprehensive and regular. Once a lower official has completed his duties, his procedural episode comes to a close. The correction of decisions made by lower officials can only be completed by those in the higher echelons of authority. It is this supervision and correction of decision-making that guarantees a fair and orderly administration of justice.⁷¹

In her book, *Fair Trials and Procedural Tradition in Europe*, Sarah Summers claims that the classic use of the adversarial and inquisitorial models should be abandoned. She argues that since the nineteenth century, criminal procedure in Europe can be described as a single

⁷⁰ M. R. Damaska, *The Faces of Justice and State Authority: A Comparative Approach to the Legal Process* (Yale University Press) 1986 at p.57-62.

⁷¹ *ibid* at p.50.

tradition.⁷² In order to establish an alternative conceptual framework for the development of the single criminal procedure in Europe, Summers' book proceeds in two halves; firstly, it challenges and rejects the established opinion that criminal procedure in Europe should be viewed through the lens of the adversarial and inquisitorial models. After rejecting this idea she seeks to 'identify a common European concept of criminal procedure.'⁷³ Summers uncovers an 'emerging European discourse'⁷⁴ amongst jurists in the nineteenth century. It was thought that criminal proceedings should be based around the notion of the 'accusatorial trinity.'⁷⁵ The trinity was the defence, prosecution and an impartial judge. Summers argues that this became the dominant procedural model in Europe.⁷⁶ In the second half of her book Summers analyses whether the European Court of Human Rights (ECtHR) is following the European criminal tradition. She suggests that the ECtHR has neglected the European tradition but the jurisprudence of the court has been influenced by developments stemming from the nineteenth century. By letting go of the traditional adversarial and inquisitorial models and devoting more consideration to the European model the ECtHR will be permitted to develop a more coherent and consistent vision of the rights that are outlined in Article 6 of the European Convention on Human Rights (ECHR).⁷⁷ In chapter eight, the traditional notion of adversarialism will be challenged. The question remains as to what the answer to the challenge is; can the process be described as an adversarial-lite, inquisitorial or managerialist. The models developed by Packer, Damaska and Summers will be used as the lens to examine the changes the new regime has had for the notion of adversarialism in England and Wales. Ultimately, this assist the thesis to place analyse the changes as a whole, instead of viewing them in isolation.

⁷² S. Summers, *Fair Trials and Procedural Tradition in Europe* (Oxford: Hart Publishing, 2007) p.29

⁷³ *ibid* p.xix.

⁷⁴ *ibid* p.22.

⁷⁵ *ibid* p.27.

⁷⁶ *Ibid*.

⁷⁷ *ibid*. Despite the findings by Summers, Stewart Field believes her findings of a single European tradition is stimulating but flawed. He argues that it is difficult to bear a label of 'European' where there is very little mention of developments in legislation or intellectual thought in Southern Europe or Scandinavia. For an in-depth analysis of Field's rejection of Summers' model see S. Field, 'Fair Trials and Procedural Tradition in Europe', *Oxford Journal of Legal Studies*, 2009, 29(2), 365-387. This problem is also critiqued in Chapter Eight.

2.2 The Purpose(s) of the Criminal Trial

Defining one meaning of the purpose of the criminal trial has proven to be quite troublesome. It is commonly assumed that the purpose of the criminal trial is to determine the guilt or innocence of the defendant. However, if the purpose of the trial is deconstructed, it is clear to see that the criminal trial serves many different purposes. This sub-section will utilize many different sources to provide a fuller picture of the purpose of the trial. The sub-section will examine the role that the trial plays in the search for the truth, the airing of conflicts, a forum to allocate punishment and the cathartic effect of the trial. It will close with a comment on the how the inquisitorial trial operates; this contrast will aid the final thoughts on what the purpose of the criminal trial is.

2.3 The Search for the Truth

Upon researching this sub-section, a common theme was discovered in a large number of sources; the adversarial trial is less committed to the discovery of the truth than its inquisitorial counterpart.⁷⁸ The prosecution and defence are charged with the responsibility of examining the facets of each other's account and exposing any weaknesses discovered during the public forum of the trial. It is during the trial that advocates endeavor to 'reveal to the tribunal which witnesses can be relied upon and which can be cast aside.'⁷⁹

Despite the search for the truth being central to the adversarial process, this search is balanced against various other considerations including maintaining the integrity of the system. The prosecution's case will only succeed should it be able to present enough evidence to convince the jury in Crown Court cases, or the Magistrates or District Judge in summary trials, that the defendant is guilty of the alleged offence beyond all reasonable doubt. Procedural safeguards not only protect the defendant but also help maintain the integrity of the system. These safeguards may also inhibit the search for the truth; for example, if evidence was obtained inappropriately, it should be excluded from trial. This exclusion of evidence protects the defendant from any abuse of state power. However, this exclusion may render a truthful confession inadmissible owing to how it was extracted from the defendant.

⁷⁸ Because the model insists that both inculpatory and exculpatory evidence is included in the dossier.

⁷⁹ S. Solley, The Role of the Advocate in M. McConville and Wilson (eds), *The Handbook of the Criminal Justice Process*, (Oxford University Press, 2002) at 312.

The skill, knowledge and experience of the advocate may also inhibit the search for the truth. The prosecution and defence lawyers present their version of an alleged incident. They attempt to convince the jury or the magistrates' court that their version is the 'truth', which can be dependent on the skill and experience of the advocate presenting the case as well as the quality and temperament of the witnesses. The art and skill of advocacy is 'a highly refined one whose very best practitioners may manage to persuade in the face of facts...'⁸⁰ whereas a more inexperienced, less eloquent practitioner may not be able to convince the jury or magistrates' court that his version of events is the truth. Further to the skill and art of the advocate, the performance of a witness may also inhibit the search for the truth. If the witness is weak, inarticulate or unwilling to answer questions it may mean a case flounders despite its merits.⁸¹

2.4 The Trial and Finality

The allocation of punishment is a common feature of all trials where the defendant has been convicted. If a defendant enters a guilty plea the truth-finding, conflict airing, dispute-resolving aspects of the trial are redundant. In essence, the trial will merely serve as a forum to allocate punishment for a certain offence. If the conviction is the moment of condemnation for a particular act, sentencing is its refinement and elaboration.⁸² The act of sentencing communicates to the defendant and to the wider community as a whole the precise condemnation and punishment for committing a certain act. The sentencing stage can be seen to communicate societal disapproval and sends out powerful statements concerning issues such as expected societal norms, morals, values and expectations of each and every citizen. Furthermore, the sentencing stage illustrates where authority lies in society, what acts constitute a threat to this authority and who maintains order, as well as illustrating how this order is maintained. The sentencing stage of trial is the symbolic means of upholding the dignity of the criminal justice process. By passing sentencing, the trial judge is demanding that the law is respected and that those that breach the law can expect to be punished.⁸³ This message of demanding respect is conveyed not only by the trial judge but further conveyed by the media. The media will carry snippets of judicial comment when reporting on sentencing; this reporting will amplify the public

⁸⁰ L. Zedner *Criminal Justice* (Oxford University Press, 2004) at p. 169.

⁸¹ A. Sanders, *Victims with Learning Disabilities* (Oxford: Centre for Criminological Research, 1997) at p. 312.

⁸² J. McEwan, The Adversarial and Inquisitorial Models of Criminal Trial in *The Trial on Trial Vol 1: Truth and Due Process* (Hart: Oxford) 2004 at 171.

⁸³ *ibid* 172.

debate on appropriateness or controversy surrounding a sentence. Ultimately it builds societal expectations of what is right and wrong.

In the second half of the eighteenth century there was a growing aversion to capital punishment. Langbein states that capital punishment was over-prescribed and the function of the trial was to ‘winnow down the number of persons actually executed from the much larger cohort of culprits whom the “Bloody Code” threatened with death’.⁸⁴ Langbein added that during the latter half of the eighteenth century ‘too much truth meant too much death.’⁸⁵ The objective of winnowing down the number of people executed illustrates an early indication that the criminal trial operates as a dynamic rather than static platform. Furthermore, this also illustrates that the trial can be truth-defeating as opposed to being a forum that exclusively seeks to discover the truth.

This desire for ‘finality’ not only applies to the victims and witnesses but also to the defendant. Article 6 of the ECHR states that when charged with the commission of a criminal offence, the accused is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal.⁸⁶ This requirement ensures that the fate of the defendant does not remain uncertain for too long a period. The requirement also ensures that the alleged incident is fresh in the memory of witnesses and therefore minimizes the potential for memory loss.

The notion of finality is in conflict with the notion of the trial representing the search for the truth. If the search for the truth were the primary aim of the trial, the quest to reach the truth would not be restricted by finality. Furthermore, to reach the truth the system would need recourse to quash a conviction should new evidence come to light regarding the potential wrongful conviction of a suspect. In essence, the search for the truth may not lead to finality at all.

2.5 Deterrence or Rehabilitation? The Inquisitorial Trial

According to Duff, the aim of the criminal trial is to ‘...not merely reach an accurate judgement on the defendant’s past conduct; it is to communicate and justify that judgment

⁸⁴ J. H. Langbein, *The Origins of the Adversary Criminal Trial*, Oxford University Press, at p.6.

⁸⁵ *ibid.*

⁸⁶ Article 6(1) European Convention on Human Rights.

– to demonstrate its justice – to him and others.’⁸⁷ The trial may also be seen as part of the rehabilitation of the accused. It is not enough to merely punish an offender; he needs to learn what society thinks justice should be. In a study of the French inquisitorial criminal process, Stewart Field identified an interesting contrast between adversarial and inquisitorial criminal trials. Here, the French judge spent a vast amount of time questioning the accused about his private life, education, history, sexual relationships and hobbies.⁸⁸ Field noted that French criminal proceedings were not only designed to discover if the particular individual committed the particular offence; there were further aims to ascertain in detail who did what, when, how and why within the context of a set of general norms about the life of the ordinary French citizen. Field stated that ‘these assumptions seemed to be part of a set of reciprocal expectations between the individual on the one hand and the state and community on the other.’⁸⁹ By conducting this examination of the accused’s educational and social weaknesses or failings, Field remarked that he had the impression that the offence in question was not only being judged but also the life of the defendant, according to a positive and fairly developed notion of what a French citizen ought to be.⁹⁰

The French inquisitorial trial places great emphasis on character evidence. Evidence of both good and bad character is heard prior to pronouncing judgement. In the adversarial trial in England and Wales, the use of character evidence is less significant in determining the culpability of the defendant. It is acceptable for character evidence to be considered at the sentencing stage but at the trial stage, the adversarial process does not permit the use of character evidence to the extent of its inquisitorial counterpart. This is to ensure that the guilt of the defendant relates to the particular offence in question and not to a broad ranging judgment of the standing of the accused in the community.⁹¹ However, this stance toward character evidence has not always been the norm in England and Wales. Prior to the emergence of the adversarial trial in the last quarter of the eighteenth century⁹² the trial and sentencing stages were less distinct. The sentencing stage would immediately follow the conclusion of the trial and it was during the sentencing proceedings that juries would

⁸⁷ R Duff, *Trials and Punishments* (Cambridge University Press) 1986.

⁸⁸ S. Field, ‘State Citizen and Character in French Criminal Process,’ [2006] *Journal of Law and Society* Vol. 33(4) at 523.

⁸⁹ *Ibid* 523-24.

⁹⁰ *ibid* 524.

⁹¹ *ibid* 544,

⁹² J. Beattie, *Crime and the Courts in England 1660-1800*, (Princeton University Press, 1986) p.253.

sometimes return a partial verdict; which is where the defendant was convicted on a lesser charge which carried a lesser penalty.⁹³

Field believes that the criminal trial in France is part of the process of rehabilitating the accused as a reformed citizen of the state. The trial acts as a positive concept of the citizen in which it is deemed appropriate to judge the character and life of the accused.⁹⁴ Furthermore the ‘dominance in France of the fact-finding by the professional judiciary changes the attitudes to the social prejudice generated by character evidence.’⁹⁵ The adversarial criminal trial presents a far narrower image of the relationship between state and citizens than its inquisitorial counterpart; as such the adversarial criminal law is more distanced from social expectations of the citizen.⁹⁶

It is clear that one single purpose of the criminal trial does not exist and there is no set definition of the trial in either the adversarial or inquisitorial jurisdictions. What has been discovered illustrates that the criminal trial is a dynamic institution; this can be seen from the eighteenth century where the discovery of the truth was, at times, treated as a secondary goal in order to reduce the number of defendants executed. The trial also has rehabilitative functions, as can be seen in Stewart Field’s inquisitorial study in which the use of character evidence is employed? All of these points emphasize the idea that there are many facets to the purpose of the criminal trial and that the trial is constantly evolving. This notion of the changing character of the trial will be examined when the thesis examines the potential changes to the role of the defence lawyer and to the adversarial system resulting from recent legislation.

3. The Actors in the Criminal Justice Process

In order to fully understand the role of the defence lawyer, there is a need to examine both the arena in which he operates and the other actors in the process. This section will examine the roles of the prosecution and judiciary in both the adversarial and inquisitorial traditions.

⁹³ *ibid* 58.

⁹⁴ R Duff, *Trials and Punishments* (Cambridge, Cambridge University Press) 1986 at 545.

⁹⁵ *Ibid* at 544.

⁹⁶ *Ibid*.

3.1 The Adversarial Prosecutor

A Royal Commission established in 1962⁹⁷ recommended that a separate body should be created to separate the investigative and prosecution stage. This added layer of independence would ensure that tension between the two stages would not arise. However, this recommendation was not implemented and many police forces continued to prosecute their own cases in magistrates' courts. For cases that would be heard in the Crown Court, the police instructed solicitors and barristers to prosecute cases on their behalf.⁹⁸ As this situation evolved, the police gradually started to employ their own in-house prosecuting solicitors who would act on the instructions of the police.⁹⁹ The prosecutor would have little recourse if the police wanted to go ahead and prosecute a weak case or 'overcharge' a suspect.

This arrangement between the police and the prosecution came under attack in the report on the 'Confait Affair.'¹⁰⁰ This case raised questions about the procedures followed by the police in the interrogation of three youths. The interrogation led the youths to falsely confess to the murder of Maxwell Confait. In 1977, an inquiry was opened into the investigation. This revealed that the officer in charge of the investigation was willing to breach the Judges' Rules and put severe pressure on the suspects when questioning them. The prosecutor was deemed unable or unwilling to act independently from the police and the youths were wrongly convicted of murder.¹⁰¹ The report was chaired by Sir Henry Fisher who proposed a number of recommendations; that the Judges' Rules should be overhauled, and that the safeguards provided to suspects, such as having a right to have a solicitor present during interrogation and the right of young people to have an appropriate adult present, should be made more clear.¹⁰²

Following this case, the Royal Commission on Criminal Procedure (the Phillips Commission) proposed that an independent body be created to take over cases that the police decided to prosecute. If the prosecutor did not believe the case should be taken to

⁹⁷ The Royal Commission on the Police Cmnd. 1728 (London: HMSO) 1962.

⁹⁸ For a further discussion on the police's use of solicitors and barristers in 1970s see Sigler J 'Public Prosecutions in England and Wales' [1974] Crim LR 642.

⁹⁹ The Investigation of Criminal Offences in England and Wales: The Law and Procedure (Cmnd 8092-1) (London: HMSO) 1981pp 49-52.

¹⁰⁰ See Inquiry into the Circumstances leading to the Trial of Three Persons on Charges arising from the Death of Maxwell Confait (HCP 90) London: HMSO:1977.

¹⁰¹ *Ibid.*

¹⁰² For a further in depth account of the Confait affair and the recommendations made by Sir Henry Fisher please see *ibid.*

court then he would have the authority to discontinue the case, have the charges changed or have the police investigate further in order to obtain more evidence.¹⁰³ The Government accepted the majority of the recommendations made by the Phillips Commission. This acceptance resulted in the Prosecution of Offences Act 1985 and established the Crown Prosecution Service (CPS). The head of the CPS would be the Director of Public Prosecutions (DPP). The Director's position was not a new creation, it was initially created in the late nineteenth century to advise the police on criminal matters and handle serious cases. Despite the CPS having a national identity, prosecutors were based locally and the CPS was organized into areas that matched police forces, each headed by a Chief Prosecutor.

3.4 The Inquisitorial Prosecutor

The adversarial battle is replaced in the inquisitorial model by a pursuit of the truth that is unprompted by partisan party allegiances.¹⁰⁴ The inquisitorial prosecutor is responsible for the creation of a dossier of evidence that is used as the basis for the criminal trial at a later date. The prosecutor ensures that both inculpatory and exculpatory evidence is included. Should a prosecutor not act upon defence requests for further lines of enquiry to be followed up, the trial judge can postpone the trial until the investigation has been concluded.¹⁰⁵ A postponement in proceedings would cause a great deal of professional embarrassment to the prosecutor; they do not seek to establish themselves as one of the contending parties but as 'dignitaries of the court'.¹⁰⁶ Unlike his adversarial counterpart, the prosecutor and defence lawyer are not considered equal parties, whose contributions are both given an equal standing. The prosecutor is said to represent the wider public interest at both the trial and pre-trial stage; he ensures that both the rights of the defendant and the effectiveness of the investigation are protected. The evidence submitted by the prosecutor is a result of the pre-trial investigation; the argument submitted by the defence lawyer is seen to only represent the narrow interests of the accused.¹⁰⁷

¹⁰³ Ibid at Ch. 7.

¹⁰⁴ M. Maguire, *Researching Street Criminals*, in R.D. King and E. Wincup, *Doing Research on Crime and Justice* (OUP: Oxford) 2008 at p.142.

¹⁰⁵ *ibid* p. 143.

¹⁰⁶ S.Field, P. Alldridge, and N. Jorg, 'Prosecutors, Examining Judges and the Control of the Police Investigations' in C. Harding, P. Fennel, N. Jorg, and B. Swart, *Criminal Justice in Europe: A Comparative Study* (1995, Oxford: Clarendon Press) p. 234.

¹⁰⁷ J. Hodgson, Conceptions of the Trial in Inquisitorial and Adversarial Procedure in *The Trial on Trial vol 1* p. 232.

In the French legal system, the *juge d'instruction* is a mandatory form of supervision for the most serious of crimes.¹⁰⁸ However, this form of supervision is almost as rare as the adversarial jury trial in England and Wales.¹⁰⁹ The opening of 'an information' is the prelude to instructing an examining magistrate, and this is only opened in eight per cent of criminal proceedings.¹¹⁰ Therefore, the police under the supervision of the *procureur* will investigate the vast majority of crimes. The police inform the *procureur* of all offences. There are three categories of offence in France, *crimes*, *délits* and *contraventions*. *Crimes* are categorized as the most serious offences, such as murder. A *délits* offence is a less serious offence such as burglary or assault and *contraventions* are the least serious of offences. If the investigation concerns the most serious offence, an *information* is opened on the authority of the *procureur* and the case is passed to the *juge d'instruction* to supervise the investigation. In all other instances the police are supervised by the *procureur*.¹¹¹

The *procureur* is responsible for the investigation and prosecution of offences. In order to carry out this role, the *procureur* directs the police investigation and will supervise the garde à vue. However, despite being responsible for the supervision of the investigation, the interrogation of the suspect will often have already been carried out by the police¹¹² and therefore this renders any supervision retrospective. The *procureur* has the authority to release the suspect, extend the period of detention or charge the suspect.

4. The Role of the Judiciary

This section will analyse the key components and the mechanisms of the role of the adversarial judiciary. In addition, it will contrast the adversarial judiciary with the inquisitorial judiciary. This analysis will contribute to the depiction of the operation of the criminal justice system that this chapter has sought to ascertain.

¹⁰⁸ It is important to note that this section is primarily referring to France. In a number of inquisitorial jurisdictions, the role of the *Juge* has been abolished. Germany abolished the role in 1974 and Italy followed suit in 1988. In the main, the role was seen to be 'needless ... and time consuming'. See M. Delmas-Marty and J. Spencer, *European Criminal Procedures*, (Cambridge University Press: Cambridge) 2002 at p.11.

¹⁰⁹ The Courts and Tribunals judiciary suggested that 95% are dealt with at the magistrates' court. See <https://www.judiciary.gov.uk/you-and-the-judiciary/going-to-court/magistrates-court/> [Last accessed 15th June 2017].

¹¹⁰ J. Hodgson, *The Police, The Prosecutor and the Juge D'instruction: Judicial Supervision in France, theory and Practice*. (2001) *British Journal of Criminology* 41, 342-361 at 344.

¹¹¹ *ibid* at 343.

¹¹² *ibid* at 346.

The classic adversarial position of the judge is one who is both passive and impartial.¹¹³ In the case of *Jones v National Coal Board*¹¹⁴ Lord Denning gave what is generally accepted as the classic statement of the modern position of the judge:

‘The judge’s part is to hearken to the evidence, only asking questions of witnesses when it is necessary to clear up any point that has been overlooked...to see that advocates behave themselves and keep to rules laid down by law...to discourage repetition...if he goes beyond this, he drops the mantle of a judge and assumes the robe (role?) of an advocate...’¹¹⁵

Lord Greene in *Yuill v Yuill*¹¹⁶ stated that if a judge was to speak ‘he...is liable to have his vision clouded by the dust of conflict.’ Both Lord Greene and Lord Denning appear to be clarifying the importance of the judge remaining impartial and passive.

4.1 Judicial Questioning

The common law in England and Wales states that it is the duty of the prosecution and defence to conduct the examination of all witnesses. The judge does not examine the witnesses himself, save for the fact that he may pose supplementary questions to the witness. The passive habit stems from the Middle Ages and it was once the original method of conducting criminal trials in all European countries. However, this procedure was abandoned in the twelfth century in favour of the inquisitorial procedure in many countries.¹¹⁷ This notion of the impartial and passive judge ensures that he is free from any bias, and by remaining passive he will be able to perform his duty correctly: ‘The duty most appropriate... is to attentively listen to all that is said on both sides. After performing the duty patiently and fully he is in a position to give a jury the full benefit of his thoughts on the subject...’¹¹⁸ However, with regard to the rights of the defendant, the judge can question a witness at some length. Lord Goddard stated that ‘if a judge thinks the case has not been thoroughly explored he is entitled to put as many questions as he likes.’¹¹⁹ However, there are limits to this provision. When a judge has intervened too frequently, the

¹¹³ Langbein J, ‘The Criminal Trial Before Lawyers; (1978) 45 U Ch LR 263 at p.314.

¹¹⁴ [1957] 2 QB 55.

¹¹⁵ *Ibid* at para 64.

¹¹⁶ [1945] 1 All ER 183, 61 TLR 176.

¹¹⁷ G. Williams, *The Proof of Guilt* (London: Stevens and Sons, 1963) at p.24.

¹¹⁸ Sir James Fitzjames Stephen, *History of the Criminal Law*, (Kessinger Publishing, 1883) as cited in *ibid* p.26

¹¹⁹ As Per Lord Goddard C.J. in Williams, *The Times*, April 26th 1955.

Court of Appeal has moved to quash the conviction in order to ensure that the notion of impartiality and passivity is retained. In *Gunning*,¹²⁰ the defendant's conviction was quashed because of the number of judicial interventions; counsel asked 172 questions and the judge asked 165.

Further to questioning a witness, the judge does have the authority to call a witness. Despite having this authority, this power is rarely used although it can be used when its purpose is to assist the defence.¹²¹ However, if the calling of a witness will, in effect, assume the role of the prosecution then this may lead to a quashed conviction. This situation occurred in the case of *Grafton*.¹²² The Court of Appeal held that the judge had to remain impartial, his role was to direct the jury on points of law. By calling the witness, the judge had acted as if he had assumed the mantle of the prosecution. In the 1993 Crown Court Study¹²³ approximately 19 per cent of judges questioned were aware of important witnesses who were not called by either side. The Phillips Commission recommended that when judges are aware that an important witness has not been called, they should ask counsel to explain the absence of the witness, and if deemed necessary, the judge should urge counsel to rectify the situation. As a last resort, judges should be prepared to exercise their power to call witnesses.¹²⁴ However, as Zander notes, there is no evidence to suggest that either recommendation has been adopted.¹²⁵

The danger posed by an intervening judge is clear to see; if a judge is overly interventionist he runs the risk of appearing to favour one side over the other. In *R v Sharp*¹²⁶ the Court of Appeal held that the judge:

‘... may be in danger of seeming to enter the arena in the sense that he may appear partial to one side or other. This may arise from a hostile tone of questioning or implied criticism of counsel who is conducting the examination or cross-examination.’

¹²⁰ [1980] Crim LR 592.

¹²¹ See *R v Haringey Justices*, ex p DPP [1996], 1 All RT 828 and *Olivia* [1965] 1 WLR 1028.

¹²² [1992] Crim LR 826.

¹²³ M. Zander and P. Henderson, *The Crown Court Study* (Royal Commission on Criminal Justice, Research Study No 19, 1993) section 4.3.12.

¹²⁴ *ibid* p. 123.

¹²⁵ M. Zander, *Cases and Materials on the English Legal System*, Tenth Edition, (Cambridge University Press, Cambridge) 2007 at p.383.

¹²⁶ [1993] 3 All ER 225, 235.

Thus, power to intervene should only be used to satisfy the minimal case management responsibilities of the judge. By making use of proper interventions, the judge is, in essence, managing the criminal trial. He is ensuring that proceedings are kept orderly and the rules of evidence and procedures are being followed. When intervening, the judge needs to ensure that the truth-finding process is not put at risk by his interventions, as can be seen by the case law illustrated; the judge's interventions may affect the fair trial process.

4.2 The Myth of the Impartial Umpire?

The role of the judge is similar to that of an umpire in a cricket match; he impartially interprets and applies the pre-established standards in the game of law and is simply 'hearkening to the evidence.'¹²⁷ It could be argued that this notion of the passive umpire does not fully exist in the adversarial system.

One example of a judge becoming involved in proceedings can be illustrated by the *voir dire* procedure in the Crown Court. During this, the jury will be temporarily discharged and the judge will decide on the admissibility of a piece of evidence. As such he is entering the realm of the fact trier as opposed to remaining the passive umpire. Whilst the Crown Court jury can be discharged to alleviate the possibility of prejudice, a magistrates' court does not have that advantage. McEwan believes that when adjudicating on the admissibility of evidence, it is difficult to proceed without the nature of the evidence becoming obvious. If the magistrates feel that by hearing the disputed evidence their opinion may be prejudiced then they have very little recourse. It would not be practical for them to recuse themselves from the case, as a later bench would not be bound by the decisions and the new bench would also have to go through the *voir dire* procedure. Ironically, lay magistrates in England and Wales are deemed capable of hearing the inadmissible evidence and trying the case with the excluded evidence erased from their minds. Professional judges in the 'Diplock Court'¹²⁸ are permitted to excuse themselves from a case if they reject evidence that may affect their neutral stance.

¹²⁷ [1957] 2 QB 55.

¹²⁸ In a Diplock Courts a professional judge sit without a jury and have to decide on questions of law and fact. For further information on Diplock Courts please see J. Jackson *Judge Without Jury: Diplock Trials and the Adversary System* (Oxford: Clarendon) 1995.

4.3 The Inquisitorial Judiciary

Despite the similarity in titles, the traditional concept of the role of the judiciary in the inquisitorial model is vastly different from his adversarial counterpart. The inquisitorial judge is viewed as the guarantor of individual liberties.¹²⁹ In order to fulfil this function the judge has a broad range of tasks for which he is responsible. The judge may be responsible for the investigation, adjudication to determine the culpability of the accused, and the authorization of coercive measures that directly impinge on individual liberty; such measures can include telephone tapping or extending the period the suspect is remanded in custody without charge. Historically, the functions of investigation, prosecution and trial were all the responsibility of a single individual¹³⁰ and in theory this remains the case today. In order to determine the culpability of the accused, the function of the *magistrate* is not merely to pass judgement on the evidence presented, but to conduct his own enquiries to determine the guilt or innocence of the defendant. This investigation may be conducted via direct questioning of the defendant or by insisting that the police carry out further investigations.

The judge is not only charged with the responsibility for the investigation but is also responsible for the discovery of the truth and therefore is charged with discovering both exculpatory and inculpatory evidence; he is therefore cast in more neutral terms than the *procurer*.¹³¹ The inquisitorial model holds that the truth is best discovered by non-partisan investigation, conducted by the judiciary. All other interests, including that of the accused, are subordinate to this theory. The inquisitorial theory holds that the truth cannot be discovered by a party contest that contains checks and balances. The truth is best discovered by ‘a concentration of power in the hands of one person, who represents neither the narrow interests of the defence or prosecution but what are claimed to be the wider interests of society.’¹³²

However, Hodgson found that the role of the judge is not as impartial in practice as it is in theory:

¹²⁹ D Salas ‘The Role of the Judge’ in M. Delmas-Marty and J. R. Spencer (ed), *European Criminal Procedures* (Cambridge, Cambridge University Press, 2002) at 534.

¹³⁰ J. Hodgson, *Conceptions of the Trial in Inquisitorial and Adversarial Procedure in the The Trial on Trial* Volume One (Oxford: Hart Publishing, 2004) at p230.

¹³¹ J. Hodgson, ‘The Police, The Prosecutor and the Juge d’instruction: Judicial Supervision in France, Theory and Practice’, *British Journal of Criminology*, (2001), 41, 342-361 at 357 at 347.

¹³² *Ibid* at 356.

‘The guilt of the suspect is presumed and denials are rejected. Evidence of violence committed against the suspect by the police was ignored and left for the defence to raise...the word of the victim or of the police was consistently preferred to that of the suspect; serious cases means an almost automatic request for a remand in custody, even where evidence is thin’¹³³

Despite many jurisdictions implementing the position of an investigating judge, there is a danger that corruption or bias may infiltrate the judiciary. Jackson states that, over time, some officials may come to favour certain kinds of litigants than others. Psychological insight suggests that it is difficult for active investigators to suspend judgement and weigh up evidence dispassionately; ultimately this will allow that particular hypothesis to be pursued to the exclusion of others.¹³⁴ One *juge* interviewed by Hodgson was very proud of his record of only two cases he had been sent in ten years resulting in acquittals.¹³⁵ However, despite the efficiency of the *juge* interviewed by Hodgson, Germany abolished the role of examining magistrate in 1975 over doubts about the role and in 1988 Italy abolished the role after a corruption scandal.¹³⁶

This section has sought to ascertain the position and function of the adversarial judge until the mid-1990s. In this period, the judge largely remained passive throughout proceedings. Despite having the authority to call and examine witnesses, neither power was invoked consistently or with any frequency. The accounts of the use of this particular authority are very few. In general the judiciary appeared to remain true to the depiction of the passive umpire. At times, the judge had to dismiss this mantle and become interwoven in proceedings, but this was largely confined to the *voir dire* procedure. Despite sharing the same title, the role and the position of the inquisitorial judge is vastly different from that of his adversarial counterpart. The inquisitorial judge is deeply interwoven into the criminal proceedings. He possesses more investigative powers and he is charged with the responsibility of investigating the criminal offence. Throughout the course of this judicial investigation, all evidence will be considered, both inculpatory and exculpatory. In providing this account of the role of the judiciary in both an adversarial and inquisitorial

¹³³ *Ibid* 357.

¹³⁴ J. Jackson and S. Doran *Judge Without Jury* (Clarendon Press, 1995) at p.68.

¹³⁵ See J. Hodgson, *The Police, the Prosecutor and the juge d’instruction: Judicial Supervision in France Theory and Practice*, *British Journal of Criminology* (2001) 41, 342-367 at 357.

¹³⁶ For an in-depth discussion on the rationale behind the abolition of the examining magistrate in Germany and Italy please R. Vogler *A World View of Criminal Justice* (Ashgate Publishing, 2005) at p. 166.

setting, it will become clear how the changes in legislation in England and Wales over the last twenty years have altered the role of the judiciary. Chapter Eight will examine the extent to which the changes have affected the judiciary. In asking this pertinent question, the foundation established in this sub-chapter and its findings will be called upon.

5. Conclusion

This chapter has provide an account of the adversarial and inquisitorial approaches to criminal procedure, and the various roles within them. It was necessary to identify the key facets of both models and how they work in practice. This foundation will provide a basis for explaining and analyzing the impact of the CPIA 1996 and the CrimPR, both in respect of the role of criminal defence lawyers, and in relation to the characterization of the criminal process in England and Wales as ‘adversarial.’ With the adversarial trial being of such ‘symbolic significance’¹³⁷ any deviation from this viewpoint could have ramifications for the notion of justice itself. As such, this chapter explains the purpose of the criminal trial and the various actors who have different roles to play depending on the particular jurisdiction in which they work. This means that it is very difficult to transplant adversarial values into an inquisitorial procedure and vice versa. Therefore, any departure from a particular procedure will hold ramifications for all of the actors involved in the process.

CHAPTER THREE

FROM THE 'ACCUSED SPEAKS' TO THE 1990s: THE CHANGING ROLE OF THE CRIMINAL DEFENCE LAWYER

CHAPTER THREE

FROM THE 'ACCUSED SPEAKS' TO THE 1990s: THE CHANGING ROLE OF THE CRIMINAL DEFENCE LAWYER

1. Introduction

This chapter will offer a critical analysis of the changing role of the criminal defence lawyer. In order to do this, it is important to establish from the outset that the focus of this thesis is the role at the post-charge phase. This means that certain aspects of the pre-trial process will not be examined or analysed. Owing to the sheer size of the role of the defence lawyer at the pre-trial stage, the thesis will not deal with the issues such as the right to silence, or information disclosed at the pre-charge stage. Furthermore, the central point to analysis is the impact of disclosure in the magistrates and thus the thesis will concentrate on the role of the defence lawyer in post-charge stages of the criminal process.

Before an examination of the defence lawyer's role can begin it is important analyse the forum in which he operates. Whilst the previous chapter analysed the purpose(s) of the criminal trial, this chapter will look at how the trial has organically evolved. The chapter will begin with an historical account of the adversarial criminal trial in England and Wales; this sub-section will chart the origins of the criminal trial and follow its transformation into the modern adversarial trial of today. This examination will also analyse the initial rationale for the prohibition on defence counsel in the criminal trial prior to the courts permitting his presence at trial. Furthermore, the chapter will examine how he exerted his influence in court to transform himself from an unwanted outcast to becoming one of the key actors in the criminal justice process.

Similarly, the structure of this chapter will utilize 1996 as the genesis of the modern era, as discussed in chapter one. This will permit chapter five to draw on the findings established in Chapter four to analyse the effect and impact of the changing obligations on the role of the defence lawyer. The analysis established in chapter three will also aid in answering another research question posed by the thesis; what the effect is of the changing legislation on the notion of adversarialism in England and Wales, which is tackled in chapter eight.

This chapter also creates a theoretical conception of the role of the defence lawyer; to create this conception the chapter will analyse the obligations that affect the role of the defence lawyer. In particular the following obligations will be deconstructed and analysed: the defence lawyer's obligation to his client, the principle of detachment, and the obligation to the court and to the administration of justice.

1.1 The Altercation: The Victim v The Accused

The earliest view on the modern criminal trial is stated by Langbein to be Thomas Smith's *De Republica Anglorum*, written in 1565.¹³⁸ Smith depicts a hypothetical felony trial held in a provincial assize court. Here the victim and witnesses supporting the victim's version of the alleged incident engage the defendant in a confrontational dialogue about the circumstances of the offence. At the end of the altercation between the two, the question for the jury was whether the accused had adequately explained away the evidence adduced against him.¹³⁹ Owing to the lack of counsel, the trial judge organized the admission and presentation of the evidence in court. It was he who examined both the prisoner and witnesses and he would make comments on their testimony as it was being given. Thus the judge would effectively act as both examiner and cross-examiner.¹⁴⁰ At times the judge may have consulted the pre-trial examinations of the witnesses and the accused that the committing magistrate would have prepared and filed with the court.

The power to conduct an early form of the committal hearing was permitted by the Statutes of Philip and Mary of 1554 and 1555 (also known as the Marian statutes). This statute allowed the Justice of the Peace (hereafter, JP) to take the statements of suspects and witnesses in the cases of petty crime.¹⁴¹ The JP would compel the victim and witnesses to attend trial to testify against the accused, and would also question the prisoner. In essence, the JP was freezing the evidence so that it remained accurate and fresh for trial. This practice restricted the scope for any doubt or inconsistency to seep into the mind of the witnesses.

The Marian system injected a strong prosecutorial bias into the legal system. The JP did not serve as a neutral investigator of an incident; it was his job to aid the accuser in building their case against the accused. A day or so prior to the trial, a grand jury would decide whether or not to approve the prosecution's case, in a process known as the Prosecutor's Bill. To support the bill, the prosecution witnesses would testify in front of the grand jury. If the grand jury decided to approve the bill then it was sent for trial. If the

¹³⁸J. H. Langbein, *The Origins of the Adversary Criminal Trial*, (Oxford University Press: Oxford), 2005 at p.13.

¹³⁹*Ibid* 2005 at p.14.

¹⁴⁰J. Beattie, *Crime and the Courts in England 1660-1800*, (Princeton University Press: Princeton, 1986) p.342.

¹⁴¹For an in-depth analysis of the role of the Justices of the peace, please see J. Langbein, *Prosecuting Crime in the Renaissance*, (Harvard University Press, 1974) chapter 3.

bill appeared groundless or insubstantial it would be rejected and the defendant was saved from the humiliation of a public trial. In essence, the grand jury acted as a filtering mechanism to weed out the weak cases. The Marian statute did not allow any disclosure of the prosecution's case to the accused; it was thought that the truth would be revealed by the unprepared answers of the accused hearing the allegations for the first time. The jury's decision of guilt or innocence would be based on his immediate and unprepared responses. It was thought that the ignorance of the accused was essential to the trial process.¹⁴²

As this sub-section has illustrated, the defence lawyer played no part in the early development of the criminal trial. It seems to have been generally agreed that it was best for the accused to be unrepresented at trial, as this gave the greatest opportunity for discovering the truth. Furthermore, the sincerity of his denials would further demonstrate his innocence for the jury to see.¹⁴³

1.2 Cases of High Treason

The late seventeenth century was a period of great instability in English politics and three major treason trials from 1678-1685 would prove to be landmark events. These trials led to subsequent criminal procedural reform that culminated in lifting the prohibition on defence counsel at trial. The Popish Plot was an alleged conspiracy on the part of Catholics to murder King Charles II. Titus Oates claimed he had overheard a plot to murder the King whilst he was in France. Upon hearing these accusations William Bedloe came forward and confirmed and embellished the accusations made by Oates. Upon his death his brother, James, would succeed the King. It was James' personal secretary, Edward Coleman, who was the alleged ringleader for the assassination. Oates had sworn his testimony to London Magistrate Sir Edmund Berry Godfrey, who then mysteriously disappeared and was later found dead in circumstances that indicated murder and seemed to confirm the plot to kill the King.¹⁴⁴ The treason trial lasted from 1678 to 1680 and the trials were described as 'six memorable failures of justice, involving the sacrifice of no less than fourteen innocent lives.'¹⁴⁵ As the trials wore on, Oates' web of lies and deceit became uncontrollable. He was eventually prosecuted for perjury and although the

¹⁴² J. H. Langbein, *The Origins of the Adversary Criminal Trial*, (Oxford University Press: Oxford), 2005 at p.62-63.

¹⁴³ J. H. Langbein, *Prosecuting Crime in the Renaissance* (Harvard University Press) 1974 at 272.

¹⁴⁴ J. H. Langbein, *The Origins of the Adversary Criminal Trial*, (Oxford University Press: Oxford), 2005 at p.71.

¹⁴⁵ Sir James Fitzjames Stephen, *A History of the Criminal Law in England* (Macmillan: London), 1883, Vol. 1 at p.392.

sanction did permit the death penalty, the judge claimed Oates' crime was 'infinitely more odious than common murder'.¹⁴⁶

The enactment of the Treason Act 1696 marked the first step in permitting the defendant to be represented by defence counsel. During the Popish Trials it was said that 'the prisoner is half or more than half, proved to be an enemy of the King, and that, in the struggle between the King and the suspected men, all advantages are to be secured for the King.'¹⁴⁷ The preamble of the Treason Act 1696 took a different approach to the assumed guilt of the suspects, and raised the notion that the defendant may be innocent; '[N]othing is more just and reasonable than that person prosecuted for High Treason ... should not be debarred of all just and equal means for the defence of their innocence in such cases ...'.¹⁴⁸

The Act permitted those accused of treason to have the assistance of defence counsel at both the pre-trial and trial stages. The Act also granted the accused the right to obtain 'a true copy of the whole indictment but not the names of the witnesses... five days at least before [the trial]'.¹⁴⁹ Linked to the disclosure of the indictment was the right to speak to counsel during the pre-trial process.¹⁵⁰ By disclosing this information, the defendant could speak to his counsel to plan his defence. Section 1 of the Act also permitted the defendant to 'advise with Counsel thereupon, to plead and make their defence ...'. Coupled with this right to seek an advanced copy of the indictment, the defendant would be better prepared for questions as defence counsel could probe the legal sufficiency of the prosecution's case. Further to the disclosure of the prosecution's case and the pre-trial preparation, the Act also allowed the defendant to receive a 'full defence' at trial.¹⁵¹ The term full defence will be discussed in section 2 of this chapter, when the right to be represented at trial resulted in defendants being permitted defence counsel to represent them in a more restricted manner in the 1730s.

¹⁴⁶ *R v Titus Oates* 10, St. Tr 1079 (K.B 1685) at 1300 as cited in *ibid* at p.62-63.

¹⁴⁷ Sir James Fitzjames Stephen, *A History of the Criminal Law in England* (Macmillan: London) 1883, Vol. 1 at page 392.

¹⁴⁸ Treason Act 1696 Act, preamble.

¹⁴⁹ Treason Act 1696 s.1.

¹⁵⁰ Treason Act 1696 s.1.

¹⁵¹ S.1 Treason Act 1696.

Defence counsel was only permitted in cases of treason; counsel was still not permitted to enter ordinary felony cases. If a case would be tried as a *felony*,¹⁵² the prosecution would also not be represented by counsel. There were five reasons that ensured treason trials were demarcated as a procedural world of their own:¹⁵³

- i) **Prosecutorial Imbalance:** The late Stuart cases outlined above indicated there was a potential imbalance between the prosecuting lawyer and the unrepresented accused. This notion of imbalance stemmed from prosecutorial misconduct, such as reliance on perjured testimony and the inequality of the procedure to convict the defendant. The prosecution was permitted to hire as many members of counsel as required, whereas the defendant was left unrepresented. In an ordinary *felony* case, the victim or kin of the victim acted as the prosecutor and he was not the beneficiary of vast state resources funding the search for witnesses to support the prosecution's story.
- ii) **Judicial Bias:** Again, as indicated by the Stuart treason trials, the subservience of the court to the King was a problem perceived to be specific to treason trials. Most of the trials took place in London under the watchful gaze of the Crown and the judges were handpicked for the trials. Langbein states that whilst the Crown had an acute interest in the outcome of a treason trial, it had no direct interest in whether a defendant was found guilty of stealing sheep.¹⁵⁴
- iii) **The Complexity:** Ordinary crimes were thought to involve more reliable proofs. Burglary, stealing sheep or murder are examples of crimes that would leave eye-witnesses or other evidence. The evidence that was used in treason trials may be evidence of a person overhearing a plot to kill the King. The case of the Popish Plot underlined the dangers of false testimony being admitted and therefore a greater propensity of evidential probing by counsel was required. It would be impossible to think an unrepresented defendant, who has no knowledge of the charge, would be able to comprehend and probe the evidence the prosecution had advanced.

¹⁵²A crime classed as a *felony* is any serious crime other than treason.

¹⁵³ J. H. Langbein, *The Origins of the Adversary Criminal Trial*, (Oxford University Press: Oxford), 2005 at p.98.

¹⁵⁴*Ibid* at p.99.

- iv) Preserving the ‘Accused Speaks’ Trial: As treason trials were relatively rare there was no threat that permitting the defence lawyer into the court would diminish the traditional ‘Accused Speaks’ trial. As such the defendant would not lose his voice in the courtroom.¹⁵⁵
- v) Evening Up: By permitting the defendant to be represented by defence counsel the Treason Act was evening up the playing field because the Crown was represented by the prosecution. The preamble of the Act states that a defendant ‘should not be debarred of all just and equal means.’

It is clear from the drafting of the Act that its intention was to afford safeguards to the defendant by way of pre-trial disclosure and representation by counsel. However, whilst being mindful to protect the defendant from further miscarriages of justice, the drafters carefully restricted the right to defence representation to treason trials alone. This chapter moves on to examine how the defence lawyer became a part of not only treason trials but of all criminal trials.

2. Enter the Lawyer: From Lawyer Free to Lawyer Dominated Trials

During the latter part of the sixteenth century judges resolutely enforced the prohibition on defence counsel, despite some emphatic comments from the juristic literature of the period. One Elizabethan writer explained that even in cases where the prosecution is represented by counsel ‘...no man is suffered to defend, instruct or speak for the accused: which is the greatest injustice that can be devised; and no doubt but innocent infinite blood is shed by this means, and lyeth upon the heads of our judges [and] juries...’.¹⁵⁶ The victim of the alleged crime acted as the prosecution and, in cases of homicide, the victim’s kin or the local coroner assumed the role of prosecutor.¹⁵⁷ The prohibition on defence counsel in felony trials applied to matters of fact as opposed to matters of law.¹⁵⁸ A prisoner would be

¹⁵⁵ This notion is discussed at length in the next section, it is briefly mentioned here to contextualize the rationale for permitting defence lawyers in treason trials yet prohibiting them in all other offences.

¹⁵⁶ An unnamed Elizabethan writer in *A Memorial of the Reformation of England* (1596), published as *The Jesuit’s Memorial for the Intended Reformation of England* 250 (London) 1690 as cited in *Supra* fn. 159.

¹⁵⁷ R. F. Hunnisett, *Eighteenth-Century Coroners and Their Clerks*, 76 *Wiltshire Archaeological Natural History Mag.* 123 (1982).

¹⁵⁸ The accused was allowed counsel to argue matters of law even in cases of treason or felony. These cases were however infrequent, David Seipp identified several cases in the fourteenth and fifteenth centuries in

assigned defence counsel when the court recognised that a legal question would require discussion. The defence counsel was not viewed as a partisan advocate of his client's rights; he acted as an *amicus curiae* rather than the representative of the accused.¹⁵⁹ However, the vast majority of defendants raised no objections at this stage and entered a plea of not guilty.¹⁶⁰ Sir Edward Coke explained that the defendant only entered the trial process after he had entered a plea, 'which goeth to the fact best known to the [accused]...shall [he] have no counsel to give evidence, or allege any matter for him...'.¹⁶¹ It was thought that it was to the accused's advantage to argue his own case as he would know more about the facts of the incident than any lawyer. William Hawkins best encapsulated this notion when he claimed:

'[I]t requires no manner of skill to make a plain and honest defence [because] the simplicity and innocence, artless and ingenuous behaviour of one whose conscience acquits him, ha[s] something in it more moving and convincing than the highest eloquence of persons speaking in a cause not their own.'¹⁶²

If the defendant was also represented at trial it would inhibit the court from treating the accused as an informational resource. Judges and juristic writers feared that counsel would speak for the accused and thereby diminish his worth as an informational resource. Furthermore, there were concerns that the defensive tactics of defence lawyers could impair the ability of the court to adjudicate accurately.¹⁶³

which counsel acts for the defence. See D.J Seipp *Crime in the Year Books*, in *Law Reporting in England* 15,22 (Chatal Stebbings ed.) (1995).

¹⁵⁹ D.J. A Cairns *Advocacy and the Making of the Adversarial Criminal Trial 1800-1865* (Clarendon Press:, 1998) at p.47.

¹⁶⁰ J. H. Langbein, *The Origins of the Adversary Criminal Trial*, (Oxford University Press: Oxford), 2005 at p.26.

¹⁶¹ E. Coke, *The Third Part of the Institutes of the Laws of England: Concerning High Treason and Other Pleas of the Crown, and Criminal Causes*, 137 (London 1644) as cited in *ibid*.

¹⁶² W. Hawkins, *A Treatise of the Pleas of the Crown*, 400 (London, 1716, 1721) (2 Volumes) as cited in *Ibid*.

¹⁶³ J. H. Langbein, *The Origins of the Adversary Criminal Trial*, (Oxford University Press: Oxford), 2005 at p.26.

2.1 Departure from the Prohibition of Defence Counsel

During the 1730s¹⁶⁴ the judiciary began to depart from the rule that prohibited defence counsel in ordinary felony cases. Counsel was permitted at trial for the limited purpose of examining and cross-examining witnesses. However, defence counsel was denied the opportunity to address the jury. This forced him to either do nothing or to cross-examine the witness. This act was somewhat futile as the defence counsel did not possess an evidential base on which he could effectively challenge or discredit the prosecution witnesses, as they were not entitled to copies of the witnesses' depositions.¹⁶⁵ The lack of opportunity to address the jury further inhibited the role of the defence counsel because the lawyer could not explain the significance of the witnesses' answer, therefore the significance had to be clear from the question and answer itself. This led to counsel asking leading questions throughout the cross-examination and Fitzjames Stephen suggested that 'the cross-examination tended to become a speech thrown into the form of questions.'¹⁶⁶

Defence lawyers were keen to maximize their opportunity to address the jury at trial, despite being prohibited from doing so. William Garrow, a defence lawyer at The Old Bailey, evaded the limits on defence lawyers. He became renowned for his intimidating and aggressive cross-examinations.¹⁶⁷ Garrow used cross-examination in order to address the jury, despite the prohibition on addressing the jury. He told the court, 'I had a right, if I could, indirectly to convey observations to the fact; and whatever other people may say, I shall certainly take the liberty of doing it; for what the law of England will not permit me to do directly, I will do indirectly, where I can'.¹⁶⁸ What Garrow is effectively saying is 'I will do anything I can get away with.'¹⁶⁹ The notion of the defence lawyer acting as a zealous advocate for his client was advanced by another Old Bailey practitioner, John Silvester, when he stated, 'My Lord, it is my duty standing here as a

¹⁶⁴ Langbein explains that the deviation from the prohibition on defence counsel occurred in early eighteenth century. However, Cairns suggests that the lifting of the prohibition occurred in the nineteenth century.

¹⁶⁵ E. Coke, *The Third Part of the Institutes of the Laws of England: Concerning High Treason and Other Pleas of the Crown and Criminal Causes*, 137 (London: 1644), as cited in J. H. Langbein, *The Origins of the Adversary Criminal Trial*, (Oxford University Press: Oxford), 2005 at p.49.

¹⁶⁶ J. F. Stephen, *A General View of the Criminal Law in London* (London, 1883, Volume 2 at 431 as cited in *ibid* 48.

¹⁶⁷ Thomas Rowlandson's cartoon 'Being Nervous and Cross-Examined by Mr Garrow' from the series 'Miseries of Human Life' (1808). Available here: <http://art.famsf.org/thomas-rowlandson/more-miseries-being-nervous-and-cross-examined-mr-garrow-fortieth-plate-book> [Last accessed 1st February 2017].

¹⁶⁸ This statement was made at The Trial of John Taylor of Forgery at Chelmsford Assizes 11(Chelmsford 1800) at 15.

¹⁶⁹ J. H. Langbein, *The Origins of the Adversary Criminal Trial*, (Oxford University Press: Oxford), 2005 at p.307.

counsel for the prisoner to take every objection that lays in my power for a man standing in his unfortunate situation.’¹⁷⁰

It is at this moment that the criminal trial takes its first steps in departing from the ‘accused speaks’ method of trial to what has become the modern form of adversarial criminal trial. The removal of the prohibition on defence lawyers in criminal trials did not come without restrictions. The lawyer could examine and cross-examine the witnesses but he could not address the court in order to give the accused’s version of events. By 1780 the accused’s counsel was playing a greater role in the trial proceedings. In one instance the court told the accused if there were ‘any questions omitted you think proper to have your counsel ask, write them down and send them over...[D]o not (you) put the questions yourself, but hand it to your counsel.’¹⁷¹

The late seventeenth and early eighteenth centuries were pivotal in transforming the criminal trial from the ‘accused speaks’ to a more lawyer-dominated trial. Those early adversarial battles provided an early example of a conflict of interests that the contemporary defence lawyer is faced with. The ethos of the adversarial battle conflicted with the notion that fidelity to the truth should place bounds upon counsel’s service to his client.¹⁷² When the judges of the 1730s first permitted defence counsel to act as a safeguard against the prospect of a mistaken conviction they limited his role by permitting him only to examine and cross-examine witnesses. It was thought that he would supplement the accused conducting his own defence and the ‘accused speaks’ trial would live on. The defence lawyer slowly encroached into the domain of the trial; the role evolved into one where the counsel would write statements for the prisoner and ask questions in court on his behalf. This sub-chapter will now continue to chart the evolution of the role of defence counsel offering a full defence to his client.

2.2 Lifting the Restrictions on the Role of the Defence Lawyer

Between 1821 and 1837, a Parliament debated the role of the defence lawyer and his role in the criminal trial. This debate resulted in the Trials for Felonies Act 1836 (this is more commonly known as the Prisoner’s Counsel Act) and the

¹⁷⁰ J. Lee, *The Old Bailey Session Papers* (Jan. 1784 No.203) at 241, 246.

¹⁷¹ D. Macginniss, *Old Bailey Session Papers* (Jan.1783 No. 85) at 111,118-119.

¹⁷² J. H. Langbein, *The Origins of the Adversary Criminal Trial*, (Oxford University Press: Oxford), 2005 at p.307.

Judicial Practice Memorandum of 1837. These two provisions abolished the restriction on the role of the defence lawyer; all prisoners were now entitled to a defence lawyer and the defence lawyer was not constrained by the restriction to only conduct the cross-examination and examination of witnesses. The second major change made by this legislation was the right acquired by prisoners to demand copies of the depositions made by prosecutorial witnesses.

The issue of the prisoner being afforded the right to a full defence¹⁷³ had been debated a number of times in Parliament. The first phase of debate started with the introduction of the Capital Crimes Bill in 1821. However, from 1821 to 1826, the Bill could not gain sufficient support to be passed by the House of Commons. The trial was seen to be an ‘investigation for the truth’ and the full introduction of defence counsel would render the trial as a ‘war of wit, ingenuity and eloquence’ all of which are incompatible with the criminal trial.¹⁷⁴ Cairns believes supporters of the Bill were of the opinion that ingenuity and eloquence were conducive to the discovery of truth by presenting a forum where the facts of the case could be fully discussed by either side. The relationship between the truth and advocacy emerged as the major issue in Prisoner’s Counsel Act debate.¹⁷⁵

In 1836, the *Second Report* of the Criminal Law Commissioners¹⁷⁶ was published. This report fully endorsed a full right to defence counsel. The Commissioners criticised the traditional stance that the truth of the offence would manifest from the prisoner’s unprepared testimony as both ‘strange and unreasonable.’¹⁷⁷ The Prisoner’s Counsel Act brought about an immediate and far-reaching transformation of criminal procedure. The Act replaced ‘the rough-and-ready procedure of the eighteenth and early nineteenth centuries into the scrupulous adversarial trial of today.’¹⁷⁸ The Act permitted all persons

¹⁷³ A full defence was one where the lawyer had no restrictions on his role at trial. Currently, the lawyer is merely permitted to examine and cross-examine witnesses. A full defence would grant him full rights of the court that would include speaking for his client as well as addressing the jury.

¹⁷⁴ This was the view of Sir John Coply who spoke out against full defence by counsel in the House of Commons in 1821, 1824 and 1826 as cited in *Supra 186* at 69.

¹⁷⁵ *ibid* 69.

¹⁷⁶ *Second Report of the His Majesty’s Commission on Criminal Law* (1836) Parl. Papers XXXVI 183 as cited in *ibid* 73. Cairns states that the use of Royal Commissions to facilitate legislative reform was a characteristic of the nineteenth century law reform and the *second report* is a classic example of this process in action.

¹⁷⁷ *Second Report of the His Majesty’s Commission on Criminal Law* (1836) Parl. Papers XXXVI 11.

¹⁷⁸ *ibid*.

who were tried for felonies to be granted permission to a full defence by counsel learned in the law or by an Attorney in courts where an Attorney practices as counsel.¹⁷⁹ The Act also permitted a person bailed or committed to prison to be entitled, on demand, to copies of the examination of witnesses on whose deposition they have been held for the sum of three and a half pence for each folio of ninety words.¹⁸⁰

The introduction of defence counsel to the criminal trial disentangled two activities that were previously the sole responsibility of the unrepresented defendant; it was the duty of the defence lawyer to probe whether the prosecution had submitted a tenable case, and the lawyer would offer evidence of a defensive nature to rebut the prosecution's allegations. The defence lawyer was able to insist on asking the judge whether the prosecution had discharged their burden of adducing sufficient evidence to support a verdict in its favour. The defence lawyer would typically move for a verdict of an acquittal at the conclusion of the prosecution's evidence. If a judge overruled this, the defence would then present its evidence.¹⁸¹ The inclusion of the defence lawyer changed the structure of the trial; he broke up the dual roles of speaking and defending that had previously been the responsibility of the accused. He assumed the role of defender; he insisted on prosecutorial burdens of proof and largely shut down the role of the accused.¹⁸² Prior to the involvement of the defence lawyer, the trial was the forum in which the accused could reply to the charge and evidence against him. The evolution of the adversarial trial changed this concept; the new 'lawyer-dominated' trials were no longer the place the accused merely aired his response to the charge, but became the forum in which the accused's defence counsel tested the prosecution's case.¹⁸³

2.3 The Accused Speaks Again?

Although the central purpose of the criminal trial was to use the accused as an informational resource and therefore to hear him 'speak,' he was not considered a witness because he spoke unsworn at trial. The disqualification on sworn testimony of the accused was lifted by the Criminal Evidence Act 1898.¹⁸⁴ The Act was enacted during a period of the widespread use of capital punishment. In Parliament, repeated references were made

¹⁷⁹ Part I – The Prisoners Counsel Act 1836 (6 & 7 Will.4, c.114).

¹⁸⁰ s.3 The Prisoners Counsel Act 1836 (6 & 7 Will.4, c.114).

¹⁸¹ J. H. Langbein, *The Origins of the Adversary Criminal Trial*, (Oxford University Press: Oxford), 2005 at p.258.

¹⁸² *Ibid* at p.307.

¹⁸³ For an analytic discussion on the origins of the defence lawyer, please see *ibid* Chapter 3 and 5.

¹⁸⁴ S. 1 Criminal Evidence Act 1898.

that compelling the accused to testify at trial was putting him in a position to put a noose around his own neck as the prisoner would be compelled to answer ‘a question [that may lead him] to convict himself, and thus put the noose round his neck by his own word of mouth ...’.¹⁸⁵ Parliamentary debates continued and concerns were raised that compelling the accused to speak at trial would bring English law in line with the inquisitorial approach to the trial as adopted in France. In France, it was thought that prisoners could be turned ‘... inside out, to supplement a case that the [prosecution] have not been able to prove’.¹⁸⁶

The notion that the prosecution should be permitted to make adverse comment concerning any accused who did not give evidence under oath was generally overlooked by the initial drafters of the Criminal Evidence Bill. Lloyd Morgan, a private member of Parliament, pointed this out and moved for an amendment to the effect that the failure of an accused to give evidence ‘shall not be made the subject of any comment by the prosecuting counsel, or solicitor or by the Court’.¹⁸⁷ The Criminal Evidence Act 1898 limited the Bench from passing comment on an accused’s decision not to testify but the prosecution was prohibited from doing so. Comments from the Bench were considered justified in cases such as an attack on a prosecution witness by defence counsel, without the basis of the attack being substantiated by a testifying defendant.¹⁸⁸ One can wonder if this was an early attempt by the Government to sideline the growing role and importance of the defence and an attempt to stop the ‘lawyerisation’ of the trial and return to the more ‘accused speaks’ model of trial. This notion of attempting to return to the ‘accused speaks’ model is something that the thesis shall return to at a later point in the final chapter and advance the argument that in the modern era, the accused is now effectively compelled to ‘speak’ about his defence, albeit in the form of written disclosure when completing the case management provisions of the CrimPR.

¹⁸⁵ Great Britain and Ireland, *Parliamentary Debates*, House of Commons, *The Parliamentary Debates (Fourth Series)*, [1898] 30 June 1898 Vol 60, 659-660 (S. Evans) as cited in C. Mosidis, *Criminal Discovery: From Truth to Proof and Back Again*, (Sydney Institute of Criminology Series), 2008.

¹⁸⁶ Great Britain and Ireland, *Parliamentary Debates*, House of Commons, *The Parliamentary Debates (Fourth Series)*, [1898] 25 April 1898 Vol 56, 1001 (Lloyd Morgan), 27 June 1898, Vol 60, 313 (T P O’Conner) 25 April 1898 Vol 56 982-983 (Attorney-General Richard Webster) as cited in *ibid*.

¹⁸⁷ Great Britain and Ireland, *Parliamentary Debates*, House of Commons, *The Parliamentary Debates (Fourth Series)*, [1898] 30 June 1898 Vol 60, 662 (Lloyd Morgan) as cited in *ibid* p.24.

¹⁸⁸C. Mosidis, *Criminal Discovery: From Truth to Proof and Back Again*, (Sydney Institute of Criminology Series: Sydney), 2008 p.24.

3. The Twentieth Century Defence Lawyer

The early twentieth century saw the continuation of the ‘testing the prosecution’s case’ form of trial. The defence lawyer was firmly established as a key actor in the criminal justice process. In fact, the position and role of the defence lawyer gained further importance as access to legal representation was increased. The Poor Prisoner’s Defence Act 1903 established that legal aid would be provided for trials on indictment for serious offences, where this would be in the interests of justice. It was not only the defence lawyer’s role at trial that grew in importance during the early part of the twentieth century; the defence lawyer was also becoming more active at the pre-trial stage. The Judges’ Rules 1912 stated that suspects should be able to consult with a solicitor, albeit with a caveat that this caused the police no unreasonable hindrance.¹⁸⁹ This reaffirmed the position of the ‘testing of the prosecution’s case’ in favour of replacing the ‘accused speaks’ trial.

Whilst the availability of defence representation via legal aid was somewhat increased by the Poor Prisoners Act 1903, judges were encouraged not to actively advertise that access to legal advice was readily available.¹⁹⁰ However, attempts to keep the right to legal advice under wraps were effectively removed by the advent of the Legal Aid and Advice Act 1949. In theory the Act would have a great impact on the defence lawyer’s role: the Act provided for legal representation for all except those who could not by any reasonable view be regarded as appropriate for state aid at all. In 1950 the Council of Europe recognised the importance of the defence lawyer’s role in the criminal justice process in The European Convention on Human Rights.¹⁹¹ This is an international treaty that protects of the human rights and fundamental freedoms of citizens of member states of the Council of Europe. Article 6 is the provision that protects the right to a fair trial; of particular interest to this thesis is Article 6(3)(c). This provision allows a defendant to either defend himself or be defended through legal assistance of his choosing. Should he not be able afford legal assistance, it is to be given to him free when it is in the interests of justice. It is clear from the drafting of this provision that the defence lawyer had an integral part to play in the criminal justice process.

¹⁸⁹ However, research shows that only nine per cent of suspects sought legal advice and only seven percent received it. Please see P. Softly *Police Interrogation: An Observational Study in Four Police Stations*, Royal Commission on Procedure, Research Study No 4, HMSO 1980).

¹⁹⁰ Paragraph 11 http://www.legalservices.gov.uk/docs/forms/60_Jewels_of_Information.pdf [Last Accessed 1st May 2017].

¹⁹¹ This was formally known as The Convention for the Protection of Human Rights and Fundamental Freedoms.

Any legal assistance under the Legal Aid and Advice Act would be authorized on a discretionary basis by the court. Concerns about the criteria the courts applied in determining who would receive legal aid led to the establishment of the Widgery Committee in 1964. The Committee recommended that the main factors a magistrate should have in mind when deciding to grant legal aid were:

- a) The gravity of the charge; whether the accused is in real jeopardy of losing his liberty or livelihood.
- b) Whether the charge raises a substantial question of law.
- c) Whether the accused can state his own case and follow proceedings.
- d) Whether legal representation is desirable in the interests of someone other than the accused. For example, in the case of sexual offences against young persons when it is undesirable that the accused should cross-examine the witness in person.¹⁹²

If a case exhibits one or more of these features then it is a case that *prima facie* is one in which the interests of justice require that legal representation be provided.¹⁹³ Following the recommendations, the Criminal Justice Act 1967¹⁹⁴ set out the guidelines governing when the use of legal aid should be authorized. Section 75(1) stated that the court shall grant legal aid when it is desirable in the interests of justice and the court should make such an order where a person is committed to court on a charge of murder,¹⁹⁵ or where the prosecutor appeals or applies for leave to appeal from the Criminal Division of the Court of Appeal, or from the Courts Martial Appeal Court to the House of Lords.¹⁹⁶ The 1967 Act also imposed a disclosure obligation on the defence lawyer; should the accused be relying on an alibi as part of the defence, section 11 of the Act states he must inform the police of this in advance of trial so this can be checked. This will be further analysed when the disclosure regime evolves in the mid-1990s. For context, it was important to outline the beginnings of a statutory regime here.

¹⁹² Departmental Committee Report: Legal Aid in Criminal Proceedings, 1966, Cmnd 2934 at para 165-180.

¹⁹³ *Ibid* at para 180.

¹⁹⁴ S.73-84 Criminal Justice Act 1967 deals with the legal aid provisions.

¹⁹⁵ S.75(1)(a) Criminal Justice Act 1967.

¹⁹⁶ S.75(1)(b) Criminal Justice Act 1967.

Despite the growing influence of the defence lawyer it was found that defence representation in the magistrates' courts was still very much a minority activity. A report by Justice in 1971 called for a greater role for the defence in the criminal justice process as some 96 per cent of defendants in the magistrates' court were unrepresented.¹⁹⁷ The importance of defence representation was highlighted by the Widgery Committee when it said that 'the object of the legal aid system should be to secure that injustice does not arise though an accused person being prevented by lack of means from bringing effectively before the court matters which may constitute a defence to the charge or mitigate the gravity of the offence.'¹⁹⁸

The Justice report highlighted the dangers faced by unrepresented defendants. The report stated that a 'majority of defendants sentenced to the most serious penalties available to the magistrates are unrepresented...'.¹⁹⁹ In order to rectify the disproportionate treatment of unrepresented defendants, Justice called for the establishment of a Duty Solicitor Scheme. The Widgery Committee considered the merits of such a scheme but arrived at the conclusion that such a scheme was impractical considering the scale that would be necessary for its implementation in England and Wales.²⁰⁰ The Justice report was not persuaded by this, and stated that the scheme had many merits; primarily it would provide assistance to a large number of defendants who would otherwise not receive any legal advice. This advice would be offered at the first stage of legal proceedings, where the suspect was still in a position to make up his mind how he wished to plead. The duty solicitor could help make up their mind by offering professional advice as opposed to rumour, suspicion or police pressure and imagined fear of consequences.²⁰¹

¹⁹⁷ Justice, *The Unrepresented Defendant in the Magistrates' Court*, (London: Stevens and Son, 1971) at para 16.

¹⁹⁸ Departmental Committee Report: Legal Aid in Criminal Proceedings, 1966, Cmnd 2934 at para 56.

¹⁹⁹ Justice, *The Unrepresented Defendant in the Magistrates' Court*, (London: Stevens and Son, 1971) at para 26.

²⁰⁰ Departmental Committee Report: Legal Aid in Criminal Proceedings, 1966, Cmnd 2934 at para 206-207.

²⁰¹ Justice, *The Unrepresented Defendant in the Magistrates' Court*, (London: Stevens and Son, 1971) at para 92.

3.4 A Theoretical Conception of the Defence Lawyer

As the introduction to this chapter stated, there is not one standard definition of the role of the defence lawyer. Thus a coherent account of the role of the criminal defence lawyer will be developed using a variety of sources, and this theoretical ideal will be tested in subsequent chapters when comparisons are drawn with the workings of the defence lawyer in practice. This comparison will allow a conclusion to be drawn regarding the differences between the theoretical role of the defence lawyer and the role in practice in the context of the disclosure legislation and the CrimPR.

This section will attempt to clarify the theoretical position of the defence lawyer starting in the eighteenth and nineteenth centuries. However, details on the theoretical conception of the lawyer during this period are scant. In fact, it was not until the 1960s that academic writing concentrated on the theoretical conception of the defence lawyer and that collection of literature originated in the United States of America. Between the 1960s until the early 1980s, there was a great deal of scholarly work concerning the theory behind the role of the adversarial defence lawyer. As such, a great deal of this work is used to establish my own ‘classic conception’ of the defence lawyer’s role. Whilst in practice, there is some question as to whether the adversarial defence lawyer may actually exist,²⁰² the theory provides a useful starting point for analysis, as this classic conception can be tested against the empirical fieldwork in chapter seven. It will provide a baseline for what an adversarial defence lawyer should do and look like. The empirical findings can examine if this type of lawyer exists and if they do not exist; the findings can extrapolate traits from this defence to classify what the lawyers look like.

As previously discussed, the criminal defence lawyer in the seventeenth century was seen as an unnecessary addition to the criminal process; as this chapter has illustrated, the court was deemed to be better suited to protecting the accused than any lawyer. To emphasize the point that the lawyer was deemed superfluous, Sir Edward Coke observed that ‘it is far better for a prisoner to have a judge’s opinion for him, than many counsellors at the Bar. The judges... have special care of the indictment and see that...’

²⁰² See p.237-242 - this section questions if the adversarial criminal lawyer actually exists in public.

justice be done to the party’.²⁰³ In this statement, Coke is effectively reinforcing the notion that the defence lawyer is an unnecessary addition to the trial; the judge can carry out the role that a prisoner would want a lawyer to carry out. In the early eighteenth century, there was growing unease about the reliability of the evidence generated by both the prosecution and defence counsel.²⁰⁴ There are examples of the defence lawyer being cast in a shady or murky light. Langbein cites an example of a lawyer who, with three other people, concocted a false highway robbery in order to claim the reward of £40. One witness claimed that the lawyer told him that it was his business to ‘set people together by the Ears and foment Law-Suits ...’.²⁰⁵ It is clear from these examples that the common notion of the defence lawyer in the seventeenth and eighteenth centuries was someone who may not be trustworthy and certainly someone who did not have the interests of justice in the forefront of their mind; they would rather further their own selfish goals of self-gain instead of dealing with their clients justly. This chapter will now address how the theoretical conception of the defence lawyer has evolved over time.

4.1 The Defence Lawyer’s Role: The Zealous Advocate?

When considering the role of the defence lawyer, there is a danger oversimplifying it as one that merely advances the interests of the client. This simplified view does not allow any room for other values that, at times, the defence lawyer may have to promote ahead of his client’s interests. The role of the defence lawyer can be seen to operate on three interwoven levels: firstly, he is the mouthpiece of his client; secondly he is an officer of the court; and finally he acts as a zealous protector of the rights of his client.²⁰⁶

Despite being charged with advancing his client’s case, the defence lawyer’s obligation to his client is, 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*:²⁰⁷

‘...Counsel has a duty to fearlessly raise every issue, advance every argument and ask 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

²⁰³*R v Walter Thomas*, 2 Bulstrode 147, 80 Eng. Rep 1022 (K.B 1613) as cited *Supra* fn.159.

²⁰⁴*Ibid* at p.136.

²⁰⁵ These events were reported in 2 *Gentleman’s Magazine* 975 (Sept. 1732) entry for 11th September as cited in *Ibid* at p.138.

²⁰⁶ M. Blake and A. Ashworth, ‘Ethics and the Criminal Defence Lawyer’ [2004] *Legal Ethics* vol 7 167-190 at 167.

²⁰⁷ [1969] 1A.C. 191.

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...'.²⁰⁸

It is clear from this statement that the role of the defence lawyer is not as clear-cut as merely advancing the case of his client and acting in his best interest. At times, he will be charged with actively engaging in ethical decision-making. These ethical obligations will be discussed at a later stage; this initial stage is attempting to construct a theoretical conception of the defence lawyer. 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; to hold it in confidence; and yet to never mislead the courts.²⁰⁹ 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 role of the defence lawyer.²¹⁰ 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 the truth is best discovered by arguments on both sides of the question.²¹¹ Despite this notion of 'zealous advocacy' being the root of the adversarial process and the best way to discover the truth, very little is said on how the ethical implications should underpin the role of the defence lawyer. Does the notion of zealous advocacy permit the lawyer to take advantage of any legal point that favours his client; should the defence lawyer be so aggressive in challenging the prosecution's witnesses that their evidence is rendered weak, muddled or confusing?²¹² It is clear that part of the defence lawyer's role is to act as a zealous advocate in advancing his client's best interests, but how is this primary goal tempered by various obligations to other parties? To answer that, the obligations placed on the defence lawyer will be examined to ascertain how they impact the role.

Following Lord Reid's judgement in *Rondel v Worsley*, the obligations of the lawyer's role can be deconstructed into three core duties. At the conclusion of this sub-chapter a conception of the theoretical role of the defence lawyer should be illustrated. This theoretical illustration will allow contrast to be drawn with the role of the defence lawyer

²⁰⁸ [1969] 1A.C. 191 at 227-28.

²⁰⁹ M. Blake and A. Ashworth, 'Ethics and the Criminal Defence Lawyer' [2004] *Legal Ethics* vol 7 167-190 at 173.

²¹⁰ *ibid* 169.

²¹¹ *Ex parte Lloyd* (1822) Montagu's Reports 70n, 72 per Lord Eldon.

²¹² See D. Napley, *The Technique of Persuasion*, (4th ed. Sweet and Maxwell: London, 1991) at p.57.

in practice. This illustration will be utilized in chapter seven²¹³ when the empirical research undertaken to examine how the changing legislation over the last fifteen years has impacted on the role of the defence lawyer is examined.

4.2 The Overarching Responsibilities of the Defence Lawyer

The three overarching duties that will be explored are extracted from Lord Reid's speech: the duty to the client, the duty to the court and the duty to the public. The duty to the client will encompass the principle of partisanship; this sub-section will examine the defence lawyer's role in advancing the interests of his client. The lawyer's duty to the court will encompass the duty to the administration of justice; the defence lawyer is under an obligation to represent his client, but in doing so he is required to facilitate the administration of justice.²¹⁴ The duty to the public obliges the defence lawyer to avoid any practice that conflicts with his own version of what is right and wrong.²¹⁵ The lawyer cannot allow his position as his client's mouthpiece to absolve him of all moral responsibility. It is these ethical issues that will now be discussed to conceptualize the theoretical role of the defence lawyer.

4.3 The Duty to the Client

The defence lawyer's duty to the client is well recognised and the sources used to research this chapter have given numerous symbolic illustrations of the role of the defence lawyer. He is seen to be the 'gladiator of the accused,'²¹⁶ a 'fearless knight,'²¹⁷ and the 'hired gun.'²¹⁸ 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'²¹⁹ as it is the defence lawyer who presents the facts of the accused's case to the court. In essence, the lawyer says 'all that the client would say for himself (were he able to do so)'.²²⁰

²¹³ See Chapter Seven p.187-246.

²¹⁴ D. Nicholson and J. Webb, *Professional Legal Ethics*, (1999), (Oxford University Press:) at p. 164 provides one definition of the duty of morality.

²¹⁵ F. Zacarias and B. Green, *Reconceptualizing Advocacy Ethics*, (2005) 74 *Geo.Wash.L.Rev.* 27.

²¹⁶ R. Du Cann *The Art of the Advocate* (Penguin Publishing, 1964) at p.46.

²¹⁷ F. Zacarias and B. Green, *Reconceptualizing Advocacy Ethics*, (2005) 74 *Geo.Wash.L.Rev.* 27. at p. 182.

²¹⁸ M. Cain and C. Harrington *Lawyers in the Post-Modern World* (Oxford University Press, 1994) at p.55.

²¹⁹ W. Simon, 'The Ideology of Advocacy: Procedural Justice and Professional Ethics' (1978), *Wis.L.Rev.* 42.

²²⁰ D. Pannick *Advocates* (Oxford University Press, 1992) at p.92.

4.3.1 The Partisan Defence Lawyer

An example of a partisan defence lawyer can be identified from Lord Reid's speech in *Rondel v Worsley*;²²¹ he is one who fearlessly raises every issue, advances every argument and asks every question, however distasteful, which he thinks will help his client's case. Coupling this quote with the symbolic illustrations above, a common thread occurs; the defence lawyer's loyalty to his client. This basic level of loyalty is well illustrated by O'Dair when he says that the duty of the defence lawyer is to present the facts of the case 'as persuasively as he can... as seen from the standpoint of his client's interests'.²²² By presenting the facts as persuasively as he can, the lawyer transforms himself into a part of his client's will. The issues he raises and the presentation of facts favour his client's perspective; they are presented in a way that his client would present, if he could.

The notion of fearlessness and partisanship are often interwoven. In order to give a full defence to a suspect, the defence lawyer must be fearless in his approach to protection. The client will often meet a lawyer post-arrest and therefore he is already in the police station, which can be viewed as a hostile environment for a suspect. The police will interrogate the suspect in order to extract a confession from him; this can then be used as a basis for the trial. The questioning may well be hostile and, as such, the defence lawyer will need to act with both 'courage and devotion'²²³ in order to protect his client. As Lord Reid identified, a partisan defence lawyer must do all he can to advance his client's case, which also includes being prepared to do 'whatever it takes to improve the client's position'.²²⁴ As such, he may offend others who may be uncomfortable with his actions; he may have to ignore certain evidence in order to present his client's case in a more favourable light and to induce the jury or judge to find a verdict that is favourable to the client. This is one example of the tension and conflict that the defence lawyer faces; as a partisan defender of the accused, he is not concerned with seeking the truth. He has an aim of what will best serve his client and then he attempts to persuade others to reach a decision that will fulfil that aim. This potential truth-defeating goal may run counter to the other duties owed by the defence lawyer to the other actors and participants in the criminal justice process. Despite causing a potential conflict with the defence lawyer's other obligations, the principle of partisanship is described as the 'virtue that trumps all other values and

²²¹ [1967] 3 WLR 1666.

²²² R. O'Dair, *Legal Ethics Text and Materials* (Butterworths, 2001) at 152.

²²³ G. Lefcourt, *Responsibilities of a Criminal Defence Attorney* 30. *Loy L.A.L. Rev.*, 61.

²²⁴ *Ibid.*

virtues'.²²⁵ Therefore, the obligation of partisanship takes precedence over the other obligations the defence lawyer has; namely, to the court and the public. This notion is supported by Charles Curtis, who said that the 'lawyer's official duty... is to devote himself to the client. The [duty to the] court comes second ...'.²²⁶

A key element of being a fearless partisan advocate is assertiveness; this is clear when the lawyer is faced with a prosecution witness. In these circumstances, the priority of the defence is clear; at times he may have to '... go after the [witness] aggressively – to destroy [their] credibility or even reputation – when the alternative is that the client will be hurt'.²²⁷ Another aggressive tactic the partisan defence lawyer has at his disposal is the weapon of an ambush defence. This occurs when a defence lawyer introduces evidence at trial at the last possible moment; it does not allow the prosecution a chance to rebut, so this evidence may result in an acquittal. For example, if a defence lawyer spots a flaw in the prosecution's case he should point it out to the judge or jury. However, not pointing the flaw out, whilst possibly being beneficial to the client, is frowned upon by the court: '... to look the other way and not point it out ... is to violate your commitment as a lawyer'.²²⁸ These tactics can be used as effective weapons for the partisan criminal defence lawyer in the fight to protect his client and further their interests. It is clear, though, that these weapons may conflict with the other obligations the lawyer owes to both the court and to the public.

The notion of partisanship is permitted in an adversarial environment; a long-standing ethic of adversarial justice is that it is better to allow a number of criminals to go free rather than to subject one innocent individual to be wrongfully convicted.²²⁹ This cornerstone principle of the adversary justice system gives rise to the notion of partisan representation because 'the criminal justice system is less a device for discovering the truth than it is a series of 'screens' designed to make it exceedingly difficult for the innocent to be convicted'.²³⁰ Therefore, by the permitting of a rigorous, aggressive, partisan defence wrongful

²²⁵ A. Smith and W. Montross, *The Calling of the Criminal Defense* (1998-1999) 50 *Mercer L.R.*, 522.

²²⁶ C. Curtis, *The Ethics of Advocacy* (1951-1952) *Stan.L.Rev.* 12.

²²⁷ *ibid* at 529.

²²⁸ G. Van Susteren, 'Responsibility' (1996-1997), 30 *Loy. L.A.L. Rev.*, 128.

²²⁹ For further discussion please see D. Luban, 'The Adversary System Excuse' in R. Abel 'Lawyers: A *Critical Reader*' (The New Press, 1997), at p.5.

²³⁰ W. Hodes, 'Lord Broughman, the Dream Team and Jury Nullification of the Third Kind' (1996) 67 *U. Colo. L. R.* 1086.

convictions should be rare in their occurrence as the prosecution's case has to pass through the many 'screens'. The process becomes more expansive, transparent and in theory protects the innocent and only allows convictions to be based on comprehensively examined evidence. Without the partisan participation of the defence lawyer the adversarial justice system would mirror its inquisitorial counterpart, which has far fewer 'screens' for a conviction to pass through.

4.4 The Duty to the Court and the Administration of Justice

In *Rondel v Worsley* Lord Reid explains that the lawyer not only owes a duty to his client but also to other interested parties. The second duty owed by the defence lawyer that will be used to illustrate the theoretical conception of the defence lawyer is the duty to the court. It is important to explain that in this context the duty owed to the court will encompass more than a duty to the physical courtroom. For the purpose of this chapter, the 'court' shall include other 'officers of the court' namely the prosecution, judge and jurors. Therefore, when the term 'court' is used in this section, it is including those other actors as outlined. By expanding the term 'court' to outside of the physical courtroom, this chapter will examine the role of the lawyer in greater depth and will help identify any conflict or tension the lawyer's duty to the court has with any other duties owed by the defence lawyer. 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'.²³¹ 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 they are not the same. 'Truth' may represent what 'actually' happened in relation to a criminal offence. Truth is defined by the Oxford English Dictionary as 'that which is true or in accordance with fact or reality.'²³² The adversary system is based on the notion that the 'truth is best discovered by powerful statements on both sides of the question.'²³³ This very definition accepts that whilst 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

²³¹ D. Nicholson and J. Webb, *Professional Legal Ethics – Critical Interrogations*, (Oxford University Press: Oxford), 1999, at p.64.

²³² http://oxforddictionaries.com/view/entry/m_en_gb0886190#m_en_gb0886190 [Last Accessed 27th December 2010].

²³³ *Ex parte Lloyd* (1822) Montagu's Reports 70n, 72 per Lord Eldon.

Dictionary defines ‘justice’ as ‘the quality of being fair and reasonable’.²³⁴ Therefore the term justice is more concerned with the fairness of the procedural process rather than ascertaining the truth of what actually happened. How the defence lawyer assists the court to arrive at the point of achieving both truth and justice is what will aid the construction of this theoretical conception of the defence lawyer.

It is clear that securing both truth and justice is at the forefront of the defence lawyer’s responsibilities. This section will now analyse the behaviour and tactics the defence lawyer can employ to achieve such goals. The defence lawyer may ‘not do everything legally permissible to promote his client’s cause’.²³⁵ 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 disclose his case in a timely manner for the procedural justice system to run efficiently.

An ambush defence 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’.²³⁶ Tactics to delay proceedings and ambush defences are tools that the partisan defence lawyer can employ but they do not necessarily advance the client’s case. As an officer of the court, the defence lawyer must take steps to ensure that he is not blinded by partisanship.²³⁷ 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

²³⁴http://oxforddictionaries.com/view/entry/m_en_gb0435410#m_en_gb0435410 [Last Accessed 27th December 2010].

²³⁵ F. Zacharias and B. Green *Reconceptualizing Advocacy Ethics* (2005) 74. *Geo. Was. L.R.* 67.

²³⁶ G. Tomljanovic, ‘Defence Disclosure: Is the Right to Full Answer the Right to Ambush?’, (2002-2003) 40 *Alta. L.R.*, 689.

²³⁷ F. Zacharias and B. Green ‘Reconceptualizing Advocacy Ethics’ (2005) 74. *Geo. Was. L.R.* 28.

both important objectives of criminal law'.²³⁸ This statement further emphasises the notion 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 that favours the client. This notion creates tension in the theoretical role of the defence lawyer; how does he balance his responsibility to the court with furthering the case of his client. It is clear that the duty to the court severely tempers the ability of the defence lawyer to solely advance the best interest of the client.

4.5 The Duty to the Public

The final duty from Lord Reid's statement in *Rondell 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.²³⁹ 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 in order to achieve the desired result for their client.²⁴⁰

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'.²⁴¹ The lawyer should remember that a partisan duty to his client does not replace his ideas of what behaviour is right and wrong. 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 the defence lawyer as an '... instrument of justice and not a worker of injustice'.²⁴² 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

²³⁸ D. Bress Professional 'Ethics in Criminal Trials: A View of Defense Counsel's Responsibility', 64 Mich. L. R., 1498.

²³⁹ J. Noonan, The Purposes of Advocacy and the Limits of Confidentiality (1965-1966), 64 Mich. L. R., 1492.

²⁴⁰ R. Lawry, The Central Moral Tradition of Lawyer, (1990-91)19 Hofstra L.Rev., 337.

²⁴¹ *Ibid* at 337.

²⁴² G. Archer, 'Ethical Obligations of the Lawyer' in F. Zacharias and B. Green *Reconceptualizing Advocacy Ethics* (2005) 74. Geo. Was. L.R. 28.

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.

²⁴³ The duty to the public acts as a check to ensure the lawyer acts in an ethically correct manner and in a way that would not cause the public to lose confidence or faith in the criminal justice process. Furthermore, by ensuring that the process is conducted ethically, it ensures that both sides play fair and ultimately, it ensures that the criminal justice process is fair.

5. Conclusion

As this chapter outlined at the start, there is not one settled definition of the role of the defence lawyer. This chapter has sought to build a conception of the archetypal defence lawyer. Whilst this chapter has relied heavily on the use of literature from the United States in the 1960s and 1970s, the chapter does not accept that there is one particular view of the defence lawyer that should be adopted. Instead, the chapter contends that there are many differing facets that need to be considered when building a theoretical conception of a defence lawyer. Whilst these findings are theoretical, the findings can be used as the theoretical lens to help establish what goals and objectives are advanced by the defence lawyer in the modern era. This section has attempted to mold a conception of the defence lawyer and the obligations faced. The role of the defence lawyer is greater than merely advancing the case of his client. Whilst the duty to his client involves acting in a partisan manner, the notion of partisanship is heavily impinged by duties to the court and the administration of justice, as well as a duty to the public. The duty to the court and the administration of justice frowns on certain acts that may be beneficial to the client, such as ambush defences, which despite being legal are discouraged by the court for fear that they distort the search for the truth. The duty to the public ensures that the behaviour of the lawyer is ethically and morally correct. The literature used for this classic conception suggests that the defence lawyer has a paramount duty to his client, despite acknowledging that other duties exist; they do so with lesser priority than the duty to the client. Terms such as zealous advocate and hired gun suggest that this duty should be prioritise by the defence lawyer, above the other competing duties. However, this places the defence lawyer with a conundrum; the theoretical literature suggests that the duty to the client is the paramount duty. However, this conception offers

²⁴³ 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.

little guidance on how the lawyer should deal with obligations that may conflict with this duty. As such, how the lawyers prioritise their obligations will be examined in chapter seven. This theoretical conception can then be compared to the empirical findings to build a picture of how the defence lawyer prioritise their competing obligations and ultimately, illuminate how the lawyers view themselves.

CHAPTER FOUR

The Criminal Procedure and Investigations Act 1996, the Criminal Procedure Rules and Disclosure

4. Introduction

This chapter will examine the evolution of the disclosure obligations and the CrimPR; in particular, the overriding objective and the case management provisions. This chapter will begin with a chronological examination of the disclosure obligations for both the prosecution and defence. Owing to the way in which the law of disclosure has developed, a chronological examination is best suited for the thesis; any reform to the area of disclosure, for both prosecution and defence lawyers, has often consisted of piecemeal changes to the law. As such, the chronological examination will permit the chapter to draw out the essence of the relevant changes and allow later chapters to contextualize the impact they have on the role of the defence lawyer. The latter part of the chapter will critically examine the disclosure obligations placed on both the defence lawyer and the accused. To conclude, the chapter will analyse the potential impact of these obligations on the classic concept of the defence lawyer as developed in chapter three.

4.1 The Evolution of Disclosure

The disclosure regime is a relatively recent creation. As chapter three established, the adversarial criminal trial was born in the mid-eighteenth century.²⁴⁴ However, any obligation to disclose information to the other party was not established until some two hundred years later. The Devlin Report, published in 1976, noted that until the mid-1940s, there was no duty to disclose any information prior to trial by either party.²⁴⁵ The judgment in *R v Bryant and Dickson*²⁴⁶ is commonly regarded as the beginning of the process in which the courts began to impose a duty on the prosecution to disclose material that may lead to the acquittal of the accused.²⁴⁷ The case established an obligation upon the prosecution to make available to the defence witnesses whom the prosecution knew could give material evidence. The rule in *Bryant and Dickson* was extended further by *Dallison*

²⁴⁴ See pages 49-73.

²⁴⁵ Devlin Committee Report: *Report of the Committee on Evidence of Identification in Criminal Cases*, 1976 Cmnd 338 134/135, 42 Paragraph 5.

²⁴⁶ [1946] 31 Cr App R 146. Prior to *Bryant and Dickson*, in the case *R v Clarke* (1930) 22 Cr App R 58 the court held that where there is a discrepancy between a witness's evidence at trial and his statements made previously to the police, the prosecution should consider if an actual copy of the witness's statement should be disclosed rather than just information given about it.

²⁴⁷ D. Corker and S. Parkinson, *Disclosure in Criminal Proceedings* (Oxford University Press: Oxford) 2010 at p.3.

v Caffery.²⁴⁸ Lord Justice Denning sought to broaden the disclosure obligations of the prosecution:

‘if he [the prosecutor] knows of a credible witness who can speak [of] material facts which tends to show the prisoner to be innocent, he must either call that witness himself or make his statement available ... it would be highly reprehensible to conceal ... the evidence which such a witness can give’.²⁴⁹

For Lord Denning, disclosure was about ensuring that justice was done and not simply following a particular rule; it was the spirit of the rule that should prevail, not its letter.²⁵⁰ Until the 1960s, obligations to disclose information were placed exclusively upon the prosecution. The Criminal Justice Act 1967 was the first exception to this general rule, s.11 of which states that in trials on indictment:

(1) ... the defendant shall not without the leave of the court adduce evidence in support of an alibi unless, before the end of the prescribed period, he gives notice of particulars of the alibi.

(2) ... on any such trial the defendant shall not without the leave of the court call any other person to give such evidence unless—

(a) the notice under that subsection includes the name and address of the witness or, if the name or address is not known to the defendant at the time he gives the notice, any information in his possession which might be of material assistance in finding the witness;

(b) if the name or the address is not included in that notice, the court is satisfied that the defendant, before giving the notice, took and thereafter continued to take all reasonable steps to secure that the name

²⁴⁸ [1965] 1 QB 348.

²⁴⁹ *Ibid* per Lord Denning M.R. at para 369.

²⁵⁰ *Ibid*.

or address would be ascertained.²⁵¹

When debating the Bill in Parliament, the alibi disclosure obligation found great support. Speaking in August 1966, some sixteen months prior to the implementation of the Act, Sir Richard Glyn stated that ‘an innocent person has nothing to lose by making a statement or going into the witness box... [he] has everything to gain by making the fullest possible disclosure to the police and letting them check it.’²⁵² In June 1967, Viscount Dilhorne said that he was ‘...greatly in favour of this proposal about disclosure of alibi defences, and I think it would be a beneficial change to our law.’²⁵³

The Fisher Inquiry²⁵⁴ was not slow to criticize those who were involved with the prosecution of the three suspects. The report made a number of recommendations in the area of prosecutorial disclosure, including a requirement that all statements taken by the police should be disclosed by the prosecuting counsel to defence counsel, in the absence of a special reason to the contrary.²⁵⁵ If the statement was made by a witness who the prosecution believed the defence would call, as soon as it was clear that the defence would not call the witness, the statement should be disclosed.²⁵⁶ Disclosure should not be subjected to conditions²⁵⁷ and no statement should be withheld.²⁵⁸ Time limits should be laid down so that the defence obtained the statements within a reasonable time prior to the commencement of the trial.²⁵⁹ Finally, the committee recommended that disclosure should be made whether or not the defence asked for it.²⁶⁰ The report suggested that unless and

²⁵¹ This provision remained in force until it was superseded by s.74 Criminal Procedure and Investigations Act 1996.

²⁵² Hansard HC, Vol 733, col 1068, (8th August 1966). Sir Richard also proposed that if a suspect refused to make a statement to the police or to give evidence at trial, counsel should be free to comment on this fact.

²⁵³ Hansard, HL, Vol 289, col 259, (5th June 1967).

²⁵⁴ ‘Report on an inquiry by the Hon. Sir Henry Fisher into the circumstances leading to the trial of three persons on charges arising out of the death of Maxwell Confait and the fire at 27 Doggett Road, SE6’ 12th December 1977.

²⁵⁵ Section (a) ‘Report on an inquiry by the Hon. Sir Henry Fisher into the circumstances leading to the trial of three persons on charges arising out of the death of Maxwell Confait and the fire at 27 Doggett Road, SE6’ 12th December 1977. Paragraph 29.36. Section (b) outlines the special reasons for non-disclosure to include, national security, safety of witness and anything that might lead to a belief that an attempt might be made to mislead the court.

²⁵⁶ *Ibid* (c).

²⁵⁷ (d) although counsel may impose a condition that the statement is for counsel’s use only.

²⁵⁸ (e).

²⁵⁹ (f).

²⁶⁰ (g).

until the suggestions were implemented, the rule in *R v Bryant and Dickson*²⁶¹ should be modified; where there are a large number of witnesses, the list of witnesses supplied by the prosecution should include a summary of what evidence each witness is able to give.²⁶²

The Attorney General's Guidelines were initially issued in December 1981 and were the 'first attempt by the government, without recourse to statute, to comprehensively improve and overhaul the disclosure system.'²⁶³ The guidelines created a set of criteria for determining what should and should not be disclosed and established the notion of disclosing 'unused material;' which was defined as:

- (i) Witness statements and documents not included in the committal bundle;
- (ii) Statements of witnesses who are to be called at committal, and any documents referred to therein; and
- (iii) The unedited version of edited statements included in the committal bundle.²⁶⁴

In 1986, the Fraud Trials Committee published their report (hereafter, the Roskill Committee), Lord Roskill chairing the report. The findings of the Committee led to the second major development in the area of defence disclosure. The Committee was established because, it was said, the public no longer believed the legal system was capable of bringing the perpetrators of serious frauds to book.²⁶⁵ The Committee found that the public was correct; the legal system was too archaic, cumbersome and unreliable. Every stage of the legal process was an 'open invitation to blatant delay and abuse'.²⁶⁶ Owing to this blatant abuse the Committee stated in its summary that radical reform was necessary. Although the terms of reference for the report related to fraud trials the Committee argued that the changes could 'be of benefit to a wider range of criminal cases'.²⁶⁷ The Committee

²⁶¹ (1946) 31 Cr App R 146.

²⁶² Report on an inquiry by the Hon. Sir Henry Fisher into the circumstances leading to the trial of three persons on charges arising out of the death of Maxwell Confait and the fire at 27 Doggett Road, SE6' 12th December 1977. Paragraph 29.37.

²⁶³ D. Corker and S. Parkinson, *Disclosure in Criminal Proceedings*, 2010 (OUP: Oxford) at p.7.

²⁶⁴ *Guidelines for the disclosure of "unused material" to the defence in case to be tried on indictment*. (1982) 74 Cr App R 302, paragraph 1. Although the guidelines are non-statutory to all intents and purposes they are intended to have the force of a statutory provision.

²⁶⁵ The Fraud Trials Committee, Chairman: The Right Honourable Lord Roskill, P.C, (HMSO: 1986) p.1 para 1.

²⁶⁶ *ibid* p.1 para 1.

²⁶⁷ *ibid* p.2 at para 4. The Committee did stop of recommending any proposal to anything other than fraud cases, they would leave that discussion for those with wider concerns than then own.

believed that forcing the defence to outline its case in advance of trial would make the trial both ‘shorter and more efficient’. Furthermore, this would make the trial clearer for the jury, if they were told at the outset what part of the prosecution’s case the defence intended to challenge. Requiring the defence to disclose a case outline would reduce the risk of fabricated defences; the prosecution would be able to investigate in advance any defence claims that required investigation.²⁶⁸ However, the Committee admitted that they had been unable to test empirically the truth of the assertion that the jury’s understanding of the case is impaired where it is not clear at the outset what the case may be.

The Committee considered a number of objections to the proposal. Firstly it accepted that the main objection was that the proposal was an infringement of a fundamental principle of our criminal law; that the burden of proof rests with the prosecution. A further objection to the proposal was the lack of an effective sanction against a defendant who fails to comply with the provisions. To alleviate any fear that a defence disclosure regime would weaken the burden of the proof, the Commission stated:

‘The prosecution would still have to prepare their case fully ... including making early disclosure of their evidence ... we recognised that the burden of proof would be affected if the prosecution were allowed to alter the nature of their case once the defence had been disclosed. To avoid this possibility, any proposal would therefore have to involve the prosecution’s case being “fixed” before the defence could show his hand. If the prosecution sought to change their ground ... to overwhelm the case put forward by the defence, the judge might well be justified in intervening to stop the case altogether or, if it were not too late, to ensure that the prosecution adhered to the original case’.²⁶⁹

By implementing the safety net of allowing the judges to intervene should the prosecution deviate from their original case, the Committee believed the burden of proof would remain intact. The Committee recommended three effective sanctions that could be used when a

²⁶⁸ The Fraud Trials Committee, Chairman: The Right Honorable Lord Roskill, P.C, (HMSO: 1986) p103 at para 6.72.

²⁶⁹ *ibid* p104 at para 6.75.

defendant failed to comply with the provision to disclose the general nature of his case in advance of trial:²⁷⁰

- (a) A defendant should be refused the right to give evidence himself at trial or call any factual evidence, save for expert evidence.
- (b) The sanction of costs should be used where it is clear that the failure... may unnecessarily prolong the trial.
- (c) After comment from the prosecution and the judge, the jury should be entitled to take account of, and draw any appropriate inferences from, the defendant's failure to disclose a particular line of defence on which he relies at trial.

The Committee believed that requiring the defence to provide a case outline in advance of trial would become routine in future trials. Furthermore, the occasions where the “teeth” would have to bite would be relatively small.²⁷¹ Michael Levi believed that the suggestion that the defence and prosecution should outline their cases in advance would greatly assist ‘the comprehension and inhibit the development of irrelevant lines or arguments in the hope of causing maximum obfuscation and uncertainty over guilt.’²⁷² This would lead to the fraud trial being handled in a far more efficient manner. Roderick Munday stated that it would make greater sense to review the suggestion through the lens of the wider context of criminal trials, rather than narrowly focus on fraud trials alone. He accepted that if one accepts the proposals in the wider context of all criminal trials, one could no longer regard the trial as the ‘unique focus of legal attention’.²⁷³ He argued that the proposed defence disclosure regime would purely serve to simplify and clarify the issues for the tribunal of fact and that the defence would not be seriously harmed; the Committee stated the prosecution’s case is “fixed” so they would be unable to alter or deviate from their disclosed case. This provision meant the burden of proof remained sacrosanct as the prosecution would be unable to use any defence disclosure in their *prima facie* case.

²⁷⁰*ibid* Para 6.76

²⁷¹ *ibid* p106 at para 6.82. At para 6.38, the report stated that the Committee could not support the suggestion that the defence should disclose the names and addresses of witnesses. They believed that the defence may not decide whether or not to call a certain witness until they have seen how the prosecution’s witnesses stood up to cross-examination. Furthermore, the disclosure may lead to allegations at trial that the police have acted improperly in interviewing a witness.

²⁷² M. Levi, *The Future of Fraud Prosecutions and Trials: Reviewing Roskill*’ Company Law (1986), 7(4) 139-146 at p.140.

²⁷³ R. Munday ‘The Roskill Committee on Fraud Trials’ (1986) Cambridge LJ, 175-179 at p.177.

Munday argued that it was perhaps time for the criminal trial to evolve, as the trial 'ought to no longer resemble a crafty game where one side's strategy may remain artfully concealed until the last moment to no real end other than to frustrate the interests of justice'.²⁷⁴

Following the Roskill Committee's report, the Government enacted the Criminal Justice Act 1987. The Act provided that in serious fraud cases, persons can be required to give information about and produce documents concerning the investigation. Section 2(3) allows the director of the investigation '... to require the person under investigation, or any other person to produce any specified document which appear to the Director to relate to any matter relevant to the investigation ...'.²⁷⁵ The Crown Court (Advance Notice of Expert Evidence) Rules²⁷⁶ provided that any statement in writing of any finding or opinion of an expert upon which a party intended to rely on had to be disclosed as soon as practicable after committal. These obligations in the mid-1980s were the first deviation from the notion that the accused does not have to outline any aspect of his defence prior to trial, save for any alibi notifications.

The genesis of the advance notice provision can be traced back to the 1981 Royal Commission on Criminal Procedure. Here the report proposed that advance notices should be extended from alibi evidence, to incorporate other spheres where it was believed the disclosure of such information would contribute to the increased efficiency of the prosecution and trial process. The Commission believed the efficiency of the process would increase, as the courts would no longer have to grant an adjournment. The adjournment would be reasonable as to allow the prosecution to investigate the validity of the evidence or witness that has taken them by surprise.²⁷⁷ Implicit in this proposal was the assertion that the 'ambush' defence was no longer a valid weapon for the adversarial defence lawyer.²⁷⁸ This notion of attempting to nullify the adversarial tactics of ambush or surprise evidence was something that would reoccur with the advent of the Criminal Procedure and Investigations Act 1996.

²⁷⁴ *ibid* 177.

²⁷⁵ S.2(3) Criminal Justice Act 1988.

²⁷⁶ SI 1987/716.

²⁷⁷ For a full review of the Commission's findings please see *The Royal Commission on Criminal Procedure. Report. The investigation and prosecution of criminal offences in England and Wales: the law and procedure*, Cmmd 8092 at p.179 para 8.22.

²⁷⁸ See Criminal Justice Act 1987, C.L.R. 1987, Aug, 525-526.

Furthermore, the Lord Chief Justice told the House of Commons that the prosecution was bound by a duty to be fair. This imposed a duty on the prosecution to supply the defence with any material that was inconsistent with the evidence of any prosecution witness.²⁷⁹ Within a decade of their creation, the principles that were involved with the guidelines began to be developed, and shaped by the common law. In *R v Lawson*²⁸⁰ the Court of Appeal quashed the appellant's conviction on the ground that the prosecution had improperly exercised their discretion of not disclosing witness statements to the defence. At the appeal, the prosecution counsel argued that the guidelines permitted the non-disclosure. The court rejected this submission; the court preferred the approach in *Dallison and Caffery*²⁸¹ of questioning whether the non-disclosure had caused injustice to the appellant.

Following this, the next major legislative development for the law of disclosure came with the Criminal Procedure and Investigations Act 1996 (hereafter, CPIA 1996). This Act was borne out of the recommendations made by the Royal Commission on Criminal Justice (hereafter, the Runciman Commission). The Commission was established in the wake of the quashed convictions of the Birmingham Six.²⁸² The then Home Secretary, Kenneth Baker, instructed the Commission to 'examine the effectiveness of the criminal justice system in England and Wales'.²⁸³ The Commission was of the opinion that the current regime of prosecution disclosure was so wide that it was 'unduly burdensome on the prosecution'²⁸⁴ and certain defence tactics could impact on the outcome of the trial.

The perceived problem of the overburden of prosecution disclosure was further exacerbated whilst the Commission was sitting. A series of court decisions rapidly expanded the disclosure obligations of the prosecution. *Ward*²⁸⁵ held that 'non-disclosure was a potential source of injustice'²⁸⁶ and it would be for the court to decide what evidence should be disclosed. If the court believed that they fell within the narrow concept of Public

²⁷⁹ House of Commons, Hansard 5 November 1987, col. 713.

²⁸⁰ (1990) 90 Cr App R 107; [1990] Crim LR 62.

²⁸¹ [1964] All ER 610 CA.

²⁸² *R v MclKenny and Others* [1991] 93 CR AR 287.

²⁸³ The Royal Commission on Criminal Justice, *Report*, Cm 2263, (HMSO 1993)

²⁸⁴ RCCJ P.91 para 33 .

²⁸⁵ *R v Ward* [1993] 2 All ER 577.

²⁸⁶ *Ibid* at 599.

Interest Immunity (PII) then the material would not be disclosed. However, all other materials gathered by investigators would have to be disclosed. The disclosure of unused materials should not just include:

‘Evidence that will obviously advance the accused’s case ... it is of help to the accused to have the opportunity of considering all the material evidence the prosecution have gathered and from which the prosecution have made their own selection.’²⁸⁷

In *R v Keane*,²⁸⁸ Lord Justice Taylor defined what material was required to be disclosed by the prosecution. He adopted the test pronounced by Jowitt J in *R v Melvin and Dingle*:²⁸⁹

‘I would judge material in the realm of disclosure that which can be seen on a sensible appraisal by the prosecution:

- (i) to be relevant or possibly relevant to an issue in the case
- (ii) to raise or possibly raise a new issue whose existence is not apparent from the evidence the prosecution proposes to use
- (iii) to hold out a real (as opposed to be fanciful) prospect of providing a lead on evidence that goes to (i) or (ii).’

The prosecution must identify documents and information which are material according to this criteria set out above.’²⁹⁰ By requesting the police to comb through masses of material, the Commission believed the defence was too demanding. By so demanding, the defence could cause a delay in proceedings or chance upon something that would induce the prosecution to drop the case rather than disclose the material concerned. The Commission stated that this process was both ‘time consuming and wasteful of resources.’²⁹¹ The law enforcement community began complaining that the judgment in *Ward* ‘became a charter

²⁸⁷ *Ibid* 601.

²⁸⁸ [1994] 2 All ER 478.

²⁸⁹ Unreported, 20 December 1993 as cited in D. Corker and S. Parkinson, *Disclosure in Criminal Proceedings*, (Oxford University Press: Oxford 2009) at 15.

²⁹⁰ *R v Keane* [1994] 2 All ER 478, 484.

²⁹¹ The Royal Commission on Criminal Justice, *Report*, Cm 2263 (HMSO) 1993 at para 42.

for the criminal and had hamstrung the police in its fight against crime.’²⁹² The Runciman Commission was of the opinion that the disclosure burden on the prosecution ‘went beyond what is reasonable’²⁹³ and recommended a regime that would have three elements. First, a more restricted test of disclosure, second a compulsory element of defence disclosure, and third a Code of Practice for the Police in carrying out their disclosure duties. The implementation of a compulsory defence disclosure regime had efficiency drivers at its heart; it was believed the regime would encourage better preparation of cases, which may well ‘result in the prosecution being dropped in light of the defence disclosure, an early resolution through a guilty plea, or a fixing of an earlier trial date.’²⁹⁴ This ‘better preparation’ would ultimately lead to a more efficient use of resources as the length of the trial could more readily be approximated, leading to a better use of the court’s time and those involved in the case.²⁹⁵ Furthermore, ‘ambush’ defences, in which the defendant withholds his evidence until the last possible moment, hoping to confuse the jury or evade investigation of a fabricated defence, would be reduced to a minimum.²⁹⁶ The Commission admitted that despite the fact that the ambush defence was only used in a small minority of cases, the principle was both undesirable and unacceptable.²⁹⁷ The Commission suggested that the ‘guilty’ are acquitted because the prosecution has not had time to investigate the ‘ambush’ defence of the defendant.

Despite the admission that the problem occurred in the minority of cases, it was not as dramatic as the Commission claimed, and an ambush defence was no guarantee of an acquittal. A Crown Court Study completed for the Runciman Commission found that ‘last minute’ defences were raised in seven to ten per cent of cases, and fifty per cent of those cases resulted in a conviction.²⁹⁸ Roger Leng’s study for the Commission found that an ambush defence was raised in between two and five per cent of trials, and all resulted in a conviction.²⁹⁹ By examining the empirical evidence, it is difficult to argue that such a minority of cases, which often resulted in conviction anyway, deserved such onerous

²⁹²D. Corker and S. Parkinson, *Disclosure in Criminal Proceedings*, 2010 (OUP:Oxford) at 15.

²⁹³The Royal Commission on Criminal Justice, *Report*, Cm 2263 (HMSO) 1993 at para 49.

²⁹⁴*Ibid* para 59.

²⁹⁵*Ibid*.

²⁹⁶*Ibid*.

²⁹⁷*ibid* para 64.

²⁹⁸M. Zander and P. Henderson, *The Crown Court Study*, Royal Commission on Criminal Justice Research Study No. 19 (1993) pp.14-15.

²⁹⁹R. Leng, *The Right to Silence in Police Interrogation*, Royal Commission on Criminal Justice Research Study No. 10 (1993) Ch. 5.

reform. However, the Commission concluded that the system would be made more efficient by reforming the disclosure regime and implementing a compulsory aspect of defence disclosure. The Commission was confident that the system would become more efficient owing to the early clarification of what was at issue in each case.³⁰⁰

Michael Zander was the sole dissenting member of the Commission in respect of this recommendation.³⁰¹ He believed that any obligation for the defendant to disclose his case undermined the principle that it is the responsibility of the defendant to respond to the case the prosecution makes at trial, not the one the prosecution says they will make. For the defendant to respond to the prosecution's case, it has to be made at trial.³⁰² Zander also cited the two studies quoted above when claiming ambush defences are indeed rare and even when they occur, they do not pose much of a problem.³⁰³ He also commented on the effectiveness of defence statements and referred to the research conducted by Michael Levi for the Commission.³⁰⁴ Levi found that defence statements that were completed in relation to fraud trials proved largely ineffective because they were not sufficiently specific and therefore too generalized. Zander opined that 'if it [defence disclosure] did not work in the serious fraud area, it probably will not work in other areas.'³⁰⁵

The Commission was criticised because it did not conduct out any explicit consideration of priorities. Michael Zander stated the Commission proceeded on the basis that 'acquitting the innocent was the priority, with convicting the guilty second, and the effective use of resources third'.³⁰⁶ However, these component parts were given different weightings on varying topics and the primary weighting was not always afforded to the acquittal of the innocent.³⁰⁷ This derogation from the acquittal of the innocent as the primary goal of the criminal justice system was undesirable. Stewart Field and Phillip

³⁰⁰ The Royal Commission on Criminal Justice, *Report*, Cm 2263 (HMSO) 1993 para 73.

³⁰¹ Zander also dissented on proposals of pre-trial procedures and the powers of the Court of Appeal. Please see *Supra* fn.318 page 223 – 234.

³⁰² *ibid* p.221 para 1.

³⁰³ *Ibid* p.221 para 3.

³⁰⁴ Michael Levi, *The Investigation, Prosecution and Trial of Serious Fraud*, Royal Commission on Criminal Justice Research Study No.14, 1993.

³⁰⁵ The Royal Commission on Criminal Justice, *Report*, Cm 2263 (HMSO) 1993 p.222.

³⁰⁶ Michael Zander's speech to the British Criminology Conference in July 1993 as cited in S. Field and P. Thomas, *Justice and Efficiency? The Royal Commission on Criminal Procedure*, *The Journal of Law and Society*, Vol.21, No 1 March (1994) 1-19 at p.9.

³⁰⁷ In relation to sentence canvassing, the need to improve efficiency of the system appeared to be afforded the greatest weight.

Thomas argued that ‘to make acquittal of the innocent, at any point, less than the primary consideration in a system that still deploys the due-process rhetoric of preferring ten guilty going free to the single convicted innocent is an important departure.’³⁰⁸ The traditional adversarial ideology of the criminal justice system of England and Wales is affected by the Commission’s proposals; the adversarial system places great value on the built-in safeguards of oral presentation of evidence that is tested in a public court before a judge and/or jury. The judge and jury are impartial as they come to the case with no preconceptions (of the case). The Commission’s proposal could weaken this classic adversarial standpoint. As Field and Thomas noted, by recommending pre-trial defence disclosure, the system becomes ‘less classically adversarial, which would reduce further the real importance of contested trials...’.³⁰⁹ The criminal trial offers a number of inbuilt safeguards, yet the proposals for defence disclosure marginalize the safeguards without substituting anything in their place. Although Field and Thomas did not explicitly touch upon the implications for the role of the defence lawyer, one can assume that the implications of the Commission’s recommendations could also dilute the importance of his role. A key component of the role of the defence lawyer is rigorously defending his client; theoretically this includes using the weapon of the ambush defence. A regime of defence disclosure blunts this adversarial weapon.

The Commission was also criticized for not addressing matters at the heart of the criminal justice system. Instead the Commission adopted a ‘managerial’ approach, which could not generate the comprehensive review that was required.³¹⁰ Whilst the aim to reduce the waste of limited resources and to increase efficiency was not to be derided, the problem with the report lies in the ‘absence of a general framework of priorities which would allow these issues to be considered in relation to other goals on a systemic rather than *ad-hoc* basis.’³¹¹ A common criticism rested on the following premise: no reduction in expenditure can be justified if it interferes with the right of the innocent to avoid conviction.³¹² Further to this criticism, the key issue is to ensure the prosecution’s burden of proving guilt beyond

³⁰⁸ S. Field and P. Thomas, Justice and Efficiency? The Royal Commission on Criminal Procedure, The Journal of Law and Society, Vol.21, No 1 March (1994) 1-19 at p.9.

³⁰⁹ S. Field and P. Thomas, Justice and Efficiency? The Royal Commission on Criminal Procedure, The Journal of Law and Society, Vol.21, No 1 March (1994) 1-19 at p.14.

³¹⁰ S. Greer, The Right to Silence, Defence Disclosure and Confession Evidence, The Journal of Law and Society, Vol.21, No 1 March (1994) p.102.

³¹¹ *ibid* p.102.

³¹² Please see Greer above, A. Owers, Runciman Reviewed’ (1993), 90 L.S.G. 2, M. McConville, ‘An Error of Judgment’, Legal Action, September 1993.

reasonable doubt is maintained. This burden needs to be discharged by the prosecution without the assistance of the accused. With the exception of Michael Zander's view, the Commission believed that early disclosure did not erode this principle. However, the key element of the Commission's proposals rests in the principle of the proposal as much as the detail of the recommendations. The Commission's proposals effectively placed the accused under an obligation to assist in his own prosecution.

Lee Bridges and Mike McConville argue that the proposals made by the RCCJ in regards to the disclosure regime reinforced the presumption of the suspect's guilt by enforcing the suspect to provide more information by way of disclosure.³¹³ This notion could satisfy the political aims of the Government to 'correct the thirty year inbuilt bias in the criminal justice system in favour of the criminal...'.³¹⁴ During this process, anything that could be presented as a 'contribution to cost effective crime control became an urgent political priority'³¹⁵ because it addressed political concerns. The Conservative Party was behind in the opinion polls, the Prime Minister John Major, was viewed as unpopular, leaving ministers jockeying for position to succeed him. The then Home Secretary, Michael Howard, was keen to underline his hardline right-wing credentials and effectively cannibalized the Commission's report by prioritizing the implementation of the cost-effective 'crime control' measures.³¹⁶

The findings of the Commission can be contrasted with those of the panel set up by Liberty and the Civil Liberties Trust in 1992. This panel was created to consider three important aspects of the criminal justice system: confession evidence, a new body to tackle miscarriages of justice and the right to silence.³¹⁷ Over the course of three one-day hearings, with participants who included Lord Runciman and the Lord Chief Justice, the panel suggested proposals that would allow for extensive defence disclosure but would stop short of impinging on the prosecution's burden of proof. The panel suggested that any

³¹³ L. Bridges and M. McConville 'Keeping Faith with Their Own Convictions: The Royal Commission on Criminal Justice' 57 Mod. L. Rev. 75, 1994 at 90. The authors also argue the presumption of guilt is reinforced by giving the police more powers to obtain evidence from suspects and by the accused continuing to suffer from poor quality legal advice in the court and police station.

³¹⁴ Michael Howard speaking at the Conservative Party Conference, October 1993.

³¹⁵ Some of the changes suggested by the then Home Secretary, such as the abolition of the right to silence, outright rejected the findings of the Commission.

³¹⁶ S. Field and P. Thomas, Justice and Efficiency? The Royal Commission on Criminal Procedure, The Journal of Law and Society, Vol.21, No 1 March (1994) 1-19 at p.6-7.

³¹⁷ P. Thornton, A. Mallalieu and A. Sceivener, *Justice on Trial: Report of an Independent Civil Liberty Panel on Criminal Justice*, (Civil Liberties Trust: London) 1993. At p.1

disclosure regime should consist of the following elements, for cases committed for trial: the prosecution should serve to the defence notice of the issue the case raises; in return the defence would reciprocate by responding with a single document, called a 'Defence List of Issues'.³¹⁸ At the beginning of the trial, both sides should briefly present their lists to the court, and should the defence depart from their list the accused could be exposed to cross-examination, with leave from the judge. This departure would not attract adverse inference; but should the prosecution depart from their list it would be open to adverse comment from the defence. Although the proposed sanctions for non-compliance seemed disproportionate at face value, they were justified by reference to both the presumption of innocence and the burden of proof.³¹⁹ The panel believed that this limited form of defence disclosure was a 'positive tool that will advance both the fairness and effectiveness of the criminal process'.³²⁰ Despite these findings being published in 1993, it appears the government ignored the disclosure proposals and pressed ahead with part of the Runciman Commission's proposals.

Following the publication of the Commission's findings, the Government published *Disclosure: A Consultation Paper*,³²¹ outlining its proposals for reforming the areas of both prosecution and defence disclosure. The Consultation Paper echoed the findings of the Runciman Commission that the current regime was very burdensome on the prosecution and the police.³²² The excessive burdens were created because the 'defence can require the police and prosecution to comb through large masses of material in the hope of causing a delay or chancing upon something that will induce the prosecution to drop the case...'.³²³ At times, the defendant sought to obscure the real issues or would sometimes create a fictitious defence. There was little or no incentive for the defendant to contribute to the process of narrowing the issues in dispute or to disclose his actual defence in advance of trial.³²⁴ The Consultation Paper further agreed with the Royal Commission when considering the issue of defence disclosure; having no disclosure of a defence in advance of trial encouraged late preparation and the withholding of information until the last

³¹⁸*ibid.* Para 11.11 p.55.

³¹⁹ For a more in-depth account of the Panel's recommendations please see P. Thornton, A. Mallalieu and A. Sceivener, *Justice on Trial: Report of an Independent Civil Liberty Panel on Criminal Justice*, (Civil Liberties Trust: London) 1993.

³²⁰The Royal Commission on Criminal Justice, *Report*, Cm 2263 (HMSO) 1993 at para 11.10.

³²¹ *Disclosure: A Consultation Paper*, May 1995 CM 2864.

³²² *ibid.*, p.4 para 13.

³²³ *ibid.* at paragraph 2.

³²⁴ *ibid.* p.5 para 16-17.

possible minute. This allowed the defendant to ‘surprise the prosecution by revealing its defence for the first time at trial.’³²⁵ In order to negate the possibility of an ‘ambush,’ the defence would have to provide particulars of its case which identified the issues in dispute. According to the authors of the Consultation Paper, the early disclosure of the defence case was in the interests of justice and should assist in the better management of trials.³²⁶ Ultimately, both the Commission and the Government were of the opinion that the regime had to be overhauled, as the burden on the prosecution was too great. The Government’s defensive stance concerning the miscarriage of justice cases in the early part of the decade had been replaced by a stance that appeared to be tough on crime.³²⁷

As was established in chapter three, the involvement of the defence lawyer was born out the need to protect the accused from the ‘overzealous’ state. Various tools were developed to assist in this duty, one of which was the ambush defence. The issue of the ambush defence was one reason for the Government to require the early disclosure of the defence case. It was argued by the then Home Secretary, Michael Howard, that ‘... hardened criminals have refused to answer police questions, only to ambush the prosecution by raising a defence at trial for the first time.’³²⁸ However, there was little evidence to suggest that ambush defences posed any threat to the administration of justice. When building the theoretical concept of the defence lawyer in chapter three, it was argued that an ambush defence was an acceptable tactic to employ when furthering his client’s case,³²⁹ yet this adversarial weapon is nullified by the notion of the defence disclosure.

4.2 The Political Context and the Drift from Due Process to Crime Control.

Whilst this thesis is concerned with evolution of disclosure and its impact on both the defence lawyer and the adversarial process of England and Wales, it is important to note that this evolution did not occur in a vacuum and a number of other changes to criminal procedure occurred in the 1980s and 1990s. The genesis of change can be traced to the

³²⁵ *ibid*, p.15, para 48.

³²⁶ *ibid*, p.15, para 52.

³²⁷ *Supra* fn 282 at 17.

³²⁸ Michael Howard “Crime and Punishment: Restoring the Balance”, Frank Newsam Memorial Lecture, Bramshill College, April 19, 1995 as cited in R. Leng, ‘Losing Sight of the Defendant: The Government’s Proposals on Pre-Trial Disclosure’ (1995) *Crim L.R* 704 at 705.

³²⁹ See Chapter Three p.49-73.

Phillips Commission³³⁰, reporting in 1981. As discussed earlier,³³¹ the Commission was established in the wake of a number of miscarriages of justice that blighted the criminal justice landscape in the late 1970s. The Commission rejected any notion that there should be any curtailment of current provision of the right to silence at both the pre-trial and trial stage.³³² In fact, the Commission re-emphasized the importance of the advanced disclosure being made to the accused as ‘it might put strong psychological pressure on some suspects to answer questions without knowing precisely what was ... the evidence against them...’³³³ In fact, the Commission appeared to enhance the due process rights of the accused and the recommended proposals that provided established PACE 1984; with the focus being on stricter control on detention periods in the police station, the right to legal advice whilst detained. Quirk suggests that the Act was ‘momentous’ and codified both parties rights in relation to stop and search, arrest, detention, questioning and charge.³³⁴

The 1990s saw a succession of successful appeals on the basis of false confessions.³³⁵ These cases ‘exposed a catalogue of wrongdoing in the process of ... criminal investigation.’³³⁶ In response, the government established the Royal Commission on Criminal Justice (RCCJ) to examine potential reforms to the criminal justice process. Quirk suggests that although the Conservative party of the early 1990s had won a fourth successive General Election, they were unpopular with the electorate.³³⁷ As such, a governmental notion of ‘Law and Order’ had begun to counter the rising concerns about crime. The then Home Secretary, Michael Howard, suggested at the 1993 Conservative Party conference that ‘the right to silence will be abolished. The innocent have nothing to fear.’³³⁸ This conflation of guilt and silence was endemic in both the crime control policies and political atmosphere of the time. However, the findings of the Commission were widely criticized by academics. Lee Bridges suggested that the Report of the Commission

³³⁰ Investigation and Prosecution of Criminal Offences in England and Wales: Law and Procedure (Command 8092-I), (HMSO: London), 1981.

³³¹ See Inquiry into the Circumstances leading to the trial of three persons on charges arising from the death of Maxwell Confait (HCP 90) London HMSO 1977.

³³² Investigation and Prosecution of Criminal Offences in England and Wales: Law and Procedure (Command 8092-I), (HMSO: London), 1981 at 90.

³³³ *Ibid* para 4.50.

³³⁴ H. Quirk, *The Rise and Fall of the Right of Silence*, (2017) Routledge: Oxon) at p.36.

³³⁵ The Birmingham Six (*McKenny and Others* [1992] Crim LR 117; Stefan Kiszko (Kiszko 1992); The Cardiff Three (*Paris, Abdullahi and Miller* [1993] 97 Cr App Rep 99; and Judith Ward (*R v Ward* [1993] 1 WLR 619 96 Cr App Rep 1)

³³⁶ H. Quirk, *The Rise and Fall of the Right of Silence*, (2017) Routledge: Oxon) at p.40

³³⁷ *Ibid* 43.

³³⁸ A. Travers (1993) ‘Right to Silence abolished in crackdown on crime’ *Guardian* 7 October as cited in at p.44.

was a ‘sham.’³³⁹ He stated that the document is ‘slipshod in its use of empirical evidence, slippery in its argumentation and shameful in its underlying political purpose’. Bridges argued that the Commission should have attempted to ‘make substantial recommendations for new protections for the accused ... [including] real improvements in the quality of defence services throughout the criminal justice process’. Had the Commission recommended this, ‘[it] might have at least restricted the government in its current “Law and Order” campaign.’³⁴⁰ The Terms of Reference of the Commission referred to ‘convicting the guilty, acquitting the innocent and efficiency.’³⁴¹ However, the Report neglected to set out the balance between these three competing goals.³⁴² When presenting the report, Lord Runciman stated that the report ‘took a step toward the inquisitorial’ and the aim of the report had been to ‘correct the excesses of the adversarial system.’³⁴³

The excesses, *inter alia*, were deemed to be the systems inefficiency and the right to silence. According to the report, the majority of the judiciary believed that suspects should give an account of themselves in order that police investigations can run more efficiently. This would allow the facts of the matter to be more readily established and those suspects who were innocent, could be eliminated from suspicion. Leaving the police to investigate those whose innocence had not been established. The impact of the provision would not only combat those who are trying to avoid charge by staying silent, it would also eliminate the use of an ‘ambush defence’ at trial where the prosecution have no time to resort to such a defence. However, the research studies used by the Commission did not bare out this perceived threat. The research suggested that very few suspects stay silent in police custody and Greer suggested that those who remain silent are more, rather than less likely, to be charged. These suspects are also more likely, rather than less likely to enter a plea of guilty.³⁴⁴ However, despite these facts, the government pressed ahead with modifying the right to silence under the Criminal Justice and Public Order Act 1994.

³³⁹ See L. Bridges, ‘Normalising Injustice: The Royal Commission on Criminal Justice,’ (21) *J.L. Soc’y* (1994) 20-29 at 20.

³⁴⁰ *Ibid* at p.36.

³⁴¹ The Royal Commission on Criminal Justice (HMSO: London) 1994, Cm 2263 at para 5-10.

³⁴² S. Field and P.A. Thomas, ‘Justice and Efficiency? The Royal Commission on Criminal Justice,’ (21) *J.L. Soc’y* (1994) 1-19 at 8.

³⁴³ S. Field and P.A. Thomas, ‘Justice and Efficiency? The Royal Commission on Criminal Justice,’ (21) *J.L. Soc’y* (1994) 1-19 at 13-14.

³⁴⁴ S. Greer, ‘The Right to Silence, Defence Disclosure and Confession Evidence’ in S. Field and P.A. Thomas, ‘Justice and Efficiency? The Royal Commission on Criminal Justice, 1994 (Oxford: Blackwell), at p104.

The defence disclosure regime was also examined by the Commission. The core issue with such a regime is ensuring that the burden of proof is not shifted from the prosecution and the accused is not pressurized to assist in the discharge of this burden. The central point of this proposal was to 'bring forward the moment at which the issues that the jury will have to decide can be clearly and concisely laid out.'³⁴⁵ Further to this efficiency driver, there would be built in benefits of more cases being dropped before trial, and therefore resources saved; the fixing of earlier trial dates; better estimations of trial length allowing for the better deployment of criminal justice resources, and the further eradication of the ambush defence. The proposed changes to silence and defence disclosure were designed to eradicate ambush defences. In reality, the use of the defence did not actually seem problematic. Leng found that 'the proportion of contested cases in which an ambush defence was raised was ... at most 5 per cent,'³⁴⁶ with the vast majority of those defendants being convicted at trial anyway. So, a question remains, if the use of the defence was not problematic, is it worth the cost of shifting diluting adversarialism? Michael Zander vehemently disagreed with the disclosure suggestions on the basis of five main grounds: (1) the proposal is inconsistent with the burden of proof, no obligation should be placed on the accused to assist his accusers. (2) they are designed to combat ambush defences, which the Commission's evidence already established was not problematic. (3) advance disclosure is unlikely to streamline and make the process more efficient. He cites the example of Levi,³⁴⁷ when examining disclosure in Serious Fraud Trials, where it was found that disclosures are largely ineffective because the information is specific. This is likely to cause, rather than remedy delays, as each side demands more information from the other. should the defendant change his lawyer at the last minute, this could be even more distressing for the accused. (5) Finally, he suggests the sanctions would be difficult to enforce considering the judicial culture is tolerant of the more limited alibi and expert evidence disclosure.³⁴⁸ Greer agreed with Zander's criticisms and found that should the regime be implemented, it would place the accused under an obligation to assist the

³⁴⁵ The Royal Commission on Criminal Justice, *Report*, Cm 2263, (HMSO 1993) p.84 para 3.

³⁴⁶ R. Leng *The Right to Silence in Police Interrogation: A study of some of the issues underlying the debate*, RCCJ Research Study no 10 (1993) at p.58.

³⁴⁷ M. Levi, *The Investigation, Prosecution and Trial of Serious Fraud*, RCCJ Research Study no.14 (1993) 104, 182.

³⁴⁸ The Royal Commission on Criminal Justice, *Report*, Cm 2263, (HMSO 1993), Note of Dissent, M. Zander p.222.

prosecution in pursuit of his conviction and this would be incompatible with both the burden of proof and the privilege against self-incrimination.³⁴⁹

Furthermore, Field and Thomas have argued that the Commission, through the proposals on disclosure, ‘set ... out to deliberately increase the pressure on the suspects to plead guilty.’³⁵⁰ This would lead to an increase in efficiency and ultimately a quicker process. However, this seems to conflate ‘justice’ with ‘results’ and just because a person enters a plea of guilty, it does not necessarily mean they have committed the offence.³⁵¹ The Commission recommended that the ‘excesses of adversarialism’ be corrected and acknowledged that the pre-trial disclosure regime would not be classically adversarial and would reduce the adversarial trial, as fewer cases would be contested due to better pre-trial preparation that would lead to the dropping of the charge or a guilty plea.³⁵² Field and Thomas thought the changes to the adversarial trial, and the pursuit of more guilty pleas, may ‘marginalize the fair safeguarding procedures without putting anything in its place.’³⁵³ However, the government largely ignored the findings of the Commission regarding the right to silence and pressed ahead with their own crime control agenda. Greer suggests that rather than being based on evidence the real purpose ‘was to mollify a police force’ in the wake of the [Police and Criminal Evidence Act 1984] ... regime and to restore the government’s tattered law and order image.’³⁵⁴ The Criminal Justice and Public Order Act 1994 was subsequently enacted and was swiftly followed by the CPIA 1996. The provisions of the 1994 Act permit comment and the drawing of inferences should suspects fail to:

³⁴⁹ S. Greer, ‘The Right to Silence, Defence Disclosure and Confession Evidence’ in S. Field and P.A. Thomas, ‘Justice and Efficiency? The Royal Commission on Criminal Justice, 1994 (Oxford: Blackwell), at p109.

³⁵⁰ S. Field and P.A. Thomas, ‘Justice and Efficiency? The Royal Commission on Criminal Justice, 1994 (Oxford: Blackwell).10

³⁵¹ The *Disappearing Trial* Report in the US found that out of 149 successful appeals in 2015, 44% had entered a guilty plea. See, *The Disappearing Trial: Towards a Rights Based Approach to Trial Waiver Systems*, Fair Trials, 2017 available here: http://www.fairtrials.org/sites/default/files/publication_pdf/Report-The-Disappearing-Trial.pdf [last accessed 4th September 2018].

³⁵² The Royal Commission on Criminal Justice, *Report*, Cm 2263, (HMSO 1993), p.97.

³⁵³ S. Field and P.A. Thomas, ‘Justice and Efficiency? The Royal Commission on Criminal Justice, 1994 (Oxford: Blackwell).14.

³⁵⁴ S. Greer, ‘The Right to Silence, Defence Disclosure and Confession Evidence’ in S. Field and P.A. Thomas, ‘Justice and Efficiency? The Royal Commission on Criminal Justice, 1994 (Oxford: Blackwell), at 106.

- mention when questioned or charged any feature of their defence that could reasonably have been mentioned;³⁵⁵
- testify or, having been sworn, refuse to answer questions without good cause;³⁵⁶
- answer questions relating to the presence of any substance, object or mark about their person;³⁵⁷
- answer questions relating to their presence at the scene of an offence.³⁵⁸

It was thought that the curtailment of the silence provisions was a ‘trade-off’³⁵⁹ for the enhancement of the suspect’s rights contained within PACE 1984. What followed was the ‘modern law and order arms race’³⁶⁰ in which due process provisions were diluted and the adversarial nature of criminal justice was fundamentally altered. It is thus arguable that the 1994 should be taken as representing the genesis of the modern era. However, for the purpose of this thesis, the modern era is established with the enactment of the CPIA 1996. It is this Act that is the catalyst for the transformation of the adversarial criminal trial in England and Wales. The changes borne by the Criminal Justice and Public Order Act 1994 fundamentally altered the position and role of the defence lawyer in the pre-charge setting. The impact of the CPIA 1996 and CrimPR take effect in the pre-trial but post-charge time frame. This thesis seeks to examine the role of the defence lawyer in the pre-trial arena. The silence provisions impact custodial legal advice. Whilst this is an fundamental component of the lawyer’s work, the word count limitation meant the thesis could not encompass all of the lawyers role. Hence why the focus of this thesis is on his pre-trial and why 1996 is used as the start point of the ‘modern era.’

³⁵⁵ S.34 Criminal Justice and Public Order Act 1994.

³⁵⁶ S.35 Criminal Justice and Public Order Act 1994.

³⁵⁷ S.36 Criminal Justice and Public Order Act 1994 .

³⁵⁸ S.37 Criminal Justice and Public Order Act 1994.

³⁵⁹ See H. Quirk ‘Twenty Years on, the right of silence and legal advice: the spiraling costs of an unfair exchange’ (2013) NILQ 64(4) 465-83 at 466.

³⁶⁰ S. Chakrabarti ‘A Thinning Blue Line? Police Independence and the Rule of Law’ (2008) 2(3) Policing 367-74 at 369.

4.3 The Efficient Criminal Process: The Birth of the CPIA 1996

The CPIA 1996 replaced the largely common law regime with a new statutory scheme. As recommended by the Runciman Commission, the disclosure regime had a three stage process: primary prosecution disclosure, defence disclosure by way of a case statement that identified the issues taken with the prosecution case, and finally, secondary prosecution disclosure in response to the issues identified in the case statement. At the primary disclosure stage, the prosecution was required to disclose any unused material ‘which has not previously been disclosed to the accused and which in the prosecutor’s opinion might undermine the case for the prosecution against the accused.’³⁶¹ The second stage of prosecution disclosure was inter-woven with the defence statement. The prosecution was required to disclose any material ‘which has not previously been disclosed to the accused and which might be reasonably expected to assist the defence of the accused, as disclosed by the defence statement given under section 5 or 6.’³⁶²

The CPIA 1996 could be described as a politically influenced piece of legislation. The Conservative government at the time was trying to take a ‘tough on crime’ approach; when introducing the Bill at the second reading Michael Howard said the Act ‘is designed to restore balance in our criminal justice system – to make life tougher for the criminal and to improve the protection of the public.’³⁶³ The requirement for defence disclosure in ‘general terms’ perhaps illustrates the tension between making the criminal process more efficient and encroaching on the traditional adversarial values of the trial. However, the end result of the CPIA 1996 disclosure regime was to tip the balance more in favour of the prosecution rather than the defence.³⁶⁴

Section 5 CPIA 1996 deals with the compulsory disclosure by the accused. The provisions apply when a person is charged with an indictable offence and is committed for trial.³⁶⁵ The defence disclosure obligations under the CPIA 1996 are only compulsory if the accused is tried on indictment. They do not apply to summary trials, although section 6(2)

³⁶¹ s.3(1)(a) Criminal Procedure and Investigations Act 1996.

³⁶² *Ibid* s.7(2)(a).

³⁶³ R. Leng and R. Taylor, *Blackstone’s Guide to the Criminal Procedure and Investigations Act 1996*, (Blackstone’s Press, London) 1996 at P.1.

³⁶⁴ *ibid* at P.2.

³⁶⁵ s.1(2) Criminal Procedure and Investigations Act 1996.

does allow the accused to voluntarily provide a defence statement to the prosecution.³⁶⁶ The content of the defence statement was defined by s.5(6). It is a written statement:

- (a) setting out in general terms the nature of the accused's defence;
- (b) indicating the matters on which he takes issue with the prosecution;
- (c) setting out, in the case of each such matter, the reason why he takes issue with the prosecution.

If the accused is relying on alibi evidence he must include the particulars of that evidence in the statement. This must include the names and addresses of any witnesses the accused believes can give evidence to support the alibi.³⁶⁷ Furthermore, the accused must provide any information that may be of material assistance in finding any such witness, if the name and address are not known.³⁶⁸ Section 12 states that the defence statement must be served within the period prescribed by the Home Secretary. Sanctions for non-compliance are governed by s.11 and apply when the defendant:

- (a) fails to give a defence statement under that section,
- (b) gives a defence statement under that section but does so after the end of the period which, by virtue of section 12, is the relevant period for section 5,
- (c) sets out inconsistent defences in a defence statement given under section 5,
- (d) at his trial puts forward a defence which is different from any defence set out in a defence statement given under section 5,
- (e) at his trial adduces evidence in support of an alibi without having given particulars of the alibi in a defence statement given under section 5, or
- (f) at his trial calls a witness to give evidence in support of an alibi without having complied with sub-section (7)(a) or (b) of section 5 as regards the witness in giving a defence statement under that section.

³⁶⁶ Richard Card and Richard Ward believe the section is unnecessary as it is always open to the accused to disclose facts about his defence. For further discussion please see R. Card and R. Ward, *The Criminal Procedure and Investigations Act 1996*, (Jordan's Publishing, Bristol) 1996 p.37.

³⁶⁷ s.5(7)(a) CIPA 1996.

³⁶⁸ s.5(7)(b) CIPA 1996.

Under the common law, the accused was permitted to withhold any defence until trial and a judge could not make any adverse comment or invite a jury to draw an adverse inference from his pre-trial silence. This was subject to two statutory exceptions; alibi evidence³⁶⁹ and expert evidence.³⁷⁰ In 1994, s.34 of the Criminal Justice and Public Order Act curtailed the accused's right to withhold his defence until trial. Under s.34, the court or jury can draw such inferences as appear proper from the accused's failure to mention, in the police interview any fact he later relies on in court. This was taken further by section 11 of the CPIA 1996, which sets out the circumstances in which the accused is liable to have adverse inferences drawn against him. If:

- (a) the defendant fails to provide a defence statement when required to do so;
- (b) either a compulsory or voluntary statement is provided but it is out of time;
- (c) the defence statement sets out inconsistent defences;
- (d) a defence is put forward at trial which is different from any defence disclosed in the defence statement;
- (e) an alibi defence is run at trial without particulars having been disclosed in a defence statement, and;
- (f) an alibi witness is called without the necessary particulars of the witness having been supplied.

Should the accused fail to comply with the defence statement provisions, two sanctions are available: the court or the prosecution, with leave of the court, may make such comment as appears appropriate;³⁷¹ and/or the court or the jury may draw inferences as appear proper in deciding whether the accused is guilty of the offence concerned.³⁷² Despite the fact the court may draw inferences from non-compliance with the disclosure obligations, the defendant cannot be convicted by mere inferences alone.³⁷³

³⁶⁹ s.11 Criminal Justice Act 1967

³⁷⁰ s.81 Police and Criminal Evidence Act 1984.

³⁷¹ s.11(3)(a).

³⁷² s.11(3)(b).

³⁷³ s.11(5).

4.4 Empirical Evidence on the Disclosure Regime

In March 2000, the Crown Prosecution Service Inspectorate published their thematic review of the disclosure of unused materials. The review examined 631 contested cases that were handled by thirteen different CPS areas. The primary purpose of the review was to establish ‘as factually clear a picture as possible about the manner in which the CPS discharges its important statutory obligations.’³⁷⁴ Although the study was primarily concerned with prosecution disclosure, the review did examine secondary disclosure. The findings of the review provided examples of the practice of defence lawyers with regards to their disclosure obligations.

The review found that in 380 Crown Court cases a defence statement was provided in 355 cases, and in magistrates’ court cases, a statement was provided in eleven of the two hundred and fifty one cases in the file sample.³⁷⁵ Despite the high number of defence statements issued in Crown Court cases, prosecutors believed ‘... they make little difference to the case ...’.³⁷⁶ Section 5(6) of the CPIA 1996 provides that the defence statement should ‘set out the nature of the defence in general terms’ but the statement has to indicate the matters on which he takes issue with the prosecution’s case, as well as the reasons why he takes issue. Despite the statutory wording of what the defence statement has to contain, the thematic review found that often, the statements would be ‘very brief ... contain[ing] little more than a denial of the offence and a request for disclosure...’.³⁷⁷ The review found that out of 344 statements examined, 85 contained insufficient detail to enable the prosecution to make an informed decision regarding secondary disclosure.³⁷⁸ The review commented that the CPIA provisions make it clear what the defence statement should contain; they do not set out what the prosecution can do if the statement does not contain the necessary information.³⁷⁹ The review recommended that the Director of Policy draw up and issue further detailed guidance on how prosecutors should deal with inadequate defence statements.³⁸⁰ Whilst the thematic review examined the issue of secondary disclosure, the report did not comment on how the issue of the defence disclosure regime could be improved.

³⁷⁴ Crown Prosecution Service Inspectorate, *The Inspectorates Report on The Thematic Review of the Disclosure of Unused Material*, Thematic Report 2/2000, March 2000 at p.4 para 1.4.

³⁷⁵ *ibid* p.36 para 5.6.

³⁷⁶ *ibid* p.36 para 5.8.

³⁷⁷ *ibid*, p.38 para 5.19.

³⁷⁸ *ibid* p.38 para 5.19.

³⁷⁹ *ibid* p.38 para 5.23.

³⁸⁰ *ibid* p.39 para 5.25.

In 2001, Joyce Plotnikoff and Richard Wolfson published their study, *A Fair Balance? Evaluation of the operation of disclosure law*. The purpose of the study was to ascertain whether the disclosure provisions contained in the CPIA had met the government's objective of '... bringing about the acquittal of the innocent and conviction of the guilty [and] efficiency in focusing on the key issues at trial and fairness towards all affected.'³⁸¹ Among the areas covered by the study, Plotnikoff and Wolfson analysed the effectiveness of the defence statement. They found the content of the statements was not fulfilling the requirements laid out by s.5. They found that eighty-four per cent of statements addressed the 'nature of defence' requirement, seventy-six per cent indicated the matters they took issue with from the prosecution's case and sixty-six per cent of statements outlined the reasons why they took issue with the prosecution's case.³⁸² Further findings indicated that ninety per cent of judges and barristers agreed that the prosecution rarely or never adduced evidence of the contents of the defence statement at trial, other than to rebut alibi evidence.³⁸³

The judicial perception of the value of the defence statement was poor. None of the judges questioned for the study found the statements useful in their current guise. One judge said: 'defence statements ... are, quite properly, meaningless ... [they] serve only to trigger the obligation to make secondary disclosure ...'.³⁸⁴ Another judge commented that the statements were ' (a) complete waste of paper.'³⁸⁵ To improve the quality of the defence statement, the following recommendations were made to Plotnikoff and Wolfson by the judges who took part in their research:

- a demand for strict compliance with the statutory regime.
- a pro-forma that directed the defence on specific issues which it must answer.
- amendment of the CPIA to be more detailed in defining areas under dispute. Mere denials and/or putting the Crown to proof would be deemed inadequate.

³⁸¹J. Plotnikoff and R. Woolfson, 'A Fair Balance? Evaluation and Operation of disclosure law' RDS Occasional Paper No 76, 2001 at P.ix

³⁸²*ibid* at p.77 table 25.

³⁸³*ibid* at p.77.

³⁸⁴*ibid*.127.

³⁸⁵*ibid*.128.

- adverse inference sanctions.
- a requirement to amend the statement to deal with issues raised by additional evidence.³⁸⁶

In her own empirical research, Hannah Quirk concluded that the provisions were unworkable. Quirk stated the provisions were flawed due to three fundamental reasons; the lack of understanding of the role and culture of each of the participants, the inadequate allocation of responsibility and the insufficient sanctions for non-compliance with the rules that can be imposed fairly on defendants.³⁸⁷ Defence statements contained often minuscule amounts of information and were generally as vague as possible; they often served as nothing more than a denial of the charge. For example, a defence statement completed by the defence in answer to a charge of handling a stolen motor vehicle, offered the following response: ‘the accused denies that he dishonestly received the vehicle and that he knew or believed that the same was stolen.’³⁸⁸ The vagueness of this statement could potentially leave the door open for the defence to spring an ambush defence at trial.³⁸⁹ The price for springing the ambush was that the defence may miss crucial material not being disclosed at the second stage of prosecution disclosure. The statement does not indicate any particular defence that the accused will rely on and therefore leaves the prosecution without any suitable guidance as to what material would be of use to the defence.

Quirk further suggests that the notion of defence disclosure and the idea of rebalancing the system fits neatly with the philosophy of managerialism.³⁹⁰ Furthermore, she supports McConville’s findings that there was a general lack of adversarialism and that ultimately the idea that disclosure was needed to combat ‘ambush defences’³⁹¹ was misplaced. Roger Leng suggests that the threat of ambush defences was ‘the single most powerful factor in the campaign to abolish the right to silence and to require the early disclosure of the

³⁸⁶ *ibid* at p.128.

³⁸⁷ Hannah Quirk discusses these issues at length in ‘The Significance of Culture in Criminal Procedure Reform: Why the Revised Disclosure Scheme Cannot Work’ 10 *Evidence and Proof*, (2006), 42.

³⁸⁸ C. Taylor ‘Advance Disclosure: Reflections on the Criminal Procedure and Investigations Act 1996’ (2001) 40(2) *Howard Journal*, 114, 117.

³⁸⁹ However, in light of the Criminal Procedure Rules and the Overriding Objective, the Court explicitly prohibits ambush defences. This point will be discussed later in this chapter.

³⁹⁰ H. Quirk ‘Disclosure: Significance of Culture in Criminal Procedural Reform’ (2006) 10 *E&P* 42-59 at 56.

³⁹¹ An Ambush defence is one which surprises the prosecution at trial. The prosecution have no idea what evidence the defence will call and is therefore ‘ambushed’ by their tactics.

defence case.’³⁹² The mention of ambush defences is used as a pejorative term in an adversarial setting, although, in practice, they were relatively unproblematic. Leng’s study for the RCCJ found that ambush defences were raised in between 2-5% of trials; all of which ended in the conviction of the defendant.³⁹³ Leng also cites the work of Block, Corbett and Peay who observed one hundred trials and did not find one single use of an ambush defence.³⁹⁴ However, Zander and Henderson’s study found ambush defences were raised in 7-10% of trials and half of these ended in a conviction,³⁹⁵ Despite ambush defences being relatively unproblematic for the courts and certainly not a weapon that could frustrate the interests of justice in the vast majority of cases, it is clear the government sought change. As such, the tenor and tone of the government’s proposals clearly fitted the aforementioned ‘rebalancing’ of the system. Michael Zander, who was the only academic to sit on the Runciman Commission, suggested that any obligation for the defendant to assist the prosecution is ‘wrong in principle’.³⁹⁶

There was much criticism of the new disclosure regime: ‘there is no shortage of criminal lawyers – judges and practitioners alike – who consider that the disclosure provisions of the CPIA are unworkable in the interests of justice and that a return to suitably post- Ward³⁹⁷ regime is the only realistic option’.³⁹⁸ Sprack was concerned that the reduction of prosecution disclosure and an increase in defence disclosure was likely to lead to an increase in the number of miscarriages of justice.³⁹⁹ Meanwhile, Redmayne suggested that the creation of the disclosure regime ‘forms part of the shift towards a criminal justice system whose prime concerns are efficiency and managerialism.’⁴⁰⁰ As the thesis will show, these concerns have not abated, and in fact, have been expedited and enhanced with the creation of the CrimPR. Whilst it is clear that disclosure is ‘desirable, particularly

³⁹² R. Leng, ‘Losing Sight of the Defendant: The Government’s Proposals on Pre-Trial Disclosure’, *Crim LR* 704 (1995) at 706.

³⁹³ *Ibid.*

³⁹⁴ *Ibid.*

³⁹⁵ M. Zander & P. Henderson, *The Crown Court Study*, Royal Commission Research Study No. 19 (1993), pp.14-15.

³⁹⁶ M. Zander’s Note of Dissent to the RCCJ report (CM2263) (HMSO:London, 1993) at 223.

³⁹⁷ The miscarriage of justice in *R v Ward* [1993] 1 W.L.R. 619 96 Cr.App.R.1 was the final example of a number of miscarriages of justice in the early 1990s. The day after the quashing of her conviction, the government announced the creation of the Runciman Commission.

³⁹⁸ A. Heaton-Armstrong, ‘The (Un)Workability of the Provisions in the Criminal Procedure and Investigations Act 1996 – Disaster in the Criminal Law?’, *Med.Sci.Law* (1999) vol.39 No.2, 93-98 at 94.

³⁹⁹ J. Sprack, ‘The Criminal Procedure and Investigations Act 1996: Part 1: The Duty to Disclose’, *Crim. LR* (1997), 308-320 at 319.

⁴⁰⁰ M. Redmayne, ‘Process Gains and Values: The Criminal Procedure and Investigations Act 1996’ *MLR* 60(1) 1997 79-93 at 93.

because of its powerful potential as a tool for trial management',⁴⁰¹ it has implications for both the role of the defence lawyer and for the adversarial criminal trial. With the creation of the case management provisions, it can be argued that, as suggested by Leng, we have 'lost sight of the defendant'⁴⁰² Who will lose their liberty? With the advent of case management, when combined with the disclosure regime, this thesis will highlight the fact that the defendant is now an active and co-operating party to his prosecution. This means that fundamental protections such as the privilege against self-incrimination and the burden of proof resting on the prosecution have been altered. The defendant needs to make a number of disclosures, some of which may incriminate him. This disclosure ultimately weakens the burden of proof as the defendant is assisting the prosecution in discharging this burden by making the pre-trial disclosures. Ultimately this sidelines the defence lawyer as he now has to assist the defendant in completing their case management obligations. The upshot of all of this means the adversarial battle is replaced with a process which is 'ruled by efficiency.'⁴⁰³

As described earlier, disclosure has been justified on the grounds that it is an efficient trial management mechanism and it nullifies the defence tool of the ambush, yet very little consideration has been given to the potential change in ideology for the role of the defence lawyer. Can he still be classed as a 'zealous advocate' in the post-defence disclosure criminal justice system?

4.5 The Auld Review and Evolution of CPIA: The Rise of Managerialism

The *Auld Review* was part of New Labour's goal to modernise the criminal justice process of England and Wales. Tony Blair's government had the goal of eradicating inefficiencies. The criminal justice system had been tasked with the goals of diverting offenders from a life of crime; making the system more efficient by implementing a fast-track, efficient procedures from arrest to sentence; improving services to witnesses and victims; and ensuring the component parts of the system are performing to their maximum potential.⁴⁰⁴ Clearly the mantra of efficiency are clear in these goals; by creating a fast-track system and ensuring the different parts of the system are being as efficient as possible it is clear New

⁴⁰¹ J. Sprack, 'Will Defence Disclosure Snap the Golden Thread?', E&P, 1998, 2(4) 224-231 at 231.

⁴⁰² R. Leng, 'Losing Sight of the Defendant: The Government's Proposals on Pre-Trial Disclosure', Crim LR 704 (1995) at 711.

⁴⁰³ *ibid.*

⁴⁰⁴ See E. McLaughlin, J. Muncie and G. Hughes, 'The Permanent Revolution: New Labour, New Public Management and the Modernization of Criminal Justice', Criminal Justice, 2001 (1)3 301-318 at 307.

Labour wanted things to get quicker; although there is scant discussion about the system remaining fair. These goals were consolidated in the Criminal Justice strategic plan 1999-2000, which had the goal of ‘dispensing justice fairly and efficiently’⁴⁰⁵ Michael Zander believes the *Report* was somewhat flawed and the cost-savings suggested by the *report* would automatically be accepted by the Government as Home Secretary and Lord Chancellor made their minds up before the consultation period had closed and before time has been allowed for an assessment of the views received.⁴⁰⁶ Furthermore, Zander expressed frustration with the consultation process itself, he termed it wholly ‘inadequate’⁴⁰⁷ as it ran over from mid-October to the end of January, which would not be long enough to digest a vast report that took twenty-one months to complete, which was 9 months longer than initially envisaged. Zander concludes that ‘major reform to the CJS is too important to be rushed through at breakneck speed’.⁴⁰⁸ It appears, at face value, that the efficiency drivers of the *Review* would be readily accepted by the government, regardless of what the consultation period offers as a response. This fits in the mantra of the government’s desire to drive efficiency and reduce waste of resources.

Lord Justice Auld was tasked to examine the workings of both the criminal justice system and the criminal courts in England and Wales with a view to considering a new structure for direction and better management of the criminal justice system. The terms of reference for the *Auld Review* were to inquire into:

‘the practices and procedures of, and the rules of evidence applied by, the criminal courts at every level, with a view to ensuring that they deliver justice fairly, by streamlining all their processes, increasing their efficiency and strengthening the effectiveness of their relationships with others across the whole criminal justice system.’⁴⁰⁹

⁴⁰⁵ Home Office, *Criminal Justice System: Strategic Plan 1999 – 2002* (1999) para 1.3.

⁴⁰⁶ M. Zander, *Lord Justice Auld’s Review of the Criminal Courts: A Response* (2001) at p.6, available here: https://www.lse.ac.uk/collections/law/staff%20publications%20full%20text/zander/auld_response_web.pdf [Last accessed 10th September 2018].

⁴⁰⁷ *ibid* p.5.

⁴⁰⁸ *Ibid*.

⁴⁰⁹ R. Auld, *A Review of the Criminal Courts of England and Wales*, (2001) Chapter One, Paragraph 1.

In his Review of the Criminal Courts of England and Wales⁴¹⁰ Auld LJ said: ‘...fairness, efficiency and effectiveness of the criminal justice system demand that its procedure should be simple, accessible and, so far as is practicable the same for every type of criminal jurisdiction.’⁴¹¹ He commented that the 1996 Act ‘was not working as Parliament intended and its operation did not command the confidence of criminal practitioners.’⁴¹² Auld also argued that there was a high level of non-compliance by the defence in its duty of completing an adequate defence statement; this non-compliance was a major deficiency in the disclosure provisions. Despite these criticisms, Auld suggested building on and improving the current three-stage disclosure regime. He believed that the three-stage process was both ‘logical and fair.’⁴¹³ Auld deemed the system logical, as what is disclosed depends on what is to be an issue. He deemed the regime fair, because ‘all’ that is required of the defendant is to disclose what facts he believes are in issue.⁴¹⁴ Auld suggested that any test for disclosure should be anchored to the issues in the case, as the police and prosecutor know or believe them to be, and suggested the following: ‘material that, in the prosecutor’s opinion, might reasonably affect the determination of any issue in the case of which he knows or should reasonably expect.’⁴¹⁵

Auld clarified this with a tautologous example, ‘material which in the prosecutor’s opinion might reasonably weaken the prosecution case or assist that of the defence.’⁴¹⁶ With regards to the defence statement, Auld believed the requirements were adequate as they stood. He did not believe that a general obligation to identify defence witnesses and the content of their expected evidence, save for alibi or expert evidence, should be introduced.⁴¹⁷

JUSTICE published their response to the Auld review in January 2002. The response commented that the disclosure regime contained in the CPIA 1996 provisions takes England and Wales closer to an inquisitorial approach to criminal procedure. The report states that ‘... there can be no connection between proper disclosure by the prosecution and

⁴¹⁰ *Ibid.*

⁴¹¹ *ibid* at chapter 10 para 271.

⁴¹² *Ibid*, Ch 10 para 163 p 463.

⁴¹³ *ibid* p.466 para 171.

⁴¹⁴ *Ibid.*

⁴¹⁵ *ibid.*

⁴¹⁶ *Ibid.*

⁴¹⁷ *ibid* p.470 para 180.

participation by the defence.⁴¹⁸ JUSTICE argued that Auld LJ did not recognize this central point, despite the widespread criticism of the CPIA regime. Furthermore, Auld failed to recognise that no matter how much the defence is cajoled or pressurized into cooperating with the prosecution, it may not wish to do so. The defence lawyer should not have to do the prosecution's work. It is for the prosecution to prove the case against the accused; a defence statement may provide the prosecution with the opportunity to investigate further and use any mistakes or admissions against the defendant. The JUSTICE response was also critical of the three-stage process that the CPIA 1996 created and which was further endorsed by Auld's review. It stated that the current regime was wrong in principle, as it legitimized the withholding of relevant information, as secondary disclosure is dependent on the submission of a defence statement. JUSTICE believed this to be incorrect because it delayed the disclosure of all relevant material to the defence. Ultimately, it may impede the defendant's chance of running a legitimate defence.⁴¹⁹

4.6 Justice for All and the CJA Reform

In 2002, the Government published its White Paper *Justice for All*.⁴²⁰ The paper was built on proposals from the Auld Review and many of the White Paper's recommendations were implemented in the Criminal Justice Act 2003 (hereafter, CJA 2003). The White Paper emphasized the Government's desire to rebalance the criminal justice process in favour of the victim. The current failings of the criminal justice process were summed up by the Government as: 'too few criminals are brought to justice, too many defendants offend on bail ... too many guilty go unconvicted'.⁴²¹ Part V of the CJA 2003 provided a comprehensive overhaul of the rules of disclosure; this overhaul impacted on both prosecution and defence disclosure. The overhaul was motivated by a dual aim; to provide more efficient case management and to minimize the chance of an ambush defence. However, as pointed out in this chapter, there is little evidence to support the notion that ambush defences were rife.⁴²² The three-stage process implemented by the CPIA 1996 was replaced by a single stage test. S.32 CJA, amending s. 3(1) CPIA 1996, established the following test:

⁴¹⁸ JUSTICE: A Response to the Auld Review p.30 para 75.

⁴¹⁹ *Ibid* para 78.

⁴²⁰ Lord Chancellor and Attorney-General Secretary of State for Home Department, *Justice for All*, Cmmd 5563 (2002) (Cm 5563).

⁴²¹ JUSTICE: A Response to the Auld Review p.11.

⁴²² See Chapter Three p.75.

The prosecutor must –

- (a) disclose to the accused any prosecution material which has not been previously been disclosed to the accused and which might reasonably be considered capable of undermining the case for the prosecution against the accused or assisting the case for the accused, or
- (b) give the accused a written statement that there is no material of a description mentioned in paragraph (a).

Paragraph (a) is reproduced almost verbatim from Auld’s suggestion of what the Act should contain. The second stage of prosecution disclosure, which was triggered by the service of a defence statement, was replaced. Under a new s.7A CPIA, inserted by s.37 CJA 2003, the prosecutor is under a continuing duty to disclose that if at any time, ‘there is material which might reasonably be considered capable of undermining the [prosecution’s] case, it must be disclosed. The primary test for prosecution disclosure was more explicit; the prosecution had to disclose material that ‘might reasonably be considered capable of undermining the case for the prosecution or assisting the case for the accused.’⁴²³ This test is more objective and specifically includes the criterion of assisting the defence case.⁴²⁴ The original disclosure regime under the CPIA 1996 only required disclosure of material that assisted the defence case at the secondary stage; and then only within the terms set out in the defence statement.

Section 33 CJA 2003 inserted a new s.6A CPIA 1996 setting out what is required for a defence statement. The statement needs to contain:

- (a) the setting out of the nature of the accused’s defence, including any particular defences on which he intends to rely;
- (b) indicating the matters of fact on which he takes issue with the prosecution;
- (c) the setting out, in the case of each such matter, as to why he takes issue with the prosecution, and

⁴²³ Criminal Justice Act s.32 amending s.3(1)(a) CPIA 1996.

⁴²⁴ M. Redmayne, Criminal Justice Act 2003: (1) Disclosure and its Discontents, *Crim. L. Rev* (2004) 441

- (d) an indication of any point of law (including any point as to the admissibility of evidence or an abuse of process) which he wishes to take and any authority on which he intends to rely for that purpose.

The requirements of the defence statement under the CJA 2003 provisions, inserted into the CPIA 1996, were greatly increased. Section 6A no longer requires the defence to be set out 'in general terms' as per the provisions in the CPIA regime. The 'nature' of the accused's defence is required to be set out. Furthermore, as per prior provisions, if the accused intends to rely on an alibi defence, the particulars of that defence have to be disclosed in the defence statement.⁴²⁵ The CJA 2003 requires that the defence must give names, addresses and dates of birth of any witness it proposes to call. Furthermore, the name and address of any expert they have consulted must be provided; regardless of whether the defence intends to call them at trial.⁴²⁶

It was widely accepted that judges were reluctant to draw adverse inference direction from faults concerning the defence statement. One reason for the reluctance was because the fault may rest with the defence lawyer as opposed to the accused and ⁴²⁷ the new s.6E CPIA 1996 provides that unless the contrary is proved, the defence statement is deemed to be given with the authority of the accused.

Section 37 CJA 2003 inserted a new s.11 CPIA 1996, providing for more punitive sanctions should the defence fail to comply with any of the defence disclosure rules:

“1 Faults in disclosure by accused

(1) This section applies in the three cases set out in subsections (2), (3) and (4).

(2) The first case is where section 5 applies and the accused—

(a) fails to give an initial defence statement,

(b) gives an initial defence statement but does so after the end of the period which, by virtue of section 12, is the relevant period for section 5,

(c) is required by section 6B to give either an updated defence statement or a statement of the kind mentioned in subsection (4) of that section but fails to do so,

⁴²⁵ CIPA s.6A(2)(a) and (b) explains what details are required to disclose in the defence statement.

⁴²⁶ S. 34 Criminal Justice Act 2003 inserting s.6C CPIA 1996. This provision was not implemented until May 2010.

⁴²⁷ J. Plotnikoff and R. Wolfson 'A Fair Balance? Evaluation and Operation of the disclosure law', RDS Occasional Paper no 76, 2001 at 446.

- (d) gives an updated defence statement or a statement of the kind mentioned in section 6B(4) but does so after the end of the period which, by virtue of section 12, is the relevant period for section 6B,
- (e) sets out inconsistent defences in his defence statement, or
- (f) at his trial—
 - (i) puts forward a defence which was not mentioned in his defence statement or is different from any defence set out in that statement,
 - (ii) relies on a matter which, in breach of the requirements imposed by or under section 6A, was not mentioned in his defence statement,
 - (iii) adduces evidence in support of an alibi without having given particulars of the alibi in his defence statement, or
 - (iv) calls a witness to give evidence in support of an alibi without having complied with section 6A(2)(a) or (b) as regards the witness in his defence statement”.

If the defendant fails to serve the defence statement in the permitted time or serves it out of time, the court or jury are permitted to draw such inferences as appear proper in deciding whether the accused is guilty of the offence he is charged with. If the accused calls a witness who he failed to notify or adequately identify, the court will consider whether the failure can be justified. The same applies to situations where the accused puts forward a different defence to the one mentioned in his defence statement.

The amendments made by the CJA 2003 were implemented in April 2005. The changed ideology regarding the trial and defence disclosure can be clearly seen in the Court of Appeal’s judgment in *Gleeson*.⁴²⁸ In that case the defence realized it had a watertight technical defence to the charge made on the prosecution’s indictment. At the end of the prosecution case, the defence made a submission of no case to answer on the basis the conspiracy charged by the prosecution was impossible. Whilst the judge agreed the defence was sound, he permitted the prosecution to redraft the indictment after closing their case to include statutory conspiracy, for which impossibility is not a defence. In his judgment, Auld LJ took the opportunity to recite a passage from his Review of the Criminal Courts of England and Wales, when he said:

⁴²⁸ [2004] Crim LR 579.

‘To the extent that the prosecution may legitimately wish to fill possible holes in its case once issues have been identified by the defence statement, it is understandable why as a matter of tactics a defendant might prefer to keep his case close to his chest. But that is not a valid reason for preventing a full and fair hearing on the issues canvassed at the trial. A criminal trial is not a game under which a guilty defendant should be provided with a sporting chance. It is a search for truth in accordance with the twin principles that the prosecution must prove its case and that a defendant is not obliged to inculcate himself, the object being to convict the guilty and acquit the innocent. Requiring a defendant to indicate in advance what he disputes about the prosecution case offends neither of those principles.’⁴²⁹

In the judgment, Auld LJ commented on the duties of the contemporary defence lawyer:

‘For defence advocates to seek to take advantage of such errors by deliberately delaying identification of an issue of fact or law in the case until the last possible moment, is in our view, no longer acceptable, given the legislative and procedural changes to our criminal justice process in recent years.’⁴³⁰

Although *Gleeson* was heard prior to the implementation of the CJA 2003 provisions, it is clear from the case and the case comment that a change to the ideology of the criminal justice process was being sought.

4.7 The New Regime: The Criminal Procedure Rules

In keeping with the recommendation of the *Auld Review*, the Criminal Procedure Rules Committee was established ‘to create a single and simply expressed instrument’⁴³¹ that contains a codification of criminal procedure. The Rules would govern the practice and procedure to be followed in the Criminal Division of the Court of Appeal, the Crown Court

⁴²⁹ As Per LJ Auld, [2004] 1 Cr. App. R. 29, para 36 cited from Auld Review, para.154 of Ch.10.

⁴³⁰ As Per LJ Auld, [2004] 1 Cr. App. R. 29 at para 35.

⁴³¹ *The Review of the Criminal Courts of England and Wales* (2001), Para 184.

and for criminal proceedings in magistrates' courts. 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.'⁴³² However, the Rules have far exceeded that goal and have arguably created a new regime of criminal procedure.

Rule 1.1 explicitly states 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' includes:

- (2) Dealing with a criminal case justly includes–
 - (a) acquitting the innocent and convicting the guilty;
 - (b) dealing with the prosecution and the defence fairly;
 - (c) recognizing the rights of a defendant, particularly those under Article 6 of the European Convention on Human Rights;
 - (d) respecting the interests of witnesses, victims and jurors and keeping them informed of the progress of the case;
 - (e) dealing with the case efficiently and expeditiously;
 - (f) ensuring that appropriate information is available to the court when bail and sentence 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.

⁴³² S.69(4)(a) and (b) Courts Act 2003.

A number of these propositions have the potential to impact on the role of the defence lawyer. Proposition (a) appears, on face value at least, to give an equal weight to acquitting the innocent and convicting the guilty. This is difficult to reconcile with an adversarial criminal process that is centered on the notion that it is better for the guilty to be acquitted than the innocent be convicted. Does this proposition impact on the presumption of innocence and how does this impact upon the adversarial defence lawyer's role? It could be argued that the apparent equal weighting between the goals dilute the effectiveness of defence representation. The accused see his shield in the police station tempered and effectively scaled back. Proposition (b) is also concerning. It appears to provide equal weight to the prosecution and defence, by requiring that they be treated fairly. This gives no thought to the equality of arms, as Chapter Two described;⁴³³ the state has vast resources that can be used against the accused. In the accused's corner, stands the defence lawyer; it is he who is charged with defending the accused from the state. Perhaps the rules would be enhanced if they explicitly recognized the equality of arms principle. Proposition (c) is a welcome addition to the CPR, especially when one considers the CrimPR did not explicitly acknowledge the presumption of innocence. Proposition (d) is relatively non-contentious as it is important to respect all participants in the criminal justice process. However, there is a danger that this mean that the defence lawyer cannot carry out certain lines of questioning, or that certain actions be frowned upon by jurors, which may reflect badly on the defendant. Whilst this provision is welcome in the sense that respect for all parties is desirable, the proposition offers no guidance to what the real-term impact may be. Proposition (e) is directly linked into the case management provisions that will be considered at a later point in this chapter. This is an explicit obligation that aims to improve the efficiency of the criminal justice process. The impact of this drive for efficiency in the defence lawyer's traditional role will be considered in section 4.7. Proposition (f) also feeds into the 'managerial' culture to ensure the system runs as efficiently as possible. By ensuring all information is presented to the court when sentencing and bail is being considered, there can be no reason for delays. This would include any reports that the court would need to make a decision. Philip Plowden argues that this is a welcome requirement for all agencies but could catch 'defence lawyers who intended to make available expert or other reports at the sentencing stage'.⁴³⁴ Proposition (g) is interesting. At face value it appears to be introducing a notion of proportionality into

⁴³³ See p.27-47.

⁴³⁴ P. Plowden, 'Make Do and Mend, or a Cultural Evolution?', *The New Law Journal*, March 2005 at p.331.

criminal proceedings. This arguably creates a culture of 'justice on the cheap' it certainly gives no thought to what the stigma of a criminal conviction can mean for a person, for example, the loss of employment or a negative perception attached to them in their local community.

The overriding objective set out in rule 1.1 applies to all participants in a criminal case. A participant is defined as 'anyone involved in any way with a criminal case',⁴³⁵ which is clearly meant to include the defence lawyer. Further to complying with the overriding objective, any party must inform the court of any 'significant failure' to take any step required by the rules. Duncan Atkinson and Tim Moloney explain that a significant failure is defined as 'one which might hinder the court in furthering the overriding objective'.⁴³⁶ This could have an impact on existing professional relationships between lawyers. Should one lawyer make a significant failure, the onus would be on the other lawyer to report this to the court as a failure to do so may lead to that participant receiving a sanction from the court. Under rule 3.5(2)(i) the case management provisions of the court allow the court to 'specify the consequences of failing to comply with a direction'.

It is the responsibility of the court to further the overriding objective by 'actively managing'⁴³⁷ the case. Active case management is defined as:

(2): -

- (a) the early identification of the real issues;
- (b) the early identification of the needs of witnesses;
- (c) achieving certainty as to what must be done, by whom, and when, in particular by the early setting of a timetable for the progress of the case;
- (d) monitoring the progress of the case and compliance with directions;
- (e) ensuring that evidence, whether disputed or not, is presented in the shortest and clearest way;
- (f) discouraging delay, dealing with as many aspects of the case as possible on the

⁴³⁵ Rule 1.2(2) Criminal Procedure Rules.

⁴³⁶ D. Atkinson and T. Moloney, *Blackstone's Guide to the Criminal Procedure Rules 2005*, (Oxford: Oxford University Press) 2005 at p.13 para 2.13.

⁴³⁷ Rule 3.2(1) Criminal Procedure Rules 2005.

same occasion, and avoiding unnecessary hearings;

(g) encouraging participants to cooperate in the progression of the case and;

(h) making use of technology.

As stated in chapter two⁴³⁸ the case management provisions are nothing new to the court. Auld had already stressed the importance of case management prior to the implementation of the CrimPR. It is worth reiterating here the importance ascribed to active case management. In the case of *Jist*⁴³⁹ Judge LJ described the starting point for any criminal case as follows:

‘The starting point is simple. Justice must be done. The defendant is entitled to a fair trial: and, which is sometimes overlooked, the prosecution is equally entitled to a reasonable opportunity to present the evidence against the defendant. It is not however a concomitant of the entitlement to a fair trial that either or both sides are further entitled to take as much time as they like, or for that matter, as long as counsel and solicitors or the defendants themselves think appropriate. Resources are limited... time itself is a resource. Every day unnecessarily used, while the trial meanders sluggishly to its eventual conclusion, represents another day's stressful waiting for the remaining witnesses and the jurors in that particular trial, and no less important, continuing and increasing tension and worry for another defendant or defendants, some of whom are remanded in custody, and the witnesses in trials who are waiting their turn to be listed. It follows that the sensible use of time requires judicial management and control.’⁴⁴⁰

This judgment occurred prior to the creation of the CrimPR, but the influence Judge's statement had on the rules is clear. The statement indicates that time is a resource that is required to be managed effectively; it also gives consideration to the stress levels of the

⁴³⁸ See p.27-47.

⁴³⁹[2004] EWCA Crim 696.

⁴⁴⁰[2004] EWCA Crim 696 as per Judge LJ at 114.

jurors, and waiting witnesses, as well as the accused. Cases are now actively managed, so what impact does that have for the defence lawyer? CrimPR rule 3.2(1)(a) requires the early identification of the real issues. What does this mean in real terms? The accused is already required to provide the prosecution with a defence statement; does an expectation exist that this provision will further widen the defence disclosure requirements? Another provision that potentially threatens to alter the fundamental fabric of the adversarial defence lawyer is rule 3.2(1)(e). This rule is designed to ensure that the evidence is presented in the most succinct and clearest way, but who decides what is the clearest way? The defence lawyer selects the evidence to present in the way that best benefits his client. Is this now to be altered because another route of presentation is deemed more time efficient? Could this potentially lead to a reduction in the presentation of oral evidence and place more focus on written submissions? As Auld LJ stated, the starting point is simple, ‘justice must be done’. However, can justice be sufficiently ‘done’ if one side of the battle is hampered by further onerous obligations; the defendant already has to indicate the matters he takes issue with the prosecution and any potential defences he intends to rely upon. As this chapter has argued, this potentially conflicts with the adversarial theory of the English and Welsh criminal justice process; the defendant should not be required to assist the prosecution in building a case which will be used as a basis upon which to convict him.

Further to the active case management definition, rule 3.4 indicates that a Case Progression Officer (CPO) has to be appointed by each side. The CPO is the person who is responsible for the case progressing and he has to monitor compliance⁴⁴¹ with directions from the court, to ‘make sure he can be contacted promptly about the case during business hours’,⁴⁴² and to act promptly and reasonably in response to communications about the case.⁴⁴³ How practical is this for a defence lawyer? A defence lawyer may not be contactable by telephone during all business hours; he may be in court, or offering police station advice or visiting clients in custody. It is difficult to imagine that a lawyer could be promptly contacted during these periods. The CPR does allow a substitute CPO to be appointed,⁴⁴⁴ although how efficient is it to brief a substitute on all the particulars of a case and then

⁴⁴¹Rule 3.4(2)(a).

⁴⁴² Rule 3.4(4)(c).

⁴⁴³Rule 3.4(4)(d).

⁴⁴⁴Rule 3.4(d)(e).

have him pass the details on to the other CPOs? At face value, this obligation appears to place another burden onto the defence lawyer. Furthermore, the burden appears to be non-adversarial in its nature; at no point does the classic concept of the adversarial defence lawyer require that the lawyer needs to inform both the court and prosecutor of his case progress.

The Case Management powers of the court can be found in rule 3.5. They are largely unsurprising in their nature, although rule 3.5(2)(i) allows the court to 'specify the consequences of failing to comply with a direction'. The rule does not substantiate what the sanction can be. The threat of sanctions could raise further conflict with the classic concept of the defence lawyer. Finally, the case management provisions of the CrimPR have the potential to alter the notion of the adversarial trial; as argued in Chapter Three, the adversarial trial and role of the defence lawyer are inextricably linked. If there are provisions that impact on the adversarial criminal trial, they potentially impact on the role of the defence lawyer. Rule 3.10 concerns the conduct of the trial. The rules permit the court to require each party to identify:

- (a) which witnesses he intends to give oral evidence;
- (b) the order in which he intends those witnesses to give their evidence;
- (c) whether he requires an order compelling the attendance of a witness;
- (d) what arrangements, if any, he proposes to facilitate the giving of evidence by a witness;
- (e) what arrangements, if any, he proposes to facilitate the participation of any other person, including the defendant;
- (f) what written evidence he intends to introduce;
- (g) what other material, if any, he intends to make available to the court in the presentation of the case;

- (h) whether he intends to raise any point of law that could affect the conduct of the trial or appeal; and
- (i) what timetable he proposes and expects to follow.

Does this have the effect of transforming the traditional adversarial trial, where the defence battles the prosecution, into something that more resembles a meeting that follows a strict timetable or agenda? Within rule 3.10 where is the scope for the defence lawyer to become his accused's 'zealous advocate', where is the scope to be the accused's 'white knight'? Do the CrimPR present a potential danger to the classic concept of the defence lawyer? Is the defence lawyer removed from his traditional partisan role and placed in a more managerial capacity, which creates pressure to conform to timetables and requirements to assist the prosecution as well as further the best interest of his client? Can the lawyer satisfy both requirements without impinging either his duty to his client or his duty to the court and the administration of justice?

The CJA amendments to the CPIA 1996 conflated the two stages of prosecution disclosure into one and reformed the defence disclosure obligations. The CrimPR have consolidated over fifty different sets of rules and places them into one single document. The rules draw together each step of the criminal process and divide them into ten sections. The rules were supposedly drawn together to enable '... those who are not legally qualified to find all relevant provisions in one place ...'⁴⁴⁵ If the CrimPR were created merely to consolidate existing law, the impact of rules may be modest.⁴⁴⁶ It is clear that the rules are more than a mere consolidation of the existing legislation as the CrimPR implemented both an 'overriding objective' and new requirements for case management. Both have the potential to impact on all actors in the criminal justice process; including the defence lawyer and the accused.

The Rules, as originally issued, also offered no new developments to the disclosure regime and no amendments to the existing legislation was offered. However, In May 2010 a change was made in circumstances where the defendant intends to call any persons other

⁴⁴⁵ P. Plowden, 'Make Do and Mend, or a Cultural Evolution?', *The New Law Journal*, March 2005 at p.329.

⁴⁴⁶ *Ibid.*

than himself as a witness. The defendant must give notice to both the prosecution and the court regarding the name, address and date of birth of any proposed witness and any other information that may assist in identifying and finding the witness.⁴⁴⁷ Failure to disclose the information about a witness may lead to that witness being subjected to cross-examination as to why the information was withheld; which may call into question their credibility.⁴⁴⁸ This sets aside the decision in *R (Kelly) v Warley JJ*⁴⁴⁹ where the court ruled that the general powers of case management do not extend to the defence having to identify their witnesses. Does this pose any problem in regards to any potential coercion on the part of the police to dissuade certain witnesses from giving evidence? In the case of the Guildford Four, the police ‘threatened’ a journalist who claimed to have alibi evidence concerning one of the suspects. He also had evidence that contradicted the police account that the bomb detonated at 20:30; he insisted the device exploded at 20:50.⁴⁵⁰ It should also be noted the police are not necessarily looking for evidence that will exonerate or even assist the defendant as that would require ‘the culturally adversarial police to fulfil an effectively inquisitorial function.’⁴⁵¹ Quirk found that the police remained ‘committed to prosecutorial culture’⁴⁵² and one officer suggested that they were ‘salesman for jails;’⁴⁵³ highlighting the culture and mantra of the police force. As such, if the police interviewing of defence witnesses became widespread, it could severely undermine the defence case as it could be seen to be an ‘invitation to poison the well by undue influence as they naturally want to get the evidence that will convict the defendant.’⁴⁵⁴

⁴⁴⁷ S. 34 Criminal Justice Act 2003 inserting s.6C CPIA 1996.

⁴⁴⁸ The Law Society Practice Note, Defence Witness Notices, 27 January 2011 s.2.7 <http://www.lawsociety.org.uk/productsandservices/practicenotes/defwitnessnotice/4826.article> [Last Accessed 27 April 2011].

⁴⁴⁹ [2007] EWHC 1836 (Admin); [2008] 1 W.L.R. 2001.

⁴⁵⁰ For a more detailed account of the threats, please see <https://www.bbc.co.uk/news/uk-england-surrey-42665187> [Last accessed 1 September 2018].

⁴⁵¹ H. Quirk, "The significance of culture in criminal procedure reform: why the revised disclosure scheme cannot work" (2006) 10 Int. J. of E. & P. 42, 46.

⁴⁵² H. Quirk, "The significance of culture in criminal procedure reform: why the revised disclosure scheme cannot work" (2006) 10 Int. J. of E. & P. 42, 46.

⁴⁵³ *Ibid* at 48.

⁴⁵⁴ A. Owusu-Bempah, ‘Defence Participation through pre-trial disclosure: issues and implications, (2013) 17 E&P 183-201 at p.195

4.8 Conclusion.

Traditionally, a fundamental principle ran through the common law: the defendant has the right of silence throughout criminal proceedings and the prosecution was required to prove its case. Viscount Sankey LC stated that ‘throughout the web of English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner’s guilt.’⁴⁵⁵ Originally, the majority of the disclosure provisions, save for alibi and expert evidence, placed the onus on the prosecution to disclose information to the defence. If we follow Lord Justice Denning’s view from *Dallison and Caffery*,⁴⁵⁶ the disclosure regime was created to ensure the defendant is not subjected to an injustice. However, an ardent crime control agenda required a ‘price’ to be paid for the due process protections afforded to the defendant in the mid-1990s. That price was the defence case statement. This signified the creation of a new regime of pre-trial obligations and this regime was enhanced by the creation of the CrimPR. The rules have the potential to transform the summary trials into an efficient and economic process via its case management provisions. Effectively, to compel the defendant to disclose his defence in a manner akin to the defence case statement. Furthermore, the defence is required to outline witness details and, if the defence lawyer spots a flaw in the prosecution’s case, he has to notify the court, and the court can then permit the prosecution to alter their indictment.

All of these elements are non-adversarial in their nature and as chapter two highlighted, it is very difficult to transplant non-adversarial traits into an adversarial setting. In the quest for a more efficient criminal justice process, it appears that an expectation has been placed on the accused and his defence lawyer to participate and aid the case for the prosecution. In doing so, the adversarial fabric of the criminal justice system in England and Wales is torn and leaves an interesting theoretical conundrum for the defence: which of his duties should take precedence?

CHAPTER FIVE

The New Regime: The Potential Implications for the Defence Lawyer

5. Introduction

As discussed in Chapter Four, the changes to disclosure and then the creation of case management provisions of the CrimPR have led to the creation of a ‘new regime.’ This chapter will examine the implications of the changes which led to the creation of the ‘new regime.’ Chapter Three⁴⁵⁷ established that the defence lawyer has three core duties: to his client, the court and the public.⁴⁵⁸ Despite having no relative weighting attached to them, these duties establish the core elements of the obligations for the defence lawyer. These were overarching duties that encompassed other elements including the principle of partnership and the duty to the administration of justice. Chapter Three⁴⁵⁹ concluded that the fact that the defence lawyer is his client’s mouthpiece does not absolve him of all moral responsibility and he has to consider his other obligations. It is with these core duties in mind that this chapter will examine the theoretical implication of the new regime; this examination will provide the foundation for the empirical research tool that will be utilized in Chapter Six. This chapter will examine if the duty to the client remains the lawyer’s paramount duty or whether disclosure,⁴⁶⁰ the overriding objective and further case management provisions of the CrimPR⁴⁶¹ have led to a shift in the obligations owed by the lawyer. The chapter will analyse the *causatum* of the case management provisions for the adversarial nature of the defence lawyer and examine problematic ethical situations the lawyer may find himself in. Finally, the chapter will examine various enforcement mechanisms available to the court, such as wasted costs orders and adverse inferences and how they impact the decision making of the defence lawyer.

5.1 The Obligations of the Modern Defence Lawyer

For the purpose of examining the theoretical impact of the obligations, it is important to reiterate what is expected of the ‘modern day’ defence lawyer. This modern day picture will be examined through the lens of the legislative obligations placed on him. It is also important to clarify upon whom the obligations rest. Some obligations rest directly on the defence lawyer. Other obligations rest ostensibly on the accused but operate as an indirect obligation on the lawyer.

⁴⁵⁷ See Chapter 3 p.47-75.

⁴⁵⁸ As stated by Lord Reid in *Rondell v Worsley* [1969] 1A.C. 191.

⁴⁵⁹ see p.49-76.

⁴⁶⁰ By way of s.6A Criminal Procedure and Investigations Act

⁴⁶¹ Rule 1.1 and Part 3 of the Criminal Procedure Rules 2011.

As stated in Chapter Three, from the genesis of the adversarial criminal trial in the mid- 19th century until 1967, neither the defence lawyer nor his client were under any obligation to disclose any facet of their case to the prosecution or the court in advance of trial.⁴⁶² The CPIA 1996 fundamentally altered this and imposed the most radical and onerous obligations on the accused. The Act required a defence statement to be disclosed in advance of trial.⁴⁶³ The content of the defence statement was defined by s5(6) CPIA 1996. The statement had to set out ‘... in general terms, the nature of the accused’s defence.’⁴⁶⁴ This obligation was enhanced by the Criminal Justice Act 2003.⁴⁶⁵ The Act removed the ‘general terms’ of the nature of the accused’s defence and replaced it with something far more onerous. Now, the defence statement had to be far more detailed including an outline of what points of law and authority he will be relying on. The regime is enforced by the threat of adverse inferences being drawn should the defendant fail to disclose the statement in the prescribed time or if his defence deviates at trial from the disclosed case statement.⁴⁶⁶ In May 2010,⁴⁶⁷ a new obligation came into force, giving effect to s.35 of the Criminal Justice Act 2003.⁴⁶⁸ The details of any witnesses the defence intends to call at trial, other than the accused, have to be disclosed. These details include the names, addresses, dates of birth and any other information that may assist the prosecution in locating the witnesses. The prosecution is allowed to interview the witnesses, although during any witness interview the defence lawyer is permitted to be present.

As well as disclosure obligations imposed by the CPIA 1996, the CrimPR have imposed further obligations on the defence lawyer. The CrimPR have an overriding objective of ‘dealing with cases justly’⁴⁶⁹ and the defence lawyer is required to contribute to fulfilling this overriding objective. Should any ‘significant failure’ arise the court should be informed at once, regardless of whether or not that participant is responsible for the

⁴⁶² Save for S.11 Criminal Justice Act 1967 and s.2(3) Criminal Justice Act 1987

⁴⁶³ The first disclosure obligation was placed on the Prosecutor; the defence lawyer would fulfill the second aspect by submitting the defence statement. The prosecutor would then be responsible for a second stage of prosecutorial disclosure.

⁴⁶⁴ s.5(6)(a) Criminal Procedure and Investigations Act 1996.

⁴⁶⁵ S.33 Criminal Justice Act 2003.

⁴⁶⁶ S.11 Criminal Procedure and Investigations Act 1996.

⁴⁶⁷ By virtue of Criminal Justice Act 2003 (Commencement no.24 and Transitional Provisions) Order 2010, SI 2010/1183

⁴⁶⁸ This section inserted a new s.6C Criminal Procedure and Investigations Act 1996.

⁴⁶⁹ Rule 1.1 Criminal Procedure Rules 2016.

‘significant failure.’⁴⁷⁰ Additionally, the CrimPR state that each party must actively assist the court in fulfilling its duty under rule 3.2,⁴⁷¹ with or without a direction from the court. Rule 3.3(b) does allow a participant to apply for a direction, should that be necessary. At the beginning of each case, each side must appoint a Case Progression Officer.⁴⁷² The CPO is responsible for progressing the case and he has to monitor compliance with directions⁴⁷³ and make sure the court is informed of any events that may affect the progress of the case.⁴⁷⁴ He needs to ensure he can be contacted promptly during business hours⁴⁷⁵ and to act promptly and reasonably in response to communications about the case.⁴⁷⁶ If he is unavailable at any stage he needs to appoint a substitute.⁴⁷⁷

As this section has illustrated, in a little over forty years, the legislative obligations have changed from the defence and his client having to disclose no information in advance of trial to a situation where detailed information must be provided. As well as having to fulfil many disclosure provisions, the CrimPR have imposed a duty on the defence lawyer to further the overriding objective; the lawyer has to help the court fulfil the requirement that ‘cases are dealt with justly.’ A pivotal aspect of this overriding objective is ‘dealing with cases efficiently and expeditiously.’⁴⁷⁸ This represents a fundamental shift caused by the CPIA 1996 and the CrimPR, the implications of which will be highlighted throughout this chapter, as will the implications this shift has on the three core duties that have been extracted from Lord Reid’s judgment.⁴⁷⁹

5.2 The Conflicts with the Traditional Role of the Defence Lawyer

The pre-trial disclosure requirements established by the CPIA 1996 and the CrimPR potentially conflict with the notion of zealous advocacy. Should the lawyer fail to comply with the provisions, his client faces the possibility of the court making ‘such comment as

⁴⁷⁰ Rule 1.2(c) defines a significant failure as one ‘[that] might hinder the court in furthering the overriding objective’, as such it takes a very wide approach to what may constitute a failure. Effectively, it could be argued that the defence lawyer should point out flaws in the case of this opponent, there by ensuring the overriding objective has been satisfied.

⁴⁷¹ Rule 3.2(1) states ‘The court must further the overriding objective by actively managing the case’. Examples of active case management are then provided. These have been discussed in Chapter IV (see p.33 in particular) and the impact of the rules will be critically examined in this chapter. As such, the examples will not be repeated here.

⁴⁷² Rule 3.4.

⁴⁷³ Rule 3.4(a).

⁴⁷⁴ Rule 3.4(b).

⁴⁷⁵ Rule 3.4(c).

⁴⁷⁶ Rule 3.4(d).

⁴⁷⁷ Rule 3.4(e).

⁴⁷⁸ Rule 1.1(e).

⁴⁷⁹ [1969] 1A.C. 191.

appears appropriate⁴⁸⁰ which may result in the ‘court or jury ... [drawing] such inferences as appear proper in deciding whether the accused is guilty of the offence concerned.’⁴⁸¹ This is problematic: firstly, as the matrix used in the development of this chapter⁴⁸² illustrates, the duty rests on the accused to fulfil the statutory provisions, not directly with the defence lawyer. However, it has to be questioned whether placing the obligation on the accused is realistic. If one assumes that it is an unrealistic obligation, it can be assumed that the defence lawyer completes the defence statement and therefore the obligation rests ostensibly on him.

The traditional conception established earlier in Chapter Three shows the lawyer acting as the zealous advocate of the accused; he acts with vigour as the partisan defender of his client’s rights and advances the interests of his client at any given opportunity. The problem with advancing the interests of the client is that it may lead to frustrating the administration of justice, thereby frustrating the duty to the court. It has been noted that the ‘win at all costs’ mentality of lawyers means ‘... [they are] running roughshod over witnesses, and with court procedures and the truth’.⁴⁸³ This poses a question of how does a lawyer ‘win’? Arguably, a win would mean that his client is acquitted at trial. If this is the only measure of success, it is arguable that defence lawyers are failing their clients. The reason for this is the fact that in 2017 and 2016 the guilty plea rates in the Crown Court remained at 67%.⁴⁸⁴ So it is clear that the vast majority of cases are not ‘won’ by the defence lawyer. However, the answer is not as simplistic as that. The lawyer may ‘win’, even if a guilty plea is entered. For example, the lawyer may have reached a charge bargain with the prosecution which means his client enters a guilty plea to a lesser offence carrying a less severe sentence. In theory, the lawyer may wish to win at all costs, but the current practice illustrates that there is more than one way to ‘win’ but also the lawyer simply cannot advance his client’s best interest, to the exclusion of his other duties.

⁴⁸⁰ Section 11(5) Criminal Procedure and Investigations Act 1996.

⁴⁸¹ Section 11(5) Criminal Procedure and Investigations Act 1996.

⁴⁸² The matrix can be found on p.118.

⁴⁸³ A. Smith and W. Montross (1998) ‘The Calling of Criminal Defense’, 50 Mercer L.R., 523.

⁴⁸⁴ Criminal court statistics quarterly, England and Wales, January to March 2018 (annual 2017), published June 2018 available here:https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/72002/6/ccsq-bulletin-jan-mar-2018.pdf [last accessed 28th August 2018].

As an Officer of the Court he has to pay a great deal of attention to his duty to the court and he is expected to facilitate justice in the courtroom by assisting the court to discover the truth which will enable the court to serve justice. Thereby, if the defence lawyer adopts this approach he will satisfy his duty to the court and, should justice be served, his duty to the public. It is arguable that those two duties are maybe satisfied at the expense of advancing the best interests of his client. This is an example of conflict that epitomizes the conundrum role faced by defence lawyers. Justice Crampton in *R v O'Connell*⁴⁸⁵ identified the goal of truth-seeking as the primary goal of all actors in the legal process when he said 'we are all ... concerned with the truth ... that is primary and paramount.'⁴⁸⁶

Although it is arguable that truth-seeking should be the primary goal of the lawyer, the classic conception established that the primary duty of the lawyer is to advance the best interests of his client but that does not necessarily satisfy the truth seeking goals of the court. This conflict between two duties can be illuminated by examining the ambush defence. This is the classic example of two duties coming into conflict or tension with each other and the question remains, which duty should take precedence: the duty to the client or the duty to the court? By using the tactics of an 'ambush', the late introduction of evidence may catch the prosecution off guard and may advance the interests of the client. However, it will certainly frustrate the duty to the court as the ambush may result in an acquittal or an adjournment, which will waste the precious resources of the court. In an effort to combat the problem⁴⁸⁷ of ambush defences, the accused is now required to give a defence statement to the court; this has effectively eradicated the use of the ambush defence as a valid weapon of the defence lawyer.

5.2 The Matrix of obligations

The matrix was developed in order to clearly identify on whom the pre-trial obligations rest with; is it the defence lawyer or his client? The typology provides the overarching structure to this chapter; it permits a deeper examination of the issues at hand as some of the issues rest under the surface rather than being explicitly clear at first glance. For example, many aspects of the CrimPR and the CPIA 1996 explicitly place obligations on the accused rather than the defence lawyer. An example of this opaque obligation would be

⁴⁸⁵ (1844) 7 I.L.R. 261.

⁴⁸⁶ (1844) 7 I.L.R. 261 at 312.

⁴⁸⁷ Although, as illustrated by the RCCJ, ambush defences were only run in 5% of trials and provided little obstacle to the conviction of the defendant.

the notion of compulsory⁴⁸⁸ and ‘voluntary disclosure.’⁴⁸⁹ It is clear from the statutory wording that the onus falls on the accused (as opposed to their lawyer) to disclose the required elements of his defence. However, a question remains as to how realistic this expectation is owing to the complex nature of these provisions. Further to this particular issue, the obligations of the Overriding Objective of the Criminal Procedure Rules will be examined,⁴⁹⁰ along with the obligations of the case management provisions.⁴⁹¹

The matrix of obligations, which follows on the next six pages,⁴⁹² separates the obligations under the CPIA and the CrimPR. Along the top of the typology we have the obligations, enforcement mechanism, the obligation placed on the accused and finally, whether or not the obligation is placed on the lawyer directly or indirectly. Down the side of the typology we have the different sections of the two pieces of legislation that require analysis. Under the CrimPR heading the typology has broken down the overriding objective, the efficiency and expedition requirement, the compliance with directions, informing the court and other side of significant failures and the application for directions. Under the CPIA 1996 obligations the service of the defence case statement will be analysed, including outlining the nature of the accused’s defence, matters taking issue with, expert evidence and witness details. Finally, there is a section on other obligations imposed by case law or court rules and in this section fall the case progression forms and the obligations under the plea and direction hearings. This matrix assisted breaking down where the pre-trial obligation rested:, was it the defence lawyer or the accused? This then informed what questions would be asked when constructing the interview *pro-forma*.

⁴⁸⁸ S.5 Criminal Procedure and Investigations Act 1996.

⁴⁸⁹ S.6 Criminal Procedure and Investigations Act 1996.

⁴⁹⁰ Criminal Procedure Rules Rule 1.1.

⁴⁹¹ Criminal Procedure Rules Rule 3.1-3.11.

⁴⁹² The unabridged typology can be found in Appendix One This is a condensed version in order to not disturb the flow of thesis but still highlight the importance of typology in devising the research instrument.

The obligation	The enforcement mechanism(s) /consequences	Obligation placed on accused	Obligation placed on lawyer	
			Directly	Indirectly
Obligations under CPR				
Further the overall objective	(How far is this intended to go? Could lead to lawyer placing pressure on the D to plead G) Sanctions for failing to comply: 1. WCO 2. Refusal of an application/adjournment 3. Professional conduct sanctions.	Yes – participant he is obliged to help the court further the OR rule 1.2	Yes – participant. Should his client or the other side breach the Overriding Objective, pursuant to r.1.2(1) (c) he should inform the court of failure which will in turn, further the Overriding objective.	
Efficiency and expedition	Has there been any sanctions for a lawyer failing to work efficiently? Sanctions for failing to comply: 1. WCO 2. Refusal of an application/adjournment 3. Professional conduct sanctions.	Yes – Failure to stick to the case management timetable may lead costs against the A – s.18 POOA 1985 ‘such costs as are just and reasonable’.	Yes. <i>Heppenstall</i> – Judge was correct to seek an estimate from counsel how long cross-X would take and they need to stick to it.	
Comply with directions	Rule 3.2.(1) and (3) gives the court power to actively manage the case. R.3.5 and 3.10 contain powers to shorten(!) or lengthen time limits.	Yes. As a participant - Rule 1.2(b) As a party rule 3.3	Yes – as a participant	

Inform re significant failures	<p>Loss of an ambush defence, loss of a watertight defence (Gleeson).</p> <p>The Prosecution can be given a 2nd attempt to re-draft an indictment.</p> <p>Sanctions for failing to comply:</p> <ol style="list-style-type: none"> 1.WCO 2. Refusal of an application/adjournment 3. Professional conduct sanctions. 	Yes, he's a participant in the criminal process Rule ... says any participant has to inform the court.	Yes, again he's a participant– the duty to 'grass up'. Rule 1.2(1)(c) "inform the court of significant failures..." This will redefine the lawyer/client relationship (perhaps breed a lack of trust or informal regard to the rules? The grass up rule impacts on the notion of the 'fearless and zealous advocate')	
Apply for directions		Yes ? (is that a realistic expectation of the accused)	yes	
Appoint a case progression officer	<ol style="list-style-type: none"> 1. WCO 2. Refusal of an application/adjournment 	Yes. Rule 3.4 states the Party has to appoint a CPO.	No – Not classed as a party - a person or organization directly involved in a criminal case, either as prosecutor or defendant	Yes – although he's not a party, it is not realistic to expect the D to appoint a CPO

<p>Active Case Management</p> <p>(a) ID of early issues</p> <p>(d) Monitoring progress of case</p> <p>(e) presenting evidence in the shortest and clearest way</p> <p>(f) discouraging delay</p>	<p>1. WCO</p> <p>2. Refusal of an application/adjournment</p> <p>3. Professional Conduct reported</p> <p>The sanctions are relevant for all sections.</p>	<p>Yes</p> <p>Yes, but how realistic is it?</p> <p>Yes, if unrepresented in MC.</p> <p>As above.</p>	<p>Yes (does this go further than CPIA DS. Possibly does - active case management applies in Mags court. CPIA DS is voluntary in MC).</p> <p>Yes, ties in with the requirement to deal with cases expeditiously.</p> <p>Yes – infringes on the classic notion of adversarial DL as established in chapter Three. The DL cannot take as long as he wants</p> <p>Delay could be beneficial to the client. Witnesses could be discouraged from testifying which leads to P case collapse. Clear conflict between interests of Crt v Client (how far should DL go?)</p> <p>Irrelevant, unnecessary or time wasting. The judge may limit the time for further cross-examination of a particular witness.</p>	
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Obligations under the CPIA				
Serve a defence statement	<ul style="list-style-type: none"> - Inferences - Admissibility of defence statement - WCO S.19A PoOA 1985 – 	<p>Yes – (How realistic is for the D to complete this himself? Not very, hence the indirect obligation on the DL).</p>	No	<p>Yes. Deemed to be given with the consent of the A unless stated.</p> <p><i>Essa</i> made it clear that it is professionally unacceptable for a defence lawyer to advise his client not to file a defence statement.</p>
Nature of the defence	<ul style="list-style-type: none"> - Court may introduce further evidence - allowed to amend the indictment (erosion of the penalty shoot-out theory). - Consequence – Evidence ruled inadmissible if not raised early. <i>Writtle v DPP</i> 2009 EWHC 236 	Yes.		<p>Yes. By disclosing the nature of defence the client may lose the strategic advantage that he once held. Defeats adversarial principles by showing the other s</p> <p><i>Malcolm v DPP</i>.</p>
Matters taking issue with	Inferences	Yes – (but is it realistic to expect accused to identify this)		<p>Yes – because not realistic to expect accused to identify this. <i>Gleeson</i> End of the “ambush”.</p> <p>Thomas LJ again in <i>Chorley Justices</i> ‘sea change in the way which cases should be conducted’.</p> <p>R (on the application of Payne) –v</p> <p>R. v Musone (Ibrahim)</p>
Expert evidence	<p>Expert evidence refused if not served in time.</p> <p>Rule 24.1 “shall not adduce evidence without leave of the court”.</p>		<p>Yes- Have to serve expert reports in prescribed limits: <i>R v Ensor</i></p>	

Witness details	Refusal to permit witness to be called? - Probably not - <i>R (Tinnion) v Reading Crown Court</i> <i>R v Ensor,</i>		No.	Yes - Duty to attend any resulting interview. Yes, but how practical is this? The DL cannot attend every interview:
Other obligations imposed by case-law or court rules				
Case progression forms	Consequence - Turing the lawyer into a witness against the client? Sanctions for failing to comply: 1.WCO 2.Refusal of an application/adjournment 3.Professional conduct sanctions.		Yes. it is no longer appropriate for the defence to either put the prosecution to proof or ambush the prosecution at the close of the prosecution's case. - <i>Firth</i> Effectively analogous to DS served in CC	

<p>Plea and directions hearings</p>	<p>Failure to declare issues at PDH can lead to inadmissible evidence.</p>		<p>Yes, see <i>Ensor</i> above. All issues have to be declared as early as possible</p> <p>COA have upheld ruling that written rather than oral statements can be requested in the PCMH <i>K and Others</i> [2006] EWCA Crim 835</p>	
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5.4 Disclosure and the Impact on the Defence Lawyer

The requirements of the defence statement have already been outlined in Chapter Four and will not be repeated here.⁴⁹³ This section will concentrate on the conflicts the defence statement may cause for the defence lawyer. The CPIA 1996 provisions state that the defence statement must set out ‘the nature of the accused’s defence including any particular defences on which he intends to rely.’⁴⁹⁴ The admissions made in the defence statement will clearly have ramifications at trial. Despite the wording of the statutory provision and direct obligation on the accused, the defence statement has a theoretical impact on the classic conception of the defence lawyer, especially in terms of the lawyer- client relationship; the accused may not wish to divulge certain facts that the lawyer is compelled to reveal. How the lawyer tackles this problem will be addressed in the empirical study but theoretically, it could have a great impact on his role.

The completion and service of a defence statement is a statutory requirement and it has been held wholly unacceptable to attempt to circumvent this obligation, even if the accused has no positive case to answer. In *Essa*⁴⁹⁵ the court made it clear that it is professionally unacceptable for the lawyer to advise his client not to complete the defence statement. Lord Justice Hughes was ‘at a loss to understand how any lawyer can properly give the advice [not to file the defence statement] in the face of s.5(5) CPIA 1996, ‘... its requirement is that the accused provide [a copy] of the defence statement to the court and prosecutor.’⁴⁹⁶ In the pre-CPIA era, if the defendant had no positive case to advance yet wanted to enter a plea of not guilty, the lawyer would simply put the prosecution to proof and ask them to discharge the burden of proof. However, the CPIA provisions have fundamentally altered the traditional conception of the adversarial defence lawyer and therefore his approach to advancing the best interests of his client. It is no longer acceptable for him to consider the duty to his client as his primary duty; the duty he owes to the court is reinforced with the weight of statutory authority. Following *Essa*,⁴⁹⁷ it appears that the duty to the court could potentially override the lawyer’s duty to the client. The overriding of the primary duty to the client with that of the court creates a seismic

⁴⁹³ Please see p.76-119.

⁴⁹⁴ S.5(6)(a) Criminal Procedure and Investigations Act 1996.

⁴⁹⁵ [2009] EWCA Crim 43.

⁴⁹⁶ *Ibid* at para 18.

⁴⁹⁷ [2009] EWCA Crim 43.

swing; the primary duty theoretically swings from being the zealous advocate of his client to an advocate that has a duty of co-operation with the prosecution which serves an overarching duty to the court.

By disclosing the nature of the accused's defence in the statement, the client will lose the strategic advantage of surprise. The defence case statement is effectively showing the hand of the defence to the prosecution and enhances this notion of co-operation between the defence and the prosecution. *Gleeson*⁴⁹⁸ illustrates the erosion of the penalty shoot-out theory⁴⁹⁹ of the criminal trial. The penalty shoot-out theory is based on the premise that traditionally the prosecution has one shot to secure a conviction against the defendant; should the striker miss his penalty, he does not get an opportunity to re-kick. However, post-*Gleeson* it is clear that the prosecution may be permitted to amend its case should the defence introduce a legal argument that the prosecution should not succeed. Further, case law illustrates that the adversarial weapon has not only been blunted but completely prohibited from use. The courts have frowned upon on 'ambush' attempts as can be seen from a number of judgments. In *Brett v DPP*⁵⁰⁰ Leveson LJ reiterated the judgment from the *Chorley Justices*⁵⁰¹ case:

'For defence advocates to seek to take advantage of such errors by deliberately delaying identification of an issue of fact or law in the case until the last possible moment is in our view no longer acceptable, given the legislative and procedural changes to our criminal justice process in recent years'⁵⁰²

The days of the defence being able to raise points at the last moment are clearly over. In *Malcolm v DPP*⁵⁰³ the Divisional Court explained that the defence has a duty to make the points they will raise and their defence clear to both the prosecution and the court at an early stage. In this case, the defence took a point in the closing speech that was not raised

⁴⁹⁸[2004] 1. Cr. App. R. 29

⁴⁹⁹J.R. Spencer, 'Acquitting the Innocent and Convicting the Guilty – Whatever will they think of next!', C.L.J. (2007), 66(1), 27-30 at 27. By this Spencer means the prosecution gets one shot at goal and should their striker miss, he does not get another shot, no matter how unlucky the shot.

⁵⁰⁰[2009] EWHC 440.

⁵⁰¹*R (on the application of the DPP) v Chorley Justices* [2006] EWHC 1795.

⁵⁰²*ibid* per Thomas LJ at para 35.

⁵⁰³ [2007] EWHC 363.

with any prosecution witness. As such, the court permitted the prosecution leave to call further evidence. The Divisional Court commended the justices for ‘refusing to succumb to this kind of forensic legerdemain’⁵⁰⁴ and it is apparent that the tactics of the defence lawyer has begun to have stern restrictions placed upon them. Owusu-Bempah suggests that the defence disclosure regime, and the linked dilution of the ambush defence, indicates a move to a more inquisitorial model of criminal justice.⁵⁰⁵ She goes onto argue that issues regarding prosecutorial non-disclosure represents a greater threat to truth-finding than defence non-disclosure.⁵⁰⁶ Ultimately, she concludes that the defence disclosure is not an inquisitorial trait as ‘inquisitorial jurisdictions do not require defence disclosure.’⁵⁰⁷ However, the regime has cultivated a culture of defendant participation whereby the defendant is co-opted into the process in seeking to ensure the criminal justice process runs smoothly. Ultimately, this means that should the defence lawyer attempt to advance the interests of his client by using ambush tactics, that behaviour will be deemed wholly inappropriate. In ruling ambush tactics as inappropriate, the courts are effectively saying that whilst the duty to the client is of importance, the furthering of that duty must not come at the expense of the duty to the court. In essence, by ensuring that the defence lawyer will not spring a surprise at trial, that duty will be satisfied. Of course, by that ensuring the nature of the accused’s defence is disclosed and prohibiting ambush defences, these provisions have potentially altered the relationship between the defence lawyer and his client. Previously, the lawyer’s position was based on ‘zealous advocacy’. It can now be described as resting on the foundation of co-operation with the prosecution. Not only does this notion of co-operation hamper the lawyer in advancing the best interest of his client, it could also have ramifications for the lawyer-client relationship. For example, if the client knows that his lawyer has an obligation to co-operate with the prosecution, it could potentially lead to the client not trusting his lawyer. As a result, the notion that the lawyer is the ‘zealous advocate’ of the accused is defeated, because he is unable to zealously protect his client owing to the other competing duties that the lawyer must recognised and comply with.

⁵⁰⁴ *Ibid* at para 44.

⁵⁰⁵ O. Owusu-Bempah, ‘Defence Participation through pre-trial disclosure’, (2013) 17 E&P 283-201 at 200.

⁵⁰⁶ The issues surrounding prosecutorial non-disclosure are discussed in Chapter 8 p.254-274.

⁵⁰⁷ O. Owusu-Bempah, ‘Defence Participation through pre-trial disclosure’, (2013) 17 E&P 283-201 at 200.

5.4.1 Witness Disclosure

As of May 2010, the accused had his disclosure obligations further enhanced. Section 34 Criminal Justice Act 2003 (hereafter, CJA 2003) inserted a new section 6C into the CPIA 1996. This new section created a requirement for the defendant to disclose in advance of trial the names, addresses and dates of birth of any witnesses, other than himself, that he intends to call at trial.⁵⁰⁸ Furthermore, any other information that may be a material assistance in identifying or finding the proposed witness is required to be disclosed. Previously, this obligation only existed in relation to a witness who was giving evidence to support an alibi defence.⁵⁰⁹ Following the service of initial prosecution disclosure, the defendant has 14 days in which to disclose which defence witnesses he intends to call. *R v Ensor*,⁵¹⁰ concerned the late service of expert evidence; the court excluded the defence evidence as the defence did not alert the court to a significant failure. The Court of Appeal held that ‘it is incumbent upon both the prosecution and defence ... to alert the court and the other side at the earliest practical moment...’ and the court were entitled to exclude the evidence. The Law Society issued a Practice Note concerning Defence Witness Notices and this suggests a similar interpretation is likely to apply to defence witness notifications.⁵¹¹ Therefore the defence will not be able to wait until the close of the prosecution’s case before deciding the witnesses they will call. Should the defendant call a witness who was not disclosed, the court cannot prohibit him from giving evidence. The case of *R (Tinnion) v Reading Crown Court*⁵¹² stated that the court will not exclude the evidence of the witness being heard. The case was heard in the youth court and any disclosure of a defence statement was voluntary.⁵¹³ Furthermore, the court held that if the defendant was under an obligation to provide a defence statement, failure to do so does not render the evidence inadmissible. The ‘sanction against a defendant who fails to give such notice is not that the witness cannot be called, but that adverse comment can be conducted, and that the court or jury may draw such inference as is proper ...’⁵¹⁴

Therefore, in a true adversarial process, the prosecution should not be able to access defence witnesses for fear of an inimical risk of adverse pressure being placed on the

⁵⁰⁸ S.6C(1)(a) Criminal Procedure and Investigations Act 1996.

⁵⁰⁹ S.6A(2) Criminal Procedure and Investigations Act 1996.

⁵¹⁰ [2009] EWCA Crim 2519 at para 30.

⁵¹¹ The Law Society’s Practice Note on Defence Witness Notices, 27th January 2011 at para 2.4.1.

⁵¹² [2009] EWHC 2930 (Admin).

⁵¹³ S.6 Criminal Procedure and Investigations Act 1996.

⁵¹⁴ [2009] EWHC 2930 (Admin) per Clarke J at para 8.

witnesses by the police. This risk might influence the witness to not testify or alter their accounts of events. Furthermore, a theoretical risk exists that if the lawyer is not present at the interview the police may assert undue influence on the suspect by bullying or intimidating them to change their statement or not to testify at trial. Fundamentally, the police are not neutral actors in the criminal justice process; they want to obtain as much evidence as possible that will lead to the conviction of the defendant.⁵¹⁵

5.5 Potential Conflicts with the CrimPR

Theoretically, the disclosure provisions of the CPIA 1996 fundamentally alter the classic conception of the defence lawyer's role. By altering the role, the provisions place a number of obligations ostensibly on the lawyer, which create a number of conflicts or tensions that he will have to address. These conflicts and tensions are further heightened by the requirements of the CrimPR. Whereas previously the CPIA 1996 governed the pre-trial disclosure obligations of the accused, or more indirectly, the lawyer, the CrimPR place obligations directly on the defence lawyer as well as a number of indirect obligations. The Rules place obligations on both 'parties' and 'participants.' The glossary of the CrimPR states that a party is a person or organization directly involved in a criminal case, either as a prosecutor or a defendant. It is important to note that the defence lawyer is not classed as a 'party'. The CrimPR provide that 'anyone involved in any way with a criminal case is a participant in its conduct for the purposes of this rule,' which does include the defence lawyer.⁵¹⁶ This distinction is important as some obligations rest with a party, thereby not directly placed on the defence lawyer and some obligations are placed directly on a participant, which includes the defence lawyer. However, as with the above section, the question remains whether it is realistic to presume the defence lawyer will not take on an obligation, despite it being placed on the accused.

The overriding objective is succinctly outlined in Rule 1.1(1): The overriding objective of the CrimPR is that criminal cases be dealt with justly. The Rules⁵¹⁷ state that each participant, in the conduct of each case, must prepare and conduct the case in accordance with the overriding objective. The definition of dealing with a case 'justly' is outlined

⁵¹⁵ Baldwin suggests that police interviews are crucial to the investigation of crime as they may obviate the need for further enquiries. This notion can be transferred from interviewing the suspect to interviewing defence witnesses. See J. Baldwin 'Police Interview Techniques: Establishing Truth or Proof?' *The British Journal of Criminology* Vol.33(3) 1993 325-352.

⁵¹⁶ Rule 1.2(2) Criminal Procedure Rules 2011.

⁵¹⁷ Rule 1.2(1)(a) Criminal Procedure Rules 2011.

explicitly in Chapter Three.⁵¹⁸ However, the efficiency drivers are abundantly clear through both the CrimPR and judicial tenor post-*Auld* Review.⁵¹⁹ It is Rule 1.2(2)(e)⁵²⁰ that provides the core issue to this chapter; whilst dealing with the case efficiently and expeditiously is not to be derided, nevertheless little thought appears to be given to the impact on the role of the defence lawyer. This notion of ‘efficiency’ implicitly lays at the heart of the CrimPR and the courts have been clear to enforce the notion that time is not unlimited and a strict timetable is to be adhered to. The then Senior Presiding Judge for England and Wales, Lord Justice Leveson, published guidance on how courts should apply the CrimPR.⁵²¹ The guidance stated that ‘unnecessary hearings should be avoided by dealing with as many aspects of the case as possible at the same time.’⁵²² This includes taking the plea of the defendant or if no plea can be taken, an indication as to what plea would be ‘likely.’⁵²³ This plea or indication of the plea needs to be taken either at the first hearing or as soon as possible after the first hearing.⁵²⁴ Surprisingly, the guidance states that this obligation does not depend on the extent of advance information, service of evidence, disclosure of unused documents or the grant of legal aid.⁵²⁵ A footnote to the guidance explicitly states that the rules are not mere guidelines. Compliance is compulsory.⁵²⁶ The requirement for a plea at the earliest possible moment creates a professional conflict for the defence lawyer. On one hand, his duty to the court will be satisfied by compliance with this provision and advising his client to enter a plea. However, if the lawyer has insufficient information about the nature of the prosecution case, it may not be possible to give proper advice as to plea.⁵²⁷ The lawyer or the accused should must not be cajoled into entering a plea without proper thought and attention to what the consequences are.

⁵¹⁸ See pages 49-76.

⁵¹⁹ See *Gleeson* [2004] Crim LR 579; *R v Essa* [2009] EWCA Crim 43; *Malcolm v DPP* [2007] EWCA 363 and *Firth* [2011] EWHC 388 (Admin).

⁵²⁰ Rule 1.2(2) Criminal Procedure Rules dealing with the case efficiently and expeditiously;

⁵²¹ Lord Justice Leveson, *Essential Case Management: Applying the Criminal Procedure Rules*, Judiciary of England and Wales, 2009. Available here: <https://www.judiciary.gov.uk/publications/applying-criminal-procedure-rules/> [Last Accessed 17th May 2017].

⁵²² *Ibid* Point A.

⁵²³ Rule 3.8(2)(b) Criminal Procedure Rules 2010.

⁵²⁴ Rule 3.8(1) Criminal Procedure Rules 2010.

⁵²⁵ Point A, Lord Justice Leveson, *Essential Case Management: Applying the Criminal Procedure Rules*, Judiciary of England and Wales, 2009.

⁵²⁶ Please see Fn.1 Point A, Lord Justice Leveson, *Essential Case Management: Applying the Criminal Procedure Rules*, Judiciary of England and Wales, 2009.

⁵²⁷ P. Hungerford-Welch, *Summary Trial – Too Summary?* in *Criminal Justice Matters*, No.84 June 2011 10-11, 10.

This notion of efficiency is exemplified by the court's reluctance to grant adjournments. In *Balogun v DPP*⁵²⁸ Leveson LJ stated that any application to adjourn proceedings needed to be subjected to 'rigorous scrutiny.'⁵²⁹ In suggesting this, Leveson LJ reiterated the judgment of Openshaw J in *Aravinthan Visarathnam v Brent Magistrates' Court*⁵³⁰ where he said:

'...An[y] improvement in timeliness and the achievement of a more effective and efficient system of criminal justice in the Magistrates' Court will bring about great benefits to victims and to witnesses and huge savings in time and money.'⁵³¹

This desire for efficiency and a reduction of adjournments, thereby saving both time and other resources, is assisted by the compliance with the Case Management powers of the court and the completion of the Case Management Forms. These provisions are found in Part III of the CrimPR and the management of cases applies to both magistrates' court and Crown Court cases.⁵³² As discussed in Chapter Four,⁵³³ Rule 3.2(1) sets out the duty of the court: the court must further the overriding objective by actively managing the case. Interestingly, active case management is partly defined as 'the early identification of the real issues'⁵³⁴ and the 'early identification of the needs of witnesses.'⁵³⁵ If the accused is entering a not guilty plea the prosecution and defence must identify what the issues are at trial and what witnesses will be required to attend court. If the parties do not tell the court, the court must require them to do so. Any disputed issues will need to be explicitly identified so the court can ensure that the 'live' evidence heard at trial is confined to these real issues.⁵³⁶ Rule 3.10 of the CrimPR allows the court to 'limit the examination or re-examination of a witness, and the duration of any stage of the hearing.'⁵³⁷ This provision alters the trial dynamic and the classic adversarial conception of the defence lawyer; the contemporary defence lawyer will have to justify how long he intends to cross-examine a witness. Whilst 'fishing expeditions' are best avoided, some speculative questioning by the

⁵²⁸ [2010] EWHC 799 (Admin).

⁵²⁹ *Ibid* at para 8.

⁵³⁰ [2009] EWHC 3017 (Admin).

⁵³¹ *Aravinthan Visarathnam v Brent Magistrates' Court* [2009] EWHC 3017 (Admin) as per Openshaw J at para 19.

⁵³² Rule 3.1 Criminal Procedure Rules 2011.

⁵³³ See pages 75-108.

⁵³⁴ Rule 3.2(1)(a) Criminal Procedure Rules 2011.

⁵³⁵ Rule 3.2(1)(b) Criminal Procedure Rules 2011.

⁵³⁶ *ibid*.

⁵³⁷ Rule 3.10(d)(i) Criminal Procedure Rules 2011.

defence may be necessary to properly probe the evidence of a prosecution witness.⁵³⁸ Again, this demonstrates a clear tension between the duty to the client and the duty to the court. The interests of the client will be best served by his lawyer vigorously probing the prosecution witness in order to discover inconsistencies with his version of events. However, the duty to the court is satisfied by the court's time being used in the most efficient manner and the trial process being conducted in a more streamlined manner. The CrimPR makes this task of furthering the interests of the client even more difficult. Rule 3.10(b)(i) states that the court may require a party to indicate what witnesses they wish to give evidence in person. The court will then decide whether or not the attendance of the witness is justified or whether the witness statement could be read out under s.9 of the Criminal Justice Act 1967.⁵³⁹ However, if a defence lawyer contests the s.9 admission, he could be liable for a Wasted Costs Order⁵⁴⁰ if his client is found guilty. This presents an obvious tension for the lawyer; he could be penalized financially for trying to advance the interest of his client by exercising his duty to fully test the evidence of the prosecution by way of cross-examination.

5.6 Further Disclosure under the CrimPR

It was noted in Chapter Four⁵⁴¹ that the requirements of the CPIA 1996 to provide a defence statement only apply to trials on indictment. Should the defendant wish to disclose a defence statement in the magistrates' court, he can do so but this is not a mandatory provision.⁵⁴² However, the overriding objective of the CrimPR increases the disclosure obligations. The objective requires cases to be dealt with efficiently⁵⁴³ and this drive for efficiency includes completing a Case Management Form.⁵⁴⁴ The forms can be found in the Consolidated Criminal Practice Direction and the form is extensive.⁵⁴⁵ It consists of six pages, asking various questions about the offence including the defendant's plea⁵⁴⁶ and what witnesses will be required.⁵⁴⁷ Hungerford-Welch claims that the form is so extensive

⁵³⁸ P. Hungerford-Welch, *Summary Trial – Too Summary?* In Criminal Justice Matters, No.84 June 2011 10-11, 11.

⁵³⁹ Written statements are admissible as evidence to the extent of oral evidence.

⁵⁴⁰ The ramifications of which will be discussed in a later section, however, it is important to highlight the potential tension faced by the defence lawyer.

⁵⁴¹ See pages 76-121.

⁵⁴² S.6 Criminal Procedure and Investigations Act 1996.

⁵⁴³ Rule 1(2)(e) Criminal Procedure Rules 2011.

⁵⁴⁴ Rule 3.11(1) Criminal Procedure Rules 2011.

⁵⁴⁵ See Appendix Two for the Case Management Form and See Appendix Two for the Defence Case Statement to compare how similar the forms actually are. The case management form effectively circumvents statutory legislation by removing the voluntary requirement of defence disclosure in the magistrates' court.

⁵⁴⁶ Magistrates' Court, Preparation for Trial, question 7, page 2.

⁵⁴⁷ *Ibid*, question 10, page 4.

it effectively requires a defendant to provide much of the information that would be required in a s.6A CPIA defence statement. These provisions effectively undermine the exclusion of summary trial from the mandatory defence statement regime.⁵⁴⁸ The provision places a duty to disclose elements of the defendant's defence prior to trial, regardless of whether the case is heard in a magistrates' court or the Crown Court.

The completion of the form has the potential to be inherently dangerous for the accused; as was illustrated by *Firth v Epping Magistrates' Court*.⁵⁴⁹ As described in Chapter Four, in this case the defence lawyer made an assertion in the case progression form that the accused was acting in self-defence. At trial, the prosecution successfully relied upon this as an admission to prove presence at the scene. In *Gleeson* Auld LJ stated that the trial was '...a search for truth in accordance with the twin principles that the prosecution must prove its case and that a defendant is not obliged to inculpate himself.'⁵⁵⁰ However, in the *Firth* case, it is hard to argue that either of those principles have been satisfied. The defence tested the prosecution's point and quite properly took the point that identification could not be established.⁵⁵¹ However, the magistrates admitted the Case Management Form as evidence of an admission by the defendant that she was present at the scene and struck the complainant. In the Divisional Court, Toulson LJ upheld the magistrates' court decision, explaining:

'It does not infringe against the principle that a defendant is not required to incriminate himself for the court to require that the nature of the defence is made plain well before the trial. Of course, any requirement for disclosure of the nature of the defence must be a fair requirement, in the sense that it must not be extracted from a defendant in circumstances where the prosecution has no case ...'⁵⁵²

In *R v Newell*⁵⁵³ the appellant appealed against a conviction for possession of cocaine with intent to supply. At the Plea and Case Management Hearing (PCMH), the appellant did not

⁵⁴⁸ P. Hungerford-Welch, *Summary Trial – Too Summary?* in Criminal Justice Matters, No.84 June 2011 10-11, 11.

⁵⁴⁹ [2011] EWHC 388 (Admin).

⁵⁵⁰ *R v John Vincent Gleeson* [2004] 1 Cr App R 29, per Auld LJ at para 36.

⁵⁵¹ D. Rhodes 'Life in Crime: The Truth is Out There', *Solicitors' Journal*, vol 156, no 19 16th May 2011.

⁵⁵² *Firth v Epping Magistrates' Court* [2011] EWHC 388 (Admin), per Toulson LJ at para 22.

⁵⁵³ [2012] EWCA Crim 650.

serve a defence statement and when completing the Case Management Form, the lawyer, who did not represent N at trial, stated ‘no possession’. On the morning of the trial and under the instruction of new solicitors, a defence statement was served in which he accepted possession of cocaine but denied the intent to supply. The CPS sought to cross-examine him because there were inconsistencies with his case progression form and the defence statement admission. The judge allowed the cross-examination. The Court of Appeal allowed the appeal, holding that the judge should have excluded the case progression form under s.78 Police and Criminal Evidence Act 1984, as the sanction of adverse inferences for the failure to serve the defence statement was sufficient.⁵⁵⁴ This highlights just how careful the lawyer needs to be when completing the form in order to not incriminate his client.

The completion of the case progression form is inescapable. Andrew Keogh believes that the forms are analogous to the defence statement in the Crown Court and uses the case of *Rochford*⁵⁵⁵ to illustrate why. In this case, the court held:

‘There is a statutory obligation to file a defence statement and in addition there are statutory consequences if one does not. ... counsel, or for that matter a solicitor or other legal adviser, cannot properly advise a defendant to disobey the statutory duty imposed by section 5(5). He can of course advise the defendant what his obligation is, what he must put in his defence statement (which in turn depends upon how the trial is going to be conducted) and he must advise him of the consequences of not doing so.’⁵⁵⁶

Rhodes suggests that as there are no adverse inferences for failure to complete the case progression form, perhaps the lawyer should write on the form ‘the issue at trial is whether the prosecution can prove its case, I am not instructed to make any factual admissions until after the prosecution has complied with its duty of disclosure.’⁵⁵⁷ If the completion of the Case Management Form is analogous with the defence statement then perhaps the detail required in the defence statement will also correspond to the Case Management Form. In *R*

⁵⁵⁴ *Ibid* at para 36.

⁵⁵⁵ [2010] EWCA Crim 1928.

⁵⁵⁶ *R v Rochford* [2010] EWCA Crim 1928 per Hughes LJ at para 23

⁵⁵⁷ D. Rhodes ‘Life in Crime: The Truth is Out There’, *Solicitor’s Journal*, vol 156, no 19 16th May 2011.

*v Malcolm*⁵⁵⁸ a defence statement was said to be hopelessly inadequate in light of the requirements of s.6A CPIA. The statement involved an allegation of the theft of a number of items from a flat. Hooper LJ said:

‘It was insufficient merely to say that the Defendant did not accept that he took all the items being claimed by the Complainant. The Appellant was required to identify what was taken by him from the flat and to identify those items said to be stolen which he had left in the flat. If he had taken, for example, the fridge freezer and dishwasher, what had he done with them? If, as alleged, he did not intend permanently to deprive the owner of the items, what was his intention particularly in relation to those items missing ... To satisfy the statutory requirements, the Appellant ought also to have explained whether he accepted the value of some £15,000-£20,000 for the items taken and explained why, in his view, he was entitled to take the items which he did take.’⁵⁵⁹

However, if the lawyer did adopt the approach to the Case Progression Form suggested by Rhodes, it is hard to believe that the courts would find that response adequate. They would undoubtedly argue that this type of response directly breaches the lawyer’s duty to the court, as he will not be assisting the court to fulfil the overriding objective of dealing with cases justly, of which dealing with cases expeditiously and efficiently is a core element.⁵⁶⁰

5.7 Enforcement Mechanisms for non-compliance with the CPIA or CrimPR

5.7.1 Inferences

For non-compliance with the disclosure provisions under the CPIA 1996, the court is permitted make adverse comment and/or to draw adverse inferences. Section 39 CJA 2003 inserted an amended s.11 into the CPIA 1996. The statutory sanction available to the court for disclosure faults is that of drawing inferences. Should the accused fail to provide the

⁵⁵⁸ [2011] EWCA 2069.

⁵⁵⁹ *R v Malcolm* [2011] EWCA Crim 2069 per Hooper LJ at para 76.

⁵⁶⁰ Rule 1.2(e) Criminal Procedure Rules 2011.

defence statement,⁵⁶¹ provides one outside the prescribed time limits,⁵⁶² fails to give any updated version of the statement required by s.6B CPIA 1996,⁵⁶³ gives the updated statement outside of the prescribed time period⁵⁶⁴ or sets out inconsistent defences in his statement, then the court will make such comment that appears appropriate,⁵⁶⁵ or the court or jury may draw such inferences as appear proper in deciding whether the accused is guilty of the offence concerned.⁵⁶⁶ Further to proper inferences being drawn in the above examples, should the accused fall into the below categories inferences can also be drawn:

- (i) _____ puts forward a defence which was not mentioned in his defence statement or is different from any defence set out in that statement,
- (ii) _____ relies on a matter (or any particular of any matter of fact) which, in breach of the requirements imposed by or under section 6A, was not mentioned in his defence statement,
- (iii) _____ adduces evidence in support of an alibi without having given particulars of the alibi in his defence statement, or
- (iv) _____ calls a witness to give evidence in support of an alibi without having complied with section 6A(2)(a) or (b) as regards the witness in his defence statement.

These failures may also result in inferences being drawn by the court or jury.⁵⁶⁷ The final examples of when inferences can be drawn concerns when the accused provides a witness notice but then at trial he calls witnesses who are not adequately identified in the witness notice.⁵⁶⁸

5.7.2 Costs

Despite not carrying any statutory weighting, the Case Management Forms are akin to the defence statement. However, failure to comply with any CrimPR provision carries no express sanction. The CrimPR is an administrative rule rather than a statutory provision; as

⁵⁶¹ S.11(2)(a) Criminal Procedure and Investigations Act 1996.

⁵⁶² S.11(2)(b) Criminal Procedure and Investigations Act 1996.

⁵⁶³ S.11(2)(c) Criminal Procedure and Investigations Act 1996.

⁵⁶⁴ S.11(2)(d) Criminal Procedure and Investigations Act 1996.

⁵⁶⁵ S.11(5)(a) Criminal Procedure and Investigations Act 1996.

⁵⁶⁶ S.11(5)(b) Criminal Procedure and Investigations Act 1996.

⁵⁶⁷ S.11(2)(f)(i-iv) Criminal Procedure and Investigations Act 1996.

⁵⁶⁸ S.11(4)(b) Criminal Procedure and Investigations Act 1996.

such, it cannot create a sanction of adverse comment. Although the rules do not contain an adverse inference sanction, there are a number of other enforcement mechanisms designed to ensure all parties comply with the provisions. Auld LJ noted the problem of creating an enforcement mechanism for compliance with case management orders or other procedural orders. Auld stated that ‘[He had] anxiously searched here [in England and Wales] and abroad for just and efficient sanctions and incentives to encourage better preparation for trial ... we are not alone in this search and that, as to sanctions at any rate, it is largely in vain.’⁵⁶⁹

Rule 3.5(2) states that should a party fail to comply with a rule of direction, the court may fix, postpone, bring forward, extend, cancel or adjourn a hearing.⁵⁷⁰ The court has the power to make a costs order⁵⁷¹ or the court can impose any sanction as may be appropriate.⁵⁷² The final provision appears to give the court a great deal of latitude in administering and ensuring an effective enforcement mechanism. However, with no statutory weight behind the rules, it is difficult to envisage anything other than the court administering a financial penalty in respect of costs being ordered.

Although costs seem the most likely enforcement mechanism for breaching the rules, Auld LJ did highlight the difficulty of using such tools. He believed that orders of costs, wasted costs orders, the drawing of adverse inferences or depriving one side or the other of the opportunity of advancing an aspect or all of their case, are not ‘apt ways of encouraging and enforcing compliance with criminal pre-trial procedures.’⁵⁷³ Furthermore, orders against defendants are rarely an option owing to their lack of means and the difficulty in apportioning blame between them and their lawyer. The wasted costs order against a defence or prosecution lawyer is possible but again, there is difficulty in identifying where the fault lies.⁵⁷⁴ Costs against a defendant are governed by s.18 Prosecution of Offences Act 1985 (hereafter, POA 1985). In the case of any person convicted of an offence before the Crown Court, the court can make such an order as to the costs to be paid by the accused to prosecution as it considers just and reasonable. The amount shall be specified in

⁵⁶⁹ *Supra* fn.395 at para 231.

⁵⁷⁰ Rule 3.5(6)(a) Criminal Procedure Rules 2011.

⁵⁷¹ Rule 3.5(6)(b) Criminal Procedure Rules 2011.

⁵⁷² Rule 3.5(6)(c) Criminal Procedure Rules 2011.

⁵⁷³ *Review of the Criminal Courts of England and Wales*, 2001, Para 229.

⁵⁷⁴ *Ibid* para 230.

the order,⁵⁷⁵ which potentially means any order can be uncapped. Both the POA 1985 and the CrimPR state that the payment of costs from a defendant to the prosecution requires him to have been convicted.⁵⁷⁶ This is applicable to both convictions in the magistrates' and the Crown Court.

The Wasted Costs Order is governed by S.19A POA 1985; the Act allows the '... Crown Court to order the legal representative concerned to meet the whole of any wasted costs or such part of them...'.⁵⁷⁷ A legal representative is further defined as 'a person who is exercising a right of audience or a right to conduct litigation on behalf of any party to proceedings'.⁵⁷⁸ It is clear that the defence lawyer will fall within this category. A 'wasted cost' means any costs incurred by a party 'as a result of any improper, unreasonable or negligent act or omission on the part of any representative ...'.⁵⁷⁹

Guidance for the court can be found in the Practice Direction (Costs) Criminal Proceedings.⁵⁸⁰ Judges contemplating a wasted costs order should bear in mind the guidance given by the Court of Appeal in *Re P(A Barrister)*.⁵⁸¹ This case outlined a three-stage approach when a wasted costs order was being contemplated. Firstly, has there been any improper, unreasonable or negligent act or omission? Secondly, as a result have any costs been incurred by the party? Thirdly, if the answers to the first two questions are 'yes' the court could exercise its discretion to order the representative to meet the whole or part of the relevant costs. Paragraph 1.5 of the guidance illustrates that the Court of Appeal has given further guidance in the case of *Re P (A Barrister)*.⁵⁸² It was held that the primary purpose was to compensate rather than punish and because of the penal element to the sanction, a mere mistake is not sufficient to justify an order, there must be a serious error.

The case of *R v SVS Solicitors*⁵⁸³ concerns a wasted costs order against a firm of solicitors. The court ordered the firm to pay £3,402.50 in respect of wasted costs incurred by the prosecution for flying a witness from Australia. The court reminded the appellant law firm

⁵⁷⁵ S.18(1)(3) Prosecution of Offences Act 1985.

⁵⁷⁶ Criminal Procedure Rules 2010 Rule 76.5(1)(a)

⁵⁷⁷ S. 19A(1)(b) Prosecution of Offences Act 1985.

⁵⁷⁸ S.19(3) Prosecution of Offences Act 1985.

⁵⁷⁹ S.19(3)(a) Prosecution of Offences Act 1985.

⁵⁸⁰ [2004] 2 Crim R 26.

⁵⁸¹ (No 1 of 1991) [1993] QB 293.

⁵⁸² [2001] EWCA Crim 1728; [2002] 1 Cr App R 207.

⁵⁸³ [2012] EWCA Crim 319.

that it had to balance its duty to the court with its duty to the client. In this instance the defendant was manifestly seeking to manipulate the court's process by insisting on Mr. Amako's appearance at trial without disclosing the defence case that would be put to the witness. In the court's view 'the appellant firm made itself complicit in the manipulation being practiced by their client... and the appellant's conduct was improper, unreasonable and negligent.'⁵⁸⁴ Once again the court can be seen to further strengthen the notion that the lawyer's duty to his client has either been superseded by the duty to the court or, at best, is now on a level footing. Furthermore, theoretically, if the defence lawyer partakes in any behaviour that is contrary to the overriding objective, he could be potentially levied with a wasted costs order. Could this could have ramifications when a defence lawyer is deciding whether or not to cross-examine a prosecution witness or allow the evidence to be admitted under s.9 Criminal Justice Act 1967. This section means that witnesses should not have to attend court unless it is unavoidable. The CPS believe there are a number of benefits to this, including the savings of costs, as trials can be shortened and the criminal justice system as a whole can run more effectively.⁵⁸⁵

5.7.3 The Refusal of an application or adjournment

Should an application to adduce new evidence or introduce a witness be made outside of prescribed time limits, the court can refuse an application to hear the evidence. In *Musone*,⁵⁸⁶ at a late stage in a murder trial, the appellant attempted to introduce hearsay evidence without any prior notice. This evidence was highly damaging to the co-accused. The trial judge refused leave and the decision was upheld. Moses LJ said:

'The Act thus gives power to the judge to prevent that which, in the judge's assessment, might cause incurable unfairness either to the prosecution or to a fellow defendant. Plainly, the procedural rules should not be used to discipline one who has failed to comply with them in circumstances where unfairness to others may be cured and where the interests of justice would otherwise require the evidence to be admitted.'⁵⁸⁷

⁵⁸⁴ *Ibid* as per Field J at para 24.

⁵⁸⁵ Please see Evidence: Admitting evidence under s.9 and s.10 Criminal Justice Act 1967. http://www.cps.gov.uk/legal/d_to_g/evidence_admitting_evidence_under_the_cja/#a03 [Last accessed 14th May 2012].

⁵⁸⁶[2007] EWCA Crim 1237.

⁵⁸⁷*R v Musone* [2007] EWCA Crim 1237 per Moses LJ at para 37.

Both defendants were blaming the other for the murder. Moses LJ thought it was not possible to see how the overriding objective could be achieved if the court has no power to prevent deliberate abuse of the trial process. The co-defendant would have no opportunity of dealing with the allegation properly. As such the court had the power to exclude the evidence. Furthermore, to combat an ambush defence, the court could allow the prosecution to introduce further evidence even though the prosecution had closed its case. A similar approach was adopted in *Writtle v DPP*.⁵⁸⁸ Here, the defence sought to introduce an expert report after the close of the prosecution case. The magistrates rejected the application, as it was not relevant to the issues outlined in the case progression form. The defence lawyer was effectively seeking to introduce wholly new evidence. The Court of Appeal held that if the expert evidence was disclosed at a very early stage and the late application to adduce further evidence would undoubtedly cause delay then this approach was to be ‘deplored’.⁵⁸⁹ In this case the court held that the defence lawyer either knew the nature of the defence but failed to raise it appropriately, or the defence was contrived at the close of the prosecution’s case.⁵⁹⁰ The court believed that the efficient administration of justice would be delayed as the prosecution would need adequate time to consider how to refute the ‘new’ evidence and reiterated the point that the issues in the case ‘are identified well before a hearing’.⁵⁹¹

5.7.4 Professional Censure

Andrew Keogh believes that this is the most ‘nuclear option, but this initiative may require a scalp before the message hits home.’⁵⁹² Keogh’s statement indicates that currently there are no examples of this sanction being used for breaching the CrimPR. However, by examining the court’s reaction to other examples of ‘bad behaviour’, it is clear the court will not tolerate such an attitude. In the *Three Rivers*⁵⁹³ case Tomlinson J openly criticized the behaviour of the defendant’s barrister. Mr. Pollock was infrequently rude to the judge, which the judge ignored. However, the sustained rudeness to his opponent ‘was of an altogether different order. It was behaviour not in the usual tradition of the Bar and it was

⁵⁸⁸ [2009] EWCA 236 (Admin).

⁵⁸⁹ *Ibid* at paragraph 14.

⁵⁹⁰ *Ibid*.

⁵⁹¹ *Ibid*.

⁵⁹² A. Keogh, speaking at the Eldon Lecture Series 2011 at Northumbria University School of Law. 24th November 2011. <http://www.youtube.com/watch?v=2bhMweYNF24> [Last Accessed 16th April 2012].

⁵⁹³ [2006] EWHC 816 (Comm).

inappropriate and distracting...'.⁵⁹⁴ In 2009 the Law Society Gazette reported a case where a judge 'slams solicitor-advocates for incompetence.'⁵⁹⁵ The judge felt that the defendant was represented so poorly that he almost discharged the jury owing to the incompetence of his lawyers. The lawyers were accused of not understanding the rules of re-examination and the jury were misled about the bad character of one of the defendants. The judge added that the basic rules of both law and procedure had been regularly broken.⁵⁹⁶ Although these examples are vastly different from a breach of the CrimPR, they give a flavour of the expectations of the court. Theoretically, the court will be willing to use this sanction should a lawyer fail to comply with the overriding objective of the rules.

5.7.5 Professional Censure

Furthermore, the lawyer's professional body could potentially censure the lawyer. The Solicitor's Regulation Authority Handbook contains a number of disciplinary measures for lawyers. The lawyer can be given a written rebuke,⁵⁹⁷ he can be made to pay a penalty⁵⁹⁸ or/and have details of the rebuke or penalty published.⁵⁹⁹ Furthermore, he can be disqualified from acting as a Head of Legal Practice, a Head of Finance and Administration or being a manager/employee of a licensed body.⁶⁰⁰ The final opportunity is for an application to the Solicitors Disciplinary Tribunal. Because of the severity of the sanctions it is perhaps unrealistic that the final three sanctions will be used to punish a breach of the rules. Theoretically, it is entirely plausible that the first two sanctions *could* be used to punish lawyers who do not comply with the CrimPR. To give a written rebuke, three conditions need to be met. Firstly, the act or omission needs to be deliberate or reckless,⁶⁰¹ caused or had the potential to cause loss or significant inconvenience to any other person.⁶⁰² Furthermore, the act or omission could have occurred because the lawyer failed to recognised the obligations given by the court.⁶⁰³ If the lawyer continued acting in

⁵⁹⁴ *Ibid* per Tomlinson J at para 135.

⁵⁹⁵ C. Baksi, 'Fraud Case Judge Slams Solicitor-Advocates for Incompetence, Law Society Gazette, 23 April 2009.

⁵⁹⁶ Please see <http://www.lawgazette.co.uk/news/fraud-case-judge-slams-solicitor-advocates-incompetence> [Last accessed 9th June 2012].

⁵⁹⁷ Solicitors Regulation Authority Handbook, 3rd Edition, (2012), para 2.1(a), <http://www.sra.org.uk/solicitors/handbook/discproc/part1/content.page> [Last accessed 9th May 2017].

⁵⁹⁸ *Ibid* para 2.1(b).

⁵⁹⁹ *Ibid* para 2.1(c).

⁶⁰⁰ *Ibid* 2.1(d).

⁶⁰¹ *Ibid* 3.1(a),(I).

⁶⁰² *Ibid* para 3.1(a),(ii).

⁶⁰³ *Ibid* para 3.1(a),(iii).

this manner for a period of time,⁶⁰⁴ or persisted once he knew it was improper,⁶⁰⁵ he has the potential to mislead clients or the courts.⁶⁰⁶ The second condition is that a proportionate outcome in the public interest is either a written rebuke or a direction to pay a penalty.⁶⁰⁷ The final condition is that the act or omission was neither trivial nor justifiably inadvertent.⁶⁰⁸

A barrister may also be sanctioned should his conduct be called into question. The Professional Conduct Handbook⁶⁰⁹ states there are seven potential sanctions if charges of professional misconduct are proved. Section 6.12 states that the barrister could be disbarred,⁶¹⁰ suspended,⁶¹¹ ordered to pay a fine,⁶¹² order to forgo/repay fees,⁶¹³ reprimanded,⁶¹⁴ permanently or temporarily excluded from undertaking publicly funded work,⁶¹⁵ or finally advised to his or her future conduct.⁶¹⁶ Again, as with the SRA the more severe sanctions are likely to be unsuitable for breaches of the rules, but the less severe, such as the reprimand or the warning over future conduct, could potentially incur a sanction from the Bar Standards Council.

5.7.6 Sanctions: Conclusion

As this section has illustrated, there are a number of enforcement mechanisms that are available to the court. However, their application is fraught with difficulty. A direction to draw adverse comment for breaching the disclosure provisions only affects the defendant and at times the defence lawyer may have difficulty in obtaining instructions from his client. Furthermore, Denyer indicates that courts are unlikely to allow adverse comment for late disclosure unless it was ‘very very late indeed.’⁶¹⁷ Furthermore, it is not appropriate to draw inferences should the fault lie with the lawyer. Costs orders against the defendant are unlikely: firstly, owing to his lack of means; secondly, as Auld LJ stated, it is

⁶⁰⁴ *Ibid* para 3.1(a),(iv).

⁶⁰⁵ *Ibid* para 3.1(a),(v).

⁶⁰⁶ *Ibid* para 3.1(a),(vi).

⁶⁰⁷ *Ibid* para 3.2(a),(i) – (ii).

⁶⁰⁸ *Ibid* para 3.1(c).

⁶⁰⁹ Professional Misconduct 2006/07, Inns of Court School of Law, City University, London (Oxford University Press: Oxford 2006).

⁶¹⁰ *Ibid* s.6.12(a).

⁶¹¹ *Ibid* s.6.12(b).

⁶¹² *Ibid* s.6.12(c).

⁶¹³ *Ibid* s.6.12(d).

⁶¹⁴ *Ibid*.s.6.12(e).

⁶¹⁵ *Ibid* s.6.12(f).

⁶¹⁶ *Ibid* s.6.12(g).

⁶¹⁷ R. Denyer, ‘The Defence Statement’ [2009] Crim LR 340 at 343.

difficult to establish who was at fault. Wasted costs could be imposed on the lawyer, but again the difficulty is found in establishing who was at fault. The courts could refuse to grant an adjournment or allow certain evidence to be adduced. These provisions would surely undermine the overriding objective of dealing with cases justly. After an analysis of the available sanctions, it appears there is not one ‘fix-all’ sanction that the court can apply and therein lies the difficulty faced by the courts.

5.8 Professional Guidance

This chapter has explored a number of conflicts posed by the disclosure obligations of the CPIA 1996 and the CrimPR. However, neither the CPIA nor the CrimPR offer any guidance on how the defence lawyer should deal with any conflicts or tensions that he faces. The biggest conflict is the duty to the client versus the duty to the court. The Solicitors Regulation Authority Handbook states that ‘upholding the rule of law and the proper administration of justice’⁶¹⁸ is the first principle the lawyer has to adhere to. Furthering the best interests of each client is not mentioned until principle 4. Chapter 5 of the guidance explicitly states that ‘where relevant, clients are informed of the circumstance in which your duties to the court outweigh your obligations to the client’.⁶¹⁹ However, the SRA handbook offers no guidance on how to resolve the conflict between the duty to the court and the duty to the client, and neither does it explicitly state which duties to the court outweigh the duty to the client. Chapter Three ‘Conflicts of Interest’ merely discusses the various times a lawyer may find himself in conflict rather than dealing with the conflicts between the differing principles outlined above, so any guidance offered by the SRA to resolve conflict can be seen as rather opaque.

The Law Society’s Code for Advocacy states that ‘advocates have an overriding duty to the court to ensure in the public interest that the proper and efficient administration of justice is achieved: they must assist the court in the administration of justice...’.⁶²⁰ Paragraph 2.3 acknowledges that the lawyer has a duty to the client but again, this acknowledgment comes after the duty to the court is acknowledged. The paragraph states that advocates must ‘promote and fearlessly protect and by all proper and lawful means the

⁶¹⁸ *Supra* Fn. 587 Part 1.

⁶¹⁹ *Ibid* para 5.05.

⁶²⁰ The Law Society’s Code for Advocacy, para 2.2

http://www.lawsociety.org.uk/documents/downloads/Profethics_Advocacy.pdf [Last accessed 16th May 2012].

client's best interests and will (should) do so without any regard to their own interests...'.⁶²¹ But again there is no guidance on how to act should one or more of the duties conflict. The Bar Standards Council almost mirrors the aforementioned pieces of professional guidance. Rule 302 states that 'a barrister has an overriding duty to the Court to act with independence in the administration of justice; he must assist the court ...'.⁶²² Rule 303 then outlines the duty to the client: 'He must promote and protect fearlessly and by all proper and lawful means the lay client's best interests and do so without regard to his own interests...'.⁶²³

It is clear by analyzing the professional guidance that the professional and disciplinary bodies regard the duty to the court as being primary and having paramount importance. However, there is very little guidance on what to do should the duty to the court come into conflict with the duty to the client. The Law Society's Practice Note⁶²⁴ also offers very little guidance, although the note does use the case of *Arthur J.S. Hall and Co v Simmons*⁶²⁵ to illustrate that the duty to the court:

'is not just that he must not mislead the court, that he must ensure that the facts are presented fairly and he must draw attention of the court to the relevant authorities even if they are against him. It extends to the whole way in which the client's case is able to focus on the issues as efficiently and economically as possible.'⁶²⁶

The practice note takes the time to reiterate what was stated in the SRA handbook. It lists the duty to uphold the proper administration of justice as the lawyer's primary duty. The duty to advance the best interests of the client is only the fourth duty of the lawyer, coming after acting with integrity and independence. It would seem that the legal professions, in the post-CPIA/CrimPR era, have accepted that the primary duty of the modern defence

⁶²¹ *Ibid* para 2.3.

⁶²² Bar Standards Council, Part III, Fundamental Principles (2004) Rule 302, <http://www.barstandardsboard.org.uk/regulatory-requirements/the-code-of-conduct/the-code-of-conduct/part-iii-fundamental-principles/#appall> [last accessed 16th May 2017].

⁶²³ *Ibid* Rule 303.

⁶²⁴ Law Society, Practice Note, Criminal Procedure Rules: Impact on Solicitors Duty to the Client (2009) http://www.lawsociety.org.uk/documents/downloads/practicenote_criminalprocedurerules.pdf [Last accessed 15th May 2012].

⁶²⁵ [2000] UKHL 38, [2002] 1 AC 615.

⁶²⁶ As Per Lord Hope at 715.

lawyer is explicitly to the court and to the administration of justice. Three different sets of professional guidance state this, as does case law and a Law Society Practice Note. However, no guidance is given as to how the lawyer should deal with any conflict, save for a brief explanation that at times the client will have to be informed that a duty to the court outweighs his own duty. This is significant departure from the classic conception of the defence lawyer that was established in Chapter Four.⁶²⁷

5.9 The implications of the CPIA and CrimPR for the defence lawyer

As this chapter has illustrated, the obligations that Lord Reid highlighted in *Rondel v Worsley*⁶²⁸ have been fundamentally altered. The duty to the client appears to have been superseded by the duty to the court; this usurping of duties can be seen through the enhanced obligations the defence lawyer now has to comply with under the CPIA and CrimPR regimes. These obligations include: furthering the overriding objective of dealing with cases justly; which incorporates an obligation to deal with the case efficiently and expeditiously⁶²⁹ and complying with case management provisions, which include assisting the court in fulfilling the overriding objective. A key component of the overriding objective is the early identification of the real issues;⁶³⁰ he must inform the court and the other side of any significant failures, even if he is not responsible for the failures;⁶³¹ he must advise his client to cooperate and comply with the disclosure obligations and subject to the instructions of his client, he must draft and serve both the defence case statement⁶³² and/or the Case Progression Form; the identity and details of the witnesses the defence intends to call is required to be disclosed to the prosecution and a Case Progression Officer has to be appointed.⁶³³ It is important to remember that not all of these obligations rest directly on the defence lawyer. However, it is arguable that it is unrealistic to assume the accused is capable of fulfilling such onerous duties; the effect of which means that the obligations rest indirectly on the defence lawyer.

⁶²⁷ See pages 75-108.

⁶²⁸ [1969] 1A.C. 191. The three duties identified were the duty to the client, the duty to the court and the duty to the public

⁶²⁹ Rule 1.1(2)(e) Criminal Procedure Rules 2010.

⁶³⁰ Rule 3.2(2)(a) Criminal Procedure Rules 2010.

⁶³¹ Rule 1.2(1)(c) Criminal Procedure Rules 2010. A significant failure is one that is likely to hinder the court in furthering the overriding objective.

⁶³² Where applicable in Crown Court cases.

⁶³³ Rule 3.4 Criminal Procedure Rules 2010.

It is arguable that the fulfilment of some of these duties does not further the best interest of the client, for example, the completion of the defence statement. By submitting the statement, the defendant might lose any strategic advantage that he held. *Gleeson*⁶³⁴ illustrates that the prosecution no longer has one attempt to secure a conviction; the prosecution might be permitted to amend their indictment should the defence attempt to ‘ambush’ the prosecution at a late stage. As Thomas LJ stated, this type of behaviour is ‘no longer acceptable, given the legislative and procedural changes that have taken place ...’.⁶³⁵ This notion of co-operation with the prosecution holds potential implications for the lawyer-client relationship. It might lead to the client becoming untrusting of his lawyer, as he is aware that furthering his best interests is not his lawyer’s primary obligation. The CPIA 1996 disclosure regime is a statutory obligation and the defence lawyer cannot advise the client not to comply with the regime, as this would be professionally improper. In *Essa*,⁶³⁶ the court made it clear that the lawyer can advise the client that it is his choice whether or not to file the defence statement and he can outline the merits of either approach, but it is for the client to decide if he will submit the statement. The lawyer cannot advise him to simply not complete the statement.

Although the defence case statement is only required for trials on indictment, the Case Progression Form is analogous to the defence statement.⁶³⁷ This effectively extends the compulsory disclosure regime to magistrates’ courts. The completion of the Case Progression Form could potentially lead to breaching the privilege against self-incrimination or, at the very least, not be in the best interests of the client. For example, in the *Firth* case the prosecution established the identity of the defendant as the assailant by using an admission on the case progression form. The court allowed the admission and held that ‘it does not infringe against the principle that a defendant is not required to incriminate himself for the court to require that the nature of the defence is made plain well before the trial.’⁶³⁸ However, theoretically one could argue that the completion has led to a breach of the privilege, as without the completed form, the prosecution might not have been able identify the assailant. Further to not being in the client’s interest, it could be argued that the Case Progression Form, whilst furthering the overriding objective,

⁶³⁴[2004] 1. Cr. App. R 29.

⁶³⁵*R (on the application of the DPP) v Chorley Justices* [2006] EWHC 1795 per Thomas LJ at para 35.

⁶³⁶*R v Essa* [2009] EWCA Crim 43.

⁶³⁷A. Keogh, speaking at the Eldon Lecture Series 2011 at Northumbria University School of Law. 24th November 2011. <http://www.youtube.com/watch?v=2bhMweYNF24> [Last Accessed 2nd July 2012].

⁶³⁸*Firth v Epping Magistrates’ Court* [2011] EWHC 388 (Admin), per Toulson LJ at para 22.

effectively extends the compulsory disclosure regime into the magistrates' court. Whilst it may not be as comprehensive as the defence statement, the Case Progression Form clearly contains elements analogous to the s.5 CPIA 1996 defence statement. The impact of this statement forces the defence lawyer to disclose key facts concerning the case. This provides a clear conflict of duties for the defence lawyer. In order to combat the potential breach of self-incrimination, Rhodes suggests that the content of the Case Progression Form should not contain vast amounts of detail.⁶³⁹ Edwards also suggests that the form should be completed with the word 'privileged.'⁶⁴⁰ Whilst the approaches suggested by Rhodes and Edwards appear sound in a theoretical context, the court may well view the approaches as inadequate. The CPIA 1996 defence statement requires a certain level of detail;⁶⁴¹ it is not sufficient to merely supply minimal detail. If the Case Progression Form is analogous to the defence statement, one can presume the level of detail will also have to be both extensive and comprehensive.

Although the Case Progression Form has the potential to extend the compulsory disclosure regime into magistrates' courts, completion of the forms is not a statutory obligation; as such there is no statutory sanction for failure to comply with the form.⁶⁴² However, it is arguable that the defence lawyer will have to notify the both the court and prosecution of the accused's failure to supply adequate information to complete the form, as this could potentially be deemed a 'significant failure' which will hinder the furthering of the overriding objective. Theoretically, the lawyer might have to act against his client's interests by informing both the court and the prosecution that his client did not wish to comply with the provisions. This might further weaken the lawyer-client relationship.

As well as conflicting with the best interests of the client, some of the modern obligations of the defence lawyer may conflict with the overriding objective of the CrimPR and, in particular, rule 1.1(2)(e) of dealing with cases efficiently and expeditiously. Firstly, the disclosure of defence witnesses might cause tension with the overriding objective.⁶⁴³

⁶³⁹ D. Rhodes 'Life in Crime: The Truth is Out There', *Solicitor's Journal*, vol 156, no 19 16th May 2011.

⁶⁴⁰ A. Edwards, 'Case Management Forms' [2011] *Crim L Rev* 546 at 548.

⁶⁴¹ Please see *Malcolm v DPP* [2007] EWCA 363 and in particular the comment by Hooper LJ on para 76 or p.134.

⁶⁴² Unlike the sanction of adverse inferences for failure to complete and serve a defence case statement.

⁶⁴³ Currently these concerns are theoretical, the extent of their impact in practice will be examined in the empirical study in Chapter Four, thus far nothing is written in the academic or professional literature as to the regimes impact.

Edwards believes that this issue will cause great concern to defence lawyers, as witnesses are already reluctant to provide assistance and greater pressure will be placed on them by the police and may discourage some witnesses from giving evidence.⁶⁴⁴ He believes it to be ‘unthinkable that the lawyer would not attend a police interview of a defence witness.’⁶⁴⁵ However, is this creating even more work for the defence lawyer and could it lead to a failure to satisfy the overriding objective if the lawyer cannot attend an interview and delays proceedings?

A further problem that might frustrate the overriding objective is the location of the interview. The witness is most likely to feel comfortable being interviewed in their home, although this would be unrealistic owing to a lack of recording equipment. If the witness were interviewed at the police station, would they feel comfortable being interviewed in what could be described as a ‘hostile’ or ‘alien’ environment? This dilemma might be solved if the interview could take place at the lawyer’s office, if they had the sufficient equipment to record the interview. This might be appropriate for a larger defence firm, but smaller firms may not have such equipment.

A similar argument might be made for the implementation of requirements regarding the Case Progression Officer. Rule 3.4 states that each party must appoint a Case Progression Officer at the beginning of each case. The officer must monitor compliance with directions,⁶⁴⁶ keep the court informed of the progress of the case,⁶⁴⁷ ensure he is available for contact in ordinary business hours,⁶⁴⁸ respond promptly and reasonably to communications about the case,⁶⁴⁹ and appoint a substitute if he is unavailable.⁶⁵⁰ The duties are extensive and require the officer to regularly check both e-mails and voicemail to ensure the latest directions are not missed. As with the problem with witness interviewing, this might not prove problematic for larger defence firms, but for the smaller firms this could have significant ramifications. What if staffing levels are not sufficient to satisfy the requirement of the Case Progression Officers? This poses another tension that has the potential to derail the overriding objective of dealing with cases efficiently and expeditiously and it is unclear what the sanctions are for any non-compliance.

⁶⁴⁴ A. Edwards ‘Criminal: Defence Witness Notices’ *Law Society Gazette*, 6 May 2010.

⁶⁴⁵ A. Edwards ‘Criminal: Defence Witness Notices’ *Law Society Gazette*, 6 May 2010.

⁶⁴⁶ Rule 3.4(4)(a) *Criminal Procedure Rules 2010*.

⁶⁴⁷ Rule 3.4(4)(b) *Criminal Procedure Rules 2010*.

⁶⁴⁸ Rule 3.4(4)(c) *Criminal Procedure Rules 2010*.

⁶⁴⁹ Rule 3.4(4)(d) *Criminal Procedure Rules 2010*.

⁶⁵⁰ Rule 3.4(4)(e) *Criminal Procedure Rules 2010*.

The enforcement mechanisms available to the court are, on the whole, relatively weak and the stronger sanctions available to the court relate to the accused rather than the lawyer. The sanction of adverse inferences only applies in limited cases, where the accused fails to comply with the compulsory disclosure regime in the Crown Court cases. There is no statutory sanction for failing to complete a Case Progression Form, although the accused might be punished because the court may allow the prosecution to amend their indictment or re-open their case. As mentioned above, should the accused not wish to complete the Case Management Form, this potentially could be a ‘significant failure’. The ramification of this might be seen as a further dilution of the lawyer-client relationship. The Case Progression Form potentially turns the lawyer into a witness against his client and should the accused not wish to complete the form, the lawyer must report him to the court and ‘tell tales’ regarding his lack of co-operation. This could further strain the relationship between lawyer and client to the point where the client does not feel he is acting in his best interests.

Enforcement mechanisms to ensure the defence lawyer complies with his obligations are also relatively weak. The sanctions available to the court centre around costs orders and the threat of professional censure. In regards to costs, a three-stage approach was established in *Re P (A Barrister)*:⁶⁵¹

- (1) where the lawyer was guilty of any improper, unreasonable or negligent act or omission and;
- (2) where costs were incurred by the other side, and;
- (3) where the court could exercise its discretion to order costs against the relevant lawyer.

It is difficult to imagine where a breach of the CrimPR would not constitute ‘improper, unreasonable or negligent act’ as established in the *Re P (A Barrister)*.⁶⁵² One can presume the threat of costs is very real, although in practice the sanction appears to be infrequently used. However, the *SVS* case⁶⁵³ indicates that the court will punish the defence lawyer should he not comply with the wording of the CrimPR. As discussed earlier in the chapter,

⁶⁵¹ (No 1 of 1991) [1993] QB 293.

⁶⁵² (No 1 of 1991) [1993] QB 293.

⁶⁵³ *R v SVS Solicitors* [2012] EWCA Crim 319.

the case concerned a defence lawyer who was seen to be complicit in his client's manipulation of the court process. This manipulation was two-fold; firstly, by not serving a defence statement and secondly, by not providing a reason for contesting a hearsay notice. This resulted in the Crown having to fly a witness from Australia to testify. The second type of sanction aimed at the lawyer is professional censure, again this sanction is rarely used and there are no cases reported in the literature concerning censure for breaches of the CrimPR.⁶⁵⁴

The implications of the CPIA 1996 and CrimPR appear to suggest that the duty to the court is the paramount obligation for the defence lawyer to satisfy. However, both the courts and Law Society are guilty of advancing mixed messages. In *Medcalf v Mardell*⁶⁵⁵ Lord Hobhouse stated: 'at times ... duties to the client will be liable to bring him into conflict with the duty to the court ... this may require more courage to represent a client in the face of a hostile court but the advocate must be prepared to act fearlessly.'⁶⁵⁶ The statement espouses that the defence lawyer is still the zealous advocate of the accused, but the reminder from Lord Hobhouse does not provide any practical guidance to address any conflict or tension the changing legislation has created. The professional guidance somewhat contradicts the statement by Lord Hobhouse and appears to give precedence to the duty to the court being the paramount obligation of the lawyer:

'The CrimPR stipulates that solicitors must assist the court in the management of the case. This can come into conflict with their duty to act in the best interests of their client where the client wishes to exercise their right to put the prosecution to proof and offers little by way of assistance to the court.'⁶⁵⁷

Although the professional guidance offers no assistance in how a lawyer should deal with a between his duty to his client and the court, one can assume that the expected approach would be to advance the duty to the court as the paramount duty. This approach falls in

⁶⁵⁴ The empirical chapter on pages 174- 224 will test the validity of use of censure as an appropriate sanction for breach of the CrimPR.

⁶⁵⁵ *Medcalf v Mardell* [2003] 1 AC 120 (HL).

⁶⁵⁶ *Ibid* per Lord Hobhouse at para 142.

⁶⁵⁷ Legal Policy Directorate, *Criminal Procedure Rules: Impact on Solicitor's Duties to the Client*, (2009) London, The Law Society at p.9.

http://www.lawsociety.org.uk/new/documents/2009/practicenote_criminalprocedurerules_031209.pdf [Last accessed 18th April 2012].

line with the case law, legislation and administrative tools examined in this chapter.

Should the lawyer only advance the interests of his client and adopt an uncooperative approach to his duty to the court, it is clear that the court will be frustrated. This will leave the overriding objective of dealing with cases justly unsatisfied. In the modern era, it appears that this approach will be deemed wholly unacceptable. The lawyer is required to assist in the satisfaction of the overriding objective by identifying the real issues in dispute, even if this means losing his client any tactical advantage.⁶⁵⁸ By identifying the real issues, the trial can be conducted in a very efficient fashion. The courts have fully endorsed this approach, such as in *Jisil*,⁶⁵⁹ where the court held that it was not a concomitant of a right to fair trial that each side could take as much time as they like.⁶⁶⁰ Judge LJ reiterated the same point in *Chaaban*⁶⁶¹ when he said ‘time is not unlimited. No one should assume that trials can continue to take as long or use as much time as both sides may wish.’⁶⁶² This shift of duty, by way of increased obligations in order to deal with cases in the most efficient manner, has potentially come at the cost of advancing the client’s interests. Whilst the drive for a more efficient trial process should be applauded, speed must not be achieved at the expense of the accused’s fair trial rights. This includes allowing his lawyer sufficient time to prepare the case and the right to present that fully.⁶⁶³ The consequence of this shift in duty is three-fold:

Role Confusion: The lawyer is the ‘zealous advocate’ of his client and the furthering of his best interests is the paramount obligation. If the duty to the court has superseded this obligation, this could cause confusion as to what the role of the defence lawyer should be.

Tensions for Lawyer: Following on from the above point, the confusion illustrated above may lead to the various tensions for the defence lawyer. When the two duties clash, what is the best course of action? The professional guidance is unhelpful in this instance and by examining the *Firth* case it appears the duty to the court takes

⁶⁵⁸ Legal Policy Directorate, *Criminal Procedure Rules: Impact on Solicitor’s Duties to the Client*, (2009) London, The Law Society at p.10.

⁶⁵⁹ [2004] EWCA Crim 696.

⁶⁶⁰ *R v Jisil* [2004] EWCA Crim 696 per Judge LJ at para 14.

⁶⁶¹ *R v Chaaban* [2003] EWCA Crim 1012.

⁶⁶² *Ibid* per Judge LJ at para 37.

⁶⁶³ P. Hungerford-Welch, *Summary Trial – Too Summary?* in *Criminal Justice Matters*, No.84 June 2011 10-11, 11.

precedence and the Case Management Form must be completed. This comes at the cost of furthering the best interests of the client. Does the modern day defence lawyer consider advancing the client's best interests or have they been operationalised to the extent that the duty to the court is accepted as the paramount obligation they have to satisfy?

Implications for the lawyer-client relationship: Does the paramount duty to the court diminish or impact upon the relationship between the defence lawyer and his client? This will be elucidated more in the empirical chapter as no work, thus far, has highlighted this concern. Theoretically, it could be argued that compliance with the CrimPR may lead to a lack of co-operation between the lawyer and his client. The client may not wish to divulge information that he feels may incriminate him in the pursuit of the overriding objective. The notion of co-operation may leave the client feeling untrusting of his lawyer, because he does not hold advancing his interests as the paramount obligation he has to satisfy.

Furthermore, the requirement for the defence lawyer to co-operate with the prosecution potentially weakens the privilege against self-incrimination. The lawyer is being compelled to assist in building a case against his client. The watering down of principle appears to suggest that the building of a case against the accused no longer rests solely with the prosecution but it is in fact a shared burden. By using the *Firth* example once more, the accused assists in the fulfilling the overriding objective by completing the Case Management Form yet he also incriminates himself; the Crown uses the admission on the form to establish her presence at the scene. However, the judiciary does not believe this example will cause any conflict or problem. In the *Review of Disclosure in Criminal Proceedings*, Lord Justice Gross stated:

‘A constructive defence approach to disclosure issues should be seen and encouraged as professional “best practice”. It involves no sacrifice of the defendant’s legitimate interests; in large and complex cases it is difficult to see how the system can otherwise remain affordable.’⁶⁶⁴

⁶⁶⁴ Gross LJ, *Review of Disclosure in Criminal Proceedings*, Judiciary of England and Wales, at p.8

This illustrates the complexity regarding the shift in duties and further emphasises the role confusion and the ramifications of such role confusion. On one hand, we have very drastic changes to both the role of the defence lawyer and the obligations they have to undertake. On the other, the judiciary claims the legitimate interests of the client are not sacrificed; although it is difficult to fathom how Ms. Firth's interests were not sacrificed by completing the Case Progression Form, and effectively breaching her privilege against self-incrimination. This is even more difficult to understand as a magistrates' court case would not fall into Gross' category of 'large and complex'. The privilege against self-incrimination is enshrined in the European Convention of Human Rights. Whilst the Article 6 right is not absolute, it is a 'strong right.'⁶⁶⁵ Owusu-Bempah suggests that the notion of the defendant providing the prosecution with information that could be used against him is deeply non-adversarial. Such changes are diluting at best, or at worst, ignoring these fundamental defence rights that have been established to both protect the defendant and ensure that the process is fair.⁶⁶⁶ By forcing the lawyer to co-operate with the prosecution in order to achieve maximum efficiency it is arguable that the role of the defence lawyer has been implicitly diluted. Cape suggests that there has been 'a growing antipathy towards adversarial principles and the adversarial role of defence lawyers.'⁶⁶⁷ The remaining chapters of this thesis will examine whether defence lawyers recognised their role have been transformed.

⁶⁶⁵ O. Owusu-Bempah, 'Defence Participation through pre-trial disclosure', (2013) 17 E&P 283-201 at 193

⁶⁶⁶ The theme of diluted rights will be returned to in chapter 8 when the current state of the criminal justice process is examined.

⁶⁶⁷ E. Cape, *The Rise (And Fall?) of a Criminal Defence Profession*, Crim. L. R. 415.

CHAPTER SIX

Fieldwork Methodology

6. Introduction

In chapter three, desk-based research was employed to develop a theoretical conception of the classic role of the defence lawyer. The desk-based research emphasized that the primary duty of the defence lawyer was to advance the best interests of his client. Chapter three established the ‘classic conception’ of the defence lawyer with the core motivation acting as the ‘white knight’ of his client.⁶⁶⁸ The research questions have been outlined in chapter one;⁶⁶⁹ the thesis has one overarching question:

What is the role of the defence lawyer in the modern era?

This question has three further research questions which will assist in answering the overarching question:

1. What relevant legislation has changed over the last twenty years?
2. What are the theoretical and practical consequences for changing legislation for the defence lawyer?
3. What are the implications of the developments for both the lawyer-client relationship and the notion of adversarialism in England and Wales?

6.1 Methods of Data Collection

Qualitative research has a number of fundamental features. The data collection process can be characterized as intensive. It is a very detailed study that collects large quantities of data from a small number of informants.⁶⁷⁰ The primary goal of the qualitative researcher is to obtain ‘an understanding of social processes rather than obtaining a representative sample.’⁶⁷¹ This can be contrasted with quantitative research studies that investigate much a numbers of cases. Hakim distinguished the two approaches by comparing the quantitative

⁶⁶⁸ See Chapter Three p.49-73.

⁶⁶⁹ See pages 17-18.

⁶⁷⁰ M. Henn, M. Weinstein and N. Foard *A Critical Introduction to Social Research*, 2nd Edition (London: Sage) 2009 at p.182.

⁶⁷¹ S. Arber, Designing Samples in N. Gilbert (ed.), *Researching Life*, (London: Sage) 1993 p68-92 at p.73.

studies providing the bird's eye view and qualitative research offering the 'worm's eye view.'⁶⁷²

There are a number of different ways to obtain the worm's eye view from the participants and a number of different techniques were considered:

- Focus groups
- Ethnography and Case Studies
- Interviews: Structured and Semi-Structured

6.1.2 Focus Groups

A focus group would involve a group of lawyers who would be led in a discussion of the research questions and aims of the empirical study.⁶⁷³ The researcher would ask specific questions and guide the discussion to ensure the group is addressing the questions posed. However, the resulting information is relatively unstructured. A focus group would consist of seven to ten discussants and whilst the participants would not directly work together, the selection would be homogeneous as they would all be practicing defence lawyers. Whilst the collection of data in this manner is attractive - one can collect a number of different viewpoints from one setting - this method of data collection was quickly disregarded for the purposes of this study. Focus groups can be difficult to manage and there is a danger in seeking to maximize the involvement of all participants; it is possible that some contributors would perceive this as a signal to exert themselves into a dominant position, which might lead to the exclusion of other participants.⁶⁷⁴ Furthermore, the use of focus groups could be problematic because of the difficulty attracting seven to ten lawyers to take part at a mutually convenient time. There is also the question of where the focus group would take place. The study could have been conducted online but this in itself poses a number of issues. The group members would have to be given exclusive access to a webpage and/or download specialist software in order to take part. With these concerns in mind, this approach was disregarded at a very early juncture as the approach did not appear to be viable either in economic terms or logistically.

⁶⁷² C. Hakim, *Research Design: Strategies and Choices in the Design of Social Research*, (London: Routledge) 1987, p.28.

⁶⁷³ R. Bachman and R. K. Schutt, *Fundamentals of Research in Criminology and Criminal Justice*, 2nd Edition (Sage: London), 2012 at p.213.

⁶⁷⁴ *Ibid* at p.194.

6.1.3 Ethnography and Case Studies

Ethnography is the study through the observation of institutions, cultures and customs.⁶⁷⁵ The researcher aims to investigate a group that is relatively under-researched. The genesis of the present study stems from the fact that there has been very little discussion of the ‘impact of the new case management system enshrined in the CrimPR.’⁶⁷⁶ The ethnographic approach could be used to systematically inquire about the world the defence lawyers see and how they react to various challenges. The researcher would be immersed in the practical world of the defence lawyer; observing interactions with clients and other lawyers with the aim of acquiring knowledge from the perspective of the lawyer. Spradley states that it is ‘best to think of ethnographic interviews as a series of friendly conversations into which the researcher slowly introduces new elements to assist the respondents.’⁶⁷⁷ If the researcher introduced the elements too quickly, any established rapport will evaporate. Hammersley states this is often referred to as ‘naturalistic’⁶⁷⁸ research. The researcher observes in a sensitive and unobtrusive manner.

Whilst the potential yield of results from this study would no doubt be fascinating, the sheer magnitude of undertaking such a task rendered it unrealistic. The researcher would have to be immersed in the field for a prolonged period of time before obtaining meaningful data.⁶⁷⁹ Bernard says ‘hanging out builds trust and trust results in ordinary behaviour in your presence’.⁶⁸⁰ However, behavioural adaptation could in situations where participants are feeling under examination. As this study was self-funded and the researcher held a full time lecturing position, it would not have been viable to invest the required amount of time in observation. Furthermore, it already proved difficult to attract single participants to take part in the study. As such, it would have been very difficult to attract participants who were willing to give up significant amounts of time to allow research with numerous members of staff. This difficulty was crystalized by the lack of ‘snowballing’ in the research sample. Only one firm offered more than one lawyer to be

⁶⁷⁵ *ibid.*

⁶⁷⁶ F. Garland and J. McEwan, ‘Embracing the Overriding Objective: Difficulties and Dilemmas in the New Criminal Climate’, *International Journal of Evidence and Proof*, (2012) 16 233-262 at 233.

⁶⁷⁷ J.P. Spradley, *The Ethnographic Interview* (1979) (New York: Holt) p.58-9.

⁶⁷⁸ M.Hammersely, *What’s wrong with Ethnography?*, (London: Routledge), 1992, p.163-5

⁶⁷⁹ See E. Barker, *The Making of a Moonie: Brainwashing or Choice*, (Oxford: Blackwell), 1984 where for years the author lived with and observed a church. Whilst this might appear extreme, it suggests a great commitment in order to obtain results using this method. Daniel Newman does not state how long he spent in the field but his methodology indicated it was an ‘extended’ amount of time. D. Newman, *Legal Aid Lawyers and the Quest for Justice* 2013, (Hart: Oxford) at p21.

⁶⁸⁰ H.R. Bernard, *Research Methods in Anthropology: Qualitative and Quantitative Approaches*, (London: Sage), 1994, p.152. ⁶⁸¹ *Supra* fn.673 p.197.

interviewed. Therefore, to capitalize on the interest, the study pursued interviewing individual lawyers, rather than approaching firms.

6.1.4 Case Studies

The use of case studies in small-scale research has become widespread in social research.⁶⁸² The defining characteristic of a case study is its focus on one thing under investigating by the researcher. For this study in particular, a case could have been replicated using the facts of a number of judgments that have been highlighted by this thesis. For example, a hypothetical scenario could be built from the facts of an existing case. The researcher could construct a scenario with the key fact being the prosecution lack evidence of presence at the scene but the case management form disclosed that the ‘issue’ was self-defence, thereby identifying themselves and ultimately incriminating themselves.⁶⁸⁴ In another example, the defence will make a submission that there is no case to answer at the close of the prosecution case⁶⁸⁵ but the magistrate permits the prosecution to adduce evidence from the case management form because the defence has not complied with the spirit of the CrimPR.⁶⁸⁶ These cases are drawn from the theoretical tensions identified and discussed in chapter four; the case study would highlight the choices the lawyer has to make in dealing that has a number of potential tensions. The case study would illustrate how cases are handled by lawyers and the reasons decisions are made.⁶⁸⁷ A case study could be a component part of a multi-method approach to research as it could be accompanied by a questionnaire which examines the reasons why a lawyer adopted a particular approach in the case study.

Ultimately, the time taken to complete to study and any follow-up questionnaire may be too onerous for the participants, who would have to allocate space in their working day in order to participate.

6.1.5 Interviews

The object of any empirically based social science is to generate knowledge. This knowledge can be viewed as two-fold. Firstly, at a philosophical level one needs to understand the nature of knowledge and secondly, an understanding of methods or

⁶⁸² M. Denscombe, *The Good Research Guide: for small scale social research projects*, 2nd Edition, (Maidenhead: Open University Press), 2003, p.30.

⁶⁸³ *Ibid.*

⁶⁸⁴ [2011] EWHC 388 (Admin)*Firth*

⁶⁸⁵ [2004] Crim LR 579.

⁶⁸⁶ [2012] EWCA Crim 650.

⁶⁸⁷ M.Hammersely, *What's wrong with Ethnography?*, (London: Routledge), 1992, p.184-5.

processes by which this knowledge can be developed.⁶⁸⁸ An interview involves the interviewer reading questions to respondents and recording their answers.⁶⁸⁹ The interview has been described as a ‘verbal interchange, often face to face (though the telephone may be used), in which an interviewer tries to elicit information, beliefs or opinions from another person.’⁶⁹⁰ This method of data collection allows the researcher a great deal of flexibility. The researcher decides the format and content of the questions, how they are worded and their order. A distinction can be made between the types of interview; the process can be an unstructured interview, a structured interview or semi-structured interview. Interviews are used extensively by qualitative researchers who are examining either a ‘legal phenomena [or] perceptions of law and the legal professional.’⁶⁹¹ This is precisely what the study was attempting: to examine the impact of the changing pre-trial obligations of the defence lawyer. It has been said that the interviews are effective at garnering data on an individual’s perception or view, as well as insight into personal experiences.⁶⁹²

6.1.6 Unstructured Interviews

An unstructured interview gives the researcher almost complete freedom in terms of its structure, content, question, wording and order.⁶⁹³ Here, the intention is to capture the point of view of the respondent rather than the concerns of the researcher. The interview is designed to explore issues in detail using a series of prompts, probes and a flexible questioning style.⁶⁹⁴ Furthermore, the respondent also benefits from this flexible approach and could play an active role in the shaping in shaping the interview agenda. This is beneficial as it may illuminate certain issues that the researcher is yet to discover. This approach permits the respondent to potentially exploring new concepts. A fundamental component of this approach is the developing of a rapport between the researcher and interviewee.⁶⁹⁵ The rapport can be enhanced by the fact the interviewee assists in setting the agenda for the interview as the goal of the researcher is to be as unobtrusive as possible.

⁶⁸⁸ See. A. Bottoms, *Theory and Empirical Observations in Criminology* in R. D. King and E. Wincup, *Doing Research on Crime and Justice*, (Oxford: OUP) 2008 at p76.

⁶⁸⁹ D. R. Monette, T.J. Sullivan, C. R. DeJong, (1986) *Applied Social Research: Tools for Human Services*, (Fort Worth: Texas) Holt, Rienheart and Wilson at p. 156.

⁶⁹⁰ R. Burns, (1997) *Introduction to Social Research Methods* (2nd Ed), (Melbourne: Longman Cheshire) at 329.

⁶⁹¹ H. Sommerlad (2007) ‘Researching and Theorising the Processes of Professional Identity Formation’ *Journal of Law and Society* 34(2): 190.

⁶⁹² L. Webley, *Qualitative Approaches to Empirical Legal Research* in P. Crane and H. M. Kritzer, *The Oxford Handbook of Empirical Legal Research* (Oxford: Oxford University Press), 2010 at 937.

⁶⁹³ R. Kumar, *Research Methodology: A Step by Step Guide for Beginners* (4th Ed) (London: Sage) at p.177.

⁶⁹⁴ *Supra* fn.673 at p.187.

⁶⁹⁵ R.G. Burgess, *In the Field: An Introduction to Field Research*, (London: Routledge) at p.107

By allowing the participant to ‘speak their mind’ it is thought that more complex issues can be identified than using the semi-structured interview.⁶⁹⁶ A major advantage of the unstructured approach is that not all respondents will feel comfortable with an ‘interrogation’ and therefore a loose structure, with no exact schedule of questions will be acceptable to them.⁶⁹⁷ Without the resources to build rapport with the participants the findings may prove to be superficial and lack the depth that might be garnered from utilising another approach.

6.1.7 Semi-Structured Interviews

This approach allows the participants to talk about the CPIA 1996 and CrimPR in their own voice; by doing this the participants maximize the interviewer’s own understanding of their responses.⁶⁹⁸ The general aim of the interview is to encourage the participants to talk at length about their own experiences and thoughts; the process is not concerned with obtaining the ‘right’ answer but what the lawyer thought.⁶⁹⁹ The interviewer has a clear set of issues that has to be addressed, but is prepared to be flexible in terms of allowing the interviewee to develop ideas and speak more widely on the issues raised. The emphasis is on the interviewee elaborating on key points of interest and speaking widely on the issues raised.⁷⁰⁰ The interviewer can explore the areas of ambiguity and seek clarification on any relevant issue.⁷⁰¹

The aim of the research is to develop a deeper understanding of the impact of the CPIA 1996 and CrimPR from the perspective of defence lawyer. A structured interview might lead to short, simple, general or abstract answers to the interviewer’s questions.⁷⁰² The material sought by this empirical study required depth, detail and is nuanced with vivid thematic material.⁷⁰³ This would allow the interviewer to probe the answers given by the participant.

⁶⁹⁶ *Supra* fn.673 at p.167

⁶⁹⁷ B. Gillham, *Research Interviews: The Range of Techniques*, (Berkshire: Open University Press) 2005 at p.47.

⁶⁹⁸ *Supra* fn.667 at p.161.

⁶⁹⁹ E. Drever *Using Semi-Structured Interviews in Small-Scale Research: A Teacher’s Guide*, The Scottish Council for Research in Education (Glasgow: 1995) p. 10. Thereby avoiding the ‘observer effect’ see Bernard, H.R., *Research Methods in Anthropology: Qualitative and Quantitative Approaches*, (London: Sage), 1994, p.152.

⁷⁰⁰ *Supra* fn.673 at 167.

⁷⁰¹ C. Costley, G. Elliott and P. Gibbs, (2010) *Doing Work Based Research: Approaches to Enquiry for Insider-Researchers* (Sage: London) at p.93.

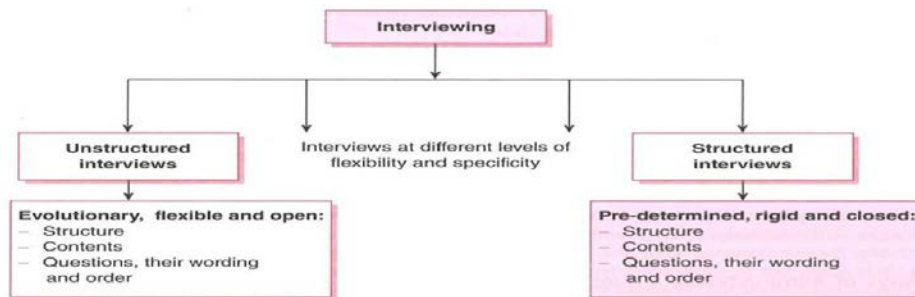
⁷⁰² U. Flick, (2014), *An Introduction to Qualitative Research*, 5th Edition (Sage: London) at p.208.

⁷⁰³ H.J. Rubin and I.S. Rubin (2012) *Qualitative Interviewing: The Art of Hearing Data*, 3rd Edition, (Sage: London) at p101.

Rubin and Rubin state that there are three question types: the main questions, follow-up questions and probes. They claim the follow-up and probes are the most problematic types of questioning.⁷⁰⁴ Flick accentuates the problematic nature of when to follow-up and when to ask the probing questions. He claims that the interviewer might stick to the questions too rigidly, thereby interrupting the response at the wrong moment in order to move the interview along.⁷⁰⁵ I employed the approach suggested by Flick and Rubin. After asking the main question, I would then ask follow-up questions and then probe the participants answer. Obviously, it was impossible to ask identical follow-ups and probes to the sample but they broadly attempted to tease out the same detail. With the difficulties highlighted by Flick and Rubin, I made sure to wait until the participant had completed their answer before following-up.

6.2 The Rationale for Semi-Structured Interviews

If the interviewer requires flexibility such as the opportunity to formulate questions during the process then an unstructured or semi-structured approach should be adopted. If the interviewer requires a pre-determined, rigid interview a structured interview should be adopted as this will keep strictly to the questions decided beforehand.⁷⁰⁶ The core differences between the two approaches can be illustrated in fig.1⁷⁰⁷ below:



A semi-structured interview sits in-between the two approaches, its degree of flexibility is not as free as an unstructured interview but is less rigid and closed than a structured interview. The interview is probably the most popular method of generating data in the social sciences.⁷⁰⁸ Both Dingwell⁷⁰⁹ and Rapely⁷¹⁰ comment that this is partly due to the

⁷⁰⁴ *ibid* at p116-120.

⁷⁰⁵ U. Flick, (2014), *An Introduction to Qualitative Research*, 5th Edition (Sage: London) at p.209.

⁷⁰⁶ R. Kumar, *Research Methodology: A Step by Step Guide for Beginners* (4th Ed) (London: Sage) at p.177.

⁷⁰⁷ *ibid*.

⁷⁰⁸ See P. Atkinson and D. Silverman, 'Kunera's Immortality: The Interview and the invention of the Self', *Qualitative Inquiry*, 197, Vol 3 p.304-325; See also, C.L. Briggs, *Learning how to ask: A sociolinguistic appraisal of the role the interview in social science research*, 1986 (London: Cambridge University Press).

⁷⁰⁹ R. Dingwell, 'Accounts, Interviews and Observations' in G. Miller and R. Dingwell (Eds) *Context and Method in Qualitative Research*, (1997) (London: Sage) p. 51-65.

⁷¹⁰ T.J. Rapley, *The Art(fullness) of Open-ended Interviewing: Some considerations on analyzing interviews*, *Qualitative Research*, Vol , pp303-323.

fact that it is inexpensive, efficient and flexible in relation to the multiple responsibilities of holding an academic post.

With these research methodology questions in mind, the findings from chapter five⁷¹¹ could be considered when creating the research instrument. The findings highlighted a number of potential issues with both the CPIA 1996 and the CrimPR:

1. Role Confusion: whether advancing the best interest of the client has been superseded by the duty to the court.
2. Tensions for the defence lawyer: what does the lawyer do when two duties clash. Does the modern-day defence lawyer notice the best interest of his client is not advanced?⁷¹²
3. The impact on the lawyer – client relationship: does this notion of co-operation with the prosecution and court weaken the privilege against self-incrimination?

With this in mind, the interview was divided into four sections. Three sections consisted of questions concerning the CPIA and CrimPR, the fourth section concerning basic facts about the participant: the date the participant qualified as a lawyer, how many years' experience they had as a defence lawyer, whether they had ever worked as a prosecutor, their gender and location. The purpose of this was three-fold: firstly, the diversity in the different levels of experience will produce a more accurate picture of how the defence lawyers perceives their role. Secondly, the study sought to include a mix of experience levels to examine whether the response differed greatly between experienced lawyers and those who were less experienced. In essence, the mix of experience levels might hint toward a notion of the less experienced lawyer being 'operationalized' by the CPIA and CrimPR. That is to say that they do not feel the consequences of the three-fold impact highlighted above because they have always had to deal with the obligations in their daily workload. Thirdly, a question was asked about their location as it would yield more valid results.

⁷¹¹ See pages 121-163.

⁷¹² For example, the case of *Firth* [2011] EWHC 388 (Admin) where the completion of the case management form was furnished at trial to establish presence at the scene.

6.2.1 Proforma Construction

The structure and construction of the interview is important and the interview pro-forma was divided into three separate sections:

- General obligations under the CPIA and CrimPR;
- Implications these obligations have for your practice and;
- Conflicts between the obligations and your duties as a defence lawyer.

For lawyers based in my local area of Bristol, this was conducted via a face-to-face interview. The rationale for this choice was to obtain an understanding of the processes and thoughts of defence lawyers rather than obtaining a representative sample.⁷¹³ This approach is vastly different to quantitative research studies. However, it posed two problems. Firstly, attracting participants from the local area was difficult; and secondly, lawyers are difficult to meet owing to their changing schedules. To combat these issues, a switch was made from face-to-face interviews to telephone interviews. This decision was made on the basis that the lawyers' diaries were constantly changing, issues developed at a late juncture and meant interviews were missed. In one instance the researcher made his way to Exeter for a 09.00 meeting with a lawyer only to be told that the lawyer had an urgent appointment and would be away from the office most of the day. This was frustrating and not the most efficient use of what limited resources there were. As such, telephone interviews were set up to provide access to participants who were difficult to meet. There are notable drawbacks to such an approach. Drever explains that any non-verbal communication through posture, gesture and facial expression is lost.⁷¹⁴ Despite this, the approach was thought to be adequate to gather the data. To combat the issues outlined by Drever, a researcher can implement certain techniques to diminish what communication might be lost. For example, in place of body language, paralinguistic utterances such as 'yes, uh-uh and good' can be used to give encouragement to the interviewee.⁷¹⁵ Passivity and neutrality are key components to the interview; the researcher is there to listen and learn not to preach.⁷¹⁶ This is of particular importance as chapter three focused on a theoretical conception of the defence lawyer.

⁷¹³ S. Arber, *Designing Samples*, in N. Gilbert (ed.) *Researching Social Life*, (London: Sage) 1993 at p.73.

⁷¹⁴ E. Drever *Using Semi-Structured Interviews in Small-Scale Research: A Teacher's Guide*, The Scottish Council for Research in Education (Glasgow: 1995) p. 15.

⁷¹⁵ *ibid.*

⁷¹⁶ M. Denscombe *The Good Research Guide: For Small-Scale Research Projects*, 2nd Edition, (Maidenhead: 2003) at p.171.

It was important not to allow the classic conception did not overly influence the questions set, in order to justify the theoretical conclusion. As such the PhD supervision team examined both the structure and content of the interview pro-forma as well as the findings of the pilot study. A pilot study was undertaken to allow the researcher to deliver the planned interview to a small sample of participants. During this process notes were taken about the time the interview took, whether any clarification of questions was sought by the respondent, and any difficulties the interviewer faced in delivering the questions.

6.3 The Research Sample

This thesis is analyzing the role of the defence lawyer in the modern era. The term defence lawyer is an umbrella term encompassing solicitors, barristers and accredited police station representatives. When the thesis was first planned it was thought that all types of lawyer would be included in the empirical study. On completion of the earlier chapters it became apparent that the primary focus of this study would be on solicitors and primarily those who advocate in magistrates' courts. The semi-structured interview was designed to discover a range of views⁷¹⁷ concerning the impact the CPIA 1996 and CrimPR have for the role of the defence lawyer. This will lead me to a narrative approach to my data. The narrative approach is based on the notion that data generated by interviews allows the research to '... access various stories or narratives through which people describe their worlds... [and this will] generate plausible accounts of their world.'⁷¹⁸ It is this 'narrative account' the research seeks to illuminate, as my goal is to paint a picture of the modern day defence lawyer and how the pre-trial obligations have impacted on the role.

⁷¹⁷ N. Fielding, *Qualitative Interviewing*, in N. Gilbert (ed.) *Researching Social Life*, (London: Sage) 1993 at p.141.

⁷¹⁸ D. Silverman, *Doing Qualitative Research: A Practical Handbook*, (London: Sage) 2000 at p.122-3.

6.3.1 Attracting the Participants

As mentioned above, attracting participants was a problematic facet of the empirical study. The study primarily used three different techniques in order to attract participants. Firstly, a pilot study was undertaken in March 2012 with two solicitors. One was based in London and the other in Somerset. This period allowed the researcher to give a test-run of the types of questions that would be asked in the full study. This allowed the researcher to ensure that the questions were relevant. As a result, the two solicitors volunteered to take part in the full empirical study. With the contacts secured, this allowed me to use ‘snowball sampling’ in order to generate some further participants. Snowballing is ‘when the researcher accesses informants through contact information that is provided by other informants.’⁷¹⁹ This strategy can be viewed as a response to overcoming problems associated with sampling concealed, hard to reach, populations.⁷²⁰ Sampling of this nature is used where there is no obvious list to refer to in order to generate a participant base. The researcher would obtain one important contact in a firm who would recommend other possible participants to partake in the study.⁷²¹ It is unrealistic to categorise defence lawyers as ‘hard-to-reach’, as they are accessible through various websites.⁷²² However, it might be more appropriate to classify them as ‘lacking interest in empirical work’. There are many reasons for this apparent lack of interest. Firstly, the nature of the work is unpredictable; a particular case may run on longer than expected and therefore keeping to appointments might be problematic. Secondly, during the period of the fieldwork the government was in the midst of various cost cutting measures which were particularly aimed at defence lawyers who were funded by Legal Aid.⁷²³ As such, any enthusiasm which lawyers have for criminal defence work might be diluted because of the current economic climate; firms are concerned that redundancies might follow the cuts proposed by the government.⁷²⁴ Thirdly, King and Wincup explain that ‘practical people’ may express dismay at a researcher’s theory or attempts to that theories

⁷¹⁹ C. Noy ‘Sampling Knowledge: The Hermeneutics of Snowball Sampling in Qualitative Research’ Int. J. Social Research Methodology (2008), *International Journal of Social Research Methodology*, vol 11(4), 327-344 at 331.

⁷²⁰ R. Atkinson and J. Flint ‘Accessing Hidden and Hard-to-Reach Populations: Snowball Research Strategies, (2001) *Social Research Update* Vol 33 pp 1-5 at p.1.

⁷²¹ *Supra* fn. 660 at p.157.

⁷²² Yell.com and the Law Society’s Find a Solicitor Page <http://www.lawsociety.org.uk/find-a-solicitor/?view=solsearch>

⁷²³ <http://www.independent.co.uk/voices/comment/graylings-cuts-to-legal-aid-are-both-unnecessary-and-calamitous-labour-should-reverse-them-9166504.html> [Last Accessed 3rd March 2014].

⁷²⁴ <http://www.theguardian.com/law/2014/feb/27/legal-aid-cuts-low-wages-solicitors-fears-criminal-justice> [Last Accessed 3rd March 2014].

as parsimoniously as possible.⁷²⁵

The snowball sample only yielded a total of five participants. This number was unexpectedly low as snowballing has the potential to increase the number of participants. In order to snowball, you identify the participants and at the completion of the interview you ask them to suggest other people to interview.⁷²⁶ This was insufficient, so my second approach was using the Law Society's 'find a solicitor' web-page.⁷²⁷ I would search for criminal law solicitors in different areas of England and Wales. Once I had fifty email addresses I would send a blanket email requesting solicitors to take part in a telephone interview. This yielded five participants from approximately 500 e-mails sent. Whilst the number of respondents was ultimately disappointing, those interviewed proved to be most useful. In the main, the traditional methods of attracting participants to take part in the empirical research proved to be disappointing. Evans and Mathur illuminate a number of problems with this method of researching. They claim that the 'non-response rate' is increased because the cold-contact might be perceived as 'spam.'⁷²⁸ Furthermore, because the blanket e-mail is sent in an unsolicited manner, it will only attract the attention of pro-active participants.⁷²⁹ Securing interest from the legal profession to take part in empirical research is difficult, and this problem is not novel. Writing in 1978, Baldwin and McConville stated that '[t]he legal profession has never shown much enthusiasm for research'⁷³⁰ and at times the legal researcher might be viewed with 'suspicion.'⁷³¹

As a result of the low number of participants from the more traditional methods of sampling, I also used the social media website 'Twitter', a social media platform.

⁷²⁵ A. Bottoms, *Theory and Empirical Observations in Criminology* in R. D. King and E. Wincup, *Doing Research on Crime and Justice*, (Oxford: OUP) 2008 at 80.

⁷²⁶ E. Drever *Using Semi-Structured Interviews in Small-Scale Research: A Teacher's Guide*, The Scottish Council for Research in Education (Glasgow: 1995) p. 10

⁷²⁷ <http://www.lawsociety.org.uk/find-a-solicitor/> [Last Accessed 18th February 2013].

⁷²⁸ Although this article concerns online surveys, the method in which the participants were contacted was very similar to my own. See J. Evans and A. Mathur (2005) 'The Value of Online Surveys' *Internet Research* Vol. 15 No.2 195-219.

⁷²⁹ J. Evans and A. Mathur (2005) 'The Value of Online Surveys' *Internet Research* Vol. 15 No.2 195-219.

⁷³⁰ J. Baldwin and M. McConville (1978) *Plea Bargaining: Legal Carve-Up and Legal Cover-Up* 5 *British Journal of Law and Society* 2, 228.

⁷³¹ J. Baldwin and M. McConville (1981) *Courts, Prosecution and Conviction* (Oxford: Clarendon Press) p.1.

The potential reach of using Twitter is vast and very attractive to an empirical research study. A person can ‘tweet’ another user directly without requiring prior permission.⁷³⁵ Further to this, other users can share existing information with their own followings by ‘re-tweeting.’ This extends the reach of the original tweet as it will be seen by far more users. Twitter was selected over other forms of social media as it was easier to identify lawyers and to then approach them from a position of no pre-existing relationship. From tailoring my own personal account it was clear that there is a large community of defence lawyers and academics with an interest in criminal defence on Twitter.

The use of Twitter occurred in two separate stages. Firstly, in August 2012 a 140 character ‘tweet’ was composed in order to attract participants for the study. The tweet was sent to users who have a large number of lawyers who ‘follow them’. Two people who received my tweet were Andrew Keogh who runs the ‘CrimeLine.info’ Twitter account and Gary Lee Waters who operated the [now defunct]⁷³⁶ ‘legalacademia’ Twitter account. Andrew and Gary were contacted because they had a large number of legal practitioners ‘following’⁷³⁷ them,⁷³⁸ so their audience was the ideal market for me to advertise my needs to. They both re-tweeted my message to their followers and the respondents could contact me directly to set up a telephone interview. Below is a copy of the Tweet I sent to both:



⁷³² A monthly active user is one who logs onto Twitter at least once a month.

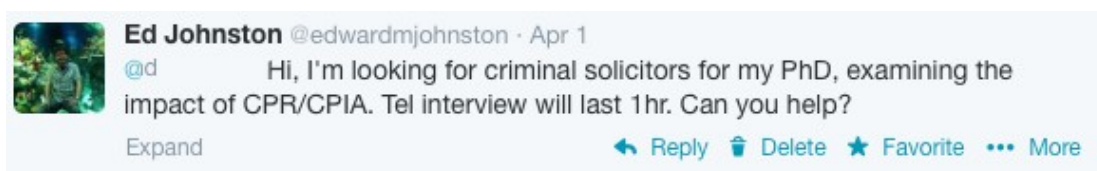
⁷³³ J. Edwards, *Twitter's 'Dark Pool': IPO Doesn't Mention 651 Million Users Who Abandoned Twitter*, 6th November 2013, Business Insider, accessible here: <http://www.businessinsider.com/twitter-total-registered-users-v-monthly-active-users-2013-11> (Last Accessed 22nd April 2014).

⁷³⁴ Statistics taken from www.worldmeters.info (Last accessed 22nd April 2014).

⁷³⁵ Unlike other forms of social media like Facebook in which users might require permission to contact people who are outside of their own network.

⁷³⁶ The user has moved outside the academic sphere and is now employed in recruitment.

This approach is one that appears to be rather novel and it proved difficult to find any studies in Law that have replicated using Twitter in order to attract participants. Very little has been written on using social media sites for academic research. However, Brickman- Bhutta suggest that ‘using social networks allows the researcher to carry chain-referral methods into the age of the internet... a single scholar can complete projects that previously required large teams...’.⁷³⁹ Twitter provides links with practitioners and Twitter’s brevity, accessibility and immediacy are appealing to non-academics.⁷⁴⁰ The second attempt to use Twitter was implemented when it was apparent that the final figure of thirteen participants would not be sufficient to draw any conclusions from. The return to Twitter was far more fruitful. Twitter’s search engine was used to contact those who had ‘criminal lawyer’ in the biography. If these users were based in England and Wales, they were contacted with the following tweet:⁷⁴¹



Further to the tweet being sent directly out, it was re-tweeted a total of 17 times by different individuals with differing numbers of followers; this included Professor Cape and the blog ‘EuroRights’, which is run by a member of the Law Faculty at UWE. Both of these accounts have a substantial number of followers, as of April 2014 Professor Cape was followed by 773 users and EuroRights was followed by 6,035. Sadly, despite the best efforts to generate interest, only one person responded to the re-tweet. However, this was a far more fruitful search and the number of participants was beginning to grow.

⁷³⁷ Subscribing to someone’s Twitter feed is called ‘following’. This means you will receive any tweets the user posts that are not posted directly to another user.

⁷³⁸ As of 18th February 2013 Andrew had 5,547 follows and Gary had 2,107.

⁷³⁹ C. Brickman-Butta (2009) ‘Not by the Book: Facebook as a Sampling Frame’ as cited in F. Baltar and I. Brunet ‘Social Research 2.0: Virtual Snowball Sampling Method Using Facebook’ *Internet Research* vol 22 (1) p.65.

⁷⁴⁰ A. Mollett, D. Moran and P. Dunleavy ‘Using Twitter in University Research, Teaching and Impact Activities: A Guide or Academics and Researchers’ (2011) LSE Public Policy Group at p.7.

⁷⁴¹ To protect the anonymity of participants the user’s handle has been removed. Previous Tweets were looking to attract participants whereas the later Tweets went directly to potential participants.

Once again, interviewing the participants was difficult. Every interview had to be re-scheduled at least once and it was not uncommon for interviews to be re-arranged four or five times because the lawyers were dealing with something that was not foreseen when we booked the interview. This posed a problem in delaying the completion the interviews. The goal was to have all interviews completed by April 2014 but this was extended until the end of May 2014 because of the level of interest. The study would benefit from as many participants as possible. However, a problem of using Twitter to attract participants, is its immediacy. Unless the tweet is directly sent to a user they will possibly miss the re-tweet. Twitter immediately refreshes itself so as soon as a new tweet comes in from a follower, it is pushed to the bottom of their newsfeed. Further to using Twitter on two separate occasions to attract interviewees, my PhD Director of Studies, Professor Ed Cape, put me in contact with two members of the legal profession. They were receptive to my request and were happy to take part in the empirical study. As the response rate was still low, Professor Cape contacted the Public Defender Service (PDS) in Cheltenham, and the Head of Office agreed to grant me access to his staff. As a result of this, two interviews were conducted and contact details were provided to contact the other PDS office in Swansea and Glamorgan; unfortunately there was no snowball effect and the study was left with twenty four participants.

6.4 Target Respondents

The title of the thesis is *The Defence Lawyer in the Modern Era* and it is important to define the various terms. The term defence lawyer is an overarching umbrella term which includes both solicitors and barristers. However, as previously mentioned, from an early stage in the research it became clear that an implicit goal of the CrimPR was to make magistrates' courts more efficient. As such, this would exclude barristers from the study as they do not normally advocate in the magistrates' court. The term 'modern era' also poses a methodological question: how does one define 'the modern era'? Chapter Three outlined the first foray into defence disclosure concerned alibi witness statements in 1967.⁷⁴² The regime remained unaltered until expert evidence was required to be disclosed in advance of trial.⁷⁴³ In 1996, the defence case statement became a mandatory requirement in the Crown Court.⁷⁴⁴ It was this date that would provide a key reference point for my participants. Ideally, it would be beneficial to interview lawyers who practiced prior to the 1996 changes. These findings could be contrasted with those lawyers who have only practiced within the CPIA 1996

/CrimPR regime. This is important as it will allow the research to test whether: a) there are fundamental changes to the role of the defence lawyer; and b) whether the participants are aware of any paradigm shift. The interview *pro forma* was designed to examine whether there was a difference between the more experienced practitioners and their more recently qualified counterparts. This would allow analysis to see whether there is a difference in operational culture between the two sets of lawyers. The importance of this difference will be addressed in the empirical chapter.

6.5 Ethics

Attracting participants in this manner poses a number of ethical issues. It is important to verify the identity of the participant to ensure they are who they say they are. The British Psychological Society⁷⁴⁵ states there are a number of mechanisms to authenticate participants, including checking credit/bank cards.⁷⁴⁶ However, the study employed a far simpler method; the researcher would type the name and law firm into Google to ensure the results correlated. I never encountered a participant who was impossible to verify. Furthermore, to support this verification process the empirical study also required ethical approval from the University of the West of England's Research Ethics Committee.⁷⁴⁷

Kimmel suggests there are nine key welfare issues to consider when researchers are using human subjects:⁷⁴⁸

1. Protecting the identity of the subjects
2. Protecting the legal rights of the subjects
3. Providing subjects with the opportunity to consent to participation
4. Ensuring subjects are properly informed about their obligations
5. Protecting vulnerable subjects, such as children or medical patients

⁷⁴² S11(1) Criminal Justice Act 1967

⁷⁴³ s.2(1) Criminal Justice Act 1987

⁷⁴⁴ S.6 CPIA 1996.

⁷⁴⁵ The British Psychological Society guidance was used because it was difficult to obtain guidance from the legal community.

⁷⁴⁶ The British Psychological Society: Report on the Working Party Conducting Research on the Internet: Guidelines for Ethical Practice in Psychological Research Online at P.2

6. Protecting the identity of the subjects
7. Protecting the legal rights of the subjects
8. Providing subjects with the opportunity to consent to participation
9. Ensuring subjects are properly informed about their obligations
10. Protecting vulnerable subjects, such as children or medical patients
11. The source of funding for the research and the potential bias as a result
12. Providing the opportunity to withdraw
13. Whether there will be remuneration for subjects
14. Ensuring the security of the data collected.

The majority⁷⁴⁹ of these considerations were satisfied by use of a consent form.⁷⁵⁰ The consent form highlighted that no lawyer would be identified in the process of writing up the findings, either by name or location. The general geographical area the lawyer is based in would be used in the analysis, but this will be nothing smaller than the County they practice in. Furthermore, only a transcriber and myself would hear the interviews and read the transcripts. It was also made clear that material gathered for this research would be treated as confidential and securely stored. This may would include interview transcripts, informal discussions with participants, researcher's notes and observation notes. The participants would not be identified or identifiable in any published work other than this research project.

http://www.bps.org.uk/sites/default/files/documents/conducting_research_on_the_internet-guidelines_for_ethical_practice_in_psychological_research_online.pdf [Last Accessed 18th February 2013].

⁷⁴⁷ The code of conduct from the Research Ethics Committee can be accessed here: <http://www1.uwe.ac.uk/research/researchethics/guidance.aspx> [Last Accessed 2nd January 2016].

⁷⁴⁸ A. Kimmel, *Ethics and Values In Applied Social Research* – 12 Applied Social Research Methods Series, (1988) 9.

⁷⁴⁹ The consent form dealt with issues 1-4, 7 and 8. Issue 5 was not relevant as the subjects were not vulnerable. Issue 6 did not apply as the project was self-funded and would not be subjected to any external bias and issue 8 did not apply as the project was self-funded and therefore no remuneration for participants would be offered.

⁷⁵⁰ Please See Appendix Four for a copy of the consent form.

6.6 Application of the Data

Little has been written about the methodological use of qualitative data in the legal field. The majority of work on this form of research was drawn from the social sciences, and mostly in the medical field. To begin, I started to transcribe the interviews myself, but was quick to realize this would be an enormous task. As such, the Criminal Justice Unit at UWE made funds available to employ a transcriber. I would e-mail the digital audio files to the transcriber and she would e-mail the word-processed transcription. Once I received the transcribed file I would re-listen to the audio file whilst reading the word-processed file to ensure no key aspects were omitted or misunderstood. This is because ‘... it may not be necessary to transcribe an entire interview. Selected sentences, passages, paragraphs or stories relevant to the research may be all that is needed...’.⁷⁵¹ With this in mind, it was of paramount importance to examine the contents of the transcribed file to ensure nothing pivotal was omitted.

6.6.1 Limitations of the semi-structured interview

There is a danger that this method of qualitative data collection could be compromised by the interview participant. This may not be done consciously but the interviewee may spoil the interview unconsciously. Goffman suggests that interview participants know that their responses will be judged by others and responded to this by putting on a performance. He states that there is a danger that people are poseurs and can potentially mislead others about what they are really like and what they really do. There is a further inherent danger that participants will use this self-presentation to fool themselves into believing this what they are really like.⁷⁵² Therefore, a danger exists that interviewees may follow ‘cultural scripts about how one should normally express oneself on particular topics.’⁷⁵³ Therefore, there is a danger that a defence lawyer in an adversarial jurisdiction would believe that a cultural

⁷⁵¹ E. McLellan, K. MacQueen, J. Neidig, (2003) *Beyond the Qualitative Interview: Data Preparation and Transcription* – 15 Field Methods 1, 74.

⁷⁵² See E. Goffman, *The Presentation of self in Everyday Life* (1959), Anchor Publishing.

⁷⁵³ M. Alvesson, Methodology for close up studies – struggling with closeness and closure, Higher Educ. 46(2) 167-193 at 169.

expectation exists that the lawyer should be a zealous advocate.. This does not necessarily mean that the lawyer is being deliberately misleading, however, it does temper the findings of the research. Diefenbach terms this as ‘socially accepting answering attitude.’⁷⁵⁴ This could lead to rich data being lost because the interviewer is being provided with ‘stereotypes, buzzwords, fads, fashions or the official party line.’⁷⁵⁵ Whilst this does not render the semi-structured interview worthless, it does mean the researcher should treat statements with caution as to the possibility that the participant did not say what they really thought, cannot be excluded.⁷⁵⁶ Another criticism of this form of research rests on a dual prong: quality and quantity. Whilst interviews can reveal personal insights, the aforementioned concern of truthfulness cannot be ignored. In order to combat this, Meijer suggests that the interviewer should triangulate the data, that is to say that additional data should be collected by using different methods such as observations.⁷⁵⁷ Such a method would allow the interviewer to cross-check and compare the data from the different sources. This might lead to patterns emerging through the analysis and ultimately offer ‘deeper and better analysis’⁷⁵⁸ into the subject matter under investigation. However, as was highlighted above, the study was self-funded and completed against a back-drop of full-time employment and becoming a father for the first time. As such, future research is planned that will utilize both semi-structured interviews and observations.

Whilst this method was elected as the method of choice, it was not without its drawbacks. Krippendorff⁷⁵⁹ suggests there are three issues with the reliability of coding in this manner. Firstly, there is the issue of stability, which is the concern that the researcher’s use of code may change over time. Secondly, there is the issue of accuracy, where a ‘gold standard’ has been established and other coding systems are compared to it. Finally, an issue exists around inter-coder reliability, where different coders would code the same data in different ways. These issues could be tackled with some ease in this study – the coding framework was designed and implemented by the researcher, and nobody else would code the work so there would be no issue with the aforementioned first and third concerns. However, the

⁷⁵⁴ T. Diefenbach, ‘Are case studies more sophisticated storytelling? Methodological problems of qualitative empirical research mainly based on semi-structured interviews’ *Qual Quant* (2009) 43: 875-984 at p.881

⁷⁵⁵ *Ibid.*

⁷⁵⁶ *Ibid.*

⁷⁵⁷ C. Meijer, C. Verloop and N. Beijaard, Multi-method triangulation in qualitative study on teachers’ practical knowledge: An attempt to increase internal validity, (2002) *Qual.Quant* 36 145-167 at 146.

⁷⁵⁸ T. Diefenbach, ‘Are case studies more sophisticated storytelling? Methodological problems of qualitative empirical research mainly based on semi-structured interviews’ *Qual Quant* (2009) 43: 875-984 at p.883.

⁷⁵⁹ K. Krippendorff *Content Analysis: An Introduction to its Methodology*, 2nd Ed. (Sage: California) 2004 see chapter 11.

standard of coding was a concern and one that is well-established. Campbell suggests that there is very little guidance for researchers (especially Early Career or Doctoral researchers) in methodological literature.⁷⁶⁰ A key concern of how the researcher measures 'prevalence' is important.⁷⁶¹ In this study the research was coded by the number of participants who made comments of a similar nature regarding the CrimPR or their role. This would be then coded in a positive, negative or neutral light. The different categories began to emerge after analysis of the first couple of interviews. By re-listening to the audio files and reading the transcript alongside the audio, it was clear that when the positive, neutral and negative comments arose. These descriptive elements were highlighted on the transcript in different colours, this was a time consuming process as Gillham suggests that transcripts should not be read one after another as there is a risk of concentration being dulled. He suggested not reading more than two transcripts a day, but it was also important not to be too slow when coding as the researcher may lose the categories they are forming in their head.⁷⁶² Furthermore, once all the transcripts were coded, I re-visited them to ensure the highlighted sections were still relevant and I also read the non-highlighted sections to ensure that significant statements were not missed.⁷⁶³ The final element of coding centered on the creation of an Excel document that tabulated the positive negative and neutral comments from the interviews. This acted as an index card for when I was writing the findings up in Chapter Seven.

6.6.2 Coding of Interviews

Once the empirical interviews were completed, I sent the audio recording to a professional transcriber who transcribed all 24 interviews, including the first interview that I also transcribed.

⁷⁶⁰ J.L. Campbell, C. Quincy, J. Osserman and O.K. Pederson 'Coding In-depth Semi structured Interviews: Problems of Unitization and Intercoder Reliability and Agreement', *Sociological Methods & Research* 42(3) 294-320 at 297.

⁷⁶¹ V. Braun and V. Clarke, 'Using Thematic Analysis in Psychology', *Qualitative Research in Psychology* 3(2) 77-101 at 87.

⁷⁶² B. Gillham, *Research Interviewing the range of techniques*, 2005, (Open University Press: New York) at p141.

⁷⁶³ *Ibid.*

⁷⁶⁴ *Ibid* at p.88.

She transcribed the interviews verbatim and indicated where there were significant pauses in the respondent's answer. She also highlighted where the tone and tenor changed as to reflect the mood of the answer. I asked the transcriber to transcribe the interviews verbatim. I understand that transcription is not 'neutral nor value free'⁷⁶⁵ and I wanted to avoid the any data reduction in the transcribed interview as the coding would be drawn from the transcribed interview therefore 'what is transcribed and not transcribed will very much influence the analysis process.'⁷⁶⁶ As such, I thought it imperative that that every word, pause and stoppage ought to be put on the page for me to analyse.

With the interviews transcribed, I embarked on the next stage of data analysis, this would be the coding of the interviews and data display. Coding is an important part of any analysis as it 'categoriz[es] data extracts.'⁷⁶⁷ In order to obtain as much information as possible I had to 'familiarize'⁷⁶⁷ myself with the interview data. Prior to coding I would listen to the interviews whilst referring to my hand-written notes, which were made during the interview. I would then listen to the interview whilst reading the transcription to ensure nothing was lost in the transfer from recording to paper. After this I began coding. When reading and re-listening to the audio I began searching for common themes that arose from the interviews. By splitting the interview pro-forma into different sections, each section would address a particular research question. That made the process of answering each question easier. The first section looked at how the lawyer conceives their own role. This section of the pro-forma was looking for descriptions that would correlate with the classic conception of the role, which was conceived in chapter three. The second section focused on the tensions arising from their pre-trial obligations. Here the coding was undertaken in a positive or negative manner. These answers could then be cross-referenced with section one to analyse whether there is any conflict between the answers provided. Finally, the third section examined the impact on the lawyer-client relationship and the notion of adversarialism in England and Wales. Again these answers were coded in a positive, negative or neutral manner. The rationale for this method of coding is that I wanted to explore whether defence lawyers view themselves in the same manner as the classic conception.

⁷⁶⁵ H. Arksey and P. Knigh (1999) *Interviewing for Social Scientists*, (1999) London, Sage at 141.

⁷⁶⁶ E. McLellanllan, K. MacQueen and J. Neidig *Beyond the Qualitative Interview: Data Preparation and Transcription* (2003) 15, *Field Methods* 1 at 74.

⁷⁶⁷ S. Li and C. Seale *Learning to Qualitative Data Analysis: An Observational Study of Doctoral Work* (2007) 17, *Qualitative Health Research* 10 at 1445.

⁷⁶⁷ C. Pope, S. Ziebad and N. Mays, *Analysing Qualitative Data* (2000) 320 *British Medical Journal* 114-116.

In order to code the data, I needed to create a means of displaying the data in order to glean the results of the research. The codes allows the researcher to search for common themes regarding the primacy and prioritisation of duties. These answers were then coded in order of priority and placed in a table to display the data. The data displayed is an important part of analysis as this display can be used as a 'mental map' to assist the researching in the search for important data. This map allowed me to examine the lawyer's answers and ultimately create three different types of lawyer: The Classic Adversarial Lawyer; The Conflicted Adversarial Lawyer and the Procedural Lawyer. These typologies were the product of the empirical fieldwork. They were not imposed onto the fieldwork and did not exist prior to the coding. McConville's and Newman's work were important influences here; the fact that firms can be categorised by analyzing their approach to certain tasks was transplanted to this study. However, this study centered on the individual lawyer rather than the culture of the firm.

Whilst these concepts will be fully explained in Chapter Seven, the aforementioned tally chart allowed me to examine which participant occupied different boxes. The chart was simplistic by design; I wanted to visualize how the lawyers viewed themselves. For example, if a lawyer answered that their primary duty was to the client but in section two highlighted that fulfilling the overriding objective tempers their duty to the client, they were inserted into both boxes which reflected that dual duty.⁷⁶⁸

6.7 Conclusion

The methodology was designed to ascertain how the lawyers view themselves and whether this view may be unrealistic in light of the pre-trial obligations and other competing duties they have to undertake. At each stage of the process there was a concern that those who took part in the study may have an interest in objecting to the legislative changes and, therefore, that this would taint their answers. The next chapter highlights that the lawyers who responded are passionate about criminal defence; however, the empirical chapter suggests they are not as 'adversarial' as they as they believe themselves to be. This study presented empirical data that currently does not exist in the field of research in criminal procedure. There was also a concern that the participants may have been unresponsive or unwilling to answer the question. However, this was not an issue as the participants showed genuine enthusiasm in answering the questions. Of the twenty-four participants, only one interviewee

⁷⁶⁸ This prioritisation of duties can be found on p.198.

was hostile. Lawyer 013 believed that the opening section was a test of his knowledge and he put the interview on hold to check his answers in a book. Outside of this example experience, I had no negative experiences from the process and I believe the study to be one of both credibility and integrity.

CHAPTER SEVEN

The Defence Lawyer in the Modern Era

1. Introduction

This chapter is based on the classic conception of the defence lawyer which was established in chapter Three. The conception is used as the starting point and, using interviews with defence lawyers, an assessment is made of whether it provides an accurate depiction of the modern-day practice of the defence lawyer. That conception suggested that the primary duty of the lawyer was to the client, despite the fact there were other duties that competed for priority. This empirical study sought to ascertain the duty which was prioritized and the implications of this for the defence lawyer's role. The interviews were designed to garner the lawyer's views on the potential implications of the 'new regime.' First, a general obligations section would explain the obligations encountered by a defence lawyer. The second section would highlight the tension faced by the lawyer. This examined how the aforementioned obligations influence the daily practice and routine of the lawyer. Third, a conflict section would elucidate how the lawyer tackles any conflict arising from the obligations and the impact they hold for the lawyer-client relationship. Smith and Montrose suggest that defence lawyers have a 'win at all costs' mentality,⁷⁶⁶ which clearly intimates that the only duty that should exist is that to the client. From the responses from the lawyers interviewed, a clear picture emerged that suggests that different lawyers take different approaches to prioritizing their respective duties. It will be argued that the responses of the lawyers in the interviews indicate that there are three distinct types of lawyer:

The Classic Adversarial Lawyer – The lawyer identifies their role as being to advance the best interest of the client. This comes at the cost of any other objectives.

The Conflicted Adversarial Lawyer – The lawyer maintains that their primary obligation is to the client but recognizes that, in a culture of co-operation, they have to satisfy more than one duty. Frequently, but not exclusively, the lawyer resolves the conflict by prioritizing the duty to the court, despite the earlier proclamation that the primary or main obligation is to the client.

⁷⁶⁶ A. Smith and W. Montross *The Calling of Criminal Defence* (1998-99) 50 Mercer LR 523. However, other work suggests that, in practice, this characterization is somewhat of misnomer and does not exist in reality. For a detailed account of this, see p.228.

The Procedural Adversarial Lawyer –Generally, The lawyer sees no conflict between their existing pre-trial obligations. Should any conflict be encountered, the lawyer simply views it as an occupational hazard that requires careful navigation but will generally be settled by prioritizing the obligation to the court. As an officer of the court, nobody is more suited to this careful navigation than a skilled procedural adversarial lawyer.

The three categories of lawyer take different approaches to their obligations. Whilst the categories have been influenced by the existing literature, they differ because they examine the drivers and goals of individual lawyers rather than that of criminal defence firms. As discussed earlier, it was felt that it would be easier to attract individual lawyers to take part in this research rather than entire law firms. Furthermore, this thesis seeks to understand the lawyers' priorities rather than the culture of firms as a whole. The implications of this typology of lawyers will be examined to discover whether this has consequence for the notion of adversarialism in England and Wales. In particular, whether there are any repercussions for fundamental fair trial rights such as the presumption of innocence⁷⁶⁷ and the privilege against self-incrimination.⁷⁶⁸

7.2 Role Confusion

*Confuse: n. throw into distortion, disconcert, perplex, fail to distinguish, make indistinct*⁷⁶⁹

The defence lawyer has to balance the interests of their client with the duty that is owed to the court. This presents the lawyer with an ethical dilemma. The classic conception developed in chapter three stated the primary duty of the lawyer was to the client.⁷⁷⁰ It was suggested in chapter five that by creating a climate of co-operation between the prosecution and defence a 'growing antipathy toward adversarial principles and the adversarial role of the defence lawyer has been created'.⁷⁷¹ The interviewees did not always recognise such antipathy. In fact, the notion that lawyers have a duty to fearlessly

⁷⁶⁷ Article 6(2) European Convention on Human Rights defines the presumption as 'Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law'

⁷⁶⁸ *Blunt v Park Lane Hotel Ltd* [1942] 2 KB 253 as being 'the rule... that no one is bound to answer any question if the answer thereto would, in the opinion of the judge, have a tendency to expose [him] to any criminal charge or penalty, or forfeiture which the judge regards as reasonably likely to be referred or sued for' and further that the rule 'applies to oral evidence, interrogatories and the discovery of documents.'

⁷⁶⁹ The Oxford Dictionary of Current English, 1990, Oxford University Press: Oxford at p.150.

⁷⁷⁰ See Chapter Three pages 49-73.

⁷⁷¹ E. Cape, *The Rise (And Fall?) of a Criminal Defence Profession*, (2004), 415, Crim. L. R. 72.

raise every issue, advance every argument and ask every question appeared to be alive and well. Some lawyers were extremely forthright in their view that the duty to the client was their absolute, paramount duty. However, many lawyers were acutely aware that this duty was tempered by other existing duties and thus created an interesting dynamic.

7.3 The Hierarchy of Duties

As previously discussed, the three interwoven duties Lord Reid spoke of in *Rondell v Worsley*⁷⁷² were not accompanied by any form of weighting or priority. Rather unhelpfully, the duties were merely listed and explained. However, it is clear that the interwoven duties cannot be equally treated; as such, their individual goals may conflict. A question remains whether the lawyers recognised that there is a conflict, and if they do, whether they are confused by it.

It is clear that some scholars believe the duty to the client is the only obligation owed by the lawyer. Fried takes this point a step further by arguing the lawyer should be permitted to lie in defence of the client's interests⁷⁷³ However, this approach would defeat the objective of dealing with cases 'justly' and ultimately render the criminal justice process unsafe. Should the lawyer lie to advance the best interests of his client, the truth-seeking goals of the trial process will be also be defeated. The lawyer should not be allowed to break the rules or cheat the system in order to satisfy any of his competing obligations. Furthermore, it should be made explicitly clear, none of the lawyers interviewed for this study ever intimated they would lie or have lied in order to advance their client's interests.⁷⁷⁴ As stated in chapter five, this may represent a methodological flaw and perhaps the lawyers are telling the researcher what they think he wants to hear. Smith and Montross suggest that devotion and faithfulness are more important than serving the truth.⁷⁷⁵ The importance of truth-seeking is a common theme and will be addressed fully later in the chapter. Any limitations on zealous advocacy⁷⁷⁶ are articulated by the other

⁷⁷²[1967] 3 WLR 166.

⁷⁷³C. Fried, 'The Lawyer as a friend: The moral foundations of the lawyer-client relation' 1975-76, 85 Yale LJ.

⁷⁷⁴Solicitors Regulation Authority, *Code of Conduct Handbook*, (2011), Chapter 1 Outcome 5.1 states that it is an offence for a lawyer to attempt to deceive or knowingly or recklessly mislead the court. <http://www.sra.org.uk/solicitors/handbook/code/part2/content.page> [Last Accessed 1 November 2015].

⁷⁷⁵A. Smith and W. Montross *The Calling of Criminal Defence* (1998-99) 50 Mercer LR 523.

⁷⁷⁶Freedman defines zealous advocacy as distinguished from over-zealous - advocacy has always meant advocacy within the law and the disciplinary rules, in the same way that "at the edge" does not mean "over

obligations faced by lawyers. Legal authors have long wrestled with the question of how to balance the roles of zealous advocate and officer of the court charged with the pursuit of justice.⁷⁷⁷

Wendell suggests that a defence lawyer has a number of different titles he can use: ‘hired guns, mouthpieces, instruments or tools.’⁷⁷⁸ He states that in legal terms, the lawyers are ‘agents’ who act on behalf of another, the principal, who in this context is the client. He goes on to state that the agent is an extension of the principal, who acts to effectuate the principals instructions.⁷⁷⁹ As the lawyer acts as an extension of the principal, it is unsurprising that some lawyers may prioritise the interests of the client above all others. What might be surprising is the fact that this approach is not universally adopted by defence lawyers. Boon and Levin suggest that describing lawyers as ‘hired guns’ or ‘mouthpieces’ is too simplistic and poses two problems. Firstly, such descriptions require the lawyer to abandon any moral evaluation of the client’s objectives or how they will achieve these goals. Secondly, this description suggests that the lawyer should not show any concern for the requirements of both law and the professional conduct codes. The characterization of the lawyer as a ‘hired gun’ is not consistent with the lawyer’s obligation to take into account the public interest, the interests of justice and their duty to the court.⁷⁸⁰ This comment highlights an enormous ethical conflict for the lawyer. Simply put, the classic adversarial lawyer and the win-at-all-costs mentality⁷⁸¹ cannot co-exist with the other pre-trial obligations of the modern era. The notion of advancing the best interests of the client, as a paramount duty, should be extinct since a duty of co-operation is thrust upon both defence lawyers and prosecution. Both are expected to work together in order to satisfy the overriding objective of the CrimPR.⁷⁸²

the edge.” See M. Freedman, ‘Henry Lord Brougham and Zeal’, (2006). 34 Hofstra L. Rev. 1319, 1320, 1323 at p.312.

⁷⁷⁷ R. Goel, ‘Can I call Kimura Crazy? Ethical Tensions in the cultural defense’ 2004 3 Seattle J Soc Justice 450.

⁷⁷⁸ W. Bradley Wendell, *Ethics and Law: An Introduction*, (2014), Cambridge University Press: Cambridge, at p.7.

⁷⁷⁹ *ibid.*

⁷⁸⁰ A. Boon and J. Levin, *The Ethics and Conduct of Lawyers in England and Wales*, (1999), Oxford: Oxford University Press, at p.188.

⁷⁸¹ A. Smith and W. Montross *The Calling of Criminal Defence* (1998-99) 50 Mercer LR 523.

⁷⁸² Rule 1.2(1)(a) states that each participant must conduct the case in accordance with the overriding objective that criminal cases be dealt with justly.

A number of interviewees highlighted that co-operation is permeating the criminal justice process.⁷⁸³ Advancing the best interest of the client was almost universally⁷⁸⁴ viewed as the primary obligation. However, some lawyers were quick to accept that the duty is qualified by other conflicting obligations:

‘The first and prime duty is to act at all times in your client’s best interests because you are there as guidance for him and his mouthpiece. Running alongside that are the duties to the court. As an officer of the court you uphold the principles of justice and perhaps nowadays you do things quickly and do not waste money basically.’ [003 solicitor, 7 years’ experience].

‘I feel the duty to my client is paramount. It is coloured by my professional obligations to the court. I do things in a lawyer-like way in line with my professional standards; I will not mislead the court and at the very tail end, follow the CrimPR as closely as possible.’ [009 Senior Partner, 29 years’ experience].

These comments are interesting. They both espouse terms such as ‘prime’ and ‘paramount’. The Oxford English Dictionary defines prime as ‘the best, choicest, most attractive, or desirable part of something’.⁷⁸⁵ Paramount is defined as ‘to rise to the highest position’.⁷⁸⁶ As well as recognizing the prime or paramount duty, the lawyers were quick to illustrate that this duty is qualified by the duty to the court. Daniel Newman found that ‘lawyers talk the talk but do not walk the walk’.⁷⁸⁷ Newman conducted an ethnographic study investigating the everyday reality of legally-aided criminal defence work. The present study consisted purely of interviews and did not contain any ethnographic observations. However, Newman argues that lawyers need to be taught to

⁷⁸³ 15/24 explicitly highlighted this concern.

⁷⁸⁴ 22/24 lawyers spoke of advancing the client’s best interest prior to any other obligation.

⁷⁸⁵ <http://www.oed.com/view/Entry/151292> [last accessed 5th May 2015].

⁷⁸⁶ <http://www.oed.com/view/Entry/137536?rskey=LqtH4l&result=2&isAdvanced=false#eid> [last accessed 5th May 2015].

⁷⁸⁷ D. Newman ‘Still Standing Accused: Addressing the Gap between work and talk in firms of criminal defence lawyers’ *International Journal of the Legal Profession* (2012) Vol 19, No 1, 3-27 at 8.

care about their clients and take responsibility for providing those accused and suspected of crime with the service they deserve.⁷⁸⁸

Lawyer 006 advocated that having a primary duty to the court ‘fudges’ the duty to the client and as such viewed it as ‘unhelpful’ to treat the duties as equal. In fact, he stated that he does not view the duty to the court as the primary duty. Lawyer 007 was equally as zealous concerning the primacy of the duty to the client:

‘I’ll ignore what it says in the procedure rules; we are there to protect the legal interest of the client.’ [007 partner, 21 years’ experience].

The most fervent example of a lawyer advancing the duty to the client above all other duties was espoused by Lawyer 019. He went as far as to say:

‘If the client tells me he’s done it, I’m not going to tell the court that. I cannot call him to give evidence at trial but I can still put the prosecution to proof’. [019, Senior Partner, 30 years’ experience]

Arguably, this approach compromises the obligations under the Code of Conduct for Solicitors. Outcome 5.1⁷⁸⁹ states that the solicitor should not attempt to deceive or knowingly or recklessly mislead the court and the solicitor must not be complicit in another person knowingly or recklessly misleading the court. Misleading of the court will qualify as a ‘significant failure’ of which the court has to be made aware.⁷⁹⁰ A significant failure is defined as a failure that might hinder the court in furthering the overriding objective.⁷⁹¹ Such hindrances would include undue delay, the need for an adjournment, or a client not providing instructions.

Lawyer 020 (senior partner, 18 years’ experience) strenuously disagreed with the approach taken by Lawyer 019 (senior partner, 30 years’ experience). When questioned about professional duties the response was clear: ‘Duty number one is an overriding duty to the

⁷⁸⁸ *Ibid* at 27.

⁷⁸⁹ Solicitors Regulation Authority, Code of Conduct Handbook, (2011), Chapter 1 <http://www.sra.org.uk/solicitors/handbook/code/part2/content.page> [Last Accessed 1 November 2015].

⁷⁹⁰ Rule 1(2)(1)(c).

⁷⁹¹ Rule 1(2)(1)(c).

court and number two is to the client. Nobody else needs to be considered.’ Lawyer 020 was the sole advocate to explicitly suggest that the duty to the court takes precedence over that owed to the client. It is noteworthy that the lawyer ended the answer to the question by saying ‘it’s a tricky position to be in’. This reflects the taut difficulty faced by the lawyers in reconciling their obligations.

Interestingly, some lawyers did not share the idea that the duties should not be treated as equal. Lawyers often placed the duty to the client first, although not with the fervour illustrated by Lawyers 006 (senior partner, 40 years’ experience) and 007 (partner, 21 years’ experience), both of whom were members of the same firm, which might point to the particular culture of that firm. Lawyer 019 also shared a similar stance but came from a separate firm. With the exception of Lawyer 020, all participants accepted the duty to the client came first. However, a number of lawyers suggested that the duty to the client was severely hamstrung by conflicting obligations to the court. There were differing levels of impact regarding how the duty might be tempered. Lawyer 018 (solicitor, 4 years’ experience) said:

‘[the duties] are numerous, I have loads of duties. The main one is to further the best interests of the client. Although, that has to be considered in light of duty to never mislead [the court]. That’s the most important ethical obligation I have. That said, the one I think of the most is the best interest of the client.’

This is an example of a clear conflict between the obligations the lawyer faces and the duties they owe to differing parties. Lawyer 018 notes that the main duty is to their client but that there are other obligations that need to be considered. Other lawyers were also well aware of the conflicting duties, and that perhaps the duty to the client was less of a priority:

‘The duties to the client are paramount but there are ever-increasing duties to the court, especially in the criminal procedure rules. The obligations are very straightforward: you should always act in the best interest of your client and give them the best advice possible. To the

court we have a duty to be open and we need to comply with our professional obligations.’ [010, solicitor, 12 years’ experience].

‘[My duty is to] advance the cause of the client commensurate with my professional duties to not mislead the court and abide by the court rules and procedures.’ [012, solicitor, 7 years’ experience].

Lawyer 011 (partner, 19 years’ experience) opened with a statement that represented their approach to the various duties: ‘[It is] to represent your client conscientiously without fear of reprisals...’ However, the impact of their statement was diluted as the lawyer was quick to add:

‘You also have a parallel duty to the court; your higher duty is to them. Their duty is to convict the guilty and acquit the innocent. My duty to my client is to represent them fairly, properly, without prejudice.’ [011].

The conflict between the duty to the court and the client was one that was readily identified by Lawyer 024 (solicitor, 9 years’ experience). There is a clear and identifiable conflict between the duty to the court and to the client. Lawyer 024 identifies his duties as:

‘... to protect and advance my client’s interests through openness and fearless presentation ... the court’s interests are not entirely chiming with the client’s and that is where the conflict enters the fray. You have to balance the two obligations’.

However, some were keen to express their ability to balance the conflicting duties. Some lawyers saw it as a balance and not a conflict. The balance was described as an ‘occupational hazard’ but one that a skilled, confident and trained advocate could handle. Lawyer 022 (solicitor, 6 years’ experience) identified this ‘occupational hazard’ and said ‘the duties to the court and client exist together – you have got to operate with both of those in mind at all times’. When further pressed he gave no indication that the two duties are theoretically incompatible. He gave the impression that the potential conflict is a

minefield that a skilled advocate can navigate successfully. This suggests that lawyers have the extraordinary power to overcome conflicting obligations with neither side losing out. The notion that those working in the legal profession can somehow see things differently to ordinary people is nothing new. The judiciary dislikes the imposition of minimum sentences because they impose fetters on discretion and ultimately hamper the notion of doing justice. Ashworth argues that judges believe they possess a particular talent in regards to sentencing and only they have the capability to decide what sentence should be handed down.⁷⁹² Lawyer 021 (solicitor, 12 years' experience) shares the view of Lawyer 022 (solicitor, 6 years' experience) that there should not be any conflict: 'If you apply it properly and you are being honest then the two should not conflict'. However, the lawyer recognised that in practice it is sometimes out of the control of the advocate. If a client does not want to give instructions this raises a conflict with the duty to the client, because the lawyer will have to tell the court.

Lawyer 023 (solicitor, 7 years' experience) painted the picture that the 'protection of the clients' was of primary importance. The drive for co-operation and efficiency permeated into how the lawyer would describe their duties. The lawyer claimed that he needed to ensure 'proceedings are conducted against the client both fairly and efficiently'. Furthermore, lawyers ought to be mindful of their 'ethical behaviour' towards all other participants. These participants would also include 'victims'. Kirchengast argues that the victim in the modern criminal trial is an 'significantly determinative and constitutive agent of justice.'⁷⁹³ Whilst crime victims have always been substantially connected to the process of policing, prosecution, evidence and sentencing, they have also taken an increasingly active role in the criminal trial process.⁷⁹⁴ For example, in the mid-1990s, many common law jurisdictions allowed the victim to prepare a statement which would 'provide them an opportunity to explain in their own words how a crime has affected them'⁷⁹⁵ at the sentencing stage. Many other victim-focused procedural and evidential reforms have

⁷⁹² See A. Ashworth 'The Techniques of Sentencing' (1984) Crim LR 519; see also J. N. Ferdico, H. Frandella and C. Totten, *Criminal Procedure for the Criminal Justice Professional*, (2012), Cengage Learning: California at p.589. The authors argue that the judiciary dislikes minimum sentences because 'they do not have the ability to fashion a sentence appropriate to the facts of a particular case'.

⁷⁹³ T. Kirchengast, *Victims and the Criminal Trial*, 2016, (Palgrave: London) at p1.

⁷⁹⁴ *Ibid* p2.

⁷⁹⁵ Code of Practice for Victims of Crime, Ministry of Justice, (2015) HMSO: London Chapter 2, Part A paragraph 1.12 available here: https://www.cps.gov.uk/sites/default/files/documents/legal_guidance/OD_000049.pdf [Last Accessed 9th September 2018].

followed. With the ever growing presence of the victim, is the criminal trial ‘losing sight of the defendant?’⁷⁹⁶ Furthermore, the Victims’ Right to Review scheme allows the victim to seek a review of a CPS decision not to bring charges or to terminate all proceedings. The upshot of things detracts from the finality of the criminal justice process, as discussed in chapter two.⁷⁹⁷ Should the accused go through the process and find the CPS decides not to charge, the rise of victim-focused reforms such as the review scheme may mean that the matter is not fully disposed of and the life of the suspect will continue to be disrupted. Whilst it is important to correct errors, the promptness of the overriding objective may mean that decisions are made too quickly, mistakes are made and then victims appeal against this hastily-made decision. As such, there is untold delay for courts, witnesses and the suspect, who at no juncture appears to be considered in this process. Indeed, the suspect is not permitted to make representations as part of the Victim Right to Review Scheme. Lawyer 023 highlighted whilst that he has never encountered any decisions to review CPS decision and in reality, the decisions are very rare. In the period from April 2016– March 2017, there were 1988 appeals received and only 137 of them were upheld. Out of the 103,113 CPS decisions made in this period, the percentage of appeals that were upheld was 0.13% and ultimately paints a picture that is not as great a concern in reality, as it is in theory.⁷⁹⁸ Despite this worry, the lawyer stated that the ‘obligation to the court has to come first’. This lawyer, who may be characterized as a *Conflicted Adversarial Lawyer*, appeared to want to hold on to the notion of being the defendant’s ‘white knight’⁷⁹⁹ and fearless representative, but the era in which he operates would not allow him to do so. The notion of efficiency, and the interwoven notion of co-operation, has clouded the mindset of some defence lawyers. The goals have become firmly established in how he rationalizes the conflicting duties before him. Stating that his duty was to the ‘court and his opponent’ is somewhat surprising. No other lawyer even hinted that this conflict existed. All other conflicts of duties identified by the lawyers centered on that between the best interests of the client and the interests of the court. The lawyer was further asked why he felt that the duty to the prosecution and the court took precedence. He explained that ‘the Rules [the CrimPR] state we have to help the court fulfil the overriding objective. With that in mind,

⁷⁹⁶ R. Leng, ‘Losing Sight of the Defendant: The Government’s Proposals on Pre-Trial Disclosure’, Crim LR 704 (1995) at 711.

⁷⁹⁷ See pages 27-47.

⁷⁹⁸ Victims Right to Review, April 2016-March 2017 available here: https://www.cps.gov.uk/sites/default/files/documents/victims_witnesses/vrr_data_2016_2017.pdf [last accessed 3rd September 2018].

⁷⁹⁹ See chapter three pages 48-73.

it is impossible to advance the duty to the client above those two duties. The Rules come first.’ Whilst a number of lawyers indicated there was a conflict as to what should be prioritized, Lawyer 023 was the only interviewee who explicitly believed that the managerialist aims of the CrimPR should trump the classic adversarial position that the duty to the client should be prioritized.

Whilst Lawyer 022 (solicitor, 6 years’ experience) sensed there was absolutely no conflict between the obligations, Lawyer 023 (solicitor, 7 years’ experience) takes that a step further. He begins to incorporate the principles of the CrimPR, the notions of efficiency and co-operation. Lawyer 015 (solicitor, 13 years’ experience) also illustrated how the ‘sea change’⁸⁰⁰ impacts their view on their duties. The lawyer stated that their ‘primary duty is to the client, I also have a duty to the court and tied in with that is a duty to my opponents.’ The lawyer reiterated that the duty to the client takes ‘primacy’, but this was clearly tempered by other competing obligations. The duty to their opponents was intriguing. Here, the lawyer mentioned the notion of co-operation. He said, ‘I cannot mislead nor ambush them; I have to inform them [and the court] if there is any significant failure’. Whilst the notion of co-operation has been elicited from the aforementioned lawyers, Lawyer 016 (solicitor, 18 years’ experience) was the only participant to suggest there is a duty to the prosecution.

The importance of clarifying the lawyer’s role was highlighted by Newman and Ugwudike who suggested that the defence lawyer’s role is of vital importance because he is considered to be one of the closest allies of the client.⁸⁰¹ However, none of the respondents used the term ally or even intimated that they were allies or even resembled members of the same team. To return to Lord Broughman’s quote, ‘[A]n advocate, in the discharge of his duty, knows but one person in the all the world and that person is their client’.⁸⁰² Lord Reid attributed no weight to the three individual duties in *Rondel*.⁸⁰³ However, what this section has

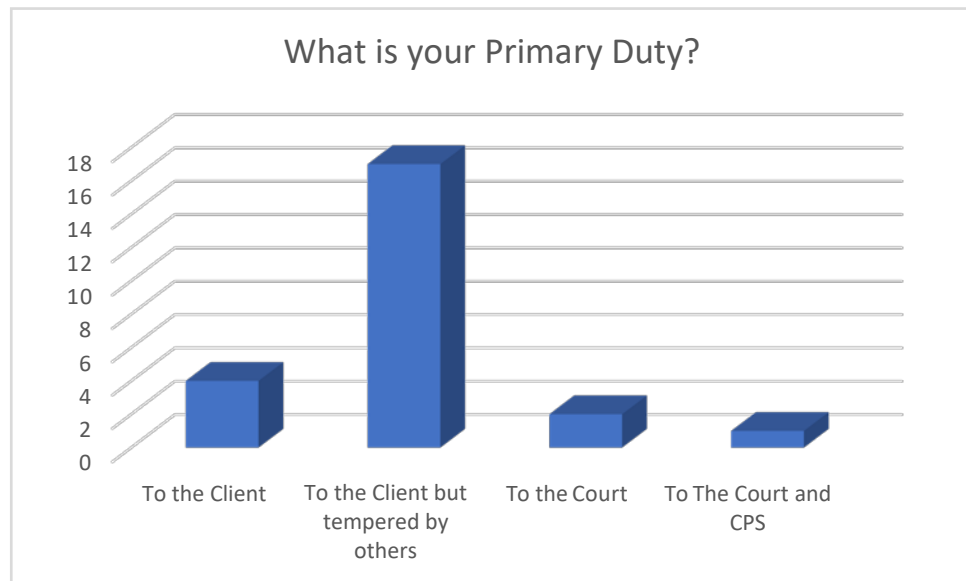
⁸⁰⁰*R (on the application of the DPP) v Chorley Justices and Anor* [2006] EWHC 1795 per Thomas LJ at para 24.

⁸⁰¹ D. C. Newman and P. Ugwudike, ‘Defence Lawyers and Probation Officers: Offenders’ allies or adversaries?’ (2014) *International Journal of the Legal Profession* 183-207.

⁸⁰² *The Trial at large of Her Majesty, Caroline Emelia Elizabeth, Queen of Great Britain; in the House of Lords on Charges of Adulterous Intercourse 3* (London 18210 as cited in M.H. Freedman, ‘Henry Lord Brougham – Advocating at the Edge for Human Rights’ *Hofstra L. Rev.* Vol 36: 311 [2007] at 311.

⁸⁰³[1969] 1 AC 191.

identified is that the lawyers interviewed prioritized differing approaches to their duties. The chart below highlights the prioritisation of duties:



The majority of the published work in this field has looked at the culture of the law firm rather than the individual lawyer, and different themes operating in the same⁸⁰⁴ arena is nothing new. Newman talks of ‘Radical’ and ‘Sausage Factory’ firms to illustrate the different lawyers’ attitudes, behaviours and approach towards the lawyer-client relationship.⁸⁰⁵ Newman also highlighted a number of themes that emerged in studies by Max Travers⁸⁰⁶ and Hilary Sommerlad.⁸⁰⁷ These themes were:

Social Agenda – lawyer’s virtuous reasons for being engaged in this area

Facilitators – how lawyers saw their role with clients; and

Satisfaction – the fulfilment derived from helping clients.

The themes derived from my own empirical work do not look at personal factors as above. But the lawyers who were interviewed from the same firms prioritized the same duty. For example, both 001 and 003 were from the same firm in the South East of England. Both of

⁸⁰⁴ The arena of criminal defence work.

⁸⁰⁵ D. Newman, *Legal Aid Lawyers and the Quest for Justice*, (2013) Hart Publishing: Oxford p.143-169.

⁸⁰⁶ See M. Travers, *The Reality of Law*, (1997), Ashgate Publishing: Aldershot.

⁸⁰⁷ H. Sommerlad, *Legally Aided Clients and their Solicitors*, Law Society Press: London, 2000.

them espoused the same view. Lawyer 001 stated that ‘my duty is to try and get the best result for my client within the bounds of the law’, whereas Lawyer 003 stated ‘first and foremost [the primary duty is] to act in the best interests of your client ... but running alongside that is the duty to the court’. Both readily identified the primary duty is to the client but that it is quickly tempered to acknowledge other duties that have to be satisfied in the pursuit of advancing the client’s best interest. Lawyers 006 (Senior Partner, 40 years’ experience), 007 (partner, 21 years’ experience) and 008 (solicitor, 6 years’ experience) were the only other lawyers who worked for the same firm. Lawyer 006 stated, ‘the professional codes say the duty is to the court and the client, I do not look it at that way. The duty is to the client alone.’ Lawyer 007 was more explicit, stating ‘I’ll ignore what it says in the procedure rules; we are there to protect the legal interests of the client and get the best possible sentence.’ The above two examples are the only ones in the study where more than one interviewee worked in the same firm. This means that no firm conclusions can be drawn as to whether the culture of the firm has any bearing on how the lawyer prioritizes their duty.

7.4 The Overriding Objective

The overriding objective of the CrimPR underpins the aspirations of the criminal justice system⁸⁰⁸ and has been influenced by the *Auld Review* in which Auld LJ explicitly stated that the ‘criminal trial is not a game where guilty defendant should be given a sporting chance’.⁸⁰⁹ In order to eliminate this ‘sporting chance’ the overriding objective of the CrimPR was created. This objective is to ‘deal with cases justly’.⁸¹⁰ The objective consists of a number of component parts to ensure the aspirations of the criminal justice systems were met. One such part is ‘to acquit the innocent and convict the guilty’⁸¹¹ and it is this part that appeared to garner the most attention from the participants. Rule 1.1(2)(a) appeared to have induced a fundamental misunderstanding of the overriding objective. A number of the participants were extremely forthright that the overriding objective is to convict the guilty and acquit the innocent, rather than to deal with cases justly:⁸¹²

⁸⁰⁸ D. Atkinson and T. Maloney *Blackstone’s Guide to the Criminal Procedure Rules* (2011), 2nd Edition (OUP: Oxford) at p. 2

⁸⁰⁹ Auld Rt Hon R, *A Review of the Criminal Courts of England and Wales*, (2001) <http://webarchive.nationalarchives.gov.uk/+http://www.criminal-courts-review.org.uk> [Last accessed: 28th May 2017].

⁸¹⁰ Rule 1.1 Criminal Procedure Rules 2015.

⁸¹¹ Rule 1.1(2)(a) Criminal Procedure Rules 2015.

⁸¹² 21/24 gave this interpretation of the Overriding Objective.

‘The overriding objective is to convict the guilty and acquit the innocent. They forget all about dealing with the D which is fundamental... we have circumvented the basics of our CJ practice by a set of arbitrary rules... the purpose [of which] is to get more convictions.’ [002] (Senior Partner, 32 years’ experience)

‘The official word is to convict the guilty and acquit the innocent... it’s a management system which assumes guilt and this is all about processing guilty cases. That’s my cynical view.’ [007], (Partner, 21 years’ experience).

‘The system is striving to acquit the innocent and convict the guilty. It’s as simple as that.’ [010] (Solicitor, 12 years’ experience).

‘It’s effectively to convict the guilty and acquit the innocent and you have to assist the court to promote this overriding objective.’ [011] (Partner, 19 years’ experience).

‘To ensure we have a smooth running system in which we convict the guilty and acquit the innocent’. [012] (Solicitor, 7 years’ experience)

‘It’s a nice theory but it should be worded differently - convicting the legally guilty would be a better way to put it.’ [024] (Solicitor, 9 years’ experience)

These lawyers made no mention of the other component parts of the objective, not even those that arguably enhance defendant rights. Those rights include dealing with the prosecution and defence fairly⁸¹³ or recognizing the rights of the defendant, particularly those under Article 6 of the ECHR.⁸¹⁴ However, the requirement to deal with cases efficiently and expeditiously⁸¹⁵ did elicit some cause for concern.

⁸¹³ Rule 1.1(2)(b).

⁸¹⁴ Rule 1.1(2)(c).

⁸¹⁵ Rule 1.1(2)(e).

‘[The rules are] painted by policy that is not statute and based [on] speedy justice.’ [003] (Solicitor, 7 years’ experience)

‘my understanding is that it’s a money-saving exercise... the courts are insistent on a plea at the first hearing despite only seeing the client for 20 minutes and there are plenty of outstanding issues such as witnesses etc... sometimes clients are shoehorned into pleading guilty when they should plead not guilty.’ [004] (Solicitor, 8 years’ experience)

‘The CrimPR is designed to be as speedy as possible and not be wasteful of either time or money.’ [003] (Solicitor, 7 years’ experience)

The notion of efficiency is an explicit goal of the CrimPR. Lord Justice Leveson explained that, pursuant to Rule 3.8(2)(b), the court must take the plea of the defendant at the first hearing. The obligation does not rest on the extent of advance information, service of evidence, disclosure of unused material or the grant of legal aid. Leveson continued that exceptions to the rule are rare and must strictly be justified but that if a plea cannot be entered, the court must ascertain what the plea is ‘likely’ to be.⁸¹⁶ Lawyer 004 (solicitor, 8 years’ experience) illustrated the concerns they held about advising a defendant on a plea within twenty minutes of meeting them for the first time. Lawyer 024 shared the concerns about advising clients without full disclosure from the prosecution:

‘It is an unrealistic demand on the defence to be in a position [to adequately advise] without knowing what the issues are. The CPS is at a distinct advantage here.’

The notion of dealing with the case efficiently and expeditiously is explicitly outlined in Rule 1.1(2)(e). However, it appears the notion of efficiency obscures the role of the defence lawyer. He has to balance the duty to the client alongside that of the court and fulfil those duties as expeditiously as possible. To ensure the efficiency goal is met the era of Active Case Management has been ushered in. The requirement that trials become more

⁸¹⁶ Leveson LJ ‘Essential Case Management: Applying the Criminal Procedure Rules’ December 2009: <http://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Protocols/applying-crim-procedure-rules-dec-2009.pdf>

efficient and expeditious can be traced back prior to the genesis of the CrimPR. In the wake of the *Auld Review*, the criminal courts acted swiftly to adopt the notion of efficiency; illustrated by the cases of *Chabaan*⁸¹⁷ and *Jisl*,⁸¹⁸ he explicitly outlined that the starting point of a criminal case is simple:

‘Justice must be done. The defendant is entitled to a fair trial: and, which is sometimes overlooked, the prosecution is equally entitled to a reasonable opportunity to present the evidence against the defendant. It is not however a concomitant of the entitlement to a fair trial that either or both sides are further entitled to take as much time as they like.’⁸¹⁹

In order to provide effective representation at trial it is necessary to know all the facts of the case. Fuller and Randall suggest that lawyers should employ a ‘devil’s advocate’ approach to their role.⁸²⁰ However, Luban suggests that for financial reasons defence lawyers do not employ a devil’s advocate approach.⁸²¹ Furthermore, in the era of expedited hearings such an approach would be nearly impossible because of the strict time constraints. Defendants may not immediately trust their lawyer. They might believe they will ‘rat them out and disclose incriminating facts to the prosecutor or judge’.⁸²² As such, they may not wish to be fully open with the lawyer and might withhold certain key facts. Freedman provides an example of an American lawyer who represented a woman charged with killing her husband.⁸²³ The client said she was with her sister at the time of the killing but upon investigation the alibi could not be confirmed. It was only with the promise of strict confidentiality that the client indicated she had suffered years of physical and emotional abuse.⁸²⁴ This represents a danger in the current climate; here the client would put these facts in her defence case statement only for the deficiency to be discovered

⁸¹⁷[2003] EWCA 1012.

⁸¹⁸[2004] EWCA Crim 696. Both of these cases are discussed at length in chapter four. Please see p103-121.

⁸¹⁹*ibid* per Auld LJ at para 114.

⁸²⁰ L. L. Fuller and J. D. Randall, Professional Responsibility: Report of the Joint Conference, *American Bar Association Journal* (1958), 44:1159-62 at 1160. A Devil’s Advocate was an approach employed by the Roman Catholic Church who, in canonization proceedings, would convey every possible argument against sainthood.

⁸²¹ D. Luban ‘The Adversary System Excuse’ in D. Luban (Ed), *The Good Lawyer, Lawyer’s Roles and Lawyer’s Ethics* (1983) (Rowman and Allanheld: Totowa N.J.) at p.96.

⁸²² W. Bradley Wendell, *Ethics and Law: An Introduction*, (2014), Cambridge University Press: Cambridge, at p.9

⁸²³ See. M. Freedman and A. Smith, *Understanding Lawyers Ethics*, (2010), New Providence: NJ, 4th Edition at 152.

⁸²⁴ The abuse suffered constituted a full defence to the charge of murder.

at a later date. This potentially has an extremely adverse impact on the defence case and an innocent person might be imprisoned.

The Case Management Forms⁸²⁵ are analogous with the defence case statement provisions of the CPIA 1996.⁸²⁶ However, defence case statements were only voluntary in the magistrates' courts but with the implementation of the case management forms, especially 'identifying the real issues', there is a danger that the voluntary disclosure regime has been supplanted by a mandatory disclosure regime that masquerades as Active Case Management:⁸²⁷

'What they require you to do is provide a defence case statement in the magistrates' court, which is only voluntary under the CPIA 1996. They are subverting statute through the back door. [011] (solicitor, 19 years' experience).

The completion of the form posed great concern for the participants, especially when given that such a duty is combined with the obligation to deal with the case in an efficient and expeditious manner, as the lawyer has not had the requisite time to adequately consider the charge against their client and identify the best course of action to take.

'They are dangerous – you're being forced into completing a form with only a partial picture. That's my major objection.' [001] (Senior Partner, 16 years' experience).

'I do not have a problem with the form itself but the management of the form. I'm told to name the witnesses I intend to call. This is wrong. Because I don't name a witness I intend to call until such a time that I've decided to call the witness. The courts cough and splutter but it's important to remember there is one issue: can the prosecution prove the case against the D. That is the true issue. Mags say 'well your

⁸²⁵ The forms can be found here: <http://www.justice.gov.uk/courts/procedure-rules/criminal/docs/october-2015/cm001england-eng.pdf> Preparation for effective trial: Criminal Procedure Rules Parts 1 and 3. [last accessed 10th December 2015].

⁸²⁶ Section 6 Criminal Procedure and Investigations Act 1996.

⁸²⁷ Please see p. 76-121.

client knows if he has done it. That's wrong. It shows a fundamental misunderstanding of the law and it's a deliberate manipulation.' [002] (Senior Partner, 32 years' experience).

'The problem you have is that at the first hearing you are expected to put down your defence, agree witnesses, all without full disclosure. Case Management forces your hand at an early stage and it becomes a rod because you cannot divert from it. The pendulum has swung back toward the victim rather than the D.' [003] (solicitor, 7 years' experience).

'We are filling out forms yet do not hold all the information. You have to be very careful with what you put on these forms.' [011] (Partner, 19 years' experience).

Although a number of lawyers were concerned about the impact completion of the Case Management Forms had for the defendant, one lawyer in particular took no issue with the forms:

'The forms create an environment and culture where you are expected to do more ... but I don't personally believe they add any further obligations than what is strictly in the rules.' [022] (Solicitor, 6 years' experience).

Lawyer 023 (Solicitor, 7 years' experience) shared the view that the rules do not add any further obligations to their role. He emphasized the requirements to identify the real issues were effectively unproblematic:

'The identification of real issues basically means the lawyer is doing a mini-plan script, frankly that is ridiculous ... most summary cases are simple and it's just a couple of words that's needed.' [022] (Solicitor, 6 years' experience).

Surprisingly, Lawyer 024 (Solicitor, 9 years' experience) had no objection to the CrimPR. Earlier in the interview the lawyer claimed that the CrimPR placed the defence at a distinct disadvantage because frequently the lawyer is advising the defendant without a full picture. However, when questioned about the overriding objective, the lawyer claimed it was just a matter of 'terminology' and that there is nothing wrong with it in practice despite the earlier claim of the CrimPR being 'unrealistic'. The lawyer thought that the overriding objective would be better suited if it were explained as 'convicting the legally guilty' rather than 'convicting the guilty'. The lawyer explained that if the client states that 'he is probably guilty but he wants to test the prosecution's case' he would have no issue putting the prosecution to proof.

The advocates displayed an element of confusion and disagreement concerning both the prioritisation of duties and the overriding objective. Those interviewed focused on a singular component part of the objective rather than the objective as a whole. The overriding objective is to 'deal with cases justly;' thus pointing to a culture of attempting to increase the number of convictions which was alluded to by Lawyer 002 (Senior Partner, 32 years' experience). The advocate believed that we have 'circumvented our criminal justice practice by a set of arbitrary rules [with] the purpose of getting more convictions'. Whilst not all lawyers shared this view, it was clear participants did feel the traditional adversarial justice system was changing to become more efficient and a by-product of this efficiency drive might be increased numbers of convictions at trial.

Under the new regime,⁸²⁸ it is perhaps not surprising that defence lawyers might appear confused when focusing on the overriding objective. With many defence tactics diluted, the ability of the lawyers to zealously defend their client has potentially been impinged; it is perhaps easy for the lawyers to adopt a cynical view that the overriding objective is yet another attack on defence practice. Ultimately, some lawyers in the study believe that the overriding objective is to 'acquit the innocent and convict the guilty' and not to deal with cases 'justly.' In order to combat this, the lawyers adopt differing approaches to satisfy and discharge their obligations.

⁸²⁸ For a full examination of the 'new regime' please see chapter five p.121-162.

The differing approaches allow for the lawyers in the study to be placed in one of three categories; arguably, the differing approaches mean that the overriding objective is not met.⁸²⁹ The Classic Adversarial Lawyer is akin to Lord Broughman's lawyer; the only duty is to the client and the client alone. The Conflicted Adversarial Lawyer wants to project an image of Broughman's zealous lawyer but this projection is merely a veneer of zealous advocacy. This lawyer had the duty to their client tempered by the other obligations. Finally, we have the Procedural Lawyer; this lawyer sees no confusion at all. He is an officer of the court first and foremost. He complies with the rules even at the expense of the potential interests of the client. However, by adhering to the rules and satisfying multiple duties⁸³⁰ there could be severe ramifications for the defendant. Lawyer 019 (Senior Partner, 30 years' experience) gave an example of the defendant being penalized in this era of efficiency. He had a client who had been previously convicted three times and was currently accused of nine burglaries. At the initial hearing the lawyer argued that the client was not fit to plead. This potentially contravenes the guidance given by Lord Justice Leveson as he suggested the plea must be taken at the first hearing,⁸³¹ indicating that exceptions to this rule will be rare. In this case, the court adjourned for eight weeks to allow the defendant to be assessed by medical professionals to ascertain his ability to plead. The client was deemed fit to plead and returned to court eight weeks later with his lawyer. The defendant was convicted and the court stated that he would not receive the full one-third sentence discount⁸³² because he did not enter a guilty plea at the preliminary hearing. The lawyer thought this absurd and felt aggrieved. He thought he was doing the right thing: 'I was being perfectly diligent and specifically not taking instructions from somebody who might have been mad'. So by acting in the client's interest, to seek a medical evaluation, the court decided that it was not the most expeditious way to deal with the case and therefore did not allow the full sentence discount. This illustrates that there is pressure to prioritise the duty to the court when any duties conflict. With this in mind, it is not surprising there is an element of role confusion as under pressure from the courts, by virtue of the CrimPR, the lawyer acts in the best interest of the client by seeking a medical

⁸²⁹ The Typology of Lawyers is available unabridged in Appendix One.

⁸³⁰ Such as advancing the client's best interests and advancing the duty to court.

⁸³¹ Lord Justice Leveson Essential Case Management: Applying the Criminal Procedure Rules which endorses Rule 3.8(2)(b).

⁸³² In *R v Buffrey* 14.Cr. App R (S) 511 the Court of Appeal indicated that while there was no absolute rule as to what the discount should be, as general guidance 1/3 would be appropriate. This is in line with guidance provided by the Sentencing Guidelines Council (2007) that recommends: 1/3 for a guilty plea at the first opportunity, 1/4 for a guilty plea once the trial date is set and 1/10 for guilty plea at the door of the court.

evaluation but this ultimately has a detrimental impact on the client as he lost any discount for an early guilty plea. Ultimately, this presents the lawyer with a conundrum and one which highlights their role confusion. How can lawyers act as the zealous advocate, if advancing the client's best interests ultimately has a detrimental impact on that client?

7.5 Tension in the era of co-operation

*Tension: n. effect produced by forces pulling against each other.*⁸³³

The post CrimPR era of co-operation has highlighted the importance of both efficiency and economy. The courts have outlined that delay is inimical to the interests of justice.⁸³⁴ Furthermore, it is self-evident that proceedings in magistrates' courts ought to be simple, speedy and summary.⁸³⁵ However, the quest for simple, speedy and summary justice is not necessarily compatible with fairness and compliance with this implicit goal.⁸³⁶ Arguably, the notion of co-operation and satisfying the overriding objective might be adverse to the best interests of the client. This section will examine whether the lawyer perceives any tension between the competing duties. The defence lawyer has a number of pre-trial obligations; completion of Case Management Forms, acting as the Case Progression Officer and fulfilling the Advance Notice of Defence Witnesses requirements. These provisions have to be balanced against the best interests of the client. The theoretical conception of the defence lawyer⁸³⁷ highlighted that these requirements might be problematic for the lawyer as the duty to the client and the court competes for priority; chapter five concluded it would be impossible for both duties to receive equal weighting. As such, this causes a tension; either the lawyer has to dilute the duty to the client in order to satisfy their obligation to the court; or, the court would be left frustrated as the lawyer prioritizes the best interests of the client. This section examines these issues and where the lawyers recognised a tension, how they said they would deal with it.

⁸³³*The Oxford Dictionary of Current English*, 1990, Oxford University Press: Oxford at p.775.

⁸³⁴Per Sir John Thomas in *R (On the Application of Drinkwater) v Solihull Magistrates' Court* [2012] EWCA 765 at para 46.

⁸³⁵*Ibid* at para 47.

⁸³⁶For further examples of this mantra pervading the criminal justice process please see: Ministry of Justice, *Swift and Sure Justice: The Government's Plans for Reform of the Criminal Justice System*, (2012), Cm 8388, (TSO: London)

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/217328/swift-and-sure-justice.pdf [Last Accessed 2nd November 2015]; see also The Stop Delaying Justice! Initiative which looked at eradicating adjournments and establishing best practice for active case management.

⁸³⁷See chapter five page p.121-62.

7.5.1 The Case Management Form

The rules dictate that the advocates must assist the court with their Active Case Management responsibilities,⁸³⁸ and the courts' quest for co-operation and increased efficiency. In the *Chorley Justices*⁸³⁹ case Thomas LJ indicated that if the 'defendant refuses to identify what the issues are... he can derive no advantage from that or seek... to attempt an ambush at trial. The days of ambushing and taking last minute technical defences are gone'. In order to assist the court with their active case management, both sides have to complete a case management form, which includes, *inter alia*, the identification of the real issues, monitoring and progressing the case via a Case Progression Officer (hereafter, CPO), discouraging delay and encouraging participants to co-operate in the progression of the case.⁸⁴⁰ A number of theoretical issues with the Case Management Form were highlighted in chapter four; the lack of time between meeting the client and the expectation to identify the real issues, which theoretically is incompatible with the presumption of innocence.⁸⁴¹ Finally, the empirical study examined how the lawyers deal with failures to disclose from the prosecution and what tactics and strategies are adopted to advance the client's best interest.

7.5.2 Identifying the Real Issues and a Lack of Time

Some lawyers expressed dismay about the duty of co-operation as they had to disclose the real issues at the earliest opportunity whilst not necessarily knowing what evidence is in the possession of the prosecution.⁸⁴²

Some prosecutors want you to outline your cross-examination plan at the very first hearing; these are points for the trial, the testing of evidence not for now. The CPS effectively wants everything. Identify the issues should not be a script of how the trial will go. Some want that. [022] (Solicitor, 6 years' experience).

⁸³⁸CrimPR Rule 3.2.

⁸³⁹[2006] EWHC 1795 (Admin).

⁸⁴⁰Rule 3.2(2)(a)-(h).

⁸⁴¹The European Court of Human Rights, *Guide on Article 6: Right to a Fair Trial*, Council of Europe, 2014 at p.34 - Article 6(2) The principle of the presumption of innocence requires, *inter alia*, that when carrying out their duties, the members of a court should not start with the preconceived idea that the accused has committed the offence charged; the burden of proof is on the prosecution, and any doubt should benefit the accused. It is for the prosecution to inform the accused of the case that will be made against him, so that he may prepare and present his defence accordingly, and to adduce evidence sufficient to convict him http://www.echr.coe.int/Documents/Guide_Art_6_criminal_ENG.pdf [last accessed 23rd October 2014]

⁸⁴²This was not universal but 20/24 interview participants highlighted this as a concern.

Other lawyers were concerned about having to disclose the relevant issues when they were only dealing with a partial picture of the facts. Often the lawyers would only be meeting their client on the morning of trial and they sometimes have to complete the Case Management Forms within twenty or thirty minutes of meeting the client. A difficulty emerges because of the potential loss of sentence discount for a guilty plea. McEwan states that prosecution evidence is frequently not available at the first instance.⁸⁴³

‘The only difficulty is an unrealistic demand on the defence to be in a position to know what the issues are. Once charged, the prosecution should be ready to go to trial. The CPS is at a distinct advantage, as they are trial ready. The defence is not anywhere near that position.’

[024] (Solicitor, 9 years’ experience).

‘A fundamental problem with these forms is that you are expected to fill them in on the first occasion which is often when you have been given the evidence for the first time and had an opportunity to speak to the client for the first time. You are in court; it is not the appropriate environment so solicitors should be saying “I want an adjournment, I don’t want to deal with case management issues today” but the courts don’t really allow that. So the solicitor then has to decide - am I going to push ahead anyway notwithstanding and make sure I get it right or am I going to advise the client that I don’t feel in a position to properly represent you today and withdraw from the case.’ [021] (Solicitor, 12 years’ experience).

The drive for efficiency creates tensions for the lawyers. The lawyers stated that they felt it is difficult to provide adequate legal advice as a plea has to be entered and the case fully managed at the first hearing, irrespective of prosecution disclosure or access to legal advice.⁸⁴⁴ As Lawyer 003 (Solicitor, 7 years’ experience) stated ‘[the speed creates great difficulty] you’re making decisions with only a partial picture [of

⁸⁴³ J. McEwan, "Truth Efficiency and Co-operation in modern Criminal Justice, (2013), Current Legal Problems, 66, 216.

⁸⁴⁴ See Attorney General’s guidelines on disclosure for investigators, prosecutors and defence practitioners 2013

facts].’ Lawyer 019 (Senior Partner, 30 years’ experience) gave an example that highlighted the inherent dangers of advising a client without a full picture of the facts. The lawyer highlighted that the cultural change is not just about the notion of co-operation; there has been a change in culture from the judiciary and magistrates as well. When complaining to a judge that he could not adequately advise their client owing to a lack of information, the judge retorted quickly, ‘well, your client knows if he’s done it’. What confuses the matter further is the fact the defendant might not know he is guilty; a view that was not always accepted by magistrates. Four lawyers commented that they had heard magistrates proclaim words to the effect of ‘your client knows if he’s done it or not’.⁸⁴⁵ Lawyer 006 (Senior Partner, 40 years’ experience) intimated that this approach is ‘pretty much universal’ in their region. Edwards commented on the aggressive judicial behaviour, as regards the completion of statements; the judges and magistrates have evolved a long way from their original purpose of assisting in the identification of relevant material for further prosecution evidence.⁸⁴⁶

Traditional theory holds that the truth emerges where two sides present their own version of events and are pitted against each other on equal terms.⁸⁴⁷ Langbein was critical of such a process when he argued that truth-finding is flawed because each side tailors their case to suit their own self-interest.⁸⁴⁸ As established in chapter four⁸⁴⁹, the courts were quick to adopt the mantra of efficiency in the post-*Auld Review* era at the expense of adversarial justice. The courts have suggested that meeting the Overriding Objective will require both efficiency and expedition⁸⁵⁰ and embracing the notion of co-operation would lead to greater efficiency and the truth.⁸⁵¹ Lawyer 007 (Partner, 21 years’ experience) revealed that he witnessed a magistrate depart from their traditional adversarial stance of passivity⁸⁵² when he effectively ‘bullied’ two young advocates to agree to the summary of police interviews being admitted without actually hearing the tapes. Whilst the lawyer admitted

⁸⁴⁵ Although this was not an explicit question on the *pro forma* four lawyers, from three different firms, in three different regions of England and Wales suggested that they have either encountered such a question of a magistrate.

⁸⁴⁶ A. Edwards ‘Case Management Forms’ CLR 2011 54.

⁸⁴⁷ J. Jackson ‘Towards a Dialectic Theory of Proof for Legal Procedure (1991) 154 JR Stat Soc 107.

⁸⁴⁸ See generally J. Langbein – *The Origins of the Adversary Criminal Trial*, (2005), Oxford: Oxford University Press.

⁸⁴⁹ See the earlier examination of *Jisl* [2004] EWCA Crim 696 and *Chabaan*.

⁸⁵⁰ *D and Others* [2007] EWCA Crim 2485.

⁸⁵¹ J. McEwan. ‘From Adversarialism to Managerialism: Criminal Justice in Transition’, (2011), L Stud 519.

⁸⁵² The judiciary were traditionally expected to remain passive because if he ‘descends into the arena and is liable to have his vision clouded by the dust of conflict’ Per Green MR, in *Yuill v Yuill* [1945] 1 All ER 183 at 189.

that he did not believe it was the intention of the magistrate to bully the advocates, the net effect of the changing judicial demeanour meant the advocates felt they did not have the courage to do anything other than to agree to the summaries. This is to the obvious detriment of their client's best interests as the advocate had not heard the tape and thereby should not agree to its contents. This presents a very worrying example, which may well be an isolated incident but nonetheless represents a concerning attitude pervading the magistracy in the quest for efficiency. Whilst the notion of efficient and expedited trials should not be derided, it is disconcerting to see even an isolated case of the magistracy flexing their muscles in order to meet such objectives.

McEwan states that the defence might find it difficult to marshal an accurate picture of facts within the time limits set. She notes there are many problems in arranging meetings with clients and the court generally fails to take account of these failings.⁸⁵³ Some lawyers in the study indicated that there is a 'local arrangement' with the CPS and in places, the court, not to 'grass' on each other. For example, to avoid sanctions for non-compliance with particular orders some lawyers have struck up good working relationships with the CPS and they operate on quid pro quo basis; if you do not meet a deadline, we will not tell on you if you do not tell on us:

'To be honest we have a reasonable working relationship with the majority of CPS lawyers and it is sort of a quid pro quo, we don't make a fuss about them failing to meet deadlines to the extent that we could and it works both ways.' [004] (Solicitor, 8 years' experience)

'The rules are informally enforced instead of any hard and rigid sticking to the rules.' [001]. (Senior Partner, 16 years' experience).

An example of the no hard and rigid enforcement centered on the lack of sanctions for prosecutorial failures. A number of lawyer's believed the sanctions to be one sided and geared toward the defence, whereas the prosecution receive no sanction for breaches. Furthermore, some lawyers suggested:

⁸⁵³ J. McEwan 'Truth Efficiency and Co-operation in modern Criminal Justice', *Current Legal Problems* (2013), 66, 209.

‘the disclosure obligations are very much crime control ... let’s get quicker and convict earlier. But forget about receiving disclosure so you can advise your client. The prosecution can fail with their obligations. We cannot.’ [002] (Senior Partner 32 years’ experience).

This sentiment was echoed by 007 (Partner 21 years’ experience) who said: ‘We have to advise on a partial pictures of evidence ... the real risk of defeating the overriding objective [of dealing with cases justly] comes from CPS failings not from us.’ The notion that the regime allows for a conveyor belt⁸⁵⁴ like process that is punished for failures was mentioned by 014 (partner, 24 years’ experience). He believed that the carrot and the stick approach was being used by the courts routinely ignored CPS failings. Whilst it is outside the scope of this thesis, the failings in terms of police and prosecution disclosure is worth briefly raising here as since the original submission of the thesis, there have been a number of developments in the field of disclosure. Whilst they concern prosecutorial disclosure, there failings and the potential ramifications hold great danger for miscarriages of justice in England and Wales. In *R v Allan*, a police officer had to 57,000 lines of message data and whilst there is no indication that the potential exculpatory evidence was purposively withheld from the defence, the defence were not given access to the material. However, the CPS placed pressure on the police and this led to the phone records being disclosed to both sides. This disclosure yielded vital evidence that suggested ‘the complainant at best was giving a misleading impression as to her sexual relationship with Allan or at worst, maliciously lying.’⁸⁵⁵ Whilst there is no suggestion that the police deliberately withheld the information; it does point to a flaw in a reciprocal disclosure regime. Simply put, the police are looking for evidence to convict the suspect and are not too concerned with finding exculpatory evidence. As suggested, when dealing with the section on defence witnesses,⁸⁵⁶ the adversarial culture does not readily accept the notion that the police will find exculpatory evidence. However, this is at odds with the general approach to managerialism and the desire for a co-operative criminal justice system. In the wake of the Allan case the Metropolitan Police and the CPS quickly made a list of recommendations concerning disclosure. Much like Plotnikoff and

⁸⁵⁴ The notion of a shift to a more crime control approach is covered in section 8.7 p.271-274.

⁸⁵⁵ T. Smith, (2018) The “near miss” of Liam Allan: Critical problems in police disclosure, investigation culture, and the resourcing of criminal justice. *Criminal Law Review* (9). pp. 711-731 at p713.

⁸⁵⁶ See p.223-227.

Wolfson and the other inquires into disclosure, the report focused on the issue of training of officers.⁸⁵⁷ However, this simplistic answers neglects to address the issue of funding. The drive for efficiency can arguably be described as the drive to become more economic. The early guilty plea scheme embodies this; by offering a reduction in sentence for a guilty plea, the system is saving money. Should the defendant wish to have his day in court and is found guilty, he is likely to receive a harsher sentence than if he copped to an early plea. If the system is looking to become more efficient, and effective, the composite bodies need adequate funding. The Metropolitan Police and CPS suggested better training is required by the question remains if the police have the necessary personnel⁸⁵⁸ and time to undertake the vital work with disclosure,⁸⁵⁹ especially in the light of the extensive digital material the police may now hold. As such, the Justice Committee welcomed the formation of a technology group to deal with this problem.⁸⁶⁰ The joint review of disclosure by the HMCPSI and the HMIC found that policing schedules for disclosure were routinely poor and contained inadequate descriptors.⁸⁶¹

7.5.3 Strategies and Tactics: Advancing the Client's Best Interest

Defence lawyers are placed in an unenviable position of having to provide advice to clients without a full picture of the facts. The impact of the advice at this early stage might have massive ramifications at the later sentencing stage and this was explained by Lawyer 019.⁸⁶² Here, he did not enter a plea at the first hearing and as such he paid a penalty by not receiving the full sentence discount. By advising with only a partial picture, the situation is akin to a surgeon having to operate on a patient without the full knowledge of his condition. This situation is clearly undesirable and yet lawyers are expected to offer advice

⁸⁵⁷ CPS and Metropolitan Police, A Joint Review of the disclosure process in the case of *R v Allan*, January 2018, at p. 7 available here: <https://www.cps.gov.uk/sites/default/files/documents/publications/joint-review-disclosure-Allan.pdf> [Last accessed 1 September 2018].

⁸⁵⁸ Since 2010, frontline police officers have fallen by 20,000.

⁸⁵⁹ T. Smith, (2018) The “near miss” of Liam Allan: Critical problems in police disclosure, investigation culture, and the resourcing of criminal justice. *Criminal Law Review* (9). pp. 711-731
726.

⁸⁶⁰ House of Commons Justice Committee, Disclosure of evidence in criminal cases, Eleventh Report of Session 2017-19, at p. 47. Available here: <https://publications.parliament.uk/pa/cm201719/cmselect/cmjust/859/859.pdf> [Last Accessed 1 September 2018].

⁸⁶¹ HMCPSI, Making it fair - a joint inspection of the disclosure of unused material in volume Crown Court cases, (2017) at para 1.3.

⁸⁶² The lawyer had a client who he believed to be unfit to plead but as a result. The client was later declared fit to plead but had lost his sentence discount as the plea was not entered at the earliest opportunity.

on the basis of the ‘client knows if he’s done it’.⁸⁶³ To combat this issue, some defence lawyers employ a somewhat tactical approach to completing the form. Andrew Keogh has said that the ‘clever technical lawyer is now officially dead’.⁸⁶⁴ However, that position appears rather extreme; although it is impossible to refute that the courts have adopted a new approach to hearing criminal cases.⁸⁶⁵ However, to say the clever technical lawyer is dead might not necessarily be the case. It was clear from the interviews that some lawyers have reinvented themselves and adopted a technical approach to fulfilling their case management responsibilities:

‘I try to be as vague as possible and supply as minimal detail as possible to satisfy the court.’ [008] (Solicitor, 6 years’ experience).

‘I complete the form with as little detail, but sufficient detail, to satisfy my obligation to the court. I will not go chapter and verse into my client’s defence.’ [010] (Solicitor, 10 years’ experience).

‘I won’t disclose his defence ... the form is completed in minimal detail. But completing the form causes difficulties because we are working from a skeleton. The response is very basic, not very detailed.’ [011]. (Partner, 19 years’ experience)

As discussed at length in chapter four,⁸⁶⁶ the approach of submitting minimum detail in the Case Management Form is a problem the courts have faced since the inception of the CPIA 1996.⁸⁶⁷ Plotnikoff and Wolfson found that 52 per cent of defence case statements contained a bare denial of guilt or did not meet the requirements of S.5 CPIA 1996.⁸⁶⁸ Furthermore, they highlighted that nearly 90 per cent of judges and barristers ‘rarely or

⁸⁶³ This phrase was repeated throughout the empirical research and Lawyer 007 explained how he witnessed junior lawyers being bullied by a magistrate.

⁸⁶⁴ Andrew Keogh speaking at the Eldon Lecture Series (2001), Northumbria University School of Law, ‘Criminal Case Management – Is the Game Over?’ the quote is taken from p.1 of the transcript.

⁸⁶⁵ For example, see *R (on the application of the DPP) v Chorley Justices & Anor* [2006] EWHC 1795 per Thomas LJ at para 24.

⁸⁶⁶ See Pages 76-120.

⁸⁶⁷ In *Tibbs* (The Times, February 28th, 2000) the Court of Appeal stated that it was not suitable to merely use the general legal description of the defence i.e. accident or self-defence. The form needs extend to the facts the defendant will rely on at trial.

⁸⁶⁸ J. Plotnikoff and R. Wolfson, *A Fair Balance? Evaluation of the operation of disclosure law*, (2001) RDS Occasional Paper no 76, at p.77.

never adduce evidence of the contents of the defence statement at trial, other than to rebut alibi evidence'.⁸⁶⁹ The defence statement was designed to narrow the issues at trial, and the Case Management Forms were designed to 'identify the real issues' and make the trial process more efficient and expeditious. However, Quirk found that the defence case statements were 'merely an administrative requirement rather than anything of any practical utility'.⁸⁷⁰

A number of lawyers interviewed had established a more co-operative attitude toward their obligations and they did not feel the need to strategically withhold information in order to protect their client. In fact, some said there was little point in doing so because the culture of the court has now changed and they would be criticized for taking such an approach:

I flag all issues as there is no point springing the issues later as you will be criticized by the court ... it's difficult because, I know it's not a listed penalty, but you don't want your client receiving a heftier sentence but it does have that effect sometime. But we will not write paragraphs we will just say what the 'nature' is'. [004] (Solicitor, 8 years' experience).

I do not see this as onerous. What is the point of creating more work for everyone when the end point is going to be the same and most likely that your client is going to be prejudiced by you trying orchestrate otherwise ... generally we don't have too many 'no comment' interviews so the forms are not telling the CPS anything they don't know already...' [005] (Solicitor, 5 years' experience).

'The CrimPR [are] generally a positive tool, although it faces a risk of falling into disrepair because of courts' failure to sanction those who don't comply. The CPS cannot keep up with the pace [of the Rules]. They know if they breach it, there's no sanction.' [024] (Solicitor, 9 years' experience).

⁸⁶⁹ *ibid.*

⁸⁷⁰ H. Quirk, 'The Significance of Culture in Criminal Procedure Reform: Why the Revised Disclosure Scheme Cannot Work' (2006) E&P 10(1), 42-59 at 57.

Ultimately, these lawyers have embraced the era of co-operation and do not necessarily adopt a technical approach to completing the Case Management Forms. They think the forms are a positive tool and those who do not reply should be sanctioned. This is an example of the non-adversarial defence lawyer at work. The adversarial defence lawyer would not go ‘chapter and verse’ into the form. The lawyers I interviewed did not really fear any judicial sanction, save for costs orders, and as such, thought the best approach for the client was to set out a little more than a skeleton outline of the issues at hand. However, other lawyers disagreed with this approach and thought it to be pointless, with one lawyer [007] fearing, unofficially, that his client may get a ‘rougher ride’ with the magistrate, if the lawyer did not comply with the CrimPR.

The minority of lawyers who were positive about the CrimPR are in contrast to Garland and McEwan’s findings, who concluded that failure of the defence to file defence case statements was ‘a perennial problem’.⁸⁷¹ Furthermore, the court had to press the defence lawyer on what the issues were because they only provided one or two word answers:⁸⁷²

I do not think it’s unreasonable to say to a D we need you to identify what your defence is. These are public funds. Because of *Newell*,⁸⁷³ we do not have to be as cautious as one once was.’ [006] (Senior Partner, 40 years’ experience).

Lawyer 019 (Senior Partner, 30 years’ experience) held the opinion that the protection afforded in *Newell* was robust enough to withstand any tactical use by the prosecution. Nonetheless the lawyer adopted a very cautious approach to completing the forms:

⁸⁷¹ F. Garland and J. McEwan ‘Embracing the Overriding Objective: Difficulties and Dilemmas in the new criminal climate’, (2012) 16 E&P 233-262 at 243.

⁸⁷² *Ibid.*

⁸⁷³ The protection afforded by *Newell* [2012] EWCA Crim 650 is welcomed but it can be viewed as somewhat opaque. The court decided the Crown could not use a statement made in a PCMH to prove the defendant’s evidence at trial was inconsistent with the completed form. The prosecution could not use the statement to the detriment of the appellant. This would be unfair to the defence. However, if the spirit of the Rules is not complied with the court may allow such evidence to be admitted at trial (per Sir Anthony May P at para 37).

‘I complete the forms with great care. Although, the higher courts have said the forms would not be used against a defendant⁸⁷⁴... but someone will always raise it in my view... We basically need a full picture [of evidence]. That isn’t happening. We have to make progress, but we have 1/3 of evidence yet have to advise the client. If he is pleading not guilty, we have to complete the Case Management Form. It has to be done very carefully; it could undermine his position at trial.’

It appears the lawyers face a number of tensions or concerns when completing the case management requirements. Some were very concerned with the implications of what might happen with the information contained within the form, whilst a minority were happy to comply with the rules, because to them, they provide a good framework in order to operate efficiently. However, the existing literature suggests that there are high levels of non-compliance with the new regime disclosure requirements. The defence fraternity have been accused of failing to produce a defence case statement.⁸⁷⁵ Furthermore, some defence lawyers produce statements which omit details of their defence,⁸⁷⁶ or serve them out of the time limits.⁸⁷⁷

The lawyers who expressed concern with the *Newell* protections were correct in their caution. A recent review of the sanctions for failures relating to disclosure made an interesting point. Lord Justice Gross and Lord Justice Treacy stated: ‘We see no reason why a defence statement should not be capable of forming part of the prosecution’s case ... since the statement is deemed to be made with the defendant’s authority it is thus akin to comments he makes in an interview’.⁸⁷⁸ Whilst this point concerns the defence statement, if the Case Management Form has been deemed to be ‘analogous to the defence case statement’⁸⁷⁹ any repercussions may present a similar danger to lawyers. *Rochford*⁸⁸⁰

⁸⁷⁴ As per *Newell* [2012] EWCA Crim 650.

⁸⁷⁵ J. Plotnikoff and R. Wolfson, *A Fair Balance? Evaluation of the Operation of Disclosure Law*, Home Office, RDS Occasional Paper No 76 (2001)

⁸⁷⁶ R. L. Denyer, ‘The Defence Case Statement’ [2009] Crim LR 340 at 343.

⁸⁷⁷ HM Crown Prosecution Service Inspectorate (HMPSI), *An Audit of the Crown Prosecution Service Handling of Judges’ Orders in the Crown Court* (HMCPSP: London, 2011)

⁸⁷⁸ Rt. Hon Lord Justice Gross and Rt Hon Lord Justice Treacy, *Further Review of Disclosure in Criminal Proceedings*, (Judiciary of England and Wales, 2012) available here: http://www.judiciary.gov.uk/wpcontent/uploads/JCO/Documents/Reports/disclosure_criminal_courts.pdf [Last Accessed 28th November 2014].

⁸⁷⁹ Andrew Keogh speaking at the Eldon Lecture Series (2001), Northumbria University School of Law, ‘Criminal Case Management – Is the Game Over?’ the quote is taken from p.1 of the transcript.

suggests it is not a contempt of court to fail to file a defence statement and Edwards indicates that the defendant is entitled to hold back the information provided the defendant is prepared to take the risk an inference being drawn.⁸⁸¹ However, a basic completion of the form is now viewed rather dimly by the courts; it is expected to be completed fully, containing extensive detail.⁸⁸² This provides a difficulty for the lawyer. On one hand, the courts are pressing them to ensure the form is completed adequately and on the other, the D will not be in contempt should he not file one; he can hold information back and face the sanctions available to the court.

If this is the case, it is arguable that the defence lawyers were acting in the best interests of their client by adopting a tactical approach to the case management forms. Sir John Thomas stated, 'statements should be made without the risk they would be used at trial [against the defendant], provided the advocate follows the letter and spirit of the CrimPR.'⁸⁸³ As of December 2015, there had only been a small number of reported cases where the Case Management Forms were used by the prosecution.⁸⁸⁴ Despite the protection afforded by *Newell*⁸⁸⁵ the case management forms appears to 'maximize the opportunities for the prosecution to obtain knowledge helpful to its case.'⁸⁸⁶

The desire to have the defence reveal its hand in advance of trial supports the argument that the CrimPR represent a departure from classic adversarialism. The pre-trial disclosure of salient facts indicates a move towards a more truth-orientated model of criminal procedure.⁸⁸⁷ As discussed in chapter four, the original rationale for prosecution disclosure was to level the playing field as the prosecution had a far greater arsenal of resources than the defence. So much so, that until 1996, the defence only had to disclose alibi witnesses and expert evidence. Owusu-Bempah⁸⁸⁸ and McEwan⁸⁸⁹ suggest that the

⁸⁸⁰[2010] EWCA Crim 1928.

⁸⁸¹ S.11 Criminal Procedure and Investigations Act 1996, See also, J McEwan 'From Adversarialism To Managerialism: Criminal Justice In Transition', *Legal Studies*, vol. 31, no. 3, at p.528 which states trial judges seem reluctant to discipline the defence through measures such as adverse inferences which penalize the defendant.

⁸⁸²*R v Writtle* [2009] EWHC 236 and *R v Bryant* [2005] EWCA Crim 2079.

⁸⁸³*Newell* [2012] EWCA Crim 650 per Sir John Thomas P at para 25.

⁸⁸⁴*Firth* [2011] EWHC 388 (Admin) and *Newell* [2012] EWCA Crim 650

⁸⁸⁵[2012] EWCA Crim 650.

⁸⁸⁶ M. McConville and L. Marsh, *Criminal Judges: Legitimacy, Courts and State Induced Guilty Pleas in Britain* (2014) (Edward Elgar: Northampton) at p.181.

⁸⁸⁷ A. Owusu-Bempah, 'Defence Participation through Pre-Trial Disclosure: Issues and Implications', (2013) 17 E&P 183-201 at 200.

⁸⁸⁸ *Ibid.*

current disclosure regime represents a shift to a managerial model of criminal procedure that prioritizes efficiency at the expense of justice and due process. If the piecemeal changes to disclosure have ultimately shifted the legal landscape in which the lawyer operates, recognition ought to be given to this to fully explain the implications of such a shift.

Despite the apparent managerial elements permeating the adversarial process, evidence from the interviews suggests that the ‘clever, technical lawyer’ has not officially died;⁸⁹⁰ he is very much alive and functioning within the criminal justice system, albeit as a minority in this study. He submits sufficient detail to satisfy the court but insufficient detail to fully reveal the composition of his case to the CPS. McEwan and Garland suggest that the most significant influence on whether or not a lawyer will comply with the provisions is down to their own perception of their professional obligations.⁸⁹¹ This could go some way to explain why there is not a uniformed approach to the case management provisions. McEwan and Garland also argue that there is a conflict between the efficiency drivers of the CrimPR and how to advance the client’s best interest. This point was reiterated by Lawyer 002 [Partner, 32 years’ experience], who stated ‘the system is about getting convictions, ideally via a guilty plea, as quickly as possible. We need to convict, convict, convict. Despite this, I’ll still put the client’s interest before any crime control conveyor belt’. Whilst the goals of efficiency are clear, he will still advance the best interest of the client. He was adamant that complying with the CrimPR could be seen to benefit the CPS rather than his client and he took measures to counter this impact. He would complete the case management forms with minimal detail but still satisfy the court. He stated that occasionally this attracts comment from the magistrate, who is frustrated with the lack of detail. But here is where his years of experience benefit him, he was neither intimidated nor flustered by the court’s approach. Lawyer 007 [Partner, 32 years’ experience,] also stated that he can withstand challenge from the magistrates but has seen less experienced advocates crumble under such pressure. Here the experience and perhaps ‘thick skin’ of the advocate allows him to withstand an annoyed or frustrated magistrate. The implication being that the experienced lawyer advances his client’s best interest by standing by their

⁸⁸⁹ J. McEwan, ‘Adversarialism to Managerialism: Criminal Justice in Transition, (2011) 31 *Legal Studies* 519.

⁸⁹⁰ Andrew Keogh speaking at the Eldon Lecture Series (2001), Northumbria University School of Law, ‘Criminal Case Management – Is the Game Over?’. The quote is taken from p.1 of the transcript.

⁸⁹¹ J. McEwan and F. Garland, Embracing the overriding objective: difficulties and dilemmas in the new criminal climate, , (2012) *E&P*, 16(3), 233-262 at p.245

approach of minimal detail. If the less experienced advocate crumbles when faced with ‘your client knows if he’s done it – why is there a lack of detail?’, this may paint the client in a bad light in the eyes of the magistrates and the client may lose confidence in his lawyer.

However, some lawyers do not take the technical route and are happy to embrace the CrimPR to identify the real issues without resorting to such tactics and they do not view the obligation as onerous. However, this is somewhat surprising. McEwan and Garland found that it was ‘difficult to see how defendants can be persuaded that they have an interest in the smooth running of the CJS ... and they may want to put things off for as long as possible.’⁸⁹² The lawyers interviewed stated this is unproblematic and it is a matter of managing the expectations of the client. Lawyer 016 [Solicitor, 16 years’ experience] stated that all the obligations and manner of handling things are highlighted in the client care letter: ‘Here we outline what is expected of us and of the court. Frankly, the client probably does not read the letter.’ As such, the change in the rules likely makes little difference to the client as they may not actually recognised that there has been any change to the law.

7.5.4 The Case Progression Officer

In order to assist with the overriding objective each side has to appoint a Case Progression Officer (CPO).⁸⁹³ The officer must monitor compliance with directions,⁸⁹⁴ keep the court informed of the progress of the case,⁸⁹⁵ ensure he is available for contact in ordinary business hours,⁸⁹⁶ act promptly and reasonably to communications about the case,⁸⁹⁷ and appoint a substitute if he is unavailable.⁸⁹⁸ The duties are potentially extensive and in an era of cutbacks concerning legal aid provision⁸⁹⁹ some offices might be understaffed and these additional duties might prove too onerous and ultimately derail the overriding

⁸⁹² *Ibid.*

⁸⁹³ Criminal Procedure Rules Rule 3.4.

⁸⁹⁴ Rule 3.4(4) (a) Criminal Procedure Rules 2012.

⁸⁹⁵ Rule 3.4(4)(b) Criminal Procedure Rules 2012.

⁸⁹⁶ Rule 3.4(4)(c) Criminal Procedure Rules 2012.

⁸⁹⁷ Rule 3.4(4)(d) Criminal Procedure Rules 2012.

⁸⁹⁸ Rule 3.4(4)(e) Criminal Procedure Rules 2012.

⁸⁹⁹ Law Society (2009) ‘A new report finds legal aid lawyers paid less than sewage workers, Law Society says NO to more fee cuts’ Law Society Press Release (19th November 2009); Law Society, ‘National Audit Office Report shows lawyers are ready to walk as failing legal aid system crumbles’ Law Society Press Release 30th November 2009; ‘Lawyers Protesting Outside Courts over Cuts’ <http://www.bbc.co.uk/news/uk-25597617> [Last Accessed 2nd March 2015]. See also T. Smith, ‘Trust, Choice and Money: Why the Legal Aid Reform “U-Turn” is Essential for Effective Criminal Defence, [2013] Crim L. R. Issue 11 906-913 and T. Smith, ‘Justice for Sale: An Empirical Examination of the Attitudes of Criminal Defence Lawyers Toward Legal Aid Reform’, (2014), Plymouth Law and Justice Review 1, 14-41.

objective. The importance of the CPO was highlighted in Garland and McEwan's study analyzing the impact of the CrimPR. They reported that one judge commented that the 'CPO is a really important function because they get the feeling of the case on the ground... it is a key position that keeps everything on track'.⁹⁰⁰ It was suggested in chapter four that the greater workload for defence lawyers would prove to be problematic.⁹⁰¹

However, the interviews suggest that it poses no problem and very often lawyers take a pragmatic view and it frequently assists in the progress of their own case file. What was discovered in this study was the fact that the defence lawyers assumed the responsibility of acting as a CPO, whereas they believed that the prosecution was in disarray in this respect:

'It's me. We don't have separate CPO. The CPS has an admin person who deals with everything and no lawyer has any responsibility for summary cases. [007] (Partner, 21 years' experience).

'I am the Case Progression Officer. It poses no difficulty from my end. With the CPS it's a different story: they often ignore my letters or calls, so we have to inform the court.' [008]. (Solicitor, 6 years' experience).

'We merely identify someone at the office who will do this, it doesn't pose a problem'. [020]. (Senior Partner, 18 years' experience).

'It is the lawyer who handles the case I would imagine in 99% of cases. You don't have the resources in legal aid to have a separate person looking at case progression.' [021] (Solicitor, 12 years' experience).

⁹⁰⁰F. Garland and J. McEwan, *Embracing the Overriding Objective: Difficulties and Dilemmas in the new criminal climate* (2012) 16 E&P 233-262 at 258.

⁹⁰¹See chapter five, pages 121-162 for the theoretical concerns.

Clearly, those interviewed do not think the appointment of the CPO poses a problem. What was discovered was that in practice the obligation was dealt with in a very informal and fluid manner.

‘The defence representative is the CPO, it’s not really a big deal for a small firm.’ [018] (Solicitor, 4 years’ experience).

None of the lawyers raised any concerns with the role of the Case Progression Officer. A concern was highlighted in chapter four that the defence lawyer might be over-worked by virtue of these new obligations. However, it appears that the theoretically onerous duty of appointing a Case Progression Officer has assisted the defence lawyer, as opposed to causing tension. A tension does arise from the lawyers interviewed alluding to the fact the CPS frequently fails to appoint a CPO. If the officer is supposed to ‘get a feeling of the case on the ground’ it is imperative that both sides appoint an officer to comply with the rules. The Lord Chief Justice has suggested the ‘appointment of a CPO achieves notable improvements in efficiency and performance’.⁹⁰² Plowden intimates that for the CrimPR to succeed, they need to consider the realities of criminal practice and if they ignore the realities they will become ‘... a dead letter and a valuable opportunity will be lost’.⁹⁰³ Perhaps the Rules ignore the realities of modern criminal practice; the CPS is woefully under-resourced and understaffed⁹⁰⁴ and this potentially leads to failure in the CPO regime. It is unrealistic to expect an understaffed and under-resourced agency to assume new and onerous responsibilities. Perhaps Plowden was right, and ten years after its implementation, the opportunity to create a case progression regime was lost. In chapter four,⁹⁰⁵ it was suggested that the failure of the regime might rest at the defence lawyer’s door; however, those interviewed appear to have embraced the responsibility in a positive light. In their view, the failure to progress a case was frequently the fault of the prosecution.

⁹⁰² Courts Service, *The Lord Chief Justice’s Review of the Administration of Justice in the Courts* HC 448 (TSO: London 2008) para 5.62

⁹⁰³ P. Plowden, ‘Case Management and the Criminal Procedure Rules’ (2005) 155 NLJ 416 at 418.

⁹⁰⁴ The under-resourced and under-staffed CPS is looking for a cheap new way to make prosecutions more successful: R. Myers ‘The CPS wants to stack the deck against the defence’ *The Telegraph* 19th January 2015 accessed here: <http://www.telegraph.co.uk/news/uknews/law-and-order/11354758/The-CPS-wants-to-stack-the-deck-against-the-defence.html> [Last Accessed 17th October 2015]. See also O. Bowcott ‘CPS severely hampered by lack of resources’ *The Guardian*, 10th July 2013 <http://www.theguardian.com/law/2013/jul/10/cps-lack-resources-funding-cutbacks> [Last Accessed 17th October 2015].

⁹⁰⁵ See Pages 76-120

7.5.5 Advance Disclosure of Witnesses

The advance witness disclosure regime was another potential tension that was highlighted in chapter five. Section 34 of the Criminal Justice Act 2003 introduced s.6C into the CPIA 1996. Under this provision, the accused must give the court and prosecution a notice which indicates whether he intends to call any other witnesses other than himself at trial. An immediate problem occurs here; the responsibility falls on the accused to give this notification. However, as the Responsibility Matrix in chapter four⁹⁰⁶ indicated, it is not realistic for the defendant to make such a disclosure; as a result, the responsibility falls on the defence lawyer. Theoretically, there were a number of potential problems concerning the advance disclosure of defence witnesses.

1. The principle of requiring advance disclosure is one that is distinctly non-adversarial.⁹⁰⁷
2. Whether the police or prosecution have the resources to contact and interview witnesses and;
3. Whether the courts prevent lawyers from calling witnesses in respect of whom prior notification has not been given?

Hungerford-Welch suggests that the concern expressed by the lawyers is not unfounded. He stated that revealing defence witnesses to the prosecution was a cause for concern as it was likely the police would want to speak to witnesses, who may be put off from testifying.⁹⁰⁸ However, to combat this potential threat, a Code of Practice was issued under s.21A CPIA 1996.⁹⁰⁹ This code introduced a number of safeguards including a requirement that witnesses be asked whether they consent to be interviewed, that they be informed that they are not obliged to attend the interview, and that they are entitled to be accompanied by a solicitor.⁹¹⁰

⁹⁰⁶ See Appendix One.

⁹⁰⁷ Chapter three examined the issue that prior to the s.5 Criminal Procedure and Investigations Act 1996, the defence only had to close alibi witnesses and expert evidence.

⁹⁰⁸ P. Hungerford-Welch, *Criminal Procedure and Sentencing*, (2014), 8th Edition, Routledge at para 4.4.5.

⁹⁰⁹ Criminal Procedure and Investigations Act 1996 (Code of Practice for Arranging and Conducting Interviews of *Witnesses* Notified by the Accused), available here: <http://www.legislation.gov.uk/ukxi/2010/1223/contents/made> [Last accessed 1st May 2015].

⁹¹⁰ Criminal Procedure and Investigations Act 1996 (Code of Practice for Arranging and Conducting Interviews of *Witnesses* Notified by the Accused), available here: <http://www.legislation.gov.uk/ukxi/2010/1223/contents/made> para 3.1

Anthony Edwards suggested that the effect of the new rule would mean that ‘careful tactical decisions [would] need to be made in each case.’⁹¹¹ However, a lack of available resources has effectively rendered the provision unproblematic and in practice the rule appears to have had little effect, despite the initial concern resulting from the implementation of the rule. The initial panic⁹¹² rested on the fear that the prosecution or police might dissuade the defence witness from testifying. However, these theoretical tensions⁹¹³ are yet to manifest themselves in practice. In fact, there was a distinct lack of concern amongst the lawyers interviewed with the advance notice of witnesses and this response was somewhat surprising. The lack of concern stems from a pragmatic response that the police and prosecution generally do not have the resources to interview potential defences witnesses. However, a small number of participants expressed a level of disappointment with the rule because of the adverse implications the regime might hold for the best interest of the client:

‘It does tip them off and allows them to go away and check whether they have any previous convictions themselves. It allows them to go away and speak to them but obviously they would have to notify that they are going to.... But it just seems to be, it is becoming more weighted against the defendant really because the police and the CPS have a substantial amount of weight behind them whereas a defence solicitor does not.’ [004] (Solicitor, 8 years’ experience).

‘I can only recollect [in my practice] the prosecution only ever speaking to one defence witness in a case where my firm has been involved, so it is not really an issue for us’. [005] (Solicitor, 4 years’ experience).

‘I don’t agree with what we have to disclose to them, they go and see the witness. The last time I disclosed, the police went round without my knowledge, it’s irritating as I would have liked to listen how they

⁹¹¹ A. Edwards ‘Criminal Defence Witness Notices’ 6th May 2010, Law Society Gazette, available here: <http://www.lawgazette.co.uk/55292.article>

⁹¹² The term ‘panic’ was espoused by both Lawyers 006 and 007.

⁹¹³ See p.137-143.

would do it. Witness was put off and CPS dropped it on day of trial'.
[018] (Solicitor, 4 years' experience).

However, it is clear the theoretical concerns did not manifest in practice:

'I cannot give you a single example of a trial that I have conducted where we have not told the prosecution witness contact details and the court have not let them give evidence. The fact of the matter is the CPS (at the moment) has no people working for them, no budget, and no time to chase up witnesses even if we did supply the contact details. I think it is almost becoming a moot point. It seems to have slid out the window as far as I can tell'. [003]. (Solicitor, 7 years' experience).

In the main, this viewpoint was echoed by each of the participants.

'The defence community got in a bit of flap about it when it came in but in reality, it doesn't matter.' [006]. (Senior Partner, 40 years' experience).

The reality of the matter, as Edwards intimated,⁹¹⁴ is that it is not practical for the police or prosecution to interview the majority of defence witnesses in the current economic climate.

'We need to divorce the theory from the practice – the theory that the Crown can interview defence witnesses was worrying. In many cases they might already have spoken to the law enforcements or be known to the police. The dissuading of giving evidence was a real concern. Reality is resources are scarce that I've not had a case where the prosecution interview the witness. Practical implications are not outweighed by the theoretical concerns.' [014] (Partner, 24 years' experience).

⁹¹⁴A. Edwards 'Criminal Defence Witness Notices' 6th May 2010, Law Society Gazette, <http://www.lawgazette.co.uk/55292.article>.

It's tricky; you have tactical decisions to make, keeping in mind who has to prove the case. The CPS might want to interview someone who plugs a few gaps; this is a problematic and non-adversarial. You do not necessarily disclose that you are considering the witness; it's only where you are certain you will call them. We have called witnesses who we haven't disclosed – nobody really minds. [020] (Senior Partner, 18 years' experience).

Since the genesis of the disclosure regime, courts have been hampered by the lack of an effective sanction for failing to comply with the disclosure requirements.⁹¹⁵ This lack of sanction means that the provision effectively loses its teeth and compliance with the regime slips. Lawyer 020 indicated that the court does not really mind if they call witnesses that have not been disclosed. The lack of sanction was recognized in *R (on the Application of Kelly) v Warley Magistrates*,⁹¹⁶ where it was held that the imposition of an effective sanction, such as a prohibition on relying on the evidence of a witness not previously identified, would require primary legislation.⁹¹⁷ However, the Courts have explicitly expressed a desire to comply with the advance notification of defence witnesses; it has been held that 'the defendant's interests are best served by early identification of witnesses and obtaining statements from them.'⁹¹⁸

Currently, it appears that the potential tension caused by the implementation of the rule has yet to come to fruition and it may not be realistic to think that the S.6C provisions will lead to routine interviewing of defence witnesses.⁹¹⁹ The participants noted the current economic climate which meant the prosecution and police are not fully equipped with the resources to take advantage of the benefits of interviewing defence witnesses. What this section has found is rather surprising. A number of the projected tensions outlined in chapter five have not become problematic in practice. It appears that in places, the defence community has embraced the concept of a case progression officer and acted in a pragmatic fashion by allowing the individual lawyer to become responsible for the

⁹¹⁵See chapter four p.144 for a full examination of the ineffective sanctions governing the disclosure regime.

⁹¹⁶[2007] EWHC 1836 (Admin).

⁹¹⁷[2007] EWHC 1836 (Admin) per Mitting J at para 37.

⁹¹⁸*R (Law Society of England and Wales) v Lord Chancellor and the Legal Services Commission* [2012] EWHC 794 (Admin).

⁹¹⁹A. Owusu-Bempah, 'Defence Participation through Pre-Trial Disclosure: Issues and Implications', (2013) 17 E&P 183-201 at 195.

individual progression of the case. An issue arises where failures occur with the prosecution's progression officer and the ramifications of this will be dealt with in the next section.

7.5.6 Conclusions

The biggest tension faced by the advocate might potentially alter the fabric of the adversarial criminal justice system of England and Wales. The defence lawyer is facing immense pressure to complete the Case Management Forms shortly after meeting his client for the very first time. Often lawyers feel that they are not operating with a full set of facts and as such, find it extremely difficult to adequately advise their client. As a result, a client might be advised to enter a not guilty plea where a plea of guilty might be more appropriate.⁹²⁰ The result of such inadequate advice would be a more severe sentence for the defendant. On the other hand, some elements of the CrimPR are unproblematic and assist the defence lawyer; the CPO is an example of this. It is unproblematic as the prosecution frequently flouts the Rule and any sanctions are both unenforced by the courts and wholly ineffective. The Rule regarding Advance Disclosure of witnesses is generally viewed as unproblematic. That is not to say that when the economic climate changes the theoretical concerns may indeed become manifest when resources to interview defence witnesses are available. However, the Case Management Forms and the obligation to identify the real issues present problems for some lawyers. According to Gordon, lawyers are expected and even encouraged to exploit every loophole in the rules, 'take advantage of every one of their opponents' tactical mistakes or oversights... to favour their client.'⁹²¹ However, with the focus on case management and the overriding objective, that is simply impossible to do. The rules simply will not allow it and the courts will not tolerate such an approach. If a defence case statement is lacking in detail, the lawyer encounters a difficult line of questioning from the magistrate. Lawyers often hear '[when explaining the lack of detail in the forms] well your client knows if he has done it. That's wrong. It shows a fundamental misunderstanding of the law and it's a deliberate manipulation'⁹²² of the law to deal with cases more efficiently. The desire for more efficiency neglects to consider that the overriding objective is to deal with cases 'justly,'⁹²³ not merely speedily.

⁹²⁰ See Lawyer 019's early example of a client with mental health concerns.

⁹²¹ R. Gordon, 'The Independence of Lawyers' (1988) *Boston Law Review* 1, 10.

⁹²² Participant 002.

⁹²³ Rule 1.1 CrimPR 2016.

7.6 The Implications for the Lawyer-Client Relationship

*Relationship: n. a state of being related; what one person or thing has to do with another; kinship.*⁹²⁴

The final section of the empirical study examined whether the effect of the changed obligations for the defence lawyer had any detrimental impact on the notion of the lawyer-client relationship. For example, does the requirement of co-operation between the defence and prosecution undermine trust between the lawyer and the client? Theoretically, the client is being asked to divulge information that has the potential to incriminate him and assist the prosecution in convicting him. If the client believes the lawyer has to disclose information that might be adverse to their position, the client might lose all confidence in their ability to confide in their lawyer, which ultimately means there is difficulty in establishing a basis for a fair trial. McConville and Marsh suggest that the role of the defence is to now co-operate with the prosecution, with the goal of satisfying the case management provisions of the court⁹²⁵ and these formal duties may be diametrically opposed to the wishes of the client.⁹²⁶

7.6.1 The obligation to inform the court of significant failures

In the wake of *Gleeson*⁹²⁷ and *Chorley Justices*⁹²⁸ it became clear that the defendant will not be permitted to benefit from errors made by the prosecution. He certainly will not be allowed to ambush the prosecution in order to reap a benefit. As such, should the defence spot a flaw in the case of the prosecution, they are expected to flag this flaw to give the prosecution time to remedy the issue. Prior to *Gleeson* the defence could sit back and take advantage of the flaw to the benefit of their client. However, Rule 1.2 of the CrimPR outlines the duty of the participants in a criminal case and states that ‘each participant must at once inform the court and all parties of any significant failure (whether or not that participant is responsible for the failure)’. The rule goes on to define a significant failure as something that ‘might hinder the court in furthering the overriding objective’. Despite the requirement to disclose anything that might hinder the overriding objective, one of the

⁹²⁴ The Oxford Dictionary of Current English, 1990, Oxford University Press: Oxford at p.628

⁹²⁵ M. McConville and L. Marsh, *Criminal Judges: Legitimacy, Courts and State-Induced Guilty Pleas in Britain* (Edward Elgar Publishing: Cheltenham, 2014) at p.168

⁹²⁶ *ibid* at 169.

⁹²⁷ [2003] EWCA Crim 3357.

⁹²⁸ [2006] EWHC 1795.

lawyers interviewed indicated that he adopts a very technical approach to such disclosure:

‘If I do not have instructions from my client I have to, under the rules, inform the court. However, I have to phrase this carefully – something neutral like “I still await detailed instruction” or something like that.’

[002] (Senior Partner, 32 years’ experience).

At times, the majority of lawyers indicated that they may have to ‘snitch’ on their client because he is yet to provide instructions to the lawyer and the case requires progression.⁹²⁹ In that instance the lawyer pleads with their client to instruct him and clearly outlines the consequence of continued non-instruction, but the rules require cases to progress so the lawyers have to take action:

‘You write to your client and say, please come and see me, you write to your client and say, you still haven’t been to see me, I really must have your instructions in order to prepare this case. You write to your client and say, I have written to you twice before, you haven’t come in, I am obliged by the court to notify them of the fact that you are not complying and I am unable to progress the case and if you don’t contact me within the next 5 days, I shall write to them and ask them to list it. That is a conflict but you set out clearly to the client what their obligations are, what the obligations imposed upon you by the court are and you have to work within that.’ [014] (Partner, 24 years’ experience).

‘We try everything before dobbing them in. It is often in a difficult situation in terms of ethics, the SRA helpline is also consulted. It covers your back.’ [018] (Solicitor, 4 years’ experience).

It is examples like this that Wendell alluded to. He intimated that the client worries that

⁹²⁹ 15 of 23 lawyers indicated that in order to progress the case, they may be viewed as betraying their client by ‘snitching.’

their lawyer would ‘rat them out’.⁹³⁰ However, in this instance it is not because of something incriminating the client has told the lawyer, it is their own failure to act. Some lawyers intimated that without ‘grassing’ on their client, the case would not progress.

‘The aim is to ensure that progress is not derailed and that the overriding objectives are satisfied throughout proceedings. It does feel somewhat uncomfortable exposing a client or a defence witness but the rules are there to be complied with. The best way around this issue is to manage your client’s expectations from the start with a warning of the duty on all parties to report all failures’. [016] (Solicitor, 16 years’ experience).

‘You write to your client, you give them several opportunities and you warn your client before you actually ultimately have to do that. So yes, I suppose it is a conflict because you are telling on your client, aren’t you?’ [021] (Solicitor, 12 years’ experience).

Lawyer 020 was quick to point out that the reason for non-compliance was a genuine one:

‘Because of the chaotic nature of a defendant’s life; moving home etc., it can be difficult to get them to give instruction. However, the threat of grassing them up works and they pick up the phone. At times it can be difficult to forge a relationship.’ [020] (Senior Partner 12 years’ experience).

However, realism and the overriding objective soon became apparent for Lawyer 023 (Solicitor, 7 years’ experience) and he thought that informing the court was ‘sometimes... the only way to make progress with a case.’ Here, the pressures of co-operation come to the fore. Lord Broughman’s lawyer only has a duty to the client and the client alone,⁹³¹ but it is clear these competing interests might cause strain on the lawyer-client relationship. By reporting him to the court or the prosecution the lawyer has discharged their duty to the

⁹³⁰ W. Bradley Wendell, *Ethics and Law: An Introduction*, (2014), Cambridge University Press: Cambridge, at p.8.

⁹³¹ The Trial at large of Her Majesty, Caroline Amelia Elizabeth, Queen of Great Britain; in the House of Lords on Charges of Adulterous Intercourse 3 (London 18210 as cited in M.H. Freedman, ‘Henry Lord Brougham Advocating at the Edge for Human Rights’ [2007] Hofstra L. Rev. Vol 36: 311, [2007] at 311.

court; however, this might be at the expense of the duty to the client. In general, this appeared to have no adverse impact on the lawyer-client relationship; the lawyers said that they went to great lengths to explain both their obligations to the court and what would be expected from them as a client. The majority of lawyers⁹³² commented that they provided a client care letter at the first consultation which explained the obligations that they have to meet and what conduct is expected of the client.

If the client was not adhering to advice and refusing to give instructions this poses a conflict for the lawyer. The duty to the court will be become frustrated as the lack of instruction will not allow for an efficient and expedited trial. As such, the remedy will be simple:

‘Quite simply, if the conflict was such that I felt that continuing to rep[resent] him means I couldn’t properly represent him, I would just withdraw and say, I can no longer represent him for professional reasons.’ [002] (Senior Partner, 32 years’ experience).

‘I would speak to my client about any conflict, it can usually be resolved prior to trial but if it couldn’t be resolved with my client then I would cease to act.’ [005] (Solicitor, 4 years’ experience).

‘I have had clients asking me to mislead the court or telling me one thing but saying they will say something different in the hearing itself and the way to deal with it is that I explain my obligations to the court, my obligations to the client. I explain to them that they can go in there and tell them the truth or if they insist on saying something different I will have to withdraw as their solicitor’. [008] (Solicitor, 6 years’ experience).

‘I’ll use the SRA helpline and partners. At trial the real reason could be that she hasn’t been speaking to me. You’re in a position where I don’t want to ‘dob’ the client in but it’s not really fair that the judge thinks I

⁹³² 15/23 lawyers made explicitly reference to a letter or form which was provided to the client to explain the situation.

didn't do something. There isn't a right answer to this; this is incredibly tough ... my personal career is conflicting with the duty to the client. Constantly put things in that compromise our integrity. You cannot always do what's best for the client'. [018] (Solicitor, 4 years' experience).

Lawyer's looking to protect their own careers is nothing new. Quirk found that 'some solicitors appear more concerned with protecting their own positions than acting solely in their client's interest.'⁹³³ She found that lawyers were fearful of suggesting a client remain silent in the police station interview, one lawyer said 'I don't want to get the blame ... I'm fearful of that ... it's rare you advise them to remain silent ... you always think "I may have to take the stand about this one day."⁹³⁴ As such, in order to protect themselves from any liability they draft disclaimers that their clients have to sign in which the client accepts the consequences of a 'no-comment' interview.⁹³⁵ Again, this re-affirms McConville's findings that completely adversarial defence lawyers may not actually exist in England and Wales. From my own study, Lawyer 016 [Solicitor, 16 years' experience] stated that in order to inform the client of their obligations, some of which may be defeating the client's best interest, e.g. case management disclosure, they draft a client care letter that highlights everything the lawyer does. As such, this absolves the lawyer of facing any conflict when the client turns around to say 'I don't like that you told the CPS that.' The lawyer can then point to the letter and say 'we told you we had to do this.' Whilst this satisfies the obligations to the court under the new regime, it does seem difficult to suggest that the client would see this as furthering their best interests; however, no lawyers suggested the client had an issue with this type of approach. This could mean that the client simply does not recognise there has been a cultural change in terms of co-operation. The client may not even care, Lawyer 012 [Solicitor 12 years' experience] intimated that whilst client care letters are detailed, he thought the clients just 'signs them without really digesting them, as they do not understand the nuances of criminal defence; they only want to avoid punishment.'

⁹³³ H. Quirk, 'Twenty years on, the right of silence and legal advice: the spiraling costs of an unfair exchange, 2013; NILQ 64(4):465-484 at482

⁹³⁴ *Ibid.*

⁹³⁵ *Ibid.*

The lawyer-client relationship might be further diluted by the erosion of the presumption of innocence. In adversarial theory the accused is armed with the protection of the presumption of innocence. The presumption is enshrined in the European Convention on Human Rights.⁹³⁶ This right is closely linked to the right not to incriminate oneself, which means that if a defendant elects to remain silent during the criminal process he can do so without fear of adverse consequences.

‘The presumption of innocence in the magistrates’ [court]? Yes. You have a number of clients who wish to put the prosecution to proof. The CrimPR does cause some difficulties in relation to that because you’re being forced at a very early stage to declare your side – were you there, did you hit her etc. The CrimPR here can cause some difficulties in terms of the privilege against self-incrimination because you will be sometimes forced to admit something that it later turns out to be that the prosecution couldn’t prove.’ [001] (Senior Partner, 16 years’ experience).

‘The right against self-incrimination is more problematic. A lot of politics becomes involved in this. If you go back to rule one [the overriding objective] it is to convict the guilty and acquit the innocent.’ [007] (Senior Partner, 21 years’ experience).

‘It’s moving too far in obligating the Ds to identify Crown failings. It doesn’t contravene the presumption of innocence; it’s the burden it encroaches upon. The crown must prove it beyond reasonable doubt. I am not sure that principle is enforced by the CrimPR. The Crown proving the case as D now identifies their failures. They are assisted in proving the case. It goes beyond the adversarial system.’ [014] (Senior Partner, 24 years’ experience).

It is clear that the defence participants believe there has been a great dilution of the presumption of innocence and the privilege against self-incrimination.

⁹³⁶ ECHR Article 6(2) states that ‘Everyone charged with a criminal offence shall be presumed innocent until proven guilty according to law.’

‘Certainly the privilege against self-incrimination, obviously you are being asked to disclose at an early stage in the proceedings what your defence is, I mean, ultimately I am not sure that they have any really because you are always going to have self-incrimination. Then the [Case Management] forms are potentially incriminating if you do not comply with the spirit of the rules.’ [004] (Solicitor, 8 years’ experience).

‘Both of those, the presumptions of innocence and privilege against self-incrimination are on the wane. I don’t know how many times I have heard this year ‘well your client knows whether he has done it or not.’ [003] (Solicitor, 7 years’ experience).

The client effectively has to co-operate with the prosecution who is attempting to convict him. This notion is the complete opposite to traditional adversarial theory where the accused is fully protected from self-incrimination.

‘I think [the CrimPR] completely undermines both [the presumption of innocence and the privilege against self-incrimination]. The whole ethos of the modern trial is “your client knew whether or not he did the act”. You have got to tell us what your case is just in case we made a mistake... presumption of innocence is just not a presumption that is valid in the magistrate’s court... so they haven’t levelled the playing field, they have tilted it on the side of a mountain.’ [002] (Senior Partner, 32 years’ experience)

7.6.2 (In)Effective Sanctions for Failing to Comply with the Rules

Establishing an available sanction that would encourage better preparation and a more efficient trial has proven difficult. Chapter five examined the issue of a lack of effective sanctions.⁹³⁷ Should the defence lawyer not comply by raising a significant failure he runs

⁹³⁷ See chapter four pages 76-120

the risk of receiving a sanction for failing to comply with the CrimPR.⁹³⁸ Subsection (c) effectively means that any sanction can be handed down by the court providing it is deemed to be appropriate. However, the sanctions examined by the empirical study were Wasted Costs Orders,⁹³⁹ refusal of an application, professional censure and inferences drawn at trial.⁹⁴⁰

The danger of a Wasted Costs Order (WCO) being made against a defence lawyer for a breach of the CrimPR was highlighted in *SVS Solicitors*;⁹⁴¹ it was this sanction that provided the greatest concern for the lawyers. The lawyer in *SVS* had a very un-cooperative client and the firm failed to give appropriate reasons for opposing a hearsay notice after the defendant had failed to give timely instructions. The lawyer was deemed to have acted incompetently and the judge believed that this amounted to a deliberate and serious breach of the Rules. The lawyers interviewed indicated that the potential threat of a WCO influences the way that they deal with a case:

‘For a start you very carefully advise your client of failing to identify witnesses, the need to identify issues that might cause a problem. So to that extent, yes it does. It also makes you watch case preparation a bit more defensively, defensive in terms of protecting yourself from wasted costs’. [002] (Senior Partner, 32 years’ experience).

‘The threat of wasted costs hangs over everything. Just very much the fact that if you get something wrong at the early stage and your client says, why can’t that evidence go in and it is because you have cocked up early on, I think the worry that you are going to have to apply for an adjournment and might be refused or an application might be refused

⁹³⁸ Sanctions for non-compliance are set out in sub-rule 3.5(6) If a party fails to comply with a rule or a direction, the court may - (a) fix, postpone, bring forward, extend, cancel or adjourn a hearing; (b) exercise its powers to make a costs order; and; (c) impose such other sanction as may be appropriate.’

⁹³⁹ No published data exist concerning the use of WCO being issued against the prosecution. I have contacted Jonathan Solly, Secretary of the Criminal Procedure Rules Committee, who confirmed there are no records of such a sanction. Solly put me in touch with Bob Weston, a Knowledge Information Liaison Officer at HMCTS, who said he would look into this issue. He confirmed that no data exist on the use of CPS sanction. He suggested I make a FoI request but at the time of writing no information has been received.

⁹⁴⁰ For an in-depth analysis of the theoretical sanctions, please see chapter five page 109-144.

⁹⁴¹ [2012] EWCA Crim 319.

does play on my mind actually at the case management stage'. [003]
(Solicitor, 7 years' experience).

'You are always very aware of Wasted Costs Orders and we are far more vulnerable to them than the CPS so it is a real issue, particularly in a complex case'. [004] (Solicitor, 8 years' experience).

Despite the fact that the WCOs provide the court with an effective sanction should the lawyers not comply with the rules, it appears not all lawyers are keen to advance the duty to the court above that of their own client. In terms of informing the court of a significant failure, the majority of lawyers interviewed were prepared to give their client every conceivable opportunity before they informed the court and prosecution of any defence failure. However, there exists a problem with the culture of prosecution disclosure and this poses a failing to meet the overriding objective.⁹⁴² There appears to be no suitable sanction for the prosecution, so a cultural shift maybe required where the police and CPS turn all evidence over to the defence. However, this is not without difficulty, as an already overworked and underfunded defence fraternity may find it difficult to sift through vast amounts of evidence. What is clear, is the idea that that it is the defence who solely needed to be whipped into shape to fulfil the overriding objective. The prosecution also require the stick.

7.6.3 The Implications of the CrimPR for the lawyer-client relationship

As suggested in chapter five, the obligations imposed on defence lawyers by the CrimPR potentially interfere with the lawyer-client relationship. Arguably, the environment of co-operation is not one that is compatible with advancing the best interests of the client in particular, or adversarialism in general. As such the client may not want to disclose certain elements of their defence as it gives the prosecution an upper hand or advantage. Furthermore, if the lawyer has to assist the court by flagging up any of the client's significant failures, the client may believe the lawyer to be untrustworthy or a 'snitch.' James Richardson suggests that preparing and conducting the case in accordance with the overriding objective is incompatible with an adversarial system of justice. However, the interview data suggested that this theoretical fear did not frequently arise in practice. The theoretical chapter indicated that having to inform the court of any significant failings on

⁹⁴² See p.209-11.

the part of the client might weaken the lawyer-client relationship; should the client not follow the rules, in order to satisfy the overriding objective, the lawyer should inform the court.

The interview data suggests the lawyers take a very pragmatic approach to adhering to this rule. Lawyers often outline their expectations of client behaviour at the first meeting; this highlights the importance of providing instructions and keeping to a timetable. Lawyer 008 suggested that the benefit of such an approach was twofold; first, it shows the client he has a proactive lawyer and second, it shows the lawyer is not wasting public money. However, it appears that a minority of lawyers thought the lawyer-client relationship was impacted by the Rules. If the client wants to do something unethical or does not provide instructions, the lawyer will not jeopardize their personal career by risking professional embarrassment by the court. The strict timetable-based nature of the modern day criminal trial has left lawyers no choice but to move on from cases where the lack of instruction might be prolonged. Lawyer 018 (Solicitor, 4 years' experience) suggested that their first thought is 'can I make this case profitable?' The lawyer intimated that this kind of thinking clouds their own integrity and believes the efficiency drivers are attempting to make the criminal justice system reflect a conveyor belt process.

7.7 Does the Adversarial Lawyer actually exist?

The task of clarifying the role of the defence lawyer is one of great importance. Newman and Ugwudike suggest that 'traditionally [the lawyer] is one of the closet allies of the suspect.'⁹⁴³ As such, it is important to discover just what role the lawyer acts out. Is he an ally who will zealously defend the client and advance their interests before all others? Freedman and Smith⁹⁴⁴ explicitly state that neutral partisanship means putting the client's interests before their own or any other party, including that of the court. This notion of zealous advocacy views lawyers as a bulwark against a powerful state and cultivates the idea of neutral partisanship, which is central to the lawyer's duty.⁹⁴⁵ Steinberg suggests that the lawyer needs to be zealous as this benefits society - the victim, the judge, the defendant, witnesses, juror or disinterested bystander - because any one of them can switch

⁹⁴³ D. C. Newman and P. Ugwudike, 'Defence Lawyers and Probation Officers: Offenders' allies or adversaries? *International Journal of the Legal Profession* (2014) 183-207.

⁹⁴⁴ See M. H. Freedman and A. Smith, *Understanding Lawyers' Ethics* (2010) Lexis Nexis.

⁹⁴⁵ See M. Blake and A. Ashworth, 'Ethics and the Criminal Defence Lawyer,' [2004] *Legal Ethics* Vol 7.

roles and become a future defendant.⁹⁴⁶ This once again reiterates just how important the notion of adversarial representation is. Any dilution of this role paints a picture of potential injustice in the future. As such, it is not surprising that attempts to clarify the role of the lawyer and categorise them has been undertaken before. This attempt to understand the different roles played by lawyers in practice, and to categorise them, was partially inspired by the work of Mike McConville,⁹⁴⁷ Max Travers⁹⁴⁸ and Daniel Newman,⁹⁴⁹

Those studies examined how lawyers worked in law firms and how they interacted and treated various types of clients. The studies were the first of their kind and captured the context of what the lawyers actually ‘did.’⁹⁵⁰ Until the mid-1990s, there was very little socio-legal research of what defence lawyers actually ‘do’.⁹⁵¹ The studies that were undertaken relied on courtroom observations,⁹⁵² conversation analysis⁹⁵³ or interviews;⁹⁵⁴ none of which allowed the ‘deeper access’⁹⁵⁵ of both McConville et al and Travers. Newman states that these studies remain the key work in the field of how lawyer’s work.⁹⁵⁶ The conclusions are almost the polar opposite of one another. McConville’s *Standing Accused* offered a rather different account of the defence lawyer in terms of not being adversarial and holding low opinions of their clients. Travers’ work, on the other hand, painted a rather contrasting picture; here the lawyers were dedicated to their clients and provided a high standard of representation. McConville’s findings were classified into four distinct types of law firms: *The Classic; The Managerial, The Political and The Routine*. Travers argues that the titles are misleading as it is difficult for one firm to fit neatly in one category.⁹⁵⁷

⁹⁴⁶H. B. Stienberg, ‘The Responsibility of the Defense Lawyer in Criminal Cases’ *Syracuse Law Review*, (1960), Vol 12 442.

⁹⁴⁷M. McConville, J. Hodgson, L. Bridges and A. Pavlovic, *Standing Accused* (1994), Oxford University Press: Oxford

⁹⁴⁸M. Travers, *The Reality of Law*, (1997) Ashgate: Dartmouth.

⁹⁴⁹D. Newman, *Legal Aid Lawyers and the Quest for Justice*, (2013), Hart.

⁹⁵⁰D. Newman, *Legal Aid Lawyers and the Quest for Justice*, (2013), Hart p.23

⁹⁵¹See R.L. Abel, *The Legal Profession in England and Wales*, (1988) Basil Blackwell Ltd.

⁹⁵²See P. Carlen, ‘Remedial Routines for the Maintenance Control in Magistrates’ Courts, *British Journal of Law and Society* 101.

⁹⁵³See D. W. Maynard, ‘Narratives and Narrative Structure in Plea Bargaining’ in J.N. Levi and A.G. Walker (eds), *Language and Judicial Process*, (1990), New York: Plenum Press and B. Bogoch and B. Danet ‘Challenge and Control in Lawyer-Client Interaction: A Case Study in Israeli Legal Aid, 4 *Text* 249 .

⁹⁵⁴P.A. Thomas and G. Mungham, ‘Solicitors and Clients: Altruism or Self-Interest’ in R. Dingwell and P. Lewis (eds), *The Sociology of the Professions*, (1983) (London: McMillian Press).

⁹⁵⁵D. Newman, *Legal Aid Lawyers and the Quest for Justice*, (2013), Hart: Oxford p.23

⁹⁵⁶*Ibid.*

⁹⁵⁷M. Travers, *The Reality of Law*, (1997) Ashgate: Dartmouth.

Newman followed the work of McConville by categorizing different titles for different firms. He used the terms ‘radical’ and ‘sausage factory’. A radical firm is a ‘dying breed of lawyers who devote themselves to their clients.’⁹⁵⁸ This type of lawyer would be deemed very similar to my own ‘*Classic Adversarial Lawyer*’. The firm will fight a client’s case to the utmost; vigorously opposing both police and prosecution.⁹⁵⁹ The ‘sausage factory’ is an example of an emergent thread that places profits before clients. The sausage factory is the antithesis of the radical firm.⁹⁶⁰ This firm is more associated with the notion of a passive defence. Newman uses the title ‘sausage factory’ because in the food industry the factories are presumed to reduce diverse raw materials into uniform, easy to manage and cheap products.⁹⁶¹ This firm is synonymous with my operationalized lawyer; here the lawyer operates under the pretext of managerialism, favouring subservience to the overriding objective at the potential expense of the rights of their client. The difference between this empirical study and the pre-existing literature is the fact that this study analysed how the altered and enhanced pre-trial obligations had impacted on how the lawyer works and their views on the obligations they face. The study was less concerned with how firms work, but with the values, attitudes and perceptions held by the individual lawyers within the firms. This study only examined what the lawyers said - no observations were undertaken. This is a potential limitation of the study but the intention was to add, using a particular method, to the body of existing knowledge. There is a distinct disadvantage in only interviewing lawyers, as discussed in chapter six. Newman found significant differences in formal interviews when compared with observational research. He found lawyers would espouse the view that they stood for active defence and therefore fitted into the ‘radical’ category but that they appeared to practice something far more passive and akin to the ‘sausage factory’.⁹⁶² Whilst this study should be mindful of participants providing answers they do not necessarily practice, the findings nevertheless hold value, as they present data on how defence lawyers perceive their own role in the modern era of criminal defence work.

McConville’s work was rather scathing of the criminal defence profession, stating that lawyers would ‘import their own working assumptions about criminal suspects and

⁹⁵⁸ M. McConville, J. Hodgson, L. Bridges and A. Pavlovic, *Standing Accused* (1994), Oxford University Press: Oxford at p.30.

⁹⁵⁹ *Ibid* at p.31.

⁹⁶⁰ *Ibid* at p.30.

⁹⁶¹ *Ibid* at p.31.

⁹⁶² D. Newman, *Legal Aid Lawyers and the Quest for Justice*, (2013), Hart: Oxford p.147.

inclinations toward crime control values.’⁹⁶³ His study also found that ‘defence practice [was] seemingly concerned with the efficient management and processing of its clients through the ‘machinery of justice’ [rather] than the delivery of justice itself.’⁹⁶⁴ Ultimately, the study found that, overall, defence practitioners offered ‘poor quality services which [did] little to uphold the values or principles in our criminal justice system.’⁹⁶⁵ McConville’s work followed that of Bottoms and McClean who suggested that having access to a defence lawyer is the sacred tenant of the due process model. However, having this access to a lawyer is no guarantee of the operation of due process where the dominant structure of the court system is what they referred to as ‘Liberal Bureaucratic’.⁹⁶⁶ They summarized the Liberal Bureaucrat as ‘a practical man; he realizes that things have to get done, systems have to run ... defendant protections have a limit ... it is right to build in sanctions to deter those who might otherwise use their “Due Process” rights frivolously or to “try it on”; an administrative system at State expense should not exist for this kind of time-wasting.’⁹⁶⁷

McConville’s work suggested that the magistrates’ court was not a trial venue but more a place where the defendant can be processed via a guilty pleas and disposed of without any risk of a severe sanction.⁹⁶⁸ Furthermore, it was unrealistic to expect the prosecution to be ‘put to proof’ in order to convincingly establish a case against the defendant. The solicitors that McConville interviewed found this notion to be ‘invalid or unrealistic.’⁹⁶⁹ This stance was allowed to perpetuate because the defence lawyers held a ‘strong presumption of guilt’ against their own clients.⁹⁷⁰ Ultimately, this negative view of their clients, and the belief that the magistrates’ are pro-prosecution, drove the defence lawyer to negotiate guilty pleas rather than contesting the case in the magistrates court.⁹⁷¹ Should a trial take place, any success gained by the defence lawyer was a product of ‘what they can achieve on their

⁹⁶³ M. McConville, J. Hodgson, L. Bridges and A. Pavlovic, *Standing Accused* (1994), Oxford University Press: Oxford at p.282.

⁹⁶⁴ M. McConville, J. Hodgson, L. Bridges and A. Pavlovic, *Standing Accused* (1994), Oxford University Press: Oxford at p.295.

⁹⁶⁵ M. McConville, J. Hodgson, L. Bridges and A. Pavlovic, *Standing Accused* (1994), Oxford University Press: Oxford at p.298.

⁹⁶⁶ A. Bottoms and J. McClean, *Defendants in the Criminal Process* (Routledge: London) 1976 at p.234.

⁹⁶⁷ *ibid* at p.229.

⁹⁶⁸ M. McConville, J. Hodgson, L. Bridges and A. Pavlovic, *Standing Accused* (1994), Oxford University Press: Oxford at 210

⁹⁶⁹ *Ibid.*

⁹⁷⁰ *Ibid.*

⁹⁷¹ *Ibid* at 238.

Feet'⁹⁷² rather than planning a zealous defence for their client. Defendants who were committed to the Crown Court fared no better in McConville's study. As criminal firms expanded, they used a 'lower caliber of staff' to undertake criminal defence work.⁹⁷³ In some circumstances a firm employed two office juniors, a friend of a secretary or the parents of lawyers to attend Crown Court trials.⁹⁷⁴ In some cases, those attending court had to ask McConville's researchers for advice about what should be done or to help identify clients and/or counsel. Surprisingly, McConville found this behaviour in line with the expectations of the firm rather than out of step.⁹⁷⁵ This paints a picture that is distinctly non-adversarial. It is hard to describe any of these examples as anything that remotely represents advancing the best interest of the client or acting zealously to protect him.

This thesis has outlined that the disclosure provisions of the CPIA 1996 represent a seismic shift in the culture of adversarialism. As such, one would expect an adversarial defence lawyer to take this obligations seriously, to craft a statement with due care and attention. Yet Quirk found that the majority of firms in her study delegate the task of scrutinizing disclosure schedules and drafting defence case statements to paralegal staff.⁹⁷⁶ The thesis argues that the defence case statement shifts the notion of adversarialism to a more managerialist traditional and the defence case statement dilutes both the burden of proof and the privilege against self-incrimination. Yet, despite the large ramifications of the statement, the defence lawyer leaves the task of drafting the statement to an unqualified, junior member of the firm. This is at odds with anything this research elicited, no lawyer suggested that anyone other than themselves draft the defence case statement. Quirk states that 'disclosure is a critical and complex legal responsibility, but CPIA tasks are routinely carried out by non-lawyers.'⁹⁷⁷ If lawyers do leave the drafting of the statement to an unqualified paralegal it would be extremely hard to accept that they are acting zealously in the defendant's best interest. It is unimaginable that the unqualified paralegal will have the experience, craft of expertise to satisfy the obligations of the statement yet maintain a zealous defence of the client. This approach would be more in line with the proceduralist lawyer who accepts that their obligations that simply have to be complied with. Thus

⁹⁷² *Ibid* at 238.

⁹⁷³ *Ibid* at 242.

⁹⁷⁴ *Ibid*.

⁹⁷⁵ *Ibid*.

⁹⁷⁶ Quirk, *The Significance of culture in criminal procedure reform: Why the revised disclosure scheme cannot work*. *The International Journal of Evidence & Proof*, 10(1), 42-59 at p.56.

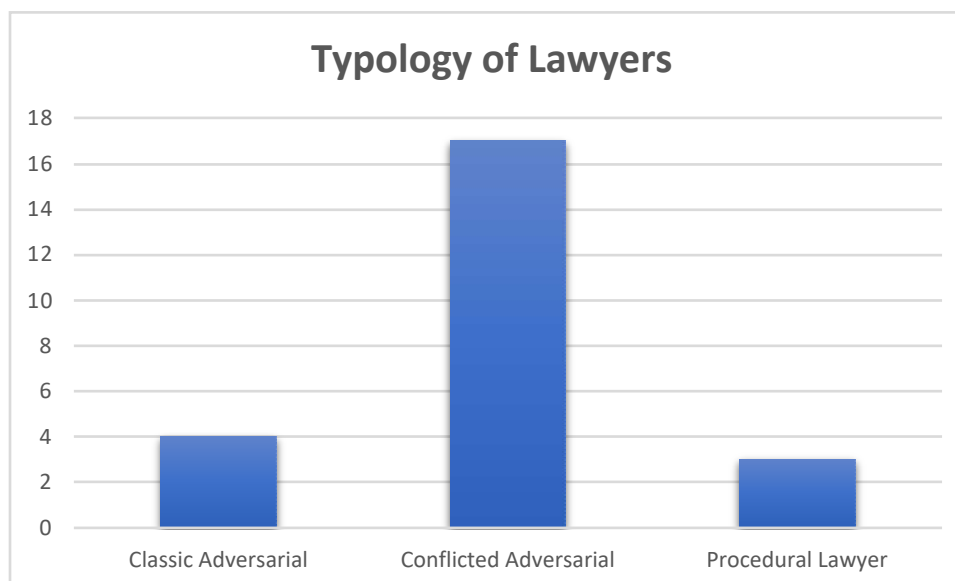
⁹⁷⁷ *Ibid* at 58.

illustrating a stark contrast between the ideological theory established in chapter 3 and the practical notion of defence work.

7.7.1 The Role(s) of the Defence Lawyer

The interviewees illustrated an element of role confusion. There is difficulty in establishing which of the three duties espoused by Lord Reid should take priority. This difficulty led to different lawyers advancing different approaches to resolving the competing priorities. The data suggests that there are three distinct ‘types’ of criminal defence lawyer.

Firstly, there is the *Classic Adversarial Lawyer*. He is a lawyer who is fundamentally clear on which obligations compete for priority. He is single-minded and believes that the duty to the client is prioritized over any other duty. In this empirical study, only four of the twenty-four interviewed lawyers could be described as coming within this category. Lawyer 007 [Senior Partner, 21 years’ experience] was an example of the *Classic* category, and was steadfast in explaining his duties: ‘I’ll ignore what it says in the Procedure Rules, we are there to protect the legal interest of the client.’ The lawyer effectively excludes all other duties in order to advance the best interests of his client. Lawyer 006 [Senior Partner, 40 years’ experience] was another who explicitly prioritized the duty to the client. The lawyer suggested that having competing duties ‘fudged’ the issue; the single duty taking priority is to the client. The four *Classic Adversarial Lawyers* had a combined one hundred and twenty-three years of criminal defence experience. They all qualified and practiced in the pre-CPIA 1996 era and therefore had experience of working in a time before the defence had to disclose any information, save for alibi and expert evidence. They had the adversarial weapon of an ambush defence and they could put the prosecution to proof without making an affirmative defence. The very notion of co-operation between the opposing sides would be shunned; prosecution and defence lawyers were adversaries, battling to advance the best interest of their respective clients. It is perhaps unsurprising to discover that the category most akin to the classic conception of the adversarial lawyer contains the fewest number of participants.



McConville and Marsh argue that lawyers have misread the extent to which their duty to the client has been overridden in the cause of efficient court administration.⁹⁷⁸ This misreading has led to a fundamental departure from adversarial values and has given rise to lawyers who either, a) claim to be adversarial but illustrate elements of conflict, or b) prioritise the managerial goals of the CrimPR ahead of their client's interest.

As illustrated by the above table, the vast majority of the lawyers in the present study fell into the second category, the *Conflicted Adversarial Lawyer*. Fifteen of the twenty four participants could be placed in this category. They are 'conflicted' because they want to prioritise their duty to the client but, for a number of reasons, the impact of doing so is greatly diluted. The lawyers use terms such as 'paramount', 'prime' or 'main'. These terms suggest that the duty to the client takes priority, but it is quickly given a caveat that other obligations also exist that requires a great deal of attention. Lawyer 008 [solicitor 6 years' experience] provides an illustration of the *Conflicted Lawyer*. The lawyer suggested that their duty was 'mainly' to the client; this was not as explicit the *Classic Lawyers* as it recognised the existence, and importance, of other duties. Lawyer 009 [Senior Partner 29 years' experience] felt that the duty to the client was 'paramount' but accepted it was 'coloured' by the professional obligations to the court. These lawyers gave the impression that they are zealous advocates who are the shield of the accused, but, unfortunately, their other obligations dilute the impact of this shield. Lawyers in this category have a vast

⁹⁷⁸ M. McConville and L. Marsh 'Adversarialism goes West: Case Management in Criminal Courts' (2015) July, E&P 172-189.

amount of experience; the most experienced lawyer qualified thirty-two years ago whereas the most recently qualified lawyer has four years' experience. The experience range of this group makes for some very interesting results when compared with the *Procedural* category.

The final category is the *Procedural Lawyer*, who ultimately sees no issue or conflict with the obligations placed upon the defence lawyer by the CPIA and the CrimPR. Lawyer 022 [solicitor, 6 years' experience] illustrated this point by explaining the obligations were merely an 'occupational hazard'. These lawyers placed a heavy emphasis on the notion of co-operation; Lawyer 023 [Solicitor, 7 years' experience] admitted they had an explicit duty to 'their opponents'. Perhaps unsurprisingly, two of the three lawyers in this category had less than ten years' experience; therefore, they have only practiced in an era when the CPIA and the CrimPR have been in operation. What was surprising was the remaining two lawyers who had thirteen and eighteen years' experience respectively. These advocates did not think the CrimPR or CPIA 1996 held many ramifications for the role of the defence lawyer. What is interesting is that the most recently qualified lawyers who took part in the study, both of whom had four years' experience, provided responses that put them in the 'Conflicted' category. A number of *Procedural* lawyers have less than ten years' experience and because they have been socialized into an era that prioritizes efficiency and cooperation, it might be expected that the most recently qualified lawyers would also occupy a space in the *Procedural* category.

7.7.2 Tension in the Modern Era

Although the CrimPR has 'an upside in that they consolidated many procedural rules, they also have a sinister downside by putting the acquittal of the innocent and conviction of the guilty at the heart of the Rules'.⁹⁷⁹ The Rules ultimately confuse procedure with outcome and fundamentally undermine adversarial criminal process. The sole objective of the process should be to provide a fair means to trying a criminal charge.⁹⁸⁰ This provides a great tension for the lawyer: how does one balance the duty to the client against the duty to the court.

Andrew Keogh intimated that the 'clever, technical lawyer had died'.⁹⁸¹ However, the

⁹⁷⁹ J. Richardson, *Archbold 2015*, Sweet and Maxwell at p. ix.

⁹⁸⁰ *Ibid.*

⁹⁸¹ Andrew Keogh speaking at the Eldon Lecture Series (2001), Northumbria University School of Law, 'Criminal Case Management – Is the Game Over?'

empirical interviews suggest that is not necessarily the case. The clever technical lawyer, who would zealously defend their client and be a white knight,⁹⁸² is alive and well; although only a minority of the research sample are in the category of the *Classic Adversarial Lawyer*. The tension created by the managerial agenda from the CrimPR is clear. Within the new managerial agenda the lawyer is required to positively contribute to the efficiency of the system; this is clearly identifiable by having to enter a guilty plea at the first hearing.⁹⁸³ This aspect was a key indicator that led to the creation of the different categories. Those in the *Classic* category thought the rule was an aberration and that zealous advocacy and an active defence cannot be undertaken adequately within a short period of time. Lawyer 002 [Senior partner, 32 years' experience] suggested that the courts were 'asking you to nail your colours to the mast without operating with the full facts'; it is in this example where the technical lawyer is allowed to showcase their talents, he offers up enough information to satisfy the courts but not at the expense of the client's rights. The *Conflicted* lawyers did not go as far as this. They wanted to highlight the importance of the duty to the client but were quick to intimate that they had other duties such as fulfilling the overriding objective. The *Conflicted* lawyers wanted to illustrate that they were zealous advocates but their answers to the questions indicated that they prioritized other obligations over that of the client. The *Procedural* lawyer saw no problem with the rules and often thought they benefitted the system, albeit not necessarily their client.

Some aspects of the CrimPR did not lead to different responses from the lawyers; the responses were almost universal across the three categories. Most notably, the issue concerning the advance disclosure of witnesses⁹⁸⁴ and the role of the CPO caused almost no concern. Only one of the twenty-four respondents had actually experienced the police interviewing any of the witnesses that they had identified, but this might alter if police or prosecution resources improve. It appears that in the age of austerity, the CPS does not have the resources to undertake such an investigation of defence witnesses. Lawyer 006 [senior partner, 40 years' experience] remarked that a number of defence practitioners 'got

⁹⁸² See discussion in chapter three on the Theoretical Conception of the Defence Lawyer p.47-75

⁹⁸³ Leveson LJ, Essential Case Management: Applying the Criminal Procedure Rules, Senior Presiding Judge for England and Wales, December 2009: <https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Protocols/applying-crim-procedure-rules-dec-2009.pdf> [Last accessed 3rd March 2015].

⁹⁸⁴ S.6C Criminal Procedure and Investigations Act 1996.

into a bit of a flap when the rule came in⁹⁸⁵ but in reality, the rule is not utilized in such a manner. That is not to say that the rule will not cause an issue in the future but as of today, the theoretical concerns are yet to manifest. Likewise, the rule concerning the Case Progression Officer⁹⁸⁶ caused no undue problems for the defence lawyer. In fact, a number of lawyers found the rule useful from an organizational standpoint.⁹⁸⁷ In places the CrimPR were ineffective; this was most notably in respect of failures by the CPS. Whilst the view that prosecution was to blame for disclosure failures is not necessarily unrealistic,⁹⁸⁸ it must be taken with appropriate care as only defence lawyers were interviewed for the purposes of the study, and not prosecution lawyers.

The *Classic* lawyer was not necessarily concerned by the threat of sanctions, and would employ a tactical approach to ensure he avoided such a risk. The *Conflicted* and *Procedural* lawyers, on the other hand, were very concerned about potential sanctions even though, as the study has shown, the enforcement mechanisms for the Crim PR are limited. Recent reviews have identified this problem yet have not proposed any alternative.⁹⁸⁹ Furthermore, Redmayne suggests that the American enforcement mechanism of exclusion of evidence is ‘hardly palatable’.⁹⁹⁰ However, the courts have routinely excluded evidence as a sanction for an inefficient use of time.⁹⁹¹ Arguably, with the growth of managerialism the courts are more likely to enforce this sanction as they are permitted to enforce the CrimPR.⁹⁹²

7.7.3 The Lawyer-Client Relationship

It was argued in chapter four that the lawyer-client relationship has potentially been diluted by the enhanced pre-trial obligations of the defence lawyer since, especially, the lawyer has an enhanced duty to the court. What the empirical research discovered was

⁹⁸⁵ See A. Edwards ‘Criminal Defence Witness Notices’ (6th May 2010), Law Society Gazette, <http://www.lawgazette.co.uk/55292.article> and P. Hungerford-Welch, ‘Prosecution Interviews of Defence Witnesses’, (2010) Criminal Law Review, (9) 690-701.

⁹⁸⁶ Rule 3.4.CrimPR 2016

⁹⁸⁷ In particular, lawyers 007,008, 010 and 018 were especially receptive to the rule.

⁹⁸⁸ The CPS has been overstretched for a number of years. In 2010 in Bristol, a case collapsed because CPS lawyers were ‘swamped with work’. See <http://www.bbc.co.uk/news/uk-england-bristol-11650159> [last Accessed 10th March 2015].

⁹⁸⁹ See Rt. Hon Lord Justice Gross and Rt Hon Lord Justice Treacy, *Further Review of Disclosure in Criminal Proceedings*, (2012) Judiciary of England and Wales, available here: http://www.judiciary.gov.uk/wpcontent/uploads/JCO/Documents/Reports/disclosure_criminal_courts.pdf and Magistrates’ Court Disclosure Review, May 2014, Judiciary of England and Wales

⁹⁹⁰ M. Redmayne, Criminal Justice Act 2003: Disclosure and its Discontents (1), (2004), Criminal Law Review, 441-462 at 453.

⁹⁹¹ See *Jisil* [2004] EWCA Crim 696, *Munsone* [2007] EWCA Crim 1237

⁹⁹² Rule 3.5(6)(c) CrimPR 2016

somewhat mixed. In order to deal with cases justly⁹⁹³ the case needs to be dealt with efficiently and expeditiously.⁹⁹⁴ As such, it was argued in chapter four that the lawyer may have to report to the court and prosecution any significant failures by the client. The client may potentially view this as the lawyer disclosing confidential information, which might have an adverse impact on the trust between the two.⁹⁹⁵ As Wendell said, the biggest fear of the client is their lawyer ‘ratting him out’.⁹⁹⁶ Although Wendell was referring to the lawyer informing the court or prosecution of something incriminating told to him by the client, the client’s fear can be translated to telling tales for failure to comply with procedure. However, the study demonstrated that the lawyers gave their clients every possible opportunity to assist in satisfying the overriding objective.

The lawyer might be more inclined to ‘tell tales’ on the client in order to avoid one of the numerous sanctions for failing to comply. However, despite the concerns caused by SVS,⁹⁹⁷ which centered on a client who would not co-operate, the lawyers interviewed did not appear to have clients who did not comply. However, lawyers intimated that the threat of a WCO is a very real threat and looms large over their heads.⁹⁹⁸ To circumvent this, they employed tactics to ensure they are not subjected to such an order. Lawyer 002 carefully advised the client of the failures of compliance, and across the board the lawyers carefully managed expectations to ensure the client was aware of their own obligations.

The majority of lawyers interviewed believed that the obligations imposed by the CrimPR represent an erosion of the presumption of innocence. Edwards suggests that adversarial justice only works if there is an effective defence and that there is no better way to discover facts.⁹⁹⁹ Furthermore, the defence lawyer’s role must be based upon a clear adversarial model, since nothing less will test the quality of the investigation.¹⁰⁰⁰ The decision in *Firth*¹⁰⁰¹ represented an inherent danger of making an incriminating admission

⁹⁹³ Rule 1.1. CrimPR 2016

⁹⁹⁴ Rule 1.1(e) CrimPR 2016

⁹⁹⁵ See chapter four p.106-108.

⁹⁹⁶ W. Bradley Wendell, *Ethics and Law: An Introduction*, (2014), Cambridge University Press: Cambridge, at p.8.

⁹⁹⁷[2012] EWCA Crim 319.

⁹⁹⁸ Lawyers 002, 003 and 004 in particular, as cited on p.46

⁹⁹⁹ A. Edwards ‘The Role of Defence Lawyers in a ‘Rebalanced’ System’ in E. Cape and R. Young, *Regulating Police: The Police and Criminal Evidence Act 1984, Past, Present and Future*, (2008), Hart Publishing at p. 252.

¹⁰⁰⁰ By the police and then taken to trial by the CPS.

¹⁰⁰¹ [2011] EWHC 388 (Admin).

on the case management form. *Newell*¹⁰⁰² has gone some way to rectifying this problem but with the caveat that ensures the ‘spirit’¹⁰⁰³ of the CrimPR is complied with. Some lawyers did not fully trust that caveat, as the notion of ‘spirit’ was relatively loose and not explicitly defined. Surprisingly, as far as the lawyers interviewed were concerned, none of this appears to have an adverse impact on the lawyer-client relationship. The theoretical chapter was concerned with the lawyer having to ‘tell tales’ on the client and the Case Progression Form potentially turning the lawyer into a witness against their client. Should the accused not wish to complete the form, the lawyer will report him to the court and ‘tell tales’ regarding his lack of co-operation. This could further strain the relationship between lawyer and client to the point where the client does not feel the lawyer is acting in their best interests. However, the interview data suggests that this was not the case. Those interviewed explained to their client what their own individual obligations were under the CrimPR and what they had to do, as lawyers, to comply with the Rules. Surprisingly, that did not appear to cause any conflicts between the lawyer and client. Conflict arose where the client wanted the lawyer to mislead the court; the lawyers said this was something that would be unpalatable. They said they would withdraw from the case and no longer act for the client should they wish to mislead the court. It is somewhat surprising that the obligation to inform the prosecution of various elements of the defence case did not provoke any response by interviewees along the lines of ‘why are you telling them that?! I do not want them to know that.’ This could be because the lawyers outline at the start of what their obligations are or it could be, as Quirk states, the fact that suspects do not recognise the changes.¹⁰⁰⁴ Although Quirk was analyzing the impact of the right to silence, the same rationale could be transplanted to this study. Quirk states that the police interview and the trial should be viewed as a ‘benign *continuum*’¹⁰⁰⁵ but this is something that the suspect is unlikely to notice. As such, the suspect appears to have the protections of the burden of proof and legal advice, but these provisions ‘are devalued by the quandary in which the lawyer is now placed ...’¹⁰⁰⁶

The same approach applied with the possible dilution of the presumption of innocence and

¹⁰⁰² [2012] EWCA Crim 650

¹⁰⁰³ [2012] EWCA Crim 650 at para 36. The court in the first instance should have used s.78 PACE to exclude the evidence.

¹⁰⁰⁴ H. Quirk, *The Rise and Fall of the Right of Silence*, (2017) Routledge: Oxon) at 172

¹⁰⁰⁵ *R v Howell* [2003] EWCA Crim 01 as cited in H. Quirk, *The Rise and Fall of the Right of Silence*, (2017) Routledge: Oxon) at 172.

¹⁰⁰⁶ H. Quirk, *The Rise and Fall of the Right of Silence*, (2017) Routledge: Oxon) at 175

the privilege against self-incrimination. Chapter five argued that a client might not engage with obligations if they thought they were disclosing incriminating material to the prosecution. However, the study found that of the 24 lawyers interviewed, none of them said that any of their clients adopted this approach. Again, this comes down to managing the expectations of the client and informing them of what it is the lawyer is obligated to do. Lawyer 018 (Solicitor, 4 years' experience), a *Conflicted Adversarial Lawyer*, explicitly said this, but no other lawyers indicated this was a problematic issue. Generally, the lawyers said they had the trust of their clients and they followed what the lawyer needed to do. Interwoven with this point is the dilution of the privilege against self-incrimination and the presumption of innocence. The client may not notice this dilution. The lawyers did and were explicitly clear; all suggested that the privilege against self-incrimination has been compromised; the majority thought there was a dilution of the presumption of innocence.¹⁰⁰⁷ Lawyer 002 even suggested that the presumption of innocence does not exist in the magistrates' court. The court takes the approach that 'your client knows if he's done it, so tell me. They almost disregard any notion of the CPS having to prove their case'. The dilution of these classic adversarial values¹⁰⁰⁸ will have a wider implication for adversarialism in England and Wales.

Quirk suggests that there is a 'danger of mission creep in these crime control policies' and gives the example of radical change becoming the accepted norm.¹⁰⁰⁹ Arguably, this is case with the new regime. In the mid-1990s, it was likely to be unimaginable that the silence provisions would open the floodgates for a radical overhaul of the criminal justice process in England and Wales. Yet, this is where we find ourselves. The notion of traditional adversarialism has been greatly diluted and with that, the client's valuable shield is rendered to be almost a cog in the process wheel, as such we are moving toward a crime control model that prioritizes the efficiency of the process above the rights of the defendant.¹⁰¹⁰ As this thesis has discussed, it is arguable just how 'adversarial' defence lawyers actually were but from the interviews for this study, it is clear that a number of defence lawyers view themselves as either the classic adversarial lawyer or one who holds adversarial traits but is conflicted in this approach. Nevertheless, the changes made to ensure the suspect is co-opted into participation should shake the foundations of the

¹⁰⁰⁷ Although Lawyer 013 was adamant that there was no dilution of the presumption.

¹⁰⁰⁸ It should be noted that these values are not exclusive to the adversarial process. The inquisitorial approach also allow for them.

¹⁰⁰⁹ H. Quirk, *The Rise and Fall of the Right of Silence*, (2017) Routledge: Oxon) at 179.

¹⁰¹⁰ This shift is examined in sub chapter 8.8.

lawyer-client relationship, yet it does not. Perhaps the suspect does not recognise that these adversarial protections have been diluted or the fact the burden of proof appears easier to discharge because the suspect is co-opted into the process from a very early stage. Whilst the suspect *may* 'know if he's done it' that should not weaken the burden of proof or require participation in pursuit of his own conviction.

The implementation of non-adversarial values aims to increase the efficiency and efficacy of the criminal trial and act as a mechanism to ascertain the truth.¹⁰¹¹ It might be argued that the dual goal of active case management by the judiciary and magistracy combined with the desire for expeditious and efficient trials have the effect of returning the trial to the 'accused speaks' format.¹⁰¹² This modern-day 'accused speaks' trial has the notable difference that the accused is speaking through written case management disclosures as opposed to oral disclosures. If this is so, the modern-day defence lawyer assumes a far more diluted role, and the defendant takes centre stage and is once again an 'informational resource of the court'. The data suggested that the main difference between the lawyers was their approach to the overriding objective and how they satisfy their duty to the court. When speaking about the use of a Case Progression Officer and the advance witness disclosure the lawyers took a pragmatic view that the CPO was useful and the collective notion about advance witness disclosure was unproblematic.

One variable that might potentially explain the different categories of lawyer is the length of experience each lawyer holds. The experience range table is set out below:

¹⁰¹¹ Owusu-Bempah, 'Defence Participation through Pre-Trial Disclosure: Issues and Implications', (2013) 17 E&P 183-201 at 195.

¹⁰¹² As outlined in chapter three p.47-75 and see C. Mosidis, *Criminal Discovery: From Truth to Proof and Back Again*, 2008, Institute of Criminology: Sydney.



It is not surprising that the different duties are prioritized differently by those with different levels of experience; some lawyers practiced prior to the ‘sea change’ in criminal procedure, whereas others have only practiced in the era of cooperation. Whilst nothing conclusive can be drawn from these facts an inference can be drawn that the length of experience is potentially one parameter that affects the view of the lawyer. For example, both Lawyers 001 and 006 were senior lawyers in their individual firm with 16 and 40 years’ experience, whereas Lawyer 003 had 7 years’ experience. Quirk suggests that the length of experience could skew the views of the lawyer. Whilst researching the changes to the silence provision, she found that ‘practitioners qualifying since 1994 were likely to accept inferences as the norm.’¹⁰¹³ This is a similar finding in this study, those with longer experience were generally seen to be more adversarial and found issue with the new regime. Whereas the more recently qualified advocates found no or little problem with the regime. This could mean that eventually, the conflicted and/or the procedural lawyer will eventually replace the classic adversarial lawyer as the most experienced practitioner and ultimately, this will render the classic adversarial lawyer obsolete. However, anecdotally the inference is one which provides support for the notion of firm-based cultures suggested by earlier research.¹⁰¹⁴

¹⁰¹³ H. Quirk, *The Rise and Fall of the Right of Silence*, (2017) Routledge: Oxon) at 179.

¹⁰¹⁴ See generally M. McConville, J. Hodgson, L. Bridges and A. Pavlovic, *Standing Accused* (1994), Oxford University Press: Oxford and D. Newman, *Legal Aid Lawyers and the Quest for Justice*, (2013) Hart Publishing: Oxford.

It is difficult to draw any firm conclusions from the length of experience owing to the size of the sample. Nonetheless, the experience table makes for interesting reading. Theoretically, it would be expected that those with the longest experience would fall into the *Classic* category; they would have practiced in an era without having to make a defence case statement. Despite this rationale, some experienced practitioners have fallen into the *Conflicted* category where the lawyer presents a veneer of classic adversarialism but find themselves conflicted by other obligations. The four most experienced lawyers in this category all prioritized the duty to the client but were quick to acknowledge other competing duties. The *Classic Adversarial* lawyer paid little attention to the competing duties and focused on advancing the best interest of their client. The *Procedural* lawyer contained some of the less experienced lawyers, which is somewhat unsurprising as they have only practiced in an era of co-operation. However, the category is populated by a minority of lawyers. It appears that the majority of the lawyers espouse adversarial values and traditions. However, it is only the *Classic* lawyer who claims to put this into practice. The defence lawyer in the modern era is one that advocates the advancement of adversarial defence rights but ultimately, these rights are diluted by other obligations, mostly notably by the duty to the court. The CrimPR and its overriding objective present a great danger to the *Classic Adversarial* lawyer; he is at threat of being eroded by both his *Conflicted* and *Procedural* counterparts.

CHAPTER EIGHT

The ‘Efficient’ Criminal Justice Process and the Dilution of Adversarialism

8. Introduction

This thesis has sought to examine whether the disclosure regimes of both the CPIA 1996¹⁰¹⁵ and the CrimPR¹⁰¹⁶ have fundamentally altered the role of the criminal defence lawyer. This encompasses the first two research questions which the thesis set out to answer.¹⁰¹⁷ Further to this, the semi-structured nature of the interviews allowed the lawyers to talk about their obligations with relative freedom. This freedom permitted the participants to talk in-depth about the impact the changes had for the adversarial nature of our criminal justice process.¹⁰¹⁸ It was earlier suggested that the primary duty of the lawyer was to advance the best interests of his client.¹⁰¹⁹ Chapter Three illustrated that the lawyer could be viewed as a ‘gladiator of the accused,’¹⁰²⁰ a ‘fearless knight,’¹⁰²¹ or a ‘hired gun.’¹⁰²² These impressions express the notion that the defence lawyer acts as the accused’s protector from the State, who is ready to advance his client’s case. Theoretically, the defence lawyer becomes an ‘extension of the client’s will’¹⁰²³ as it is the defence lawyer who presents the accused’s case in court; the lawyer says ‘all that the client would say for himself (were he able to do so).’¹⁰²⁴ The theoretical conception of the lawyer acting as a ‘fearless knight’ on behalf of his client is supported by judicial precedent. For instance, Lord Reid indicated that the defence lawyer has three obligations, the duty to the client, the court and the administration of justice.¹⁰²⁵ However, whilst Lord Reid acknowledged that the duty to the client is paramount, it is clear that the duty is also contentious. Lord Reid acknowledged the existence of other competing duties, and that they often conflict. Nevertheless, a person can only have a single ‘primary’ or ‘paramount’ duty, posing the question “which duty would be prioritized by the lawyer?”

¹⁰¹⁵ s.5 Criminal Procedure and Investigations Act 1996.

¹⁰¹⁶ Part III Criminal Procedure Rules 2016.

¹⁰¹⁷ Research Question 1 What relevant legislation has changed over the last twenty years? Research Question 2: What are the theoretical and practical consequences of the changing legislation for the defence lawyer?

¹⁰¹⁸ This was the third and final research question, which had a dual purpose: firstly, it sought to examine the ramifications of the lawyer/client relationship and it also looked at what are the implications of the developments for the notion of adversarialism in England and Wales?

¹⁰¹⁹ See Chapter Three for an in-depth examination of the classic conception of the defence lawyer at pages 49-75.

¹⁰²⁰ R. Du Cann *The Art of the Advocate* (Penguin Publishing: London, 1964) at p.46.

¹⁰²¹ D. Nicholson and J. Webb, *Professional Legal Ethics*, (Oxford: Oxford University Press, 1999) at p. 182.

¹⁰²² M. Cain and C. Harrington *Lawyers in the Post-Modern World* (Oxford University Press: Buckingham, 1994) at p.55.

¹⁰²³ W. Simon, ‘The Ideology of Advocacy: Procedural Justice and Professional Ethics’ (1978), *Wis.L.Rev.* 42.

¹⁰²⁴ D. Pannick *Advocates* (Oxford University Press: Oxford, 1992) at p.92.

¹⁰²⁵ *Rondell v Worsley* [1969] 1 AC 191

The potential conflict posed by the competing duties was established in chapter seven.¹⁰²⁶ Five lawyers suggested that their ‘primary’ duty was to their client, 18 prioritized their client but accepted that this was tempered by other factors. Two prioritized the court and one elected to prioritise the duty court and their opponent. This can be contrasted to the theoretical conception, who purely advanced the best interest of the client and ignored any other competing interests in pursuit of the adversarial ideology. The traditional conception established earlier in chapter three illustrates that the lawyer acts as the advocate of the accused and as such, prioritizes that duty. It became clear from the research that this view was not universally accepted by the participants.

Chapter Four¹⁰²⁷ highlights that there have been piecemeal legislative since 1967. The legislative amendments subtly altered the pre-trial obligations of the defence lawyer, the advent of which was the defence disclosure obligations in terms of alibi¹⁰²⁸ and expert evidence.¹⁰²⁹ These provisions are relatively uncontentious and whilst they challenge the traditional adversarial stance of not having to disclose evidence in advance of trial, the erosion is relatively insignificant. A less subtle and more pronounced change came with the advent of the CPIA 1996 and the notion of the defence case statement.¹⁰³⁰ Consequently, the defendant is now required to disclose ‘in general terms the nature of his defence... the matters he takes issue with the prosecution’s case... and why he takes issue.’¹⁰³³ This disclosure was voluntary in the magistrates’ court,¹⁰³⁴ but was necessary in order to receive secondary prosecution disclosure. The voluntary aspect of disclosure is effectively circumvented by the CrimPR which requires the court to further the overriding objective by actively managing the case.¹⁰³⁵ This case management goal is achieved by the ‘early identification of the real issues.’¹⁰³⁶ The voluntary nature of defence disclosure in summary proceedings in the CPIA has been usurped by the provisions contained in the CrimPR and represents a shifts in the notion of traditional adversarialism in England and Wales, as well

¹⁰²⁶ See 187-246.

¹⁰²⁷ See Chapter Four 76-119.

¹⁰²⁸ S.11 Criminal Justice Act 1967 see Chapter 4.1 for the genesis of the defence disclosure regime

¹⁰²⁹ S.2(3) Criminal Justice Act 1987.

¹⁰³⁰ S.5 Criminal Procedure and Investigations Act 1996.

¹⁰³¹ S.5(6)(a) *ibid.*

¹⁰³² S.5(6)(b) *ibid.*

¹⁰³³ S.5(6)(c) *ibid.*

¹⁰³⁴ S.6 *ibid.*

¹⁰³⁵ Rule 3.2(1) Criminal Procedure Rules 2016.

¹⁰³⁶ Rule 3.2(1)(a) *ibid.*

Arguably, this challenges the due process protections such as the privilege against self-incrimination and the burden of proof. These due process protections have been severely weakened by the shifting landscape, and the traditional adversarial notion that ‘the accused should not be required to actively participate or assist in proceedings against him’ has been diluted.¹⁰³⁷ By returning to the ‘accused speaks’ mode of trial, the defendant is compelled to participate in proceedings which means that the pursuit of efficient fact-finding has taken precedence over fairness and defence rights.¹⁰³⁸ This insistence on defendant participation and the dilution of adversarialism has been augmented by fact the courts have actively embraced the mantra of efficiency.¹⁰³⁹

8.1 The Current political Context

As discussed in chapter two, the 1990s were a time of great political interest in the criminal justice process. The right to silence provisions contained in the CJPOA 1994 were an admission that the accused had ‘too many rights’ and some needed to be removed.¹⁰⁴⁰ This was the first stage of re-balancing of the criminal justice process and it led to the overhaul of the disclosure regime via the CIPA 1996, which was extended to the magistrates’ court by the CrimPR. The legislative changes contributed to a culture that conflates non co-operation with guilt and if the processes are not complied with, the defence lawyer can be confronted with the following statement: ‘Well, your client knows if he’s done it.’¹⁰⁴¹ This disregards the ‘golden thread’ of criminal law which states that it is the duty of the prosecution to prove the guilt of the accused. The golden thread does not state it is the duty of the prosecution to prove the prisoner’s guilt with great assistance and co-operation of the accused. Ultimately, this crime control culture shows little sign of abating and whilst it was politicians who spearheaded the changes in the 1990s, it appears the courts hastened the modern changes. Quirk suggests that the Court of Appeal have ‘developed a normative expectation that the defendant should co- operate fully in the criminal justice process.’¹⁰⁴²

¹⁰³⁷ A. Owusu-Bempah, *Defendant Participation in the Criminal Process*, (Routledge: London) 2017 at p.101

¹⁰³⁸ *ibid* at p.49

¹⁰³⁹ The courts had adopted the efficiency mantra proposed by Auld LJ ‘*Review of the Criminal Courts*’ prior to the implementation of the CrimPR. See *R v Chaaban* [2003] EWCA Crim 1012, *R v Jisil* [2004] EWCA Crim 696, *R v Gleason* [2004] 1. Cr. App. R 29, discussed at length in Chapter Five.

¹⁰⁴⁰ H. Quirk, *The Right of Silence in England and Wales: Sacred Cow, Sacrificial Lamb or Trojan Horse?* in J. Jackson and S. Summers, *Obstacles to Fairness in Criminal Proceedings: Individual Rights and Institutional Forms*, 2018, (Hart: Oxford) at P77

¹⁰⁴¹ Lawyer 007.

¹⁰⁴² H. Quirk, *The Right of Silence in England and Wales: Sacred Cow, Sacrificial Lamb or Trojan Horse?* in J. Jackson and S. Summers, *Obstacles to Fairness in Criminal Proceedings: Individual Rights and Institutional Forms*, 2018, (Hart: Oxford) at 96.

Quirk cites the example of *Howell*¹⁰⁴³ as the supporting case that suggests there is a shift in the presumption of innocence. The court intimated that the innocent have nothing to hide and therefore it is expected that they will fully co-operate with the police investigation and prosecution; as an ‘innocent person will generally be expected to seize the chance of denying allegations.’¹⁰⁴⁴ However, this approach affords no thought to the notion that the police station would be an unfamiliar and often hostile environment for suspects and therefore the suspect in the police may be extremely confused and/or frightened. Likewise, many suspects are poorly educated, inarticulate or suffer from learning disabilities or mental health problems. It is here the role of the defence lawyer should be to protect the suspect, especially if they are vulnerable. However, the forced co-operation seeks to ensure that the suspect participates in providing evidence that could be used to convict him. Ultimately, this culture of co-operation is ‘incompatible with the principles of adversarialism and sits uneasy with the presumption of innocence, and assists the prosecution in discharging the burden of proof.’¹⁰⁴⁵ The clear drive behind these non-adversarial traits is the desire to become more efficient but little thought is given to the impact on the rights of the defendant. There are further proposals to increase efficiency through the digitization of the criminal courts with pleas being entered online¹⁰⁴⁶ with the vision of ‘modernis[ing] and upgrade our justice system so that it works even better for everyone from judges and legal professionals, to witnesses, litigants and the vulnerable victims of crime.’¹⁰⁴⁷ It is unfortunate that the defendant is not considered here. After all, the defendant has the right to a fair and impartial trial and is protected by the presumption of innocence. Yet, the 2018 reform proposals does not even recognize the existence of the defendant and this approach is somewhat unfortunate. The ‘tough on crime’ approach of successive Conservative Home Secretaries in the 1990s has continued and the reform processes prioritises other court users above that of the defendant. If the reforms in the 1990s represented the fact the defendant had too many

¹⁰⁴² H. Quirk, *The Right of Silence in England and Wales: Sacred Cow, Sacrificial Lamb or Trojan Horse?* in J. Jackson and S. Summers, *Obstacles to Fairness in Criminal Proceedings: Individual Rights and Institutional Forms*, 2018, (Hart: Oxford) at 96

¹⁰⁴³ [2002] EWCA Crim 1 [10].

¹⁰⁴⁴ H. Quirk, *The Right of Silence in England and Wales: Sacred Cow, Sacrificial Lamb or Trojan Horse?* in J. Jackson and S. Summers, *Obstacles to Fairness in Criminal Proceedings: Individual Rights and Institutional Forms*, 2018, (Hart: Oxford) at 97.

¹⁰⁴⁵ *Ibid.*

¹⁰⁴⁶ HM Courts and Tribunals Service, *Justice Matters: Reform Update, May 2018*, available here: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/711535/HMCTS_Reform_Update_May_2018.pdf page 9

¹⁰⁴⁷ *ibid* page 4

rights, the continuation of these reforms further dilutes what protections were remaining. The accused enters the police station and is presumed guilty and he has to actively assist the prosecution in their goal of convicting him. Leng suggests, the changes made to the silence and disclosure provisions in the 1990s meant that we could be ‘... losing sight of the defendant.’¹⁰⁴⁸ However, the culture of co-operation means that the criminal justice system has lost sight of the defendants fundamental rights in pursuit of an efficient criminal justice process. The remaining sections of this chapter will analyse how we have lost sight of the defendant and suggest reforms to re-establish fundamental adversarial rights.

8.2 The Efficient Process: Better Case Management and Early Guilty Pleas

This thesis has illustrated that prior to the disclosure obligations underpinned by the CPIA¹⁰⁴⁹ there were very few constraints on the ability of the defence to pursue what was in the defendant’s best interest. However, the advent of managerialist goals means that the primary concern of the accused is not to win its own case but to ensure the guilty are convicted and the case is dealt with efficiently. Both of which are alien to an adversarial setting.¹⁰⁵⁰ In 2015, it was found that there was ‘undoubted room for improvement’¹⁰⁵¹ in the sphere of case management. Sir Brian Leveson’s *Review of Efficiency in Criminal Proceedings*¹⁰⁵² found that all parties needed to work to ‘identify the issues so as to ensure that court time is deployed to maximum effectiveness and efficiency’.¹⁰⁵³ With this *Review* the goals of efficiency and effectiveness were further consolidated with the genesis of the Better Case Management Initiative (hereafter, BCM).¹⁰⁵⁴ This links a number of initiatives which aim to increase the efficiency with which cases are processed through the criminal justice system. The overarching aims of BCM are:

- Robust case management;

¹⁰⁴⁸ R. Leng, ‘Losing Sight of the Defendant: The Government’s Proposals on Pre-Trial Disclosure’, *Crim LR* 704 (1995) at 711.

¹⁰⁴⁹ s.5-6 Criminal Procedure and Investigations Act 1996.

¹⁰⁵⁰ J. McEwan ‘From Adversarialism to Managerialism: Criminal Justice in Transition (2011) 31 *Legal Studies* 519 at 532.

¹⁰⁵¹ Gross LJ, *Review of Disclosure in Criminal Proceedings*, Judiciary of England and Wales at 76.

¹⁰⁵² Sir Brian Leveson, *Review of Efficiency in Criminal Proceedings* (London, Judiciary of England and Wales, 2015) <https://www.judiciary.gov.uk/wp-content/uploads/2015/01/review-of-efficiency-in-criminal-proceedings-20151.pdf>.

¹⁰⁵³ *ibid* at p.12.

¹⁰⁵⁴ Courts and Tribunals Judiciary, *Better Case Management* available at www.judiciary.gov.uk/publications/better-case-management

- Reduced number of hearings;
- Maximum participation and engagement with every participant within the system and;
- Efficient compliance with the CrimPR, Practice and Court Directions.

To achieve these goals, BCM introduced a new case management initiative, the uniform Early Guilty Plea Scheme. The CPS state that obtaining a guilty plea at the earliest opportunity has ‘huge advantages,’¹⁰⁵⁵ one being efficiency, as the police, court and prosecution will make economic savings. Furthermore, an early guilty plea reduces victim anxiety, ensuring they do not unnecessarily have to endure long waits, lengthy trials or come to court to give evidence. However, the lawyers interviewed did not view this economic saving in a positive light. For example, as Lawyer 004 stated: ‘my understanding is that it’s a money saving exercise ... the courts are insistent on a plea at the first hearing, despite us only seeing the client for twenty minutes and there are a myriad of outstanding issues, like disclosure.’

Lawyer 002 [Senior Partner, 40 years’ experience] was more explicit in his condemnation of the pressures faced by defence lawyers: ‘we have circumvented the basis of criminal justice practice by a set of arbitrary rules... with the purpose to get more convictions.’ The lawyer added that ‘this “speedy justice” is not based on statute, and merely looks to convict more people.’ These lawyers believe that this non-statutory policy is circumventing the adversarial nature of our criminal justice process. There is a benefit to a defendant entering an early guilty plea - should they do so, they will be entitled to a sentence discount. There is no statutory provision that dictates how much discount can be given for a guilty plea. The court must consider the stage in the proceedings the offender indicates his intention to plead guilty¹⁰⁵⁶ and the amount of discount was previously at the discretion of the court. The Sentencing Guidelines Council recommend a one-third discount for a guilty plea at the first opportunity; a one-quarter discount for a plea after the date of trial has been set; and finally, a one-tenth discount should the defendant enter a plea of guilty at the door of the courthouse

¹⁰⁵⁵ See paragraph 3:

http://www.cps.gov.uk/southwest/cps_southwest_news/news_articles/in_the_dock_early_guilty_plea_scheme_speeds_up_justice_for_victims/

¹⁰⁵⁶ S.144(1)(a) Criminal Justice Act 2003.

or once the trial has started.¹⁰⁵⁷ However, the Sentencing Council has attempted to amend the level of discount on offer. In February 2016, the Council issued a consultation which is intended to encourage a greater number of defendants to enter a guilty plea at the ‘first reasonable opportunity’. The new proposals will provide a tiered approach to the level of discount offered. The first tier provides the maximum discount of one-third should the defendant indicate a guilty plea at the first hearing that they are asked to plead. The second tier has a discount of one-fifth should the defendant enter a guilty plea at a later opportunity **but** before the trial commences. The third-tier states that, should the defendant enter a guilty plea on the first day of their trial, they will only receive a discount of one-tenth. Finally, should the defendant enter a guilty plea part way through the trial, they will not be eligible for any sentence discount. This reduction of the second tier and the zero discount for a ‘cracked trial’ is an implicit indication that the provisions are about seeking more guilty pleas rather than the accused standing by his right to test the evidence at trial; thereby, subscribing to the goal of an economic and efficient criminal justice process.

The concept of an Early Guilty Plea scheme (EGP) is not, in itself, a controversial one. Where a case is straightforward, a defendant accepts their guilt, and the evidence is substantial and undisputed, it seems justifiable to encourage a guilty plea at the initial stages, provided the circumstances of the defendant do not negate his free and informed choice. In circumstances where these conditions are not met, the scheme poses problems. The scheme states that the discount is not a reward but an incentive, this is questionable because a defendant may view the discount as neither a reward for ‘doing the right thing’ nor an incentive to assist the prosecution. However, it could be viewed as a temptation to reduce the risk of conviction for an offence they have not committed or an inducement to sacrifice their legitimate fair trial rights, such as the privilege against self-incrimination and the fact it is the duty of the prosecution to discharge the burden of proof.

Furthermore, any guilty plea should be grounded in sound legal advice based on the weight of evidence the prosecution holds. However, there is clear evidence that pre-trial disclosure by the CPS is often inadequate in practice, and this poses a difficulty for defence lawyers.¹⁰⁵⁸

¹⁰⁵⁷ See Sentencing Guidelines Council, Reduction in Sentence for a Guilty Plea (2007) available here: [https://www.sentencingcouncil.org.uk/wp-content/uploads/Reduction in Sentence for a Guilty Plea - Revised 2007.pdf](https://www.sentencingcouncil.org.uk/wp-content/uploads/Reduction_in_Sentence_for_a_Guilty_Plea_-_Revised_2007.pdf).

¹⁰⁵⁸ 24 lawyers commented that the prosecution does not adhere to the regime and are effectively unchecked. When the defence do not adhere to the regime, they are frequently threatened with sanction by the court.

At present, there is little regulation of disclosure prior to the first hearing and the lack of regulation is important because it is the only point at which a defendant would be eligible for the maximum discount. The prosecution is only required to disclose Initial Details of the Prosecution Case (IDPC) if the defence request it (Rule 8.2(2)). The scope of this disclosure is narrow, particularly for defendants brought to court in custody: prosecutors are mandated to share details of circumstances of the offence and the criminal record of the defendant, and little else. This poses a very serious question: how are defence lawyers expected to give sound legal advice as to plea when they are only advising on a partial picture of the evidence? This point is analogous to the completion of the case management forms with only a partial picture of the facts. Lawyer 001 [Solicitor, 16 years' experience] stated 'you're being forced into completing a form with only a partial picture.' If entering an early guilty plea falls under 'robust case management' it is difficult to see a lawyer being able to adequately advise on plea with such little information in front of him. This difficulty was illustrated by Lawyer 007 who did not believe the overriding objective was to deal with cases justly¹⁰⁵⁹ but to be 'a management tool in a system that assumes guilt and just wants to process guilty cases'. The assumption of guilt is something that is deeply non-adversarial and if the assumption is true, it erodes the very fabric of the adversarial criminal justice process. Lord Sankey classed the presumption of innocence as the golden thread; it is one that is unbreakable. He said, 'Throughout the web of the English Criminal Law one golden thread is always to be seen that it is the duty of the prosecution to prove the prisoner's guilt.'¹⁰⁶⁰

8.3 Undue Pressure

The dangers of being pressured to enter a guilty plea and were demonstrated in the case of *R v (on the application of the DPP) v Leicester Magistrates' Court*.¹⁰⁶¹ The claimant applied for judicial review to re-open his conviction for common assault. The offence had allegedly been committed against a 14-year-old boy, in the care of the defendant as an agency worker in a care home. At his first appearance in court, he intended to enter a not guilty plea on the basis of self-defense. However, he changed this on the first day of his trial. He asserted that his solicitor had pressured him into entering an early guilty plea; he was convicted and as a

¹⁰⁵⁹ Rule 1.1(1) Criminal Procedure Rules 2016.

¹⁰⁶⁰ Per Lord Sankey in *Woolmington v DPP* [1935] AC 462 at 481.

¹⁰⁶¹ (Unreported, 9th February 2016).

result, was no longer able to find work in the social care sector. Whilst the magistrates' court can make an order to re-open a conviction when it is in the interests of justice (under s.142 Magistrates' Courts Act 1980) it can only be exercised where there has been a mistake or a situation akin to a mistake. A subsequent change of heart or regret at entering a guilty plea will not suffice as a mistake and as such the defendant's conviction was confirmed. This is a matter of interpretation. One could argue that 'regret' over changing a plea due to inappropriate pressure from lawyers is tantamount to a mistake. Clearly, the defendant's first inclination was to plead not guilty, but he was persuaded to plead otherwise. In the same way that false confessions are subsequently considered to be mistaken when extracted under police pressure, there seems no logical reason why a 'change of heart' about a guilty plea in such circumstances should be considered any differently. In contrast, where a defendant enters a guilty plea and has a vague or ill-defined 'regret' based on nothing more than the desire to avoid conviction, it seems more reasonable to prevent the overturning of convictions. There is a further danger to advising on a plea without sufficient prosecution disclosure. In response to a consultation issued in February 2016,¹⁰⁶² *The Law Society* suggested that lawyers will have to be careful when offering advice on plea as they will be potentially liable in negligence if inadequate advice is given.¹⁰⁶³

Newman found that undue pressure did not merely stem from the pressures exerted by prioritized the interests of their client, and 'sausage factories' which prioritized profit making.¹⁰⁶⁴ Newman presented an unsatisfactory image of what he witnessed and suggested that most lawyers held a presumption of guilt in respect of their clients; the lawyer 'assumed' the client would enter a plea of guilty and helped to facilitate such a plea,¹⁰⁶⁵ even when the client wanted to enter a not guilty plea.¹⁰⁶⁶ None of the participants interviewed for this study suggested that they would pressurize a client to enter a plea

¹⁰⁶² Sentencing Council, *Reduction in Sentence for a Guilty Plea Guideline Consultation*, February 2016, available here: <https://www.sentencingcouncil.org.uk/wp-content/uploads/Reduction-in-sentence-for-a-guilty-plea-consultation-paper-web.pdf> [Last Accessed 15th September 2016].

¹⁰⁶³ The Law Society, *Response of the Law Society of England and Wales to the Sentencing Council consultation on the Reduction in Sentence for an Early Guilty Plea*, May (2016) at p.6, available here: <http://www.lawsociety.org.uk/policy-campaigns/consultation-responses/sentencing-council-consultation-on-the-reduction-in-sentence-for-a-guilty-plea-guideline-law-society-response/> [Last Accessed 15th September 2016].

¹⁰⁶⁴ D. Newman, *Legal Aid Lawyers and the Quest for Justice*, (2013), Hart: Oxford p.30.

¹⁰⁶⁵ *ibid* at p.112

¹⁰⁶⁶ *ibid* at p.115, where the client says he's not guilty and the lawyer says 'look, if you plead guilty, then I'll explain why later, okay?'

which suited their own needs.¹⁰⁶⁷ Despite this, there is a concern that following Newman's findings and the *Leicester magistrates'* case that undue pressure may not only come from the judiciary but from the client's own lawyer.

8.4 Robust Case Management and the Intervening Judge

As discussed in chapter three, the creation of the adversarial criminal trial demoted the judge from an active participant to that of a pilot who was responsible for guiding the trial to completion.¹⁰⁶⁸ This remained the approach until the early part of the new millennium when tension arose between the judiciary's approach to case management and the judicial demeanor of passivity. Lord Justice Auld¹⁰⁶⁹ provided the catalyst for a change in the role of the judge. This change in role led to a number of participants in this study believing that the adversarial fabric has been torn, being replaced by a process that is distinctly non-adversarial.

Traditional adversarialism means that the trial judge should refrain from entering the arena of the adversarial battle unless he has to clear up a particular point of law for the jury. In 1957, Denning LJ gave a notable description of the adversarial judge. The Court of Appeal case of *Jones v National Coal Board*¹⁰⁷⁰ centered on the fact that the judge intervened too frequently during cross-examination and it determined that the judge should intervene as infrequently as possible as the heart of cross-examination lies in the unbroken sequence of question and answer.¹⁰⁷¹ Excessive judicial interruption weakens the effectiveness of cross-examination, and in this instance the defence, were unduly hampered. The trial judge frequently initiated discussions with counsel and often interrupted witnesses during their answers to a question; he had effectively taken the task of examination out of the hands of the advocate. This behaviour was deemed to fall outside the realm of their role. Denning LJ said the role of the judge is to 'hearken' to the evidence; he can ask questions to clear up a point and keep the advocates in good order to ensure they follow procedure and avoid repetition. If he goes beyond these tasks he 'drops the mantle of a judge and assumes the role of an advocate; the change does not become him well'.¹⁰⁷² Furthermore, Denning reiterated this stance when stating that 'patience and gravity of hearing is an essential

¹⁰⁶⁷ However, as well as interviews, Newman carried out observations which allowed him to contrast his interview findings by observing 'how' lawyers worked.

¹⁰⁶⁸ For a full examination of the judge's role during the 'Accused Speaks' trials please see p.48-54.

¹⁰⁶⁹ Auld LJ, *Review of the Criminal Courts of England and Wales* (HMSO: 2001).

¹⁰⁷⁰ *Jones v National Coal Board* [1957] 2 Q.B. 55

¹⁰⁷¹ *ibid* per Denning LJ at p.65

¹⁰⁷² *Ibid* at 64.

part of justice; and an over speaking judge is no well-tuned cymbal.’¹⁰⁷³

Lawyer 002¹⁰⁷⁴ [Senior Partner, 32 years’ experience] intimated that the trial is evolving. He said that ‘the whole ethos of the modern trial is “your client knew whether or not he did the act” and if he knows, you should therefore complete the forms in an expedited manner and comply with the CrimPR.’ It was this issue that raised a concern with many¹⁰⁷⁵ of the lawyers who were interviewed. Lawyer 010 suggested that the ‘creation of the CrimPR and its case management provisions, considerably erode the privilege against self- incrimination’ as the defence has to disclose ‘so much information pre-trial’. The lawyer went on to suggest that it is impossible to not incriminate the defendant when completing the forms as failure to comply would look like the ultimate example of guilt. Lawyer 004 [Solicitor, 8 years’ experience] also ‘certainly believed’ that the robust case management and its early identification of the real issues impinged on the privilege against self- incrimination. Lawyer 009 [Senior Partner, 29 years’ experience] pointed to the changing face of adversarialism when speaking about the robust case management. The lawyer said ‘the identification of the real issues and case management is about saving money. The system is better when the accused is allowed to stay silent’. This point raises an interesting argument: are the case management provisions effectively forcing the accused to speak? It appears almost impossible to stay entirely silent and a knock-on effect of this managerial regime is the return to ‘The Accused Speaks’ trial.

Arguably, the implementation of the CrimPR, coupled with the judiciary assuming a more interventionist role, might suggest that the pendulum is moving toward re-establishing the importance of uncovering the truth in criminal trials as opposed to discharging the burden of proof. This can be illustrated in the post-Auld review criminal trials. In *Gleeson*¹⁰⁷⁶ the court ruled that the defence tactic of an ambush defence will no longer be tolerated. This is a clear example of the court emphasizing the discovery of the truth over proving the allegation; as in the first instance, the prosecution could not prove the offence was committed by the defendant.

¹⁰⁷³ F. Bacon, *Essays, Civil and Moral*. Vol. III, Part 1. The Harvard Classics. (New York: P.F. Collier & Son, 1909–14), Chapter 56 Of Judicature as cited by Denning LJ *ibid*.

¹⁰⁷⁴ Lawyers 006, 007 and 009 explicitly commented that they have heard magistrates use a similar phrase. 4 other lawyers intimated they had heard colleagues have encountered a similar phrasing.

¹⁰⁷⁵ Whilst it was a clear issue for the 5 *Classic Adversarial Lawyers*, 6 *Conflicted Adversarial Lawyers* also raised this issue.

¹⁰⁷⁶ [2003] EWCA Crim 3357

It could only be proven once the indictment had been amended. Essentially, this is an erosion of the penalty shoot-out theory of criminal procedure. The Crown had one shot at goal, and if the striker missed, however unlucky, he did not get another chance.¹⁰⁷⁷ Additionally, this provision arguably breaks the golden thread of criminal procedure.¹⁰⁷⁸ Whilst it appears that the prosecution still has to prove guilt beyond a reasonable doubt, it is clear the defendant now has to assist the prosecution in convicting himself.

Whilst it appears that despite the notion of efficiency and effectiveness coursing through the criminal justice process, the ‘tolerance of prosecution errors is alarmingly apparent.’¹⁰⁷⁹ The CPS were allowed an adjournment to ‘get its case in order.’¹⁰⁸⁰ However, it is difficult to see an adjournment being granted to the defence to ‘get their case in order’. In *Rochford*¹⁰⁸¹ there was a lack of detail in the defence statement and the judge indicated that failure to complete the case statement in more detail would be treated as contempt of court for both the defendant and the lawyer. As such, tolerance and patience appears to be given to the prosecution but in the quest for truth and efficiency, the defence appear to be given a very unsympathetic and different treatment.

8.5 Truth or Proof: The dilution of the Adversarialism in Pursuit of the Overriding Objective.

Undoubtedly, the criminal trial is continually evolving. The development of the adversarial criminal trial occurred whilst the courts were still trying to preserve the ‘accused speaks’ form of trial. Retaining this form of trial would allow the court to benefit from treating the defendant as an ‘informational resource’ and have him openly talking at trial, with control of the proceedings remaining with the judiciary. Adversarial theory holds that the trial is a dispute between two competing sides, which are in a position of equality. The argument takes place before a passive and neutral adjudicator. The evidence is predominately oral and it is the responsibility of the adjudicator to ensure that the parties stay within the rules. Each side is responsible for the presentation of their individual case, the trial being the forum in which

¹⁰⁷⁷ J. Chalmers, F. Leverick and L. Farmer, *Essays in Criminal law in Honour of Sir Gerald Gordon*, 2010 (Edinburgh: Edinburgh University Press) p.323.

¹⁰⁷⁸ *Supra* n.999.

¹⁰⁷⁹ M. McConville and L. Marsh *Criminal Judges, Legitimacy, Courts and State-Induced Guilty Pleas in Britain* (Edward Elgar: Cheltenham, 2014) p.175.

¹⁰⁸⁰ *R (on the application of Payne) v South Lakeland Magistrates’ Court* [2011] EWHC 1802 (Admin) at para 39.

¹⁰⁸¹ [2010] EWCA Crim 1928.

the guilt or innocence of the Defendant is resolved.¹⁰⁸³ Arguably, the trial in the new millennium has departed from this traditional stance of adversarialism; what has gone relatively unreported is the potential impact this change holds for justice.

The accused speaks trial reflected the notion that the trial was designed to establish the truth of a particular accusation. The implementation of the CrimPR alongside the judiciary assuming a more interventionist role might suggest that the pendulum is moving toward re-establishing the importance of the truth in criminal trials as opposed to proof. The truth-seeking nature of the trial is also exemplified by the case management provisions of the CrimPR and its extension, BCM which is designed to ensure that the case management provisions are strictly adhered to. Never before has the judiciary or magistracy had such explicit directions as to what constitutes their role of active case management. Furthermore, the voluntary nature of the defendant's participation has dissipated and he is effectively compelled to make disclosures in 'pursuit of efficient fact-finding'.¹⁰⁸⁴

Some of the component parts challenge the notion of adversarialism in England and Wales. It is conceivable to suggest that the case management forms are akin to completing a defence case statement under the CPIA 1996;¹⁰⁸⁵ effectively the case management forms erode the voluntary nature of the statutory legislation. Whilst defence disclosure is not an entirely novel proposition, has the defendant had to disclose so much information.¹⁰⁸⁶ It might be argued that dual goals of active case management by the judiciary and magistracy combined with the desire for expeditious and efficient trials have the effect of returning the trial to the 'Accused Speaks' format.

¹⁰⁸³ J. McEwan 'From Adversarialism to Managerialism: Criminal Justice in Transition' *Legal Studies*, Vol. 31 No 4 at 520.

¹⁰⁸⁴ A. Owusu-Bempah, *Defendant Participation in the Criminal Process*, (Routledge: London) 2017 at p.163.

¹⁰⁸⁵ Andrew Keogh argues the case management form is analogous to the defence statement in the Crown Court. See A. Keogh 'Criminal Case Management – Is the Game Over?', Eldon Lecture Series, (2011) Northumbria University School of Law.

¹⁰⁸⁶ Previously, defence alibi witnesses had to be disclosed by virtue of S.11 Criminal Justice Act 1967 and in fraud trials the defendant had to outline his defence in general terms. However, if the defence to the fraud charge was based on alibi or expert evidence then fuller disclosure was required.

However, the modern day ‘Accused Speaks’ trial has a notable difference from its earlier counterpart; the accused is now speaking through written case management disclosures, as opposed to orally disclosing information. It has been claimed that defence disclosure does weaken a fundamental adversarial foundation that the burden of proof rests solely on the prosecution. However, The Roskill Committee, suggested that this issue might be circumvented:

‘The prosecution would still have to prepare their case fully... including making early disclosure of their evidence... we recognize that the burden of proof would be affected if the prosecution were allowed to alter the nature of their case once the defence had been disclosed. To avoid this possibility, any proposal would therefore have to involve the prosecution’s case being “fixed” before the defence could show his hand. If the prosecution sought to change their ground... or, if it were not too late, to ensure that the prosecution adhered to the original case’.¹⁰⁸⁷

This approach is admirable because it acknowledges that the burden of proof would be significantly diluted if the prosecution were permitted to amend their case once the defence has been disclosed. However, the ‘sea change’ which started with the Auld Review and permeated through the judiciary and magistracy to enact a change in culture almost ignores the due process safeguard highlighted by the committee. The modern judge will permit the prosecution to alter an indictment to ensure cases are not frustrated by prosecutorial error.¹⁰⁸⁸ Whilst this satisfies the goal of an efficient and expeditious criminal process, the decision is one that is certainly non-adversarial. For example, in *Chabaan*¹⁰⁸⁹ the Court of Appeal stated the trial judge was entirely correct; time is not unlimited, but the dual goals of efficiency and case management should not be fulfilled by the potential prejudice to the defendant. The evolution of role as an active case manager has further confused the role of the judge. It appears there is some difficulty in ascertaining the boundaries in which they operate. In *Cordingley*¹⁰⁹⁰ the judge was discourteous and rude and in *Copsey*¹⁰⁹¹ the Court of Appeal

¹⁰⁸⁷ The Fraud Trials Committee, Chairman: The Right Honorable Lord Roskill, P.C, (HMSO: 1986) p104 at para 6.75.

¹⁰⁸⁸ See *Gleeson* n.87.

¹⁰⁸⁹ [2003] EWCA Crim 1012.

¹⁰⁹⁰ [2007] All ER (D) 131.

deemed the judge's interventions all too frequent. However, the judge has been permitted to act as a second prosecutor. The judge in *Copsey*¹⁰⁹² asked many questions during the trial, rendering the boundaries of the role rather opaque. What is clear is that the modern-day judiciary and magistracy are no longer passive umpires, but active case managers who pilot the case along the 'correct' flight path to ensure nobody veers off course.

Furthermore, active case management makes significant inroads into the due process nature of the adversarial criminal trial. Adversarial systems are not created to consider the interests of anyone other than the state and the defendant.¹⁰⁹³ The objective of active case management is to increase the efficiency of the criminal trial process. However, the adversarial process is much like an obstacle course, with many evidential and procedural obstacles to overcome before the court can reach a safe and just decision. This is best illustrated by Packer. He created the Due Process Model (DPM) and the its polar opposite counterpart, the Crime Control Model (CCM). In the DPM the process allows the accused to have 'his day in court', and this trial is the central component of the model.¹⁰⁹⁴ The process should represent an obstacle course and each of its successive stages are designed to present formidable impediments to carrying the accused any further through the process.¹⁰⁹⁵ Packer's opposing model, CCM is almost managerial in nature and can be likened to a conveyor belt which moved an endless stream of never ending case load. Cross-examination has no real value in the model, facts are more easily established at the police station and the procedures followed need to be uniform.¹⁰⁹⁶ Essentially, the CrimPR reflects this uniform approach and the active case management powers allow the judiciary to supervise the conveyor belt of criminal cases, ensuring the process does not slow down. The judiciary can pursue the goal of efficiency and expedited trials by adopting a role that intervenes in proceedings where a delay may occur. This can potentially lead to the curtailment of oral evidence by not allowing advocates to take an unlimited amount of time to present their case.¹⁰⁹⁷ The judiciary can also substitute oral evidence by written evidence to expedite proceedings.¹⁰⁹⁸ With such a shift in the legal landscape one can understand why some lawyers are confused to their role

¹⁰⁹¹ [2008] EWCA Crim 2043.

¹⁰⁹² *Ibid.*

¹⁰⁹³ J. McEwan 'From Adversarialism to Managerialism: Criminal Justice in Transition' *Legal Studies*, Vol. 31 No 4 at 520.

¹⁰⁹⁴ H. L. Packer, *The Limits of the Criminal Sanction*, (California: Stanford University Press), 1968, at p.157.

¹⁰⁹⁵ *ibid* at p.163.

¹⁰⁹⁶ *ibid* at p.163.

¹⁰⁹⁷ Rule 3.10 (d)(ii) CrimPR 2016.

¹⁰⁹⁸ *D and Others* [2007] EWCA Crim 2485.

and how to tackle the many tensions they face whilst providing an adequate service to their client.

The requirement of co-operation between the parties is a distinctly non-adversarial feature of the criminal justice process. Dempster¹⁰⁹⁹ suggests that co-operation is both unnecessary and unwelcome. He believes that the post-*Gleeson*¹¹⁰⁰ approach is incorrect and states that ‘it is the Crown’s job to draft an appropriate indictment, not the job of the defence to proof read it.’¹¹⁰¹ The very idea that trials should become more efficient and resources should be saved is commendable and one that should be embraced and the overriding objective¹¹⁰² and the tools available to the judiciary are designed to achieve this goal. However, in meeting this goal, the judiciary may act in a manner that might appear to be incongruent with the values and principles of an adversarial system. Having non- adversarial traits in a due process adversarial system certainly appears to sit rather awkwardly; and the meeting of the overriding objective by active case management with an interventionist judiciary is distinctly non-adversarial. McEwan suggests that a new ethical code is needed if the criminal justice system is no longer adversarial.¹¹⁰³ There has been no official recognition that adversarialism has, or should be, abandoned. However, this has been suggested through piecemeal changes to the criminal justice process, and the increasing significance of judicial intervention since the turn of the century suggests a new form of process is being created.¹¹⁰⁴

A cornerstone of this change is the return to the ‘Accused Speaks’ trial, albeit the accused is speaking from written disclosure rather than orally. The importance of having the accused speak was best highlighted by the earlier Hawkins quote for ‘[the] guilty, when they speak for themselves, may often help disclose the truth, which probably would not so well be discovered from the artificial defence of others speaking for them.’¹¹⁰⁵ The interventionist judiciary and the disclosure regime are forcing the accused to talk by having them ‘identify

¹⁰⁹⁹ J. Dempster, ‘Show your Hand or Have it Cut Off’, Criminal Bar Association Newsletter, 1 March 2005.

¹¹⁰⁰ [2004] 1 Cr. App. R. 406.

¹¹⁰¹ *Supra* n.1099.

¹¹⁰² Rule 1.1 Criminal Procedure Rules 2013.

¹¹⁰³ F. Garland and J. McEwan, Embracing the Overriding Objective: Difficulties and Dilemmas in the New Criminal Climate, (2012) *The International Journal of Evidence and Proof*, 16 (233-262) at 262.

¹¹⁰⁴ *Inter alia* the dilution of the right to silence, the growing importance of the pre-trial investigation in deciding criminal matters. See J. Jackson, ‘Police and Prosecutors after PACE: The road from case construction to case disposal’ in E. Cape and R. Young, *Regulating Policing: The Police and Criminal Evidence Act 1984: Past, Present and Future*, 2008 (Hart) 255-277.

¹¹⁰⁵ W. Hawkins, *A Treatise of the Pleas of the Crown*, Vol II, (London 1721) cited in n.1 at p.171.

the real issues' at an early stage. The culture does not represent a shift in process toward inquisitorialism. Instead the shift is toward managerialism, and at the heart of this shift is the interventionist judge who is not merely a guiding pilot;¹¹⁰⁶ but the pendulum has swung, and the judiciary is now also the controller of the trial process. With the adversarial landscape shifting, the role the actors play also changes. What has not been recognised is the impact the managerial agenda has for the role of the defence lawyer.

There has been a clear departure from the traditional notion of adversarialism. The goal of the criminal trial is to reconstruct historical events in respect of which neither party is in possession of all the facts.¹¹⁰⁷ Mosidis believes it is the problem of fact possession that reveals the tension between truth and proof in a criminal trial. He states that the essence of a criminal trial is a search for the truth rather than a sporting contest between the prosecution and defence.¹¹⁰⁸ It is this sporting contest that the CrimPR has assisted in eradicating. The criminal trial now reflects the old 'Accused Speaks' trial, where the defendant is an informational resource of the court.¹¹⁰⁹ However, he is not an informational resource as used in the early-days of the adversarial trial, where he would make oral admissions. The modern day informational resource is forced to identify the 'real issues' of his case. Should the defendant delay, the court will exert pressure in order to extract a plea; even if the defence lawyer does not hold all the facts. Furthermore, the defendant is ultimately compelled to breach his privilege against self- incrimination in order to satisfy the overriding objective.

This has drastically altered the adversarial process and as such it has altered the role of the defence lawyer. A minority of respondent lawyers still fitted the '*Classic*' conception of the defence lawyer, but the majority of the lawyers were identified as either '*Conflicted*' or '*Procedural*' - simply operationalized by their obligations to the court. These lawyers are not zealous defenders of their clients, despite their initial veneer of zealous advocacy.¹¹¹⁰ The defence lawyer in the modern era is a lawyer who is cajoled and pressurized¹¹¹¹ to

¹¹⁰⁶ W. Silverman, 'The Trial Judge: Pilot, Participant or Umpire?' 11. *Alta L Rev* 40 1973 at 63

¹¹⁰⁷ C. Mosidis, *Criminal Discovery: From Truth to Proof and Back Again*, 2008, Institute of Criminology: Sydney at p.250.

¹¹⁰⁸ *ibid.*

¹¹⁰⁹ W. Hawkins, *A Treatise of the Pleas of the Crown*, Vol II, and (London 1721) cited in. J. H. Langbein, *The Origins of the Adversary Criminal Trial*, 2003, (Oxford: Oxford University Press) p.171.

¹¹¹⁰ The veneer exists since the majority of the lawyers suggested that their primary duty is to their client

¹¹¹¹ Although there were four lawyers who were termed as 'classic adversarial' lawyers and their answers indicated that they would not buckle to such pressure.

satisfy the overriding objective, regardless of how the quest for efficiency impacts upon their client. After all, their client ‘knows if he did it or not.’¹¹¹²

8.6 The Current State of the Adversarialism: A theoretical analysis

If the due process provisions contained within PACE 1984 represented the high water mark of due process protections, the thesis has illustrated that there have been piecemeal changes since that have eroded various protections and left the criminal justice system in a state of flux; it is ultimately masquerading as a due process system but this is a veneer. Therefore, crime control traits now permeate every facet of the process. Starting with the requirement to disclose expert evidence, the curtailment of the right to silence and then the genesis of the ‘new regime’, it can be stated that the due process nature of the criminal justice process has been fundamentally altered. It is clear that the process is centered within a crime control agenda.

The primary purpose of the crime control model is to repress criminal conduct.¹¹¹³ Lawyer 002 [Senior Partner, 32 years’ experience] highlighted this goal when he explained that the whole system is about ‘convictions, ideally via a guilty plea.’ This ties into the second element of Packer’s model, the process is a uniform conveyor belt. Ideally suspects are merely processed from charge to conviction. The Early Guilty Plea scheme is designed to mimic this process. The Scheme takes a carrot and a stick approach to criminal procedure. The carrot is the availability of a lesser sentence should the defendant opt to enter an early guilty plea. The stick is the idea that the defendant would receive a more severe sentence should they contest their innocence at trial and then be convicted. The process wants to save money and therefore, this waste of resource needs punishing, as after all, ‘the defendant knows if he’s done it.’ The defendant is co-opted into the process and compelled to take part in order to achieve the efficiency goals. The goals of efficiency underpins the crime control model and is one clear indicator that the criminal justice process of England and Wales resembles such a process. The alternative is the due process model, which resembled the process until the mid-1990s. This model takes the obstacle course approach to justice i.e. there are formidable hurdles in the way of a prosecution. As such, there is a presumption of innocence. However, in the modern criminal justice process it is hard to argue that this exists.

McConville found that even the defendant's own lawyer acted as if there was a presumption of guilt.¹¹¹⁵ If this is the view of their own lawyer, how are parties that are charged with investigating them supposed to treat them. As such, there has been a seismic shift in the approach to criminal procedure and Packer's models help analyse these changes. Damaska raises an interesting point concerning the conflict between the two models. The more a system wants to prevent errors of convicting the innocent, the more we run the risk of acquitting the guilty.¹¹¹⁶

Whereas Packer looked at how the process *could* work at either end of the spectrum; Damaska wanted to examine how power was allocated in criminal justice. He created the Hierarchical Ideal and the Co-Ordinate Ideal. The former centers on a ridged demarcation between 'insiders' and 'outsiders.'¹¹¹⁷ If outsiders were allowed to participate in the decision making process, they would be viewed as 'meddling.'¹¹¹⁸ To avoid meddling, any activity is routinized and therefore negates the possibility of individual justice. This formulaic view of justice was one of the initial goals of the CrimPR; to be standardized so there is one set of Rules for criminal procedure. This desire for uniformity means that we 'all march to the beat of a single drum.'¹¹¹⁹ The lack of individualised justice and the rise of standardized justice means that there will be a greater degree of consistency in the decision making process.¹¹²⁰

Damaska's alternative ideal is the Co-Ordinate ideal, and here there is a 'symbolic relationship between a cast of non-authorative professionals and the amateurs in positions

¹¹¹⁵ M. McConville, J. Hodgson, L. Bridges and A. Pavlovic *Standing Accused* (Clarendon Press: Oxford 1994) at p.210.

¹¹¹⁶ M. Damaska, 'Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study', *University of Pennsylvania Law Review*, Vol 121 507-587 at p.576.

¹¹¹⁷ M. Damaska, *The Faces of Justice and State Authority: A Comparative Approach to the Legal Process*, 1986, (Yale University Press) at p.18.

¹¹¹⁸ *Ibid* at p.19.

¹¹¹⁹ *Ibid* at p.20

¹¹²⁰ *Ibid* at p.22.

of power.’¹¹²¹ However, with the rise of the new regime, this relationship is potentially being lost. The active case manager is looking to manage the trial as efficiently as possible. If there is any threat to this, such as a lack of defence disclosure, the amateurs in power will admonish the non-authoritative professionals with cries of ‘why isn’t this done? He knows if he’s done it.’¹¹²² Furthermore, this ideal does not reflect the nature of the modern criminal process in England and Wales. The ideal does not employ ‘technical approaches to decision making.’ Whereas the modern criminal justice process does employ such a technical approach. The judicial culture in the post *Auld Review*-era means the defence could not rely on flaws in the prosecution’s case in order to seek an acquittal.¹¹²³ As such, allowing the prosecution to rectify such an error would be a very ‘technical’ approach to justice. As such, the modern process in England and Wales is more akin to the Hierarchical Ideal.

The final theoretical model is Sarah Summers’ notion of the emergence of a European Procedural tradition. This approach rejects the classic labels of adversarial and inquisitorial¹¹²⁴ as the classifications are ‘vague, inconsequent and even perhaps misleading.’¹¹²⁵ Furthermore, she suggests the labels give little thought to jurisdictions that have a fusion of both approaches to criminal justice, such as Scotland.¹¹²⁶ However, Summers’ work is heavily criticized by Stewart Field, He states that whilst she uses the word ‘tradition’, nowhere does ‘she set out to identify the particular characteristics between the varied procedural practices in many European jurisdictions.’¹¹²⁷ However, that does not mean Summers’ work should not be used as a comparative lens. She does make a number of interesting points, she suggests that there is a ‘rise of active pre-trial judicial case-management ... where, since the 19th Century, magistrates have only performed limited pre-trial functions.’¹¹²⁸ This thesis has highlighted the change in culture from a passive to a more ‘hands-on’ judiciary in the advent of the ‘new regime’. That being said, Field believes it cannot be claimed that there is European Procedure because

¹¹²¹ *Ibid* at p..25.

¹¹²² As Per Lawyer 007.

¹¹²³ See *R v Gleason* [2004] EWCA Crim 3357.

¹¹²⁴ S. Summers, *Fair Trials: The European Criminal Procedural Tradition and the European Court of Human Rights*, 2007, (Hart: Oxford) at p.9.

¹¹²⁵ *Ibid* at p.5.

¹¹²⁶ *Ibid*.

¹¹²⁷ S. Field, ‘Fair Trials and Procedural Tradition in Europe,’ *Oxford Journal of Legal Studies*, Vol. 29, No. 2 (2009), pp. 365–387.

¹¹²⁸ S. Summers, *Fair Trials: The European Criminal Procedural Tradition and the European Court of Human Rights*, 2007, (Hart: Oxford) see chapter 2.

the book bases its contentions on ‘Germanic, British and French sources ... there is hardly any mention of the 19th century developments in legislation or intellectual thought in the countries of Southern Europe or Scandinavia.’¹¹²⁹ As such, the new tradition cannot bear a ‘European label without applicability to these countries.’¹¹³⁰ With that being said, the case management provisions do contain a heavy European influence. They may not be fully inquisitorial in so far as they are responsible for the investigation but they are distinctly non-adversarial and this means the provisions sit rather awkwardly in their adversarial setting.

Whilst the impact of the ‘new regime’ may not reflect one single theoretical model, there are elements that can be extrapolated from a number of models, which may unearth the rationale and impact of the changes. Whilst questionable motives concerning efficiency may exist for the piecemeal changes— for if you know your opponent’s hand, it should be easier to win the game and, ultimately, repress criminal activity. The new regimes ensures that the stance of early disclosure cooperation, which was compulsory in the Crown Court but voluntary in the magistrates’ court, would now be compulsory in the magistrates’ court. This established a normative expectation that the accused will co-operate with the prosecution. Without using the theoretical models to analyse these changes, it might be difficult to understand the gravity and importance of each successive piecemeal change as the overarching impact of the new regime and culture shift may not be visible. The combination of changes that have occurred from the genesis of the CPIA 1996 to the creation of the new regime means that the criminal justice process of England and Wales has departed from a due process standpoint. What remains, is a managerialist system that is governed by a crime control agenda and underpinned by a desire for efficiency.

8.7 The Culture of the New Regime and the Lawyer-Client Relationship

Chapter seven suggested that the lawyer-client relationship remained relatively in-tact, despite the raft of obligations which means that the defendant is effectively co-opted and compelled to participate in the proceedings against him. The participants suggested that their clients had no little to no issue with the lawyers completing the case management forms and effectively showing part of their hand to the prosecution. As their ‘client care letter outlines all of our obligations both to the client and to the court ... as such, clients are acutely aware of what we have to do.’¹¹³¹ As discussed throughout the thesis, the new obligations effectively

¹¹³¹ Lawyer 014 outlined the importance of the client care letter when taking instructions from new clients.

mean the lawyer would have to ‘grass-up’¹¹³² the accused in the case of any delays. The new obligations under the Rules means the courts have to be kept fully abreast of the progress of the case.¹¹³³ As the thesis has highlighted, the case management regime was born out of the idea of efficiency because ‘defence lawyers were frequently accused of failing to submit case statements, or of producing statements lacking and clear and detailed exposition of the case.’¹¹³⁴ Despite the drive for efficiency being directed against the defence, the culture of adversarialism may be difficult to overturn in its entirety. Garland and McEwan suggest that it is ‘difficult to see how defendants can be persuaded that they have an interest in the smooth running of the criminal justice system.’¹¹³¹ Despite this difficult, not a single one of the twenty four participants suggested that their clients had any problem with the overriding objective of the CrimPR. This is surprising considering that it can be argued that the suspect is being to ignore the golden thread of criminal proceedings and assist the prosecution in building the case against him. The thesis accepts that the decisions in *Newall*¹¹³² goes some way to rectify the incorrect decision in *Firth*¹¹³³ but nevertheless, it appears to have changed and the lawyer-client relationship. The relationship has been fundamentally altered as it was defence that needed to get their ship in order because they were the ones that ‘putting things off for as long as possible.’¹¹³⁴ Thus, the advancing of the best interest of the client was not in the interests of justice.

Quirk suggests that the CPIA 1996 disclosure regime ignored the different working practices and therefore cultures of the key actors in the process. She suggests that it firstly requires the police to fulfill an inquisitorial function, the prosecutor to view the evidence from a defence perspective and the defence to consider the interests of justice and ultimately the occupational culture of both prosecution and defence needs to be considered.¹¹³⁵ However, it is the very nature of this culture that has been almost entirely ignored during criminal justice reform. Quirk suggests that the disclosure regime is ‘exacerbated by the flawed premise that prosecution and defence disclosure are equivalent or reciprocal; yet the two processes have

¹¹³² See p.230 for examination of the lawyers considering the implications of ‘grassing up’ their client.

¹¹³³ CrimPR Rule 1.2(1)(c)

¹¹³⁴ F. Garland and J. McEwan ‘Embracing the Overriding Objective: Difficulties and Dilemmas in the new criminal climate’, (2012) 16 E&P 233-262 at 243.

¹¹³¹ *ibid* at 254.

¹¹³² [2012] EWCA Crim 650.

¹¹³³ [2011] EWHC 388 (Admin). Please see chapter 7 p.244-48 for analysis of these cases.

¹¹³⁴ F. Garland and J. McEwan ‘Embracing the Overriding Objective: Difficulties and Dilemmas in the new criminal climate’, (2012) 16 E&P 233-262 at 254.

¹¹³⁵ H. Quirk, ‘The Significance of Culture in Criminal Procedure Reform: Why the Revised Disclosure Scheme Cannot Work’ (2006) E&P 10(1), 42-59 at 42-43.

discrete rationales, impose distinct responsibilities, raise divergent concerns and necessarily attract different sanctions.’¹¹³⁶ Furthermore, the disclosure regime ignores the working practices and attitudes of the key actors at play; they are adversaries. The disclosure regime requires the adversarial police to fulfill an inquisitorial function; prosecutors to view material from the defence perspective and the defence to act in the administration of justice, rather than the clients and the defendants to co-operate in the prosecution’s quest to convict them.¹¹³⁷ By ignoring the cultural workings of the criminal justice system, it leaves a potential source of injustice.¹¹³⁸ The source of this injustice stems from the co-operative nature of the process and begins in the police station and permeates through the criminal justice process. If adversarialism were to exist, ‘a partisan defence lawyer [is] essential.’¹¹³⁹ However, from the moment the suspect is interviewed at the police station, it is clear that an adversarial defence is unlikely to materialize. Whilst the CrimPR expect a notion of co-operation between the ‘competing’ sides, the defence lawyer is already regarded as ‘unwelcome’¹¹⁴⁰ in the police station interview. Despite, being unwelcome, there still is a great deal of co-operation required between the suspect (and by virtue of the fact he is in the room, his lawyer) and the police. Chapter Four established the political context in which the disclosure provisions were enhanced, in the early-to-mid 1990s there was a push to re-inforce a ‘crime control’ mantra to dilute the protective due process provisions afforded by PACE 1984. As part of this push, the Criminal Justice and Public Order 1994 permitted the courts to draw adverse inferences from a suspect remaining silent. As such, Leng suggests that this created a ‘normative expectation’¹¹⁴¹ that suspects would speak in the police station interview. This is a deeply non-adversarial trait which undermines the due process protection of remaining silent. As such, the importance of a partisan protector at the police station has grown in importance. In order to build a strong-lawyer client relationship, the client needs to feel protected by his lawyer and trust that he will fend off attacks from his adversaries. However, Quirk paints a very bleak picture of police station advice. She cites the work of Baldwin who states that defence representatives were ‘feeble’¹¹⁴³ in their attempts to intervene during the interview. She also states that the lawyer ‘essentially played the role of the third interviewer.’¹¹⁴⁴ Arguably, the

¹¹³⁶ *Ibid* at 44.

¹¹³⁷ *ibid* at 46.

¹¹³⁸ *ibid.*

¹¹³⁹ Quirk H, *The Rise and Fall of the Right of Silence*, (2017) Routledge: Oxon) at p89

¹¹⁴⁰ *ibid* at 90

¹¹⁴¹ See R. Leng, ‘The Right to Silence in Police Interrogation: A Study of some of the issues underlying the debate, RCCJ Research Study no 10 (1993).

¹¹⁴³ J. Baldwin, ‘Legal Advice in the police station’, *New Law Journal* 142 at 1762 cited in Quirk H, *The Rise and Fall of the Right of Silence*, (2017) Routledge: Oxon) at 93.

¹¹⁴⁴ H. Quirk, *The Rise and Fall of the Right of Silence*, (2017) Routledge: Oxon) at 3.

silence provisions of the CJPOA have ‘made it much more difficult for legal representatives to act in an adversarial manner.’¹¹⁴⁵ However, the evidence suggests that there was little regard for the lawyer-client relationship prior to the enactment of the silence provisions but if an adversarial defence did exist prior to the 1994 changes, it has now been made even more difficult to act in an adversarial manner.

Furthermore, Quirk suggests that there was a distinct lack of adversarialism in police station interviews and that a normative expectation of co-operation was established in the wake of the changes to the silence provisions. Garland and McEwan suggest that the normative expectation of co-operation is lopsided because only one side are punished for a failing to co-operate, as such any attempt to establish a new culture will likely fail because it is difficult to change a culture if the system is not perceived to be fair to all actors and participants.¹¹³⁵

The findings of Garland and McEwan’s study suggest that the goal of a co-operative, efficiency driven culture might be hampered by the fact lawyers on either side do not believe the court sufficiently punish its opponent for failings that frustrate the process. In their research, prosecution lawyers believed that the courts were harsh on them regarding the time-limits they have to adhere to whilst the defence lawyers suggested the failure of the prosecution to complete paperwork in good time went largely unpunished.¹¹³⁶ Furthermore, prosecutors argued that the incomplete detail offered by the defence defeated the overriding objective; whereas the defence did not view this as problematic.¹¹³⁷ The empirical research conducted for this study suggested that some defence lawyers did not view this a problem. For example, Lawyer 008 wanted to supply as ‘minimal detail as possible.’ Lawyer 010 refused to go ‘chapter and verse into his client’s defence.’ Lawyer 011 went a little further to explain that the detail of the case management is ‘very basic, not very detailed’ as they are working from a skeleton; the prosecution have not offered adequate disclosure to ensure a full defence could be provided in the forms. These working difficulties suggest two important points. Firstly, there are failings on both sides– the prosecution supplies insufficient detail and the defence retort with a similar response. Secondly, the classic adversarial lawyers want to advance the best interest of their client and as such, disregard the other duties that compete for priority. However, whilst the culture might be difficult to change for the classic lawyers it appears that the case management requirements appear less troublesome for the other types

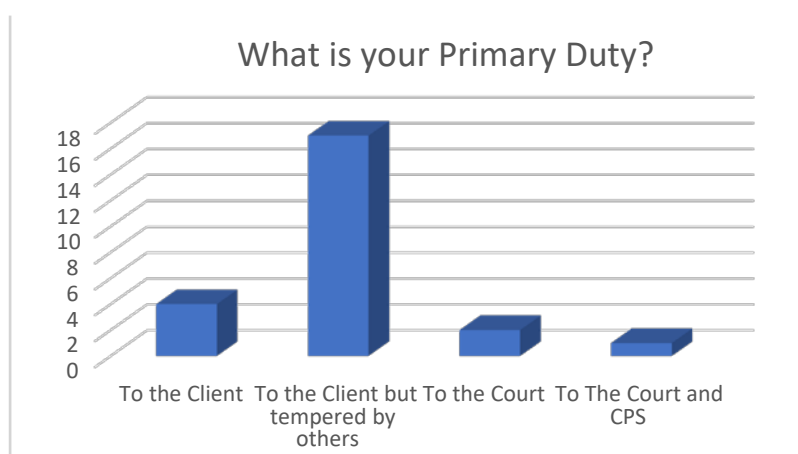
¹¹⁴⁵ *ibid* at 118

¹¹³⁵ F. Garland and J. McEwan ‘Embracing the Overriding Objective: Difficulties and Dilemmas in the new criminal climate’, (2012) 16 E&P 233-262 at 260.

¹¹³⁶ see *ibid*.

¹¹³⁷ *ibid* at p.245

of lawyer. For example, Lawyer 005 did not think the forms were ‘too onerous ... we are not telling the CPS anything they do not already know.’ Lawyer 024 suggested that the Rules and the accompanying culture change was ‘positive tool’ for criminal practitioners. Arguably, the lawyers who embrace the culture change are allowing a shift from adversarialism to a new form of process. However, as chapter 7.7 asked – does adversarialism actually exist? The benefits of a true adversarial process are clear; as Steinburg suggests an adversarial lawyer is needed because this benefits society as it offers all who fall into the criminal justice system a robust defence from State prosecution.¹¹³⁷ Garland and McEwan point out that defence lawyers are under pressure to be ready for trial without sufficient time to prepare and as a result they have to disregard their clients’ interest in favour of the system.¹¹³⁷ This non-adversarial culture was reflected in the findings of this thesis. When questioned only four lawyers suggested that their primary duty was to the client. The breakdown and full analysis of this can be found in Chapter 7.3 but it is worth reminding the reader of the breakdown of primary duties:



The culture has already changed from zealous advocacy advancing, in which defence lawyers advance the client’s best interest to the explicit obligation of considering the court and the prosecution. It has been suggested that adversarialism did not really exist in reality,¹¹³⁸ but nevertheless, the criminal process was created with a culture of adversarial due process safeguards, which includes the burden of proof resting on the prosecution, the privilege

¹¹³⁸ H. B. Steinberg, ‘The Responsibility of the Defense Lawyer in Criminal Cases’ *Syracuse Law Review*, (1960), Vol 12 442.

¹¹³⁷ Garland and J. McEwan ‘Embracing the Overriding Objective: Difficulties and Dilemmas in the new criminal climate’, (2012) 16 *E&P* 233-262 at 242.

¹¹³⁸ McConville et al’ study found that lawyers held a low opinion of their clients and Newman found that some law firms acted as ‘sausage factories’ see p.237 of this thesis.

against self-incrimination and the presumption of innocence. Packer's model of Due Process would liken these safeguards to the 'obstacles' on the 'course' of criminal procedure that he described. However, it appears that a new culture exists where fundamental safeguards can be circumvented by an overriding objective 'to deal with cases justly.' Garland and McEwan suggest the 'culture changed envisaged by the Court of Appeal may be unattainable.'¹¹⁴⁰ Yet when examining the primary duty of the defence lawyer, in this thesis, coupled with empirical work from the 1990s, it could be argued that culture of criminal defence has embraced the overriding objective and the accompanied efficiency drivers. The adversarial culture of England and Wales is no more. This section opened with the idea that the lawyers interviewed believed the lawyer-client relationship remained intact because they disclosed all their competing obligations in a standard client care letter. However, what appears to be happening is the fact that the traditional notion of adversarialism does exist in classic form and it has not for some time. The requirements of the disclosure regime make it more difficult for the defence to test the case of the prosecution ... or to adapt its evidence at trial.¹¹⁴¹ Ultimately, it is arguable that lawyer-client relationship remains intact because the notion of an adversarial culture was merely a veneer; this can be evidenced by the tiny pocket of *classic adversarial lawyers* in the study and literature from the mid-1990s which highlighted the general lack of adversarialism.

8.8 Conclusion

This chapter concluded, on the basis of the fieldwork, that three different distinctive types of lawyer currently practice in England and Wales. What this chapter has sought to do is to address the arena in which the three types of defence lawyers practice. Traditionally, England and Wales had an adversarial criminal justice process, but this chapter raises a number of issues relating to the dilution of the adversarial nature of this process. This was examined through the lens of disclosure, the early guilty plea, and the judge as the robust case manager. All of these features are distinctly alien to the adversarial process which is predicated on the battle between the all-powerful State and the Zealous Defender of the accused.¹¹⁴²

When considering the impact of the Early Guilty Plea regime, it has been established that the defence are given inadequate access to prosecution information prior to the first

¹¹⁴⁰ Garland and J. McEwan 'Embracing the Overriding Objective: Difficulties and Dilemmas in the new criminal climate', (2012) 16 E&P 233-262 at 262.

¹¹⁴¹ *ibid* 56.

¹¹⁴² Please see Chapter Three pages 47-75 for a complete examination of the theoretical defence lawyer

hearing.¹¹⁴³ This can affect the ability of the defence lawyer to advise on an appropriate plea. Equally, a defendant may be pressured by his lawyer to enter a guilty plea or be tempted to do so because of the sentence discount. In such cases, there is a risk that the overriding objective of the CrimPR will be undermined – that is, to deal with cases justly, which includes acquitting the innocent and convicting the guilty.¹⁴⁴⁴ Whilst it is important to consider the effects of lengthy criminal proceedings on victims and witnesses, it is often the defendant who is forgotten in any reform. The rise of the CrimPR and its implicit goals of managerialism has arguably diluted the adversarial nature of the criminal justice process and has given rise to emphasizing the importance of co-operation throughout proceedings.

There is undoubtedly an agenda, for better or worse, to encourage defendants to enter early guilty pleas, and it seems that should the defendant regret doing so, a remedy will rarely be offered by the courts.¹¹⁴⁵ It is imperative to ensure that any decision to enter a guilty plea is based on full and accurate evidence from the police and prosecution, made available at an early stage. This is arguably commensurate with the objectives of the CrimPR and the general culture change that has seen a drift from away from pure adversarialism, where each party hides their case for as long as possible. If co-operation is to be encouraged, it should be done on an equal basis. This would ensure that the defence lawyer can adequately advise the client as to plea. Moreover, it would re-assert the adversarial tradition of English and Welsh criminal justice by moving away from a system that is reliant on a defendant ‘knowing’ when to plead guilty towards a system which requires the prosecution to discharge the burden of proof by revealing the totality of their case from the beginning of the process.

A further shift from traditional adversarialism can be seen when one considers the impact of robust case management and the role of the intervening judge. The implementation of these ideas sits rather awkwardly in the adversarial process. The managerial model dislikes party control and this control is now taken away from the State and defence lawyers and transferred to the court.¹¹³⁵

¹¹⁴³ See The Judiciary of England and Wales, Magistrates’ Court Disclosure Review (May 2014) available here: <https://www.judiciary.gov.uk/wp-content/uploads/2014/05/Magistrates%E2%80%99-Court-Disclosure-Review.pdf> [Last Accessed 28th August 2016]. See also J. Plotnikoff and R. Wolfson, *A Fair Balance? Evaluation of the Operation of Disclosure Law*, Home Office, RDS Occasional Paper No 76 (2001) and H. Quirk, *The Significance of culture in criminal procedure reform: Why the revised disclosure scheme cannot work*. *The International Journal of Evidence & Proof*, 10(1), 42-59.

¹⁴⁴⁴ Rule 1.1 CrimPR 2016.

¹¹⁴⁵ *R v on the application of the DPP) v Leicester Magistrates’ Court* (Unreported, 9th February 2016)

The judge in the twenty-first century plays a far more prominent role than his twentieth century predecessor. The judge is no longer described as passive, and is undoubtedly the key figure throughout the trial process. He is more than a pilot, more than an umpire. He is the manager, with the goal of concluding the trial in the most expedient manner possible. Should either side not comply with the directions given by the ‘manager’, they may face a number of sanctions. The Court can fix, postpone, bring forward, cancel or adjourn a hearing. It can make a costs order and, ultimately, it can impose any other sanction as may be appropriate.

The interventionist judiciary has its goals underpinned by the CrimPR. The traditional adversarial trial has diminished in importance and it is no longer the forum in which the prosecution and defence zealously represent their clients. With the erosion of the ambush defence, the creation of both the defence case statement under section 5 of the CPIA 1996 and the analogous requirement under the CrimPR, the adversarial battle has been replaced with each party knowing the ‘real issues’ of the opposition’s case. This is in stark contrast to the initial development of the disclosure regime. As previously discussed,¹¹⁴⁶ prosecution disclosure was the antidote to the potential unfairness caused by the inequality of resources between the prosecution and defence.¹¹⁴⁷

In the modern criminal trial a duty of co-operation permeates the trial process and has fundamentally altered the culture of criminal procedure. This is illustrated by the creation of timetables and each side informing the judiciary of any significant failures of themselves or their opponent. This has effectively reconstructed the role performance of defence lawyers so they are partners and co-operators with the prosecution. This partnership and cultural evolution is clear and the role of the judiciary should be viewed through the same lens. It is the judiciary which facilitates this change by performing the pivotal role of case manager. The very idea that trials should become more efficient and that resources should be saved is commendable and one that should be embraced, but not at the cost of due process protections. However, it is apparent that the due process protections are ridden over roughshod by the judiciary who now view their role as interventionist case managers.

The interventionist judiciary, and case-management provisions, alongside the disclosure

¹¹⁴⁶ See pages 77-92 for a detailed examination of the evolution of the disclosure regime.

¹¹⁴⁷ D. Corker and S. Parkinson, *Disclosure in Criminal Proceedings*, (Oxford: Oxford University Press) 2009 at p.6.

regime, are forcing the accused to ‘speak’, albeit these are not oral representations; but by having them ‘identify the real issues’ at an early stage, the accused is ‘speaking’. The price of this is the return to an ‘Accused Speaks’ format, leading to the dilution of core adversarial features in England and Wales such as the burden of proof, the privilege against self-incrimination, and the notion of zealous advocacy.

This leaves the defence lawyer in the modern era in a perilous position. His pre-trial obligations not only alter his role but the very arena in which he operates. McConville and Marsh suggest that the CrimPR represent a platform which has allowed a departure from due process protections towards a process that maximizes the opportunities for the prosecution to obtain knowledge.¹¹⁴⁰ This has seen a dramatic reversal of ‘fearless advocate,’¹⁴⁴¹ or ‘gladiator of the accused.’¹⁴⁴² The *Conflicted* and *Procedural* lawyers did not share the worry that the adversarial lawyers were dying and the arena was shifting.

However, the lack of concern might be misplaced. The defence lawyer in the modern era is a key cog in the drive for efficiency; the adversarial criminal justice process has been vastly diluted, so much so that defence lawyers are properly described as ‘the handmaidens of the prosecution and left hand of the court.’¹⁴⁴³ The dilution of adversarialism means that its due process protections offer little for the accused. The goal of dealing with cases justly should be embraced. However, there is a clear and present danger to the notion of justice if the courts of England and Wales continue to prioritise efficiency and economy over the interests of fairness.

¹¹⁴⁰ M. McConville and L. Marsh *Criminal Judges, Legitimacy, Courts and State-Induced Guilty Pleas in Britain* (Edward Elgar: Cheltenham, 2014) p.165.

¹⁴⁴¹ *ibid* at p.179.

¹⁴⁴² R. Du Cann *The Art of the Advocate* (Penguin Publishing: London, 1964) at p.46.

¹⁴⁴³ *Supra* n.1140 at p.189.

Appendix One

The Matrix of Obligations

The obligation	The enforcement mechanism(s) /consequences	Obligation placed on accused	Obligation placed on lawyer	
			Directly	Indirectly
Obligations under CPR				
Further the overall objective	(How far is this intended to go? Could lead to lawyer placing pressure on the D to plead G) Sanctions for failing to comply: WCO Refusal of an application/adjournment Professional conduct sanctions.	Yes – participant he is obliged to help the court further the OR rule 1.2	Yes – participant. Should his client or the other side breach the Overriding Objective, pursuant to r.1.2(1) (c) he should inform the court of failure which will in turn, further the Overriding objective.	

Efficiency and expedition	<p>Has there been any sanctions for a lawyer failing to work efficiently?</p> <p>Sanctions for failing to comply:</p> <p>WCO Refusal of an application/adjournment Professional conduct sanctions.</p>	<p>Yes – Failure to stick to the case management timetable may lead costs against the A – s.18 POOA 1985 ‘such costs as are just and reasonable’.</p>	<p>Yes. <i>Heppenstall</i> – Judge was correct to seek an estimate from counsel how long cross-X would take and they need to stick to it.</p>	
Comply with directions	<p>Rule 3.2.(1) and (3) gives the court power to actively manage the case. R.3.5 and 3.10 contain powers to shorten(!) or lengthen time limits.</p>	<p>Yes. As a participant - Rule 1.2(b)</p> <p>As a party rule 3.3</p>	<p>Yes – as a participant (What if the D does not wish to provide any information? He will have to tell the court to protect himself from censure).</p>	
Inform re significant failures	<p>Loss of an ambush defence, loss of a watertight defence (Gleeson).</p> <p>The Prosecution can be given a 2nd attempt to re-draft an indictment.</p> <p>Sanctions for failing to comply:</p> <p>WCO Refusal of an application/adjournment Professional conduct sanctions.</p>	<p>Yes, he’s a participant in the criminal process Rule ... says any participant has to inform the court.</p>	<p>Yes, again he’s a participant– the duty to ‘grass up’. Rule 1.2(1)(c) “inform the court of significant failures...” This will redefine the lawyer/client relationship (perhaps breed a lack of trust or informal regard to the rules? The grass up rule impacts on the notion of the ‘fearless and zealous advocate’)</p>	

Apply for directions		Yes ? (is that a realistic expectation of the accused)	yes	
Appoint a case progression officer	<p>1. WCO</p> <p>2. Refusal of an application/adjournment</p>	Yes. Rule 3.4 states the Party has to appoint a CPO.	No – Not classed as a party - a person or organization directly involved in a criminal case, either as prosecutor or defendant	Yes – although he's not a party, it is not realistic to expect the D to appoint a CPO

Active Case Management	<p>(a)ID of early issues</p> <ol style="list-style-type: none"> 1. WCO 2. Refusal of an application/adjournment 3. Professional Conduct reported 	Yes	Yes (does this go further than CPIA DS. Possibly does - active case management applies in Mags court. CPIA DS is voluntary in MC).	
(d) Monitoring progress of case	The sanctions are relevant for all sections.	Yes, but how realistic is it?	Yes, ties in with the requirement to deal with cases in an expedited manner.	
(e) presenting evidence in the shortest and clearest way		Yes, if unrepresented in MC.	<p>Yes – infringes on the classic notion of adversarial DL as established in chapter III. The DL cannot take as long as he wants, the judge can ask for time limits on cross –X. Granted, this is for jury fraud and complex criminal cases: Setting rigid time limits in advance for cross-examination is rarely appropriate - as experience has shown in civil cases; but a timetable is essential so that the judge can exercise control and so that there is a clear target to aim at for the completion of the evidence of each witness. Moreover the judge can and should indicate when cross-examination wasting time</p>	
			<p>Delay could be beneficial to the client. Witnesses could be discouraged from testifying which leads to P case collapse.</p>	

Obligations under the CPIA				
Serve a defence statement	<ul style="list-style-type: none"> - Inferences - Admissibility of defence statement - WCO S.19A PoOA 1985 – If the Pros have ‘incurred as a result of improper, unreasonable or negligent act’. guilty party can pay made to pay costs’. S.18 orders may fail as D cannot afford the costs, can the lawyer, should he be liable for something that’s not his fault but if he declared a significant failure, is he acting in his client’s best interest? 	Yes – (How realistic is for the D to complete this himself? Not very, hence the indirect obligation on the DL).	No	<p>Yes. Deemed to be given with the consent of the A unless stated.</p> <p><i>Essa</i>¹¹⁴⁵ made it clear that it is professionally unacceptable for a defence lawyer to advise his client not to file a defence statement. The defence lawyer can outline the advantages and disadvantages of each approach; his client can analyse the merits of each approach before deciding whether to file the statement</p>

¹¹⁴⁵ [2009] EWCA Crim 43

<p>Nature of the defence</p>	<ul style="list-style-type: none"> - Court may introduce further evidence - allowed to amend the indictment (erosion of the penalty shoot-out theory). - Consequence – Evidence ruled inadmissible if not raised early. <i>Writtle v DPP</i> 2009 EWHC 236 – Mags refused to admit expert evidence at trial when issue was not made early. ‘... had the late app to adduce further evidence been allowed, delay would have occurred’ This has been endorsed by Penner and Williams (Interesting as the CPIA defence statement applies to trial on indictment and is voluntary in summary cases – is the OR of the CPR superseding the statutory provisions?) 	<p>Yes.</p>		<p>Yes. By disclosing the nature of defence the client may lose the strategic advantage that he once held. Defeats adversarial principles by showing the other side his hand.</p> <p><i>Malcolm v DPP</i> – ‘It is the duty of the defence to make its defence and the issues it raises clear to the pros and crt at an early stage.</p>
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Matters taking issue with	Inferences	Yes – (but is it realistic to expect accused to identify this)		<p>Yes – because not realistic to expect accused to identify this.</p> <p><i>Gleeson:</i> Defence counsel did not identify issue. Trial judge allowed a second count to which there was a case to answer. End of the “ambush”.</p> <p><i>Penner:</i> no identification of issues at PCMH. Thomas LJ affirms that the ambush is over (see para 6).</p> <p>Thomas LJ again in <i>Chorley Justices</i> ‘sea change in the way which cases should be conducted’.</p> <p>--</p> <p>In R (on the application of Payne) –v- South Lakeland Magistrates’ Court [2011] Defence lawyer took ‘advantage of a unilateral mistake of the prosecutor something he was</p>
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Expert evidence	<p>Expert evidence refused if not served in time.</p> <p>Rule 24.1 “shall not adduce evidence without leave of the court”.</p>		<p>Yes- Have to serve expert reports in prescribed limits: <i>R v Ensor</i> concerned a submission of expert evidence that was submitted by the defence outside the prescribed time limits. The judge refused to admit the evidence but no inferences were to be drawn. Appeal: The appeal was dismissed as rule 1.2 and 3.3 of the CPR rules state that it was incumbent on both parties to alert the other side, at the earliest practical moment, if they were intending to adduce expert evidence. The Appeal Court held that this had to be conducted at the plea and direction hearing or at least when the possibility became live</p>	
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<p>Witness details</p>	<p>Refusal to permit witness to be called? - Probably not - <i>R (Tinnion) v Reading Crown Court</i> stated that the will not exclude the evidence of the witness being heard. Although, there are number of sanctions available to the court. Firstly, the court and the prosecution may make adverse comment on the failure to serve the notice. Anthony Edwards states that this ‘in real terms this is unlikely to prove an effective sanction’, however, there are two further sanctions that potentially cause greater concern. Firstly, the witness who was not originally disclosed may be subjected to hostile cross-examination; this could raise issues concerning the credibility of the witness and ultimately render him more useful for the Crown than the defence. Finally, the defendant or his lawyer maybe subjected to a Wasted Costs Order, if costs have been incurred as a result of an ‘unnecessary or improper act or omission.’</p> <p><i>R v Ensor</i>, when dealing with the late service of expert evidence, the Court of Appeal held ‘it is incumbent upon both the prosecution and defence ... to alert the court and the other side at the earliest practical moment ...’ The Law Society’s practice note on Defence Witness Notices suggests that a similar interpretation is likely to apply to defence witness notifications</p>		<p>No.</p>	<p>Yes - Duty to attend any resulting interview. Yes, but how practical is this? The DL cannot attend every interview:</p> <p>When the defence lawyer is attending a police interview of a witness, the lawyer must protect the interests of his client, not the interests of the witness. By attending this interview, the lawyer will be aware of any inconsistencies between the witness statement the lawyer has obtained from the witness and what they state to the police. Any attempt from a lawyer attempting to dissuade a witness from attending the police interview could be interpreted as an attempt to pervert the course</p>
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Other obligations imposed by case-law or court rules				
Case progression forms	<p>Consequence - Turing the lawyer into a witness against the client?</p> <p>Sanctions for failing to comply:</p> <ol style="list-style-type: none"> 1.WCO 2.Refusal of an application/adjournment 3.Professional conduct sanctions. 		<p>Yes. it is no longer appropriate for the defence to either put the prosecution to proof or ambush the prosecution at the close of the prosecution's case. A concern about the case progression form and the requirements for the defence to outline their case prior to trial exists; would it be possible for the prosecution to admit this form as hearsay evidence? Yes - <i>Firth</i> "assault on defendant by complainant ... in self defence". Amounts to evidence of acceptance that D was involved in physical encounter. Proved an essential plank in the case of the prosecution.</p> <p>(How similar is it to the DS served in CC?)</p>	

<p>Plea and directions hearings</p>	<p>Failure to declare issues at PDH can lead to inadmissible evidence.</p>		<p>Yes, see <i>Ensor</i> above. All issues have to be declared as early as possible</p> <p>COA have upheld ruling that written rather than oral statements can be requested in the PCMH <i>K and Others</i> [2006] EWCA Crim 835</p>	
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Appendix Two

The Case Management Form

Edition for use in courts in England

..... Magistrates' Court

Preparation for effective trial Criminal Procedure Rules Parts 1 & 3

- This form:
 - collects information about the case that the court will need to arrange for an effective trial: CrimPR rules 3.2 and 3.3
 - records the court's directions: CrimPR rule 3.5.
- After the court gives directions for trial, if:
 - information about the case changes, or
 - you think another direction is needed
 you must tell the court at once: CrimPR 1.2(1) & 3.10.

- If the defendant pleads not guilty, and the court requires:
 - the prosecutor must complete Parts 1, 2 and 4
 - the defendant must complete Parts 1, 3 and 4
 - the court will record directions in Parts 4 and 5.

See the separate notes for guidance on the use of this form.

There is extra space on page 4, or attach extra sheets if required. The electronic version of this form will expand.*

A list of standard trial preparation time limits is at page 7.

Court contact details

Address	Phone
	Fax
Email	

Part 1: to be completed by the prosecutor and the defendant (or defendant's representative)

Defendant			Date of birth:
			Age: years
	<input type="checkbox"/> Summons	<input type="checkbox"/> Charge	<input type="checkbox"/> Bail
	<input type="checkbox"/> Requisition	<input type="checkbox"/> Custody	Time limit expires:
Offence(s)			
Police / CPS URN		Date of first hearing	
1	Prosecution contact details		
	Prosecuting authority		Phone
			Fax
	Email		
2	Defendant's contact details		
	Defendant	Address	Phone
			Mobile
	Email		
3	Defendant's representative (if applicable)		
	Solicitor		Phone
			Fax
			Ref
	Address		
	Email		
	Representation is:	legal aid granted	<input type="checkbox"/>
	<i>Defendant's representative to complete</i>	legal aid applied for	<input type="checkbox"/>
		privately funded	<input type="checkbox"/>

*Forms for use with the Rules are at: <http://www.justice.gov.uk/courts/procedure-rules/criminal/formspage>.

Part 2: to be completed by the prosecutor

4 Case management information

- 4.1 Are there any pending enquiries or lines of investigation? Yes No
If yes, give brief details:
- 4.2 Does the prosecutor intend to serve more evidence? Yes No
If yes, give brief details:
- 4.3 Does the prosecutor intend to serve a diagram, sketch map or photos? Yes No
If yes, give brief details:
- 4.4 The prosecution will rely on:
- | | | |
|-------------------------------------|---|--------------------------|
| <i>Tick / delete as appropriate</i> | defendant's admissions in interview | <input type="checkbox"/> |
| | defendant's failure to mention facts in interview | <input type="checkbox"/> |
| | [a summary] [a record] of the defendant's interview | <input type="checkbox"/> |
| | [expert] [hearsay] [bad character] evidence | <input type="checkbox"/> |
| | [CCTV] [electronically recorded] evidence | <input type="checkbox"/> |
- 4.5 What equipment (live link, DVD or other media player, etc.) will the prosecutor need in the trial courtroom?
The prosecutor must make sure that any DVD or other electronic media can be played in the courtroom.
- 4.6 Does the prosecutor presently expect the case to involve a complex, novel or unusual point of law and / or fact? *This information will help the court officer to list the case effectively.* Yes No
If so what?
- 4.7 Has the initial duty of disclosure of unused prosecution material been complied with? Yes No
If yes, when?

5 Applications for directions

- 5.1 Does the prosecutor want the court to vary a standard trial preparation time limit? Yes No
If yes, give details:
- 5.2 Does the prosecutor want the court to arrange a discussion of ground rules for questioning? Yes No
If an intermediary is appointed, the court must discuss ground rules with the intermediary and advocates. A discussion may be helpful in other cases.
- 5.3 Does the prosecutor want the court to make any other direction? Yes No
If yes, give details:

Part 3: to be completed by the defendant (or defendant's representative)

6 Advice on plea and absence

- Does the defendant understand that:
- (a) he or she will receive credit for a guilty plea?
A guilty plea may affect the sentence and any order for costs and other financial penalties / charges Yes No
- (b) the trial can go ahead even if he or she does not attend?
CrimPR rule 24.12 Yes No

7 Partial or different guilty plea

- 7.1 If more than one offence is alleged, does the defendant want to plead guilty to any of them? Yes No N/A
If yes, which offence(s)?
- 7.2 Does the defendant want to plead guilty, but not on the facts alleged? Yes No
If yes, the court must be given a written note of the facts on which the defendant wants to plead guilty.
- 7.3 Does the defendant want to plead guilty, but to a different offence? Yes No
If yes, what offence?

8 Case management information

- 8.1 *Initial details of the prosecution case should have been served: CrimPR rule 8.2. The following statements are to help the court find out what is in dispute and give appropriate directions for trial. Tick as appropriate.*
- The defendant [carried out] [took part in] the conduct alleged Yes No N/A
- The defendant was present at the scene of the offence alleged Yes No N/A
- The defendant was correctly identified Yes No N/A
- The defendant was arrested lawfully Yes No N/A
- [Nature of injury] [extent of loss or damage]
If not agreed, explain what is in dispute: Yes No N/A
- [Fingerprint] [DNA] evidence
If not agreed, explain what is in dispute: Yes No N/A
- [Medical] [identification of drug] [other scientific] evidence
If not agreed, explain what is in dispute: Yes No N/A
- The [alcohol] [drug] testing procedure was carried out correctly
If not agreed, explain what is in dispute: Yes No N/A
- Exhibits and samples were collected and delivered as stated (i.e. continuity)
If not agreed, explain what is in dispute: Yes No N/A
- Defendant's interview [summary] [record] is accurate
If not agreed, explain what is in dispute: Yes No N/A
- The defendant was [disqualified from driving] [subject to the alleged court order] at the time of the offence alleged Yes No N/A
- The list of the defendant's previous convictions is accurate
If not agreed, explain what is in dispute: Yes No N/A
- 8.2 What are the **DISPUTED** issues of fact or law for trial, in addition to any identified in paragraph 8.1? Give details. This question is to help the court find out what is in dispute and give appropriate directions for trial. *CrimPR rules 3.2(2)(a), 3.3(1)(a)*

8.3 Will the defendant give a defence statement? *Giving a defence statement is voluntary, but if one is given it must include the information collected in paragraphs 8.1 and 8.2 and must include particulars of facts relied on by the defence.* Yes No

8.4 Will the defendant need any live link, or DVD or other media player, etc. equipment in the trial courtroom? *The defendant must make sure that any DVD or other electronic media can be played in the courtroom.*

8.5 Does the defendant presently expect the case to involve a complex, novel or unusual point of law and / or fact? *This information will help the court officer to list the case effectively.* Yes No
If so what?

9 Admissions

Can any facts which are not in dispute be recorded in a written admission? Yes No
Undisputed facts might include any statement accepted in paragraph 8.1.

If yes, a written admission [is set out here] [is attached] [will be served later].

Facts which are admitted are evidence: CrimPR rule 24.6 & Criminal Justice Act 1967, s.10.

If no, explain why:

10 Applications for directions

10.1 Does the defendant want the court to vary a standard trial preparation time limit? Yes No
If yes, give details:

10.2 Does the defendant want the court to arrange a ground rules discussion? Yes No
If an intermediary is appointed, the court must discuss ground rules with the intermediary and advocates. A discussion may be helpful in other cases.

10.3 Does the defendant want the court to make any other direction? Yes No
If yes, give details:

Parts 2 & 3 continued: additional information

Use this space to record any additional information, or to continue an answer started above:

Defendant's name:

Part 4: to be completed by the prosecutor, the defendant (or the defendant's representative) and the court

11 Prosecution witnesses. If this information changes, you must tell the court at once: CrimPR rule 1.2(1) & 3.10.

Name of witness	Prosecutor to complete			Defendant to complete	Both parties to complete		For the court		
	Tick if under 18	Interpreter needed? If so, specify language and dialect.	Special or other measures e.g. live link needed? If so, specify.**	What disputed issue in the case makes it necessary for the witness to give evidence in person?	Tick if attendance proposed		Tick if live link ordered	Evidence to be read ('R') or time required per witness	
					P	D			EinC
1)	<input type="checkbox"/>				<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>		
2)	<input type="checkbox"/>				<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>		
3)	<input type="checkbox"/>				<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>		
4)	<input type="checkbox"/>				<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>		
5)	<input type="checkbox"/>				<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>		
6)	<input type="checkbox"/>				<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>		

12 Expected defence witnesses. If this information changes, you must tell the court at once: CrimPR rule 1.2(1) & 3.10.

Name of witness	Defendant to complete			Why is it necessary for the witness to give evidence in person?	Both parties to complete		For the court		
	Tick if under 18	Interpreter needed? If so, specify language and dialect.	Special or other measures e.g. live link needed? If so, specify.**		Tick if attendance proposed		Tick if live link ordered	Evidence to be read ('R') or time required per witness	
					D	P			EinC
1)*	<input type="checkbox"/>				<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>		
2)	<input type="checkbox"/>				<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>		
3)	<input type="checkbox"/>				<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>		

*If the defendant is likely to give evidence, list him or her as the first expected defence witness. **Special or other measures may include screens, evidence by live link or in private, video recorded interview as evidence, intermediary, breaks in examination or other measures to accommodate disability. They may increase the time needed for the witness. In some cases, the defendant may not be allowed to cross-examine a prosecution witness.

Part 5: record of court's decisions and directions for effective trial

- 13 Directions for trial** *The court must actively manage the case by giving any direction appropriate to the needs of that case as early as possible: CrimPR rule 3.2(3). Complete or delete the following as appropriate*
- 13.1 The prosecutor must serve any further evidence by: (date)
- 13.2 If the initial duty of disclosure has not been complied with, the prosecutor must comply by: (date)
- 13.3 A party who wants to use a DVD or other media, etc. must check before the trial that it can be played in the courtroom.
- 13.4 The court expects only the witnesses listed as attending in Part 4 to give evidence in person and the evidence of other witnesses to be read.
- 13.5 [Witness summons / warrant] [other steps to secure attendance] for witness(es): *insert name(s)* *CrimPR Part 17; rule 3.9(3)*
- 13.6 Interpretation in the language(s) specified in Part 4 is required for: To be arranged by:
- | | | | |
|--|-------------|-------------------------------------|------------------------------------|
| | (defendant) | Court staff | <i>CrimPR rule 3.9(5)</i> |
| | (witness) | Prosecutor <input type="checkbox"/> | Defendant <input type="checkbox"/> |
- 13.7 Special or other measure, e.g. live link, are directed for: As specified in:
- | | | | |
|--|-------------|---------------------------------|--|
| | (defendant) | Part 4 <input type="checkbox"/> | paragraph 13.11 <input type="checkbox"/> |
| | (witness) | Part 4 <input type="checkbox"/> | paragraph 13.11 <input type="checkbox"/> |
| | (witness) | Part 4 <input type="checkbox"/> | paragraph 13.11 <input type="checkbox"/> |
- 13.8 The court will discuss ground rules for questioning on: (date)
If an intermediary is appointed for a witness or for the defendant, the court must discuss the ground rules for questioning with the intermediary and the advocates before the witness or defendant gives evidence. Sufficient time must be allowed for this.
- 13.9 The defendant in person may not cross-examine witness(es): *insert name(s)* *CrimPR Part 23*
 and the court directs cross-examination for that purpose by: *name representative*
- 13.10 Standard trial preparation time limits apply [except] [with these variations]:
- 13.11 Other directions:

14 Arrangements for trial

Date:			
Time:			
Court:			Court category:
Estimated trial length: hours		
including:	Evidence and submissions: Deliberations and decision:		
	<i>A detailed trial timetable must be considered and attached if necessary: CrimPR rules 3.9 & 3.11</i>		

After the court gives directions for trial, if information about the case changes, or you think another direction is needed, you must tell the court at once: CrimPR rules 1.2(1) & 3.10.

Signatures [on the direction of] [court]

Signed: for prosecution

Signed: [defendant] [defendant's solicitor]

Date:

Standard trial preparation time limits

*The court can vary any of these time limits. Time limits marked * are not prescribed by rules or other legislation.*

The total time needed to comply with all these time limits is 6 weeks (9 weeks if paragraph m applies).

Written admissions (Criminal Procedure Rules, r.24.6; Criminal Justice Act 1967, s.10)

- a. The parties must serve any written admissions of agreed facts within **14 days**.*

Defence statement (Criminal Procedure Rules, r.15.4; Criminal Procedure and Investigations Act 1996, s.6)

- b. Any defence statement must be served within **14 days** of the prosecutor complying with the initial duty of disclosure.

Defence witnesses (Criminal Procedure and Investigations Act 1996, s.6C)

- c. Defence witness names, etc. must be notified within **14 days** of the prosecutor complying with the initial duty of disclosure.

Application for disclosure (Criminal Procedure Rules, rr.15.2 & 15.5; Criminal Procedure and Investigations Act 1996, s.8)

- d. The defendant must serve any application for an order for prosecution disclosure as soon as reasonably practicable after the prosecutor complies with the initial duty of disclosure.* *Under s.8 of the Criminal Procedure and Investigations Act 1996, no such application may be made unless a defence statement has been served.*
e. The prosecutor must serve any representations in response within **14 days** after that.

Witness statements (Criminal Procedure Rules, r.16.4; Criminal Justice Act 1967, s.9)

- f. The defendant must serve any defence witness statement to be read at trial at least **14 days** before the trial.*
g. Any objection to a witness statement being read at trial must be made within **7 days** of service of the statement. *This does not apply to the statements listed in Part 4.*

Measures to assist a witness or defendant to give evidence (Criminal Procedure Rules, rr.18.3, 18.13, 18.17, 18.22, 18.26)

- h. Any [further] application for special or other measures must be served within **28 days**.
i. Any representations in response must be served within **14 days** after that.

Cross-examination where defendant not represented (Criminal Procedure Rules, rr.23.2, 23.4)

- j. The defendant must serve notice of any representative appointed to cross-examine within **7 days**.
k. The prosecutor must serve any application to prohibit cross-examination by the defendant in person as soon as reasonably practicable.
l. Any representations in response must be served within **14 days** after that.

Expert evidence (Criminal Procedure Rules, rr.19.3, 19.4)

- m. If either party relies on expert evidence, the directions below apply.
(i) The expert's report must be served within **28 days**.*
(ii) A party who wants that expert to attend the trial must give notice within **7 days** after (i).*
(iii) A party who relies on expert evidence in response must serve it within **14 days** after (ii).*
(iv) There must be a meeting of experts under rule 19.6 within **14 days** after (iii).*
(v) The parties must notify the court immediately after (iv) if the length of the trial is affected by the outcome of the meeting.*

Hearsay evidence (Criminal Procedure Rules, rr.20.2, 20.3)

- n. The prosecutor must serve any notice to introduce hearsay evidence within **28 days**.
o. The defendant must serve any notice to introduce hearsay evidence as soon as reasonably practicable.
p. Any application to determine an objection to hearsay evidence must be served within **14 days** of service of the notice or evidence.

Bad character evidence (Criminal Procedure Rules, rr.21.2, 21.3, 21.4)

- q. The prosecutor must serve any notice to introduce evidence of the defendant's bad character within **28 days**.
r. Any application to determine an objection to that notice must be served within **14 days** after that.
s. Any application to introduce evidence of a non-defendant's bad character must be served within **14 days** of prosecution disclosure.
t. Any notice of objection to that evidence must be served within **14 days** after that.

Previous sexual behaviour evidence (Criminal Procedure Rules, rr.22.2, 22.3, 22.4, 22.5)

- u. The defendant must serve any application for permission to introduce evidence of a complainant's previous sexual behaviour within **28 days** of prosecution disclosure.
v. The prosecutor must serve any representations in response within **14 days** after that.

Point of law, including abuse of process etc. (Criminal Procedure Rules, rr.3.3, 3.10)

- w. Any skeleton argument must be served at least **14 days** before the trial.*
x. Any skeleton argument in reply must be served within **7 days** after that.*

Trial readiness (Criminal Procedure Rules, rr.3.3, 3.10)

- y. The parties must certify readiness for trial at least **14 days** before the trial,* confirming which witnesses will give evidence in person and the trial time estimate.

November 2015

Appendix Three

The Defence Case Statement

DEFENCE STATEMENT

(Criminal Procedure and Investigations Act 1996, section 5 & 6; Criminal Procedure and Investigations Act 1996 (Defence Disclosure Time Limits) Regulations 2011; Criminal Procedure Rules, rule 22.4)

Case details

Name of defendant:

Court:

Case reference number:

Charge(s):

When to use this form

If you are a defendant pleading not guilty:

(a) in a Crown Court case, you **must** give the information listed in Part 2 of this form;

(b) in a magistrates' court case, you **may** give that information but you do not have to do so.

The time limit for giving the information is:

14 days (in a magistrates' court case)

28 days (in a Crown Court case)

after initial prosecution disclosure (or notice from the prosecutor that there is no material to disclose).

How to use this form

- 1. Complete the case details box above, and Part 1 below.**
- 2. Attach as many sheets as you need to give the information listed in Part 2.**
- 3. Sign and date the completed form.**
- 4. Send a copy of the completed form to:**
 - (a) the court, and**
 - (b) the prosecutor**

before the time limit expires.

If you need more time, you **must** apply to the court **before** the time limit expires. You should apply in writing, but no special form is needed.

Part 1: Plea

I confirm that I intend to plead not guilty to [all the charges] [the following charges] against me:

Part 2: Nature of the defence

Attach as many sheets as you need to give the information required.

Under section 6A of the Criminal Procedure and Investigations Act 1996, you must:

- (a) set out the nature of your defence, including any particular defences on which you intend to rely;
- (b) indicate the matters of fact on which you take issue with the prosecutor, and in respect of each explain why;
- (c) set out particulars of the matters of fact on which you intend to rely for the purposes of your defence;
- (d) indicate any point of law that you wish to take, including any point about the admissibility of evidence or about abuse of process, and any authority relied on; and
- (e) if your defence statement includes an alibi (i.e. an assertion that you were in a place, at a time, inconsistent with you having committed the offence), give particulars, including –
 - (i) the name, address and date of birth of any witness who you believe can give evidence in support of that alibi,
 - (ii) if you do not know all of those details, any information that might help identify or find that witness.

Signed: defendant / defendant's solicitor

Date:

WARNING: Under section 11 of the Criminal Procedure and Investigations Act 1996, if you (a) do not disclose what the Act requires; (b) do not give a defence statement before the time limit expires; (c) at trial, rely on a defence, or facts, that you have not disclosed; or (d) at trial, call an alibi witness whom you have not identified in advance, then the court, the prosecutor or another defendant may comment on that, and the court may draw such inferences as it thinks proper in deciding whether you are guilty.

Appendix Four

Interview Consent Form

Faculty of Business and Law
Frenchay Campus
Coldharbour Lane
Bristol
BS16 2QY

Consent Form

I am studying for a PhD at the Faculty of Business and Law, University of the West of England.

Title of research: The Defence Lawyer in the Modern Era

Material gathered for this research will be treated as confidential and securely stored. This may include interview transcripts, informal discussions with participants, researcher's field notes and observation notes. You will not be identified or identifiable in any published work other than this research project.

Please tick the relevant box below concerning the collection and use of the research data.

	YES	NO
I have read and understood the information sheet		
I have been given the opportunity to ask questions about the study		
I have had my questions answered satisfactorily		
I understand that I am granting permission to become a participant in this research study		
I understand that I can withdraw from the study at any time without having to give an explanation		

Name (Printed).....

Signature.....Date.....

Please feel free to contact me if you have any further questions.

Contact details: edward2.johnston@uwe.ac.uk or 07540 305 587

Appendix Five

Interview *Pro Forma*

PhD Empirical Research Project

Interview pro-forma

General Obligations

1. How would you describe your professional duties as a defence lawyer?
2. How would you describe your professional obligations to your client? And to the courts?
3. What is your understanding of the obligations imposed on you as a defence lawyer to i) the CPIA and ii) the CPR?
4. Do the case management forms in magistrates' courts add anything to these obligations?

Implications for your practice

5. The CPR impose on you a general obligation to further the overriding objective? What is your understanding of this obligation? Can you give me examples of these in practice?
6. a) The CPR impose a duty of early identification of the 'real issues'? What is your general approach to completing the Case Management Forms?
b) Does completing the forms cause any difficulty?
7. Rule 3.4 requires you to appoint a case progression officer. How do you deal with this obligation in practice?

8. Rule 1.2(1)(c) requires you to inform the court of any significant failure. (a) What does this entail in practice? (b) Does it raise any conflict or difficulties for your obligations to the client?
9. The CPIA now requires you to give advance notification of defence witnesses (a) What do you think of this requirement? (b) Do you ever attend prosecution interviews of defence witnesses?

Conflicts

10. There are a number of potential consequences for failing to comply with the CPR and CPIA, including:
 - i. Wasted Costs Orders.
 - ii. Refusal of an application.
 - iii. Professional Censure.
 - iv. Inferences drawn at trial.

Some apply directly to the lawyer and some apply to the client.

- a) Have you encountered any of these?
 - b) Have any of these influenced the way you deal with cases? If so, how?
11. How do you view the consequences for failure to comply with the CPR and CPIA? Can you provide any examples where they have arisen in a case(s)?
 12. How do you deal with the obligation to inform the court of any significant failure by yourself, your client or the prosecution? Do you have any examples of such failures?
 13. If you had a conflict between an obligation to the court and an obligation to the client. (a) How would you resolve it? (b) can you think of any examples?
 14. What are the implications, if any, do the CPR/CPIA have for a) the presumption of innocence and b) the privilege against self-incrimination?

Date of interview:

Reference:

Location:

Date Qualified:

Defence Lawyer Experience (Years):

Worked as a Prosecutor (y/n)?

Gender:

Bibliography

Books

Abel R, *Lawyers: A Critical Reader* (New York: New Press 1997)

Arber S, *Designing Samples*, in N. Gilbert (ed.) *Researching Social Life*, (Sage, 1993)

Archbold J. *Archbold: Criminal Pleading, Evidence and Practice* – (London: Sweet & Maxwell, 1997)

Arksey H, Knight P. *Interviewing for Social Scientists*, (London: SAGE, 1999)

Ashworth A, and Redmayne M, *The Criminal Process*, 3rd Edition, (Oxford: Oxford University Press, 2003)

Atkinson D, and Moloney T, *Blackstone's Guide to the Criminal Procedure Rules 2005*, (Oxford: Oxford University Press 2005)

Atkinson G. *Criminal Litigation: Practice and Procedure*, (Guildford: College of Law, 2006)

Bachman R, and Schutt R.K, *Fundamentals of Research in Criminology and Criminal Justice*, (2nd Edition, Sage, London, 2012)

Baldwin J, McConville M, *Courts, Prosecution and Conviction* (Oxford: Clarendon Press, 1981)

Barker E, *The Making of a Moonie: Brainwashing or Choice*, (Oxford: Blackwell 1984)

Beattie J, *Crime and the Courts in England 1660-1800*, (Princeton University Press, 1986)

Bentham J, *The Works of Jeremy Bentham*, (John Bowring edition, William Tait: Edinburgh), 1843 Vol II)

Bernard, H.R., *Research Methods in Anthropology: Qualitative and Quantitative Approaches*, (London: Sage, 1994)

Bingham T, *The Rule of Law* (London: Allen Lane, 2010)

Boon A, Levin J. *The Ethics and Conduct of Lawyers in England and Wales* (Oxford: Hart Publishing, 1999)

Bottoms A, *Theory and Empirical Observations in Criminology* in King R.D, and Wincup E, *Doing Research on Crime and Justice*, (Oxford University Press, 2008)

Bradney A, *How to Study Law* (5th edition, Sweet and Maxwell, London, 2005)

Briggs C.L, *Learning how to ask: A sociolinguistic appraisal of the role the interview in social science research*, (London: Cambridge University Press, 1986).

Brougham H, *The Life and Times of Henry Lord Brougham* (London: Blackwood, 1871)

Bryman A., Burgess R. *Analysing Qualitative Data* (London: Routledge, 1994)

Burgess G, *In the Field: An Introduction to Field Research*, (London, Routledge 1984)

Burns R, *Introduction to Social Research Methods* (2nd Ed, Melbourne: Longman Cheshire, 1997)

Cain M, Harrington C, *Lawyers in a Post-Modern World* (Buckingham: Open University Press, 1994).

Cairns D.J.A, *Advocacy and the Making of the Adversarial Criminal Trial 1800-1865* (Clarendon Press, 1998)

Card R, and Ward R, *The Criminal Procedure and Investigations Act 1996*, (Jordan's Publishing, Bristol, 1996)

Cape E. *Defending Suspects at the Police Station* (London: Legal Action Group, 2006)

Cape E, and Young R, *Regulating Police: The Police and Criminal Evidence Act 1984, Past, Present and Future*, (Hart Publishing, 2008)

Cape E, Hodgson J, et al. *Suspects in Europe* (Oxford: Intersentia, 2007)

Cape E, Namoradze Z, Smith R, Spronken T, *Effective Criminal Defence in Europe* (Antwerp-Oxford: Intersenti, 2010)

Chalmers J, Leverick F, and Farmer L, *Essays in Criminal law in Honour of Sir Gerald Gordon*, (Edinburgh: Edinburgh University Press, 2010)

Choo A, *Evidence* (Oxford: Oxford University Press, 2006)

Corker D, and Parkinson S, *Disclosure in Criminal Proceedings* (Oxford University Press: Oxford, 2010)

Cornwell J, *Hard-earned lives: Accounts of health and illness from East London* (London: Tavistock, 1984)

Costley C, Elliott G, and Gibbs P, *Doing Work Based Research: Approaches to Enquiry for Insider-Researchers* (Sage: London 2010)

Cranston R, *Legal Ethics and Professional Responsibility* (Oxford: Oxford University Press, 1995)

Damaska M.R, *The Faces of Justice and State Authority: A Comparative Approach to the Legal Process* (Yale University Press, 1986)

- Damaska M.R *Evidence Law Adrift* (New Haven: Yale University Press, 1997).
- Dare T, *The Counsel of Rogues: A Defence of the Standard Conception of the Lawyer's Role*, (Surrey: Ashgate, 2009)
- Delmas-Marty M, and Spencer J, *European Criminal Procedures*, (Cambridge University Press: Cambridge, 2002)
- Denscombe M, *The Good Research Guide: for small scale social research projects*, (2nd Edition, Maidenhead: Open University Press, 2003)
- De Vries H. *Civil Law and the Anglo-American Lawyer* (New York: Oceana Publications 1976)
- Dingwell R, 'Accounts , Interviews and Observations' in Miller G, and Dingwell R, (Eds) *Context and Method in Qualitative Research*, (London: Sage, 1997)
- Drever E, *Using Semi-Structured Interviews in Small-Scale Research: A Teacher's Guide*, The Scottish Council for Research in Education (Glasgow: 1995)
- Dos Passos J. *The American Lawyer: As He Was, As He Is, As He Could Be* (New York: The Banks Law Publishing Co. 1997)
- Du Cann R, *The Art Of The Advocate* – (London: Penguin, 1993)
- Duff R, *Trials and Punishments* (Cambridge University Press, 1986)
- Ede R, Shepherd E, *Active Defence* (London: The Law Society, 1997)
- Ede R, Edwards A *Criminal Defence: The Good Practice Guide* (London: The Law Society, 2002)
- Ellis T, and Savage S. P, *Debates in Criminal Justice*, (London Routledge 2012)

Ellison L, *The Adversarial Process and the Vulnerable Witness*, (Oxford University Press, 2001)

R. Ericson, *The State and Criminal Justice Reform in State Control: Criminal Justice Politics in Canada*, 1987, (R. Ratner and J. McMullan Eds)

Evans E. P, *The Criminal Prosecution and Capital Punishment of Animals* (London, Heinemann, 1906)

Ferdico J. N, Frandella H and Totten C, *Criminal Procedure for the Criminal Justice Professional*, (Cengage Learning: California 2012),

S. Field and P.A. Thomas, 'Justice and Efficiency? The Royal Commission on Criminal Justice', 1994 (Oxford: Blackwell)

Flick U, *An Introduction to Qualitative Research*, 5th Edition (Sage: London 2014),)

Freedman M, *Lawyers' Ethics in an Adversary System* (Indianapolis: Bobbs-Merrill, 1975)

Freedman M, and Smith A, *Understanding Lawyers Ethics*, (New Providence: NJ, 4th Edition, 2010)

Glenn H, *Legal Traditions of the World* (Oxford: Oxford University Press, 2000)

Gilbert N, *Researching Social Life* (London: SAGE 2001)

Gillham B, *Research Interviews: The Range of Techniques*, (Berkshire: Open University Press 2005)

Goffman E, *The Presentation of self in Everyday Life* (1959), Anchor Publishing.

Hakim C, *Research Design: Strategies and Choices in the Design of Social Research*, (Routledge, 1987),

Haar C, *The Golden Age of American Law* (New York: George Braziller, 1965)

Hammersely M, *What's wrong with Ethnography?*, (London: Routledge, 1992)

Henn M, Weinstein M, Foard N, *A Short Introduction to Social Research* (London: SAGE, 2006)

Harding C, et al. *Criminal Justice In Europe: A Comparative Study* (Oxford: Oxford University Press 1995).

Hodgson J, *Conceptions of the Trial in Inquisitorial and Adversarial Procedure* in A. Duff, *The Trial on Trial Volume 1, Truth and Due Process*, (1st edition, Hart, Oxford, 2001).

Hoffman D, *A Course of Legal Study* – (Baltimore: Joseph Neal, 1836)

Holland A, et al. *Cordery on Solicitors* (London: LexisNexis Butterworths, 2008)

Hugman R, Smith D, *Ethical Issues in Social Work* - London: Routledge, (1995)

Hungerford-Welch P, *Criminal Procedure and Sentencing*, (8th Edition, Routledge 2014)

Jackson J, *Judge Without Jury: Diplock Trials and the Adversary System* (Oxford: Clarendon 1995)

Jackson J, and Summers S, *Obstacles to Fairness in Criminal Proceedings: Individual Rights and Institutional Forms*, 2018, (Hart: Oxford)

Jorg N, Field S, and Brants C, *Are Inquisitorial and Adversarial Systems Converging?* in *Criminal Justice in Europe: A Comparative Study*, (Clarendon Press, Oxford, 1995)

Kaplan J. *Criminal Justice* (New York: Foundation Press, 1973)

K . Krippendorff *Content Analysis: An Introduction to its Methodology*, 2nd Ed. (Sage: California) 2004

Kumar R, *Research Methodology: A Step by Step Guide for Beginners* (4th Ed, London: Sage, 2015)

Langbein J, *The Origins of Adversary Criminal Trial* (Oxford: Oxford University Press, 2003)

The Law Society, *The Guide to the Professional Conduct of Solicitors* (London: The Law Society 1999).

Legal Aid Board, *Legal Aid Handbook 1998/99* (London: Sweet & Maxwell, 1998)

Leng R, and Taylor R, *Blackstone's Guide to the Criminal Procedure and Investigations Act 1996*, (Blackstone's Press, London 1996)

Luban D, *Lawyers and Justice* (Princeton: Princeton University Press, 1988)

Luban D, *The Ethics of Lawyers* (Aldershot: Dartmouth Publishing 1994)

May T, *Social Research* – Buckingham: Open University Press, 1994)

Maguire M, *Researching Street Criminals* in King R.D, and Wincup E, *Doing Research on Crime and Justice* (2nd Edition, Oxford University Press, 2000)

McConville M, Sanders A, Leng R, *The Case for the Prosecution: Police Suspects and the Construction of Criminality* (London: Routledge, 1991)

- McConville M., et al. *Standing Accused: The Organisation and Practices of Criminal Defence Lawyers in Britain* (Oxford: Oxford University Press, 1994)
- McConville M, Wilson G, *The Handbook of Criminal Justice Process* (Oxford: Oxford University Press, 2002).
- McConville M, Chui W. H, *Research Methods for Law* (Edinburgh: Edinburgh University Press, 2007)
- McConville M and Marsh L, *Criminal Judges: Legitimacy, Courts and State Induced Guilty Pleas in Britain* (Edward Elgar: Northampton, 2014)
- Macmillan H, *Law and Other Things* (Cambridge: Cambridge University Press, 1937)
- McEwan J, *The Adversarial and Inquisitorial Models of Criminal Trial in the Trial on Trial Volume 1: Truth and Due Process*, (Hart: Oxford, 2001).
- Miles M, Huberman M, *Qualitative Data Analysis: An Expanded Sourcebook* (London: SAGE, 1994)
- Milsom S, *Historical Foundations of the Common Law* (London: Butterworths. 1981)
- Monette D.R, Sullivan T.J, and DeJong C.R, (*Applied Social Research: Tools for Human Services*, (Fort Worth: Holt, Rienheart and Wilson 1984).
- Mosidis C, *Criminal Discovery: From Truth to Proof and Back Again*, (Sydney Institute of Criminology Series: Sydney, 2008)
- Murphy P, *Murphy on Evidence* (Oxford: Oxford University Press, 2005)
- Napley D, *The Technique of Persuasion*, (4th ed. Sweet and Maxwell: London, 1991)
- Newman D, *Legal Aid Lawyers and the Quest for Justice*, (Hart: Oxford, 2013),

- Nicolson D, Webb J, *Professional Legal Ethics* (Oxford: Oxford University Press, 1999)
- O'Dair R, *Legal Ethics: Text and Materials* – (London: Butterworths, 2001)
- Owusu-Bempah A, *Defendant Participation in the Criminal Process*, (Routledge: London, 2016)
- Pakes F *Comparative Criminal Justice* (2nd Edition, Willan Publishing, 2010)
- Packer H.I , *The Limits of the Criminal Sanction*, (California: Stanford University Press, 1968)
- Padfield N, *Text and Materials on the Criminal Justice Process* (Oxford: Oxford University Press 2008)
- Pannick D, *Advocates* (Oxford: Oxford University Press, 1992)
- Plowden P, *Criminal Litigation in Practice* (Newcastle-Upon-Tyne: Northumbria Law Press, 2006)
- Quirk H, *The Rise and Fall of the Right of Silence*, (2017) Routledge: Oxon)
- Richardson J, *Archbold*, (London: Sweet and Maxwell, 2015)
- Reichel P, *Comparative Criminal Justice Systems* (New Jersey: Pearson/Prentice Hall, 2005)
- Rubin H.J, and Rubin I.S, *Qualitative Interviewing: The Art of Hearing Data*, 3rd Edition, (Sage: London 2012)
- Rueschemeyer D, *Lawyers and their Society* (Massachusetts: Harvard University Press, 1973) Sanders A, and Young R, *Criminal Justice* (3rd Edition, Oxford, Oxford University Press 2007)

Seipp D. J, *Crime in the Year Books*, in *Law Reporting in England* 15,22 (Chatal Stebbings ed.) 1995).

Sharswood G ,*An Essay on Professional Ethics* – Michigan: University of Michigan, 1860)

Silverman D, *Doing Qualitative Research: A Practical Handbook*, (London: Sage 2000)

Stephen J.F, *History of the Criminal Law*, Volume I (Kessinger Publishing, 1883)

Stephen J.F, *A General View of the Criminal Law in London*, Volume II (London, 1883)

Spradley J.P, , *The Ethnographic Interview* (New York: Holt 1979)

Summers S, *Fair Trials* (Oxford: Hart Publishing, 2007)

Thornton P, Mallalieu A, and Sceivener A, *Justice on Trial: Report of an Independent Civil Liberty Panel on Criminal Justice*, (Civil Liberties Trust: London 1993)

Walker C, Starmer K, *Miscarriages of Justice* (London: Blackstone 1999).

Wendell W.B, *Ethics and Law: An Introduction*, (Cambridge University Press: Cambridge, 2014)

Webley L, *Qualitative Approaches to Empirical Legal Research* in P. Crane and H. M. Kritzer, *The Oxford Handbook of Empirical Legal Research* (Oxford: Oxford University Press, 2010)

Williams G, *The Proof of Guilt* (London: Stevens and Sons, 1963)

Holdsworth G, *A History of English Law*, 4th Edition, (Methen & Co Ltd and Sweet & Maxwell: London, 1927)

Travers M, *The Reality of Law*, (Ashgate: Dartmouth, 1997)

Vogler R, *A World View of Criminal Justice* (Ashgate Publishing, 2005)

Zander M, *Cases and Materials on the English Legal System* (10th Edition, Cambridge University Press, Cambridge, 2007)

Zedner L, *Criminal Justice* (Oxford University Press, 2004)

Journal Articles

Alexander C, Becker H, *The Use of Vignettes in Survey Research* (1978) 42 *The Public Opinion Quarterly* 1.

Alschuler A, *How to Win the Trial of the Century: The Ethics of Lord Brougham and the OJ Simpson Defense Team* (1997-1998) 29 *McGeorge L. Rev.*

Ambos K, *International criminal procedure: 'Adversarial', 'Inquisitorial' or mixed?* (2003) 3 *Int. Crim. L.R.*

Archer G, 'Ethical Obligations of the Lawyer' in F. Zacharias and B. Green *Reconceptualizing Advocacy Ethics* (2005) 74. *Geo. Was. L.R.* 28.

Arguedas C, *Duties of a Criminal Defense Lawyer* (1996-97) 30 *Loy. L.A.L. Rev.*

Ashworth A, 'The Techniques of Sentencing' (1984) *Crim LR* 519;

Atkinson P, and Silverman D, 'Kunera's Immortality: The Interview and the invention of the Self', *Qualitative Inquiry*, (1997) 197, Vol 3.

Atkinson R, and Flint J, 'Accessing Hidden and Hard-to-Reach Populations: Snowball Research Strategies', (2001) *Social Research Update* Vol 3

Baldwin J, McConville M, *Plea Bargaining: Legal Carve-Up and Legal Cover-Up* (1978)
5 *British Journal of Law and Society* 2.

Baldwin J, 'Police Interview Techniques: Establishing Truth or Proof?' *The British Journal of Criminology* (1993) Vol.33(3)

Baksi C, 'Fraud Case Judge Slams Solicitor-Advocates for Incompetence, Law Society Gazette, (2009) 23 April

Barter C, Renold E, *The Use of Vignettes in Qualitative Research* (1999) 25 *Social Research Update*.

Beattie J. *Scales of Justice: Defense Counsel and the English Criminal Trial in the Eighteenth and Nineteenth Centuries* (1991) 9 *Law & Hist. Rev.*

Beauchamp T, *A Defense of Common Morality* (2003) 13 *Kennedy Inst. of Ethics J.*

Blake M, and Ashworth A, 'Ethics and the Criminal Defence Lawyer,' [2004] *Legal Ethics* Vol 7

Bradley C.M, *The Convergence of the Continental and Common Law Model of Criminal Procedure* (1996) 7 *Criminal Law Forum* 471

Braun V, and Clarke V, 'Using Thematic Analysis in Psychology', *Qualitative Research in Psychology* 3(2) 77-101

Bress D, *Professional Ethics in Criminal Trials: A View of Defense Counsel's Responsibility* (1965-1966) 64 *Mich. L.R.*

Brickman-Butta C, 'Not by the Book: Facebook as a Sampling Frame' as cited in F. Baltar and I. Brunet 'Social Research 2.0: Virtual Snowball Sampling Method Using Facebook' (2009) *Internet Research* vol 22 (1)

Bridges L, and McConville M, 'Keeping Faith With Their Own Convictions: The Royal Commission on Criminal Justice' (1994) 57 Mod. L. Rev. 75,

Brown R, *A Plan to Preserve an Endangered Species: The Zealous Criminal Defense Lawyer* (1996) 30 Loy. LAL Rev.

Campbell JL, Quincy C, Osserman J and Pederson O.K, 'Coding In-depth Semi structured Interviews: Problems of Unitization and Intercoder Reliability and Agreement', *Sociological Methods & Research* 42(3) 294-320

Carlen P, 'Remedial Routines for the Maintenance Control in Magistrates' Courts, (1974) *British Journal of Law and Society* 101.

Cape E. *The Rise (and Fall?) of a Criminal Defence Profession* (2004) *Crim. L.R.*

Cape E. *Rebalancing the Criminal Justice Process: Ethical Challenges for Criminal Defence Lawyers* (2006) 9 *Legal Ethics* 1.

Chakrabarti E. 'A Thinning Blue Line? Police Independence and the Rule of Law' (2008) 2(3) *Policing* 367-74 at 369

Curtis C, *The Ethics of Advocacy* (1951-1952) 4 *Stanford L.R.*

Daintith T, *Legal Research and Legal Values* (1989) 52 *Modern Law Review*.

Damaska M.J., 'Evidentiary Barriers to Conviction and Two models of criminal procedure' (1973) *U. PA. LR* 507

Danet B, Hoffman K, Kermish N, *Obstacles to the study of Lawyer-Client interaction: The biography of a failure* (1979-1980) 14 Law & Society Review 4.

Dempster J, 'Show your Hand or Have it Cut Off', March 2005, Criminal Bar Association Newsletter, 1

Denecke A. *The Dilemma of the Virtuous Lawyer or When Do You Have to Blow the Whistle On Your Client?* (1979) Ariz. St. L.J.

Denyer R, 'The Defence Statement' [2009] Crim LR 340 at 343.

Diefenbach T, 'Are case studies more sophisticated storytelling? Methodological problems of qualitative empirical research mainly based on semi-structured interviews' Qual Quant (2009) 43: 875-984

Doak J. *Victims' Rights in Criminal Trials: Prospects for Participation* (2005) 32 Journal of Law and Society 2.

Du Plessis J, *The Accusatorial System – Too Much A Game?* (1991) 108 South African Law Journal.

Duff P, 'Disclosure in Scottish criminal procedure: another step in an inquisitorial direction?', 2007 153 International Journal of Evidence and Proof

Edwards A, 'Criminal Defence Witness Notices' 6th May 2010, Law Society Gazette

Edwards A, 'Case Management Forms' [2011] Crim L Rev 546

Edwards J, *Twitter's 'Dark Pool': IPO Doesn't Mention 651 Million Users Who Abandoned Twitter*, 6th November 2013, Business Insider,

Ellison L, 'The Protection of Vulnerable witnesses in Court: An Anglo-Dutch Comparison' (1999) 3 International Journal of Evidence and Proof.

Erickson W, *The Perjurious Defendant: A Proposed Solution to the Defense Lawyer's Conflicting Ethical Obligations to the Court and to his Client*, (1981-1982) 59 Denv. L.J.

Evans J, and Mathur A, 'The Value of Online Surveys' (2005) *Internet Research* Vol. 15 No.2 195-219.

Field S, and Thomas P, Justice and Efficiency? The Royal Commission on Criminal Procedure, *The Journal of Law and Society*, (1994) Vol.21

Field S. *Early Intervention and the 'New' Youth Justice: A Study of Initial Decision-Making* – (2008) *Crim. L.R.* 177

Field S, 'State Citizen and Character in French Criminal Process,' [2006] *Journal of Law and Society* Vol. 33(4)

Frankel M, *The Search for Truth: An Umpireal View* (1975) 123 U. Pa. L. Rev.

Freedman M, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions* (1965-1966) 64 *Mich. L.R.*

Freedman M, *Are There Public Interest Limits on Lawyers' Advocacy?* (1977) 2 *J. Legal Prof.*

Freedman M, *Henry Lord Brougham, Written By Himself* (2006) 19 *Geo. J. Legal Ethics*.

Freedman M, *Henry Lord Brougham and Zeal* (2005-2006) 34 *Hofstra L. Rev.*

Freiberg A, *Post-Adversarial and Post-Inquisitorial Justice: Transcending Traditional Penological Paradigms* (2010) Faculty of Law, Monash University, Research Paper No. 2010/1.

Fried C, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation* (1975-1976) 85 *Yale L.J.*

Fuller L, Randall J, *Professional Responsibility: Report of the Joint Conference* (1958) 44 American Bar Association Journal.

Fuller L 'The Forms and Limits of Adjudication' (1978) 92 Harv LR 353

Fuller L, Randall J, *Professional Responsibility: Report of the Joint Conference*, *American Bar Association Journal* (1958), 44:1159-62

Garfinkel H, 'Conditions of Successful Degradation Ceremonies' (1956) *American Journal of Sociology*, 61,

Garland F, and McEwan J, 'Embracing the Overriding Objective: Difficulties and Dilemmas in the New Criminal Climate', *International Journal of Evidence and Proof*, (2012) 16 233

Gillers S, *Can A Good Lawyer Be A Bad Person?* (1985-1986) 84 Mich. L. Rev.

Glenn H, *Professional Structures and Professional Ethics* (1989-1990) 35 McGill Law Journal 424.

Goel R, 'Can I call Kimura Crazy? Ethical Tensions in the cultural defense' 2004 3 Seattle J Soc Justice 450.

Gold G, *Split Loyalty: An Ethical Problem for the Criminal Defense Lawyer* (1965) 14 Clev. Marshall L. Rev.

Goldstein A.S, and Marcus M, *The Myth of Judicial Supervision in Three "Inquisitorial" Systems: France, Italy and Germany* (1977) 87 Yale Law Journal 240

Goldstein A, *Reflections on Two Models: Inquisitorial Themes in American Criminal Procedure* (1973-1974) 26 Stanford Law Review.

- Gordon R, 'The Independence of Lawyers' (1988) *Boston Law Review* 1,
- Greer S, The Right to Silence, Defence Disclosure and Confession Evidence, *The Journal of Law and Society*, (1994) Vol.21, No 1 March
- Griffiths J, 'Ideology in Criminal Procedure or a Third model of criminal process (1970) 79 *Yale LJ* 359
- Hall A. *Where do advocates stand when the goal posts are moved?* (2010) 14 *Int. J. of Evidence & Proof*.
- Harris L, *The Emotional Labour of Barristers: An exploration of emotional labour by status professionals* (2002) 39 *Journal of Management Studies* 4.
- Harris D, *The Development of Socio-Legal Studies in the United Kingdom* (1983) 3 *Legal Stud.*
- Hodes W, *Lord Brougham, the Dream Team and Jury Nullification of the Third Kind* (1996)
67 *U. Colo. L.R.*
- Hodgson J, The Police, The Prosecutor and the Juge d'instruction: Judicial Supervision in France, theory and Practice (2001) *British Journal of Criminology* 41
- Hodgson J, *Suspects, Defendants and Victims in the French Criminal Process: The Context of Recent Reform* (2002) 51 *Int. and Comp. L.Q.*
- Hodgson J, *Codified Criminal Procedure and Human Rights: Some Observations on the French Experience* (2003) *Crim. L.R.*
- Hodgson J *The Future of Adversarial Criminal Justice in 21st Century Britain* (2010) 35 *N.C.J. Int. L. & Com. Reg.*

Hughes R, *Considering the vignette technique and its application to a study of drug injecting and HIV risk and safer behaviour* 1998) 20 *Sociology of Health & Illness* 3.

Hunnisett R.F, *Eighteenth-Century Coroners and Their Clerks*, 76 *Wiltshire Archaeological Natural History Mag.* 123.

Hungerford-Welch P, *Summary Trial – Too Summary?* (2011) *Criminal Justice Matters*, No.84 June

Jackson J, *Two Methods of Proof in Criminal Procedure* (1988) *MLR* (5) 549

Kaplan J, *Defending Guilty People* (1986) 7 *U. Bridgeport L. Rev.*

Kimmel A, *Ethics and Values In Applied Social Research* (1988) 12 *Applied Social Research Methods Series*.

King M, *Security, Scale, Form and Function: The Search for the Truth and the Exclusion of Evidence in Adversarial and Inquisitorial Justice Systems* (2001-2002) 12 *International Legal Perspectives*.

N. Lacey 'In Search of the Responsible Subject' (2001) *Modern Law* 64(3)

Landsman S, *The Rise of the Contentious Spirit: Adversary Procedure in Eighteenth Century England* (1989-1990) 75 *Cornell L.R.*

Landsman S, 'The Decline of the Adversary System: How the Rhetoric of Swift and Certain Justice has Affected Adjudication in American Courts' (1980) *Buffalo Law Review* 487

Langbein J, 'The Criminal Trial Before Lawyers;' (1978) 45 *U Ch LR* 263

Langer M, *The Rise of Managerial Judging in International Criminal Law* (2005) 53 *Am. J. Comp. L.*

Lawry R, *The Central Moral Tradition of Lawyering* (1990-1991) 19 Hofstra L.R.

Lefcourt G, *Responsibilities of a Criminal Defense Attorney* (1996-1997) 30 Loy L.A.L. Rev.

Leng R, 'Losing Sight of the Defendant: The Government's Proposals on Pre-Trial Disclosure' (1995) Crim L.R 704

R. Leng *The Right to Silence in Police Interrogation: A study of some of the issues underlying the debate*, RCCJ Research Study no 10 (1993)

Levi M, 'The Future of Fraud Prosecutions and Trials: Reviewing Roskill' *Company Law* (1986), 7(4) 139-146

M. Levi, *The Investigation, Prosecution and Trial of Serious Fraud*, RCCJ Research Study no.14 (1993)

Li S., Seale C, *Learning to do Qualitative Data Analysis: An Observational Study of Doctoral Work* (2007) 17 *Qualitative Health Research* 10.

Lieberman J, *A review of 'Partisan Justice' by Marvin Frankel* (1981) 27 N.Y.L. Sch. L. Rev.

Luban D, *The Noblesse Oblige Tradition in the Practice of Law* (1988) 41 Vand. L. Rev.

Luban D, *Are Criminal Defenders Different?* (1992-1993) 91 Mich. L.R.

Mays N, Pope C, *Qualitative Research: Rigour and qualitative research* (1995) 311 *British Medical Journal*.

McLaughlin E, Muncie J and Hughes G, 'The Permanent Revolution: New Labour, New Public Management and the Modernization of Criminal Justice, *Criminal Justice*, 2001 (1)3 301-318.

McConville M, 'An Error of Judgment', (1993) *Legal Action*, September.

McConville M, and Marsh L, 'Adversarialism Goes West: Case Management in Criminal Courts', [2015] *E&P*, 19(3)

McEwan J, 'Truth, Efficiency and Co-operation in Modern Criminal Justice', [2013] *Current Legal Problems*, Vol 1. 66(1),

McEwan J, 'From Adversarialism to Managerialism: Criminal Justice in Transition', [2011] *Legal Studies*, Vol 31(3), Wiley,

McLellan E, MacQueen K, Neidig J, *Beyond the Qualitative Interview: Data Preparation and Transcription* (2003) 15 *Field Methods* 1.

Mitchell J, *The Ethics of the Criminal Defense Attorney: New Answers to Old Questions* (1980) 32 *Stanford L.R.* 2.

Mollett A, Moran D, and Dunleavy P, 'Using Twitter in University Research, Teaching and Impact Activities: A Guide for Academics and Researchers' (2011) *LSE Public Policy Group*

Moohr G.S, 'Prosecutorial Power in an Adversarial System: Lessons from Current White Collar Cases and the Inquisitorial Model', (2004) *Buffalo Law Review*, Vol 8,

Munday R, 'The Roskill Committee on Fraud Trials' (1986) *Cambridge LJ*, 175

Nagorcka F, et al. *Stranded Between Partisanship and the Truth? A Comparative Analysis of Legal Ethics in the Adversarial and Inquisitorial Systems of Justice* (2005) 29 *Melbourne University Law Rev.*

Newman D, 'Still Standing Accused: Addressing the Gap between work and talk in firms of criminal defence lawyers' *International Journal of the Legal Profession* (2012) Vol 19, No

1

Newman D, and Ugwudike P, 'Defence Lawyers and Probation Officers: Offenders' allies or adversaries?' (2014) *International Journal of the Legal Profession* 183

Noonan J, *The Purposes of Advocacy and the Limits of Confidentiality* (1965-1966) 64 *Mich. L. Rev.*

Noy C, 'Sampling Knowledge: The Hermeneutics of Snowball Sampling in Qualitative Research' *Int. J. Social Research Methodology* (2008), *International Journal of Social Research Methodology*, vol 11(4),

O' Doherty S, *The Changing of the Guard: CPS Charging*, (2004) *Justice of the Peace*.

Owers A, 'Runciman Reviewed' (1993), 90 *L.S.G.* 2,

A. Owusu-Bempah, 'Defence Participation through Pre-Trial Disclosure: Issues and Implications', (2013) 17 *E&P* 183

Patterson L, *Legal Ethics and the Lawyer's Duty of Loyalty* (1980) 29 *Emory L. J.*

Parkinson B, Manstead, *Making sense of emotion in stories and social life* (1993) *Cognition & Emotion* 7.

Pepper S, *The Lawyer's Amoral Ethical Role: A Defense, A Problem, and Some Possibilities* (1986) *Am. B. Found. Res. J.*

Phillips T, Schostak J, & Tyler J, *Practice and assessment in nursing and midwifery: Doing it for real* (2000) 16 *Research Reports Series*.

Ploscowe M, *Development of Inquisitorial and Accusatorial Elements in French Procedure* (1932-1933) 23 *American Institute Crim. L. & Criminology*.

Plowden P, 'Make Do and Mend, or a Cultural Evolution?', (2005) *The New Law Journal*, March

Pope C, Ziebland S, Mays N, *Analysing Qualitative Data*, (2000) 320 British Medical Journal.

Postema G. (1980) *Moral Responsibility In Professional Ethics* – 55 New York University L.R.

Pye K, *The Role of Counsel in the Suppression of Truth* (1978) Duke L.J.

Quirk H, *The significance of culture in the criminal procedure reform: why the revised disclosure scheme cannot work* (2006) 10 Int. Journal of Evidence and Proof 1.

Quirk H, 'Twenty years on, the right of silence and legal advice: the spiralling costs of an unfair exchange, 2013; NILQ 64(4):465-484

Quirk H, *The Right of Silence in England and Wales: Sacred Cow, Scarifical Lamb or Trojan Horse?* in J. Jackson and S. Summers, *Obstacles to Fairness in Criminal Proceedings: Individual Rights and Institutional Forms*, 2018,

T.J. Rapley, 'The Art(fullness) of Open-ended Interviewing: Some considerations on analyzing interviews/' (2001) *Qualitative Research*, Vol 1(3)

Raine J, Willson M, *Managerialism and beyond: The case of criminal justice* (1996) 9 Int. J. of Public Sector Management 4.

Redmayne M, 'Criminal Justice Act 2003: (1) Disclosure and its Discontents' (2004) *Crim. L. Rev* 441

Rhode D, *An Adversarial Exchange on Adversarial Ethics: Text, Subtext and Context* (1991) 41 *J. Legal Ed.*

Rhodes D, 'Life in Crime: The Truth is Out There', (2011) *Solicitor's Journal*, vol 156

- Roach K, 'Four Models of Criminal Process', (1999) 89 J Crim law and Criminology 671.
- Rock P, 'Witnesses and Space in a Crown Court' (1991) 31 British Journal of Criminology
- Rogers S, *The Ethics of Advocacy* (1899) 15 L.Q. Rev.
- Rostow E, *The Lawyer and His Client* (1962) 48 ABA J.
- Rubin L, 'Trial by Battle by Argument' (2003) 56 Ark.L.Rev 261
- Sanders A, *Victims with Learning Disabilities* (1997) Oxford: Centre for Criminological Research,
- Savage C, *The Duties and Conduct of Crown and Defence Counsel in a Criminal Trial* (1958-1959) 1 Crim. L.Q.
- Selznick P, *Law in Context Revisited* (2003) 30 Journal of Law and Society 2.
- Schneyer T, *Moral Philosophy's Standard Misconception of Legal Ethics* (1984) Wis. L. Rev.
- Sigler J, 'Public Prosecutions in England and Wales' [1974] Crim LR 642.
- Silverman W, 'The Trial Judge: Pilot, Participant or Umpire?' (1984) 11. Alta L Rev 40
- Simon W, *The Ideology of Advocacy: Procedural Justice and Professional Ethics* (1978) Wis. L. Rev.
- Simon W, *The Ethics of Criminal Defense* (1992-1993) 91 Mich. L.R.
- Simon W, 'Thinking Like a Lawyer' About Ethical Questions (1998-1999) 27 Hofstra L.R.

Smith A, *The Bounds of Zeal in Criminal Defense: Some Thoughts on Lynne Stewart* (2002-2003) 44 S. Tex. L. Rev.

Smith A, Montross W, *The Calling of Criminal Defense* (1998-1999) 50 Mercer L.R.

Smith T, 'Trust, Choice and Money: Why the Legal Aid Reform "U-Turn" is Essential for Effective Criminal Defence, [2013] Crim L. R. Issue 11

Smith T, 'Justice for Sale: An Empirical Examination of the Attitudes of Criminal Defence Lawyers Toward Legal Aid Reform', (2014), Plymouth Law and Justice Review 1

Smith T, The "near miss" of Liam Allan: Critical problems in police disclosure, investigation culture, and the resourcing of criminal justice. (2018) *Criminal Law Review* (9). pp. 711-731

Sommerlad H, 'Researching and Theorising the Processes of Professional Identity Formation' (2007) *Journal of Law and Society* 34(2):

Spencer J.R, 'Acquitting the Innocent and Convicting the Guilty – Whatever will they think of next!', C.L.J. (2007), 66(1), 27

Sprack J, 'Will Defence Disclosure Snap the Golden Thread?'(1998) E&P., 2(4) 224

Stienberg H.B, 'The Responsibility of the Defense Lawyer in Criminal Cases' Syracuse Law Review, (1960), Vol 12

Tague P, (2007) *Barristers' selfish incentives in counselling defendants over the choice of plea* – Crim. L.R.

Taylor C, 'Advance Disclosure: Reflections on the Criminal Procedure and Investigations Act 1996' (2001) 40(2) Howard Journal, 114,

Thornton M, *Technocentrism in the Law School* (1998) 36 Osgoode Hall Law Journal 2.

Tomljanovic G, *Defence Disclosure: Is the Right To 'Full Answer' the Right To Ambush?* (2002-2003) 40 Alta. LR.

Traynor R.J, 'Ground Lost and Found in Criminal Discovery' (1964) 39 New York University Law Review 228

Uelman G, *Lord Brougham's Bromide: Good Lawyers As Bad Citizens* (1996-1997) 30 Loy. L.A.L. Rev.

Van Susteren G, *Responsibility of a Criminal Defence Attorney* (1996-1997) 30 Loy. L.A.L. Rev.

Wasserstrom R, *Lawyers As Professionals: Some Moral Issues* (1975) 5 Human Rights.

Woolley A, *Integrity in Zealousness: Comparing the Standard Conceptions of the Canadian and American Lawyer* (1996) 9 Can. J. L. & Jurisprudence.

Zacharias F, Green B, *Reconceptualizing Advocacy Ethics* (2005) 74 Geo. Wash. L. Rev.

Zacharias F, Green B, *Reconsidering Brougham* (2006) 74 Geo. J. Legal Ethics.

Zander M, *Lord Justice Auld's Review of the Criminal Courts: A Response* (2001)

Legislation – England and Wales

Courts Act 2003

Courts and Legal Services Act 1990

Criminal Evidence Act 1898

Criminal Justice Act 1967

Criminal Justice and Public Order Act 1994

Criminal Procedure and Investigations Act 1996

Criminal Procedure Rules 2016,

Human Rights Act 1998

Legal Services Act 2007

Police and Criminal Evidence Act 1984

The Prisoner's Counsel Act 1836

Solicitors Act 1974

Treason Act 1696 Act

Professional Standards and Advice

Attorney General's Office (2005) *Attorney General's Guidelines on Disclosure* – London: Stationary Office.

The Bar Standards Board Handbook (3rd Edition, 2017):

https://www.barstandardsboard.org.uk/media/1826458/bsb_handbook_31_march_2017.pdf

The Law Society (2008) *Withdrawing from a Criminal Case* – London: The Law Society.

The Law Society Code for Advocacy (Updated 2003):

http://www.lawsociety.org.uk/documents/downloads/Profethics_Advocacy.pdf

The Law Society, Defence Witness Notice, (2015) <https://www.lawsociety.org.uk/support-services/advice/practice-notes/defence-witness-notice/>

Legal Policy Directorate (2009) *Criminal Procedure Rules: Impact on Solicitor's Duties to the Client* – London: The Law Society

The SRA Handbook (version 18)

<http://www.sra.org.uk/handbook>

Cases

Aravinthan Visarathnam v Brent Magistrates' Court [2009] EWHC 3017 (Admin)

Arthur J.S. Hall and Co v Simmons [2000] UKHL 38, [2002] 1 AC 615

Balogun v DPP [2010] EWHC 799 (Admin).

Blunt v Park Lane Hotel Ltd [1942] 2 KB 253

Brett v DPP [2009] EWHC 440.

D and Others [2007] EWCA Crim 2485

Dallison v Caffery [1965] 1 QB 348.

ex p Lloyd (1822) Mont 70

Firth v Epping Magistrates' Court[2011] EWHC 388 (Admin)

Jones v National Coal Board [1957] 2 QB 55.

Malcolm v DPP [2007] EWHC 363.

R (on the application of the DPP) v Chorley Justices [2006] EWHC 1795.

R (On the Application of Drinkwater) v Solihull Magistrates' Court [2012] EWCA 765

R v (on the application of the DPP) v Leicester Magistrates' Court (Unreported, 9th February 2016).

R (on the application of Payne) v South Lakeland Magistrates' Court [2011] EWHC 1802 (Admin)

R v Barnes [1971] Cr.App.R 100

R v Bryant and Dickson [1946] 31 Cr App R 146

R v Bryant [2005] EWCA Crim 2079.

R v Buffrey 14.Cr. App R (S) 511

R v Clarke (1930) 22 Cr App R 58

R v Clewer (1953) 37 Cr.App.R 37

R v Grafton [1992] Crim LR 826.

Re P(A Barrister) (No 1 of 1991) [1993] QB 293.

Rondel v Worsley [1969] 1 AC 191 HL.

R v Chaaban [2003] EWCA Crim 1012.

R v College 8 St. Trials 549 (1681)

R v Ensor [2009] EWCA Crim 2519

R v Essa [2009] EWCA Crim 43.

R v Gleeson [2004] 1. Cr. App. R. 29

R v Haringey Justices, ex p DPP [1996], 1 All RT 828\

R v Keane [1994] 2 All ER 478.

R (Kelly) v Warley JJ [2007] EWHC 1836

R v Jisl [2004] EWCA Crim 696.

R v Lady Alice Lisle 11 St. Tr. 297 (Winchester Assizes 1685)

R v Lawson [1990] Crim LR 62.

R (Law Society of England and Wales) v Lord Chancellor and the Legal Services Commission [2012] EWHC 794 (Admin).

Medcalf v Mardell [2003] 1 AC 120 (HL)

R v Melvin and Dingle (Unreported, 20 December 1993).

R v McKenny and Others [1991] 93 CR AR 287.

R v Musone [2007] EWCA Crim 1237.

R v Newell [2012] EWCA Crim 650.

R v Samuel [1988] QB 615.

R v O'Connell (1844) 7 I.L.R. 261

R v Olivia [1965] 1 WLR 1028.

R v Rochford [2010] EWCA Crim 1928.

R v Sharp [1993] 3 All ER 225

R v SVS Solicitors [2012] EWCA Crim 319.

R (Tinnion) v Reading Crown Court [2009] EWHC 2930 (Admin).

R v Titus Oates 10, St. Tr 1079 (K.B 1685

R v Ward [1993] 2 All ER 577.

R v Walter Thomas, 2 Bulstrode 147, 80 Eng. Rep 1022 (K.B 1613)\

The People (at the Suit of the Director of Public Prosecutions v Phelim McGuinness [1978] IR 189.

Three Rivers DC v Bank of England (Disclosure) (No.4) [2004] UKHL 48

Tibbs (The Times, February 28th, 2000)

Woolmington v DPP [1935] AC 462

Writtle v DPP [2009] EWCA 236 (Admin).

Yuill v Yuill [1945] 1 All ER 183

Websites

The Bar Council Website

www.barcouncil.org.uk

The Bar Standards Board

www.barstandardsboard.org.uk

The Crown Prosecution Service Website

www.cps.gov.uk

The Criminal Procedure Rules

<https://www.justice.gov.uk/courts/procedure-rules/criminal>

The Courts and Tribunals Judiciary

<https://www.judiciary.gov.uk>

The Law Society Website

www.lawsociety.org.uk

The Legal Services Commission Website

www.legalservices.gov.uk

The Ministry of Justice Website

www.moj.gov.uk

The Solicitors' Regulation Authority Website

www.sra.org.uk

Miscellaneous

Home Office, *The Royal Commission on the Police Cmnd. 1728* (London: HMSO) 1962.

Departmental Committee Report: *Legal Aid in Criminal Proceedings*, 1966, Cmnd 2934

JUSTICE, *The Unrepresented Defendant in the Magistrates' Court*, (London: Stevens and Son, 1971)

Devlin Committee Report: *Report of the Committee on Evidence of Identification in Criminal Cases*, 1976 Cmnd 338

Home Office, *Inquiry into the Circumstances leading to the Trial of Three Persons on Charges arising from the Death of Maxwell Confait (HCP 90)* London: HMSO:1977

House of Commons Justice Committee, *Disclosure of evidence in criminal cases*, Eleventh Report of Session 2017-19.

HMCPPI, Making it fair - a joint inspection of the disclosure of unused material in volume Crown Court cases, (2017).

Home Office, Criminal Justice System: Strategic Plan 1999 – 2002 (1999)

HM Crown Prosecution Service Inspectorate (HMPSI), *An Audit of the Crown Prosecution Service Handling of Judges' Orders in the Crown Court* (HMCPPI: London, 2011)

HM Courts and Tribunals Service, *Justice Matters: Reform Update, May 2018*,

P. Softly *Police Interrogation: An Observational Study in Four Police Stations*, Royal Commission on Procedure, Research Study No 4, HMSO 1980).

Home Office, *The Royal Commission on Criminal Procedure. Report. The investigation and prosecution of criminal offences in England and Wales: the law and procedure*, (HMSO:1980) Cmmd 8092.

Home Office, *An Independent Prosecution Service for England and Wales*, Law Officers Department, Cmnd 9074 1983.

The Fraud Trials Committee, Chairman: The Right Honourable Lord Roskill, P.C, (HMSO: 1986)

Office of the High Commissioner for Human Rights (1990) – Adopted by the 8th United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba.

Hodgson J. (1992) *Quality of Advice in Custody* - Law Society's Gazette, 31: 2.

Home Office (1993) *Royal Commission on Criminal Justice* – London: The Stationary Office, Cm 2263.

M. Levi, *The Investigation, Prosecution and Trial of Serious Fraud*, Royal Commission on Criminal Justice Research Study No.14, 1993.

R. Leng, *The Right to Silence in Police Interrogation*, Royal Commission on Criminal Justice Research Study No. 10 (1993)

M. Zander and P. Henderson, *The Crown Court Study* (Royal Commission on Criminal Justice, Research Study No 19, 1993)

Home Office, *Disclosure: A Consultation Paper*, May 1995 CM 2864.

Crown Prosecution Service Inspectorate, *The Inspectorates Report on The Thematic Review of the Disclosure of Unused Material*, Thematic Report 2/2000, March 2000

J. Plotnikoff and R. Woolfson, 'A Fair Balance? Evaluation and Operation of disclosure law' RDS Occasional Paper No 76, 2001

Auld Rt Hon R, *A Review of the Criminal Courts of England and Wales*, (2001)

<http://webarchive.nationalarchives.gov.uk/+http://www.criminal-courts-review.org.uk>

Restorative Justice Council, *A Response to the Auld Review* (2002)

<https://www.restorativejustice.org.uk/resources/lord-justice-auids-review-criminal-courts-england-and-wales-%E2%80%93-rjc-response>

British Sociological Society (2002) *Statement of Ethical Practice for the British Sociological Association (March 2002)* - British Sociological Society Website:
www.britisoc.co.uk/equality/Statement+Ethical+Practice.htm

Home Office (2002) *Justice for All: The Need For Reform* - London: The Stationary Office, Cm 5563.

Clementi D. (2004) *The Review of the Regulatory Framework for Legal Services in England and Wales* – London: Ministry of Justice.

Brownsword R. (2006) *An Introduction to Legal Research*:

www.wellcome.ac.uk/stellent/groups/corporatesite/@msh_grants/documents/web_document/wtx030897.pdf

Leeson, P, *Trial By Battle*,

http://www.peterleeson.com/Trial_by_Battle.pdf

Professional Misconduct 2006/07, Inns of Court School of Law, City University, London (Oxford University Press: Oxford 2006).

Bridges L., Cape E., Fenn P., Mitchell A., Moorhead R., Sherr A. (2007) *Evaluation of the Public Defender Service in England and Wales* – London: The Stationary Office.

Sentencing Guidelines Council, Reduction in Sentence for a Guilty Plea (2007)
https://www.sentencingcouncil.org.uk/wp-content/uploads/Reduction_in_Sentence_for_a_Guilty_Plea_-Revised_2007.pdf

Courts Service, *The Lord Chief Justice's Review of the Administration of Justice in the Courts* HC 448 (TSO: London 2008)

Lord Justice Leveson (2009) *Essential Case Management: Applying the Criminal Procedure Rules* - London: Office of the Senior Presiding Judge For England and Wales.

Socio-Legal Studies Association (2009) *SLSA Statement of Principles of Ethical Research Practice* - Socio-Legal Studies Association Website:
www.kent.ac.uk/nslsa/content/view/247/270

The Law Society, Legal Policy Directorate, *Criminal Procedure Rules: Impact on Solicitor's Duties to the Client*, (2009) London,.

A. Travers, Police to regain power to charge suspects, *Guardian*, 19th May 2010
<https://www.theguardian.com/uk/2010/may/19/police-power-to-charge-restored>

J. Hodgson, 'The Future of the Adversarial Criminal Justice in 21st Century Britain
University of Warwick School of Law, Legal Studies Research Paper No.2010-06.

A. Keogh, speaking at the Eldon Lecture Series 2011 at Northumbria University School of Law. 24th November 2011. <http://www.youtube.com/watch?v=2bhMweYNF24>

Criminal Procedure and Investigations Act 1996 (Code of Practice for Arranging and Conducting Interviews of *Witnesses* Notified by the Accused), available here:

<http://www.legislation.gov.uk/ukxi/2010/1223/contents/made>

Judiciary of England and Wales, *Review of Disclosure in Criminal Proceedings*, (2011)

<https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Reports/disclosure-review-september-2011.pdf>

Solicitors Regulation Authority, *Code of Conduct Handbook*, (2011),

<http://www.sra.org.uk/solicitors/handbook/code/part2/content.page>

Ministry of Justice, *Swift and Sure Justice: The Government's Plans for Reform of the Criminal*

Justice System, (2012), Cm 8388, (TSO: London)

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/217328/swift-and-sure-justice.pdf

Rt. Hon Lord Justice Gross and Rt Hon Lord Justice Treacy, *Further Review of Disclosure in Criminal Proceedings*, (Judiciary of England and Wales, 2012) available here:

http://www.judiciary.gov.uk/wpcontent/uploads/JCO/Documents/Reports/disclosure_criminal_courts.pdf

O. Bowcott 'CPS severely hampered by lack of resources' *The Guardian*, 10th July 2013_

<http://www.theguardian.com/law/2013/jul/10/cps-lack-resources-funding-cutbacks>

The Judiciary of England and Wales, Magistrates' Court Disclosure Review (May 2014)
<https://www.judiciary.gov.uk/wp-content/uploads/2014/05/Magistrates%E2%80%99-Court-Disclosure-Review.pdf>

Courts and Tribunals Judiciary (2015), *Better Case Management* available at
www.judiciary.gov.uk/publications/better-case-management.

R. Myers 'The CPS wants to stack the deck against the defence' *The Telegraph* 19th January 2015 accessed here: <http://www.telegraph.co.uk/news/uknews/law-and-order/11354758/The-CPS-wants-to-stack-the-deck-against-the-defence.html>

Sentencing Council, *Reduction in Sentence for a Guilty Plea Guideline Consultation*, February 2016, available here: <https://www.sentencingcouncil.org.uk/wp-content/uploads/Reduction-in-sentence-for-a-guilty-plea-consultation-paper-web.pdf>

The Law Society, *Response of the Law Society of England and Wales to the Sentencing Council consultation on the Reduction in Sentence for an Early Guilty Plea*, May (2016) at p.6, available here: <http://www.lawsociety.org.uk/policy-campaigns/consultation-responses/sentencing-council-consultation-on-the-reduction-in-sentence-for-a-guilty-plea-guideline-law-society-response/>