Article

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Getting people thinking and talking: An exploration of the Attorney General's 2020 guidelines on disclosure

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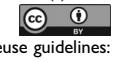
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Abstract

This article evaluates the recent Attorney General's Guidelines on disclosure in criminal cases. These Guidelines signal a further step away from adversarialism, towards an internally incoherent justice system which incorporates managerial characteristics, alongside increasing elements of inquisitorialism. Whilst still promoting the rhetoric of adversarialism, these changes have the potential to reconfigure the role of the suspect and the court in such a way as to circumvent the protections inherent in the adversarial system. This article considers two areas of the Guidelines, pre-charge engagement and the enforcement of a 'thinking manner' approach to the disclosure exercise. By considering these two expansive areas, a broader perspective of the Guidelines is taken in order to fully appreciate their significance. The impact of these newly minted Guidelines is not yet apparent, but this article postulates the potential longer-term ramifications of the changes and ultimately concludes that the Guidelines will result in further systemic incoherence which undermines suspect and defendant rights, and fundamentally reconstitutes courts as adjudicators of criminal investigations.

Keywords

adversarialism, criminal process, disclosure, pre-charge criminal procedure

Introduction

The recent Attorney General's Guidelines[1] on disclosure in criminal cases (hereafter the 'Guidelines') signal a step away from the remnants of English adversarialism, towards a confused criminal system

1. The Guidelines published in 2020 have been updated in 2022, adding changes to areas such as presumed disclosable material, redacted material, and third-party material. In only one instance are the changes pertinent to this article and this is detailed below. Otherwise, the original 2020 Guidelines are cited.

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which unites characteristics of inquisitorialism and managerialism with an increased participatory view of the defendant.[2] Introducing a series of significant alterations to the role of the court and the defendant, the Guidelines are potentially the most significant revision of English and Welsh criminal process since the introduction of the Criminal Procedure Rules (CrimPRs) (Ministry of Justice, 2005, updated 2020). Directed at those involved within the disclosure process and with judicial oversight, the Guidelines are 'high level principles which should be followed when the disclosure regime is applied' (Attorney General's Office, 2020b).

Unfortunately, the Guidelines do not move the criminal justice system towards a coherent alternative to adversarialism, instead introducing changes which inject managerial characteristics, alongside elements of inquisitorialism, and a re-envisioning of the role of suspects. The potential consequence of these alternations is further internal fragmentation of a justice system which already struggles with its identity. Such fragmentation removes or replaces aspects of the adversarial system, undermining many of the safeguards for suspects and defendants inherent in the system, and repositions the role of criminal justice actors such as the courts without regard to the practical consequences of such alterations.

The Guidelines introduce changes which impact upon a broad range of procedures and practices both before and during the criminal trial. This article cannot consider all the changes, but two of the most significant have been chosen to explore the potential impact of the Guidelines: the requirement of a 'thinking manner' in disclosure processes, and significant changes to pre-charge disclosure practices. The introduction of requirements for prosecution teams to execute disclosure duties using a 'thinking manner' (Attorney General's Office, 2020b: para. 3) will require the court to assess and make meaningful judgments on whether disclosure processes have been properly carried out. To achieve this courts will, in effect, be required to delve through the details of a specific investigation *ex post facto*. This process will be time-consuming and has the potential to be extremely intrusive, radically changing the role of the court into an overseer of investigations, further defining the court as manager of trials, rather than a traditional adversarial conception of the judge.

The Guidelines do not present a systemically coherent vision of disclosure within the justice system. Alongside the embedding of managerial expectations of the court to enforce the Guidelines, the Guidelines' pre-charge regime re-envisages the suspect as a greater source of evidence, not seen since pre-adversarial England (Gimson, 2020). This vision of the suspect harnesses characteristics of participatory, or even inquisitorial systems, where the suspect is seen as an important evidential resource, and not as a special party to the investigation worthy of additional rights (Hodgson, 2020). Whilst managerialist and participatory systems are not inherently contradictory, but introducing such measures into a system loyal to the idea of adversarialism, whilst attempting to achieve objectives of efficiency and fairness,[3] results in an incoherent system which will ultimately fail to achieve any of these objectives. The Guidelines have the potential to significantly reconfigure the role of the defendant in the justice process in such a way as to circumvent the protections inherent in the adversarial system.

The observation that criminal procedure is becoming less adversarial is not new. Academics, lawyers, and policy makers have been drawing attention to the dilution of adversarial ideals for nearly three decades (Hodgson, 2010; McEwan, 2011, 2013; Owusu-Bempah, 2013; Royal Commission on Criminal Justice Report, 1993). It is widely accepted that no pure form of procedural system exists in England or Wales, or anywhere else in the world (Royal Commission on Criminal Justice Report, 1993). However, the English and Welsh criminal justice system historically had a well-embedded adversarial system which has been increasingly altered over the past thirty years, starting with the undermining of the right to silence, and culminating in the recent disclosure Guidelines. These recent Guidelines are a

2. 'Defendant' is used interchangeably with 'suspect'. As is argued below, the distinction between suspects and defendants should not be overstated.

3. As laid down in the Overriding Objective, r. 1.1 (Ministry of Justice, 2005, updated 2020).

stark example of procedural change to 'an unruly beast of many inter-linked parts' (Hodgson, 2010: 361) with little consideration for the coherence or procedural context of the overall system (Hodgson, 2020).

To explore and illustrate the above argument, this article next considers the importance of disclosure to the adversarial system, and then introduces the new Guidelines, contextualising them in a short history of disclosure procedures. The following section addresses the Guidelines' efforts to instil cultural change in investigation and prosecution teams, change which will require enforcement by courts if it is to take hold. The article will then explore the Guidelines' vision for suspects, and how this re-positioning fundamentally undermines the last vestiges of adversarialism. The impact of these newly minted Guidelines is not yet apparent, but the final section of this article postulates the potential ramifications of the Guidelines and where the criminal justice system might go from here.

Disclosure within the adversarialism system

An identity crisis lies at the heart of the English and Welsh criminal justice system. This crisis derives from widespread belief in, and support for, an adversarial system; a system which no longer exists in a pure form. Practitioners and academics continue to cling to the adversarial ideal (Criminal Bar Association, 2020; Her Majesty's Inspectorate of Constabulary and Fire & Rescue Services, 2019; Johnston, 2021; Quirk, 2006). The difficulty with such staunch loyalty to adversarialism is that the system is by no means immutable (Redmayne, 2004). When trying to locate the ontological boundaries of adversarialism, we find ourselves struggling to identify key characteristics. This is largely because adversarialism has changed through time, making it almost impossible to land upon a satisfactory definition.

Some traditionally recognisable adversarial characteristics include opposing legal teams with the equality of arms and a largely passive court acting as umpire rather than combatant (Hodgson, 2020; Redmayne, 2004). Damaska describes adversarialism as a dispute which 'unfolds as an engagement of two adversaries before a relatively passive decision maker whose principal duty is to reach a verdict' (Damaska, 1986: 3).

Adversarialism is often defined against the continental inquisitorial systems which see judges leading investigations, supplemented by lawyers for the parties (Spencer, 2016). The judicial role within the inquisitorial system is central and active, driven by a state centralized enquiry rather than a party-driven contest, with members of the judiciary overseeing investigations themselves (Hodgson, 2020). A striking difference between inquisitorial and adversarial systems is the role of the defendant; the defendant is seen as a source of information in the former, and as an active opposition in the other (Spencer, 2016). As an opposing party, within a more adversarial system, the defendant has historically been able to choose whether to participate with the process, and to put the prosecution to proof if they so choose, whereas the inquisitorial system frames the accused as a central source of information, requiring defendant participation (Spencer, 2016). This positioning of the defendant reflects the traditionally contrasting aims of the two systems; inquisitorialism is centred upon discovering the truth, adversarialism is reliant on procedural rights and protections underpinning a contest from which a desired level of proof might emerge.

Whilst this article ultimately concludes the new Guidelines to undermine adversarialism in such a way as to render the system incoherent, it must be acknowledged that no pure form of adversarial or inquisitorial system exists in practice (Spencer, 2016). Within England and Wales, changes to criminal procedures such as inferences following the accused's silence and requirements for the defence to disclose details of their case before trial, have undermined the traditional role of the defendant, weakening claims to adversarialism (Owusu-Bempah, 2013). Likewise, many continental systems which are more aligned to inquisitorial forms, have incorporated elements of the adversarial trial such as juries and principles akin to disclosure such as *contradictoire* in France (Hodgson, 2020).

We must be careful, however, not to conclude that adversarial and inquisitorial systems are converging into a third way of justice. Incorporating elements of either (or indeed any other) system does not

necessarily signal convergence. The way characteristics are translated differs from system to system. Rather than a convergence of judicial systems, it may be that we are seeing a fragmentation of approaches across several countries, rather than an homogenous approach to justice (Jackson, 2005; Owusu-Bempah, 2017). The internal fragmentation of the English and Welsh system is problematic as the systemic structure is the lens through which criminal justice actors and the wider public understand criminal process. Procedural models provide guiding principles to any system, and these models offer both the roots of systems and a framework within which to introduce reforms whilst maintaining internal coherence (Hodgson, 2020)

Whilst procedural changes have repeatedly undermined traditional adversarial principles, there has been no clear articulation by policymakers of the desire to replace the adversarial system (Royal Commission on Criminal Justice Report, 1993). An explanation for the move away from adversarialism is the quest for efficiency, assumedly the saving of time and money (Brown, 2014; Hodgson, 2010). This article will demonstrate how the new Guidelines manifest this thirst for efficiency, without due consideration for the ultimate ramifications of such alterations. In fact, the new Guidelines go even further in their efforts to instil efficiency by extending this thinking to the investigatory stage as well as to trial procedures.

Disclosure requirements permeate the entire investigation and trial process, speaking directly to core procedural components such as evidence gathering and case management, communication between the prosecution and defence, and the filtering of information into eventual trial narratives. Because of the pivotal role disclosure plays across the investigation and trial process, changes to day-to-day disclosure requirements are likely to have a profound effect on the broader system.

The Attorney General's disclosure guidelines, past and present

The current disclosure regime is based upon the Criminal Procedure and Investigations Act 1996 (CPIA), and the provisions therein have largely remained unchanged for 25 years.[4] The implementation of the CPIA, and the interpretation of the prosecution's disclosure responsibilities, has undulated with the tides of wider criminal justice policy (Johnston, 2021; Redmayne, 2004). Whilst there has been little change to disclosure provisions over the past five years, discontent with the disclosure regime has been increasingly vocalised (Attorney General's Office, 2018). Following several high-profile criminal trials which failed on the grounds of poor disclosure practice, this discontent spilled over the barriers of legal practice and into the public forum (Dargue, 2020; Smith, 2018). The failing of prosecutions based on disclosure standards was previously seen more frequently in relation to complex fraud and dishonesty cases,[5] but disclosure failings regarding suspected rape prosecutions captured broader public attention. One such example was the 2018 case of Liam Allan, a student charged with rape and against whom the case was later dropped due to a failure to disclose digital evidence (Smith, 2018).[6]

Prior to 2018, there was already significant concern about disclosure standards across the criminal justice system and amongst the wider legal community (Attorney General's Office, 2018: 3). The Mouncher Report, an investigation into the multiple failings of disclosure which resulted in the 2011 failed prosecution of thirteen police officers in South Wales, was published in 2017 (Horwell, 2017). The Mouncher Report exposed the continued staggering lack of expertise of those executing disclosure responsibilities, even at the top levels of the criminal justice profession. As well as identifying the

4. Barring the right to silence, which is discussed below.
5. For example, in the 2010 Office of Fair Trading prosecution against British Airways for suspected price-fixing, *R* v *Burns and others* (Unreported Judgment, Southwark Crown Court, 10 May 2010).
6. Since 2020, the impact of poor disclosure practice in the Post Office Scandal, in which hundreds of innocent sub-post masters were wrongly criminalised, has further highlighted the potential for miscarriages of justice within the disclosure regime.

catastrophic errors made by the prosecution team in *R* v *Mouncher & Ors (2011)*[7] itself, the Mouncher Report identified several disclosure practices requiring improvement. These included: training and accreditation, closer liaison and better information sharing between the CPS and the police, greater accountability, the handling of third- party material, and the adoption and use of a better digital case management system (The Police Service, the Crown Prosecution Service and the College of Policing, 2018).

In his report into the failure of the authorities to properly disclose material in the *Mouncher* case, Richard Horwell QC (2017: para. 24.9) stated:

> Disclosure problems have blighted our criminal justice system for too long and although disclosure guidelines, manuals and policy documents are necessary, it is the mindset and experience of those who do disclosure work that is paramount.

The report's overall finding was the need for a wholesale change in culture and attitudes towards disclosure. As well as more thematic changes to the disclosure regime, the Mouncher Report stressed the hope that three fundamental objectives might be achieved. The first speaks to the methods through which disclosure requirements are endeavoured to be met. Horwell QC found an overly strict interpretation of the law was being applied, alongside a culture of reluctance to disclose material. The Report, rather optimistically, called for 'a new spirit of openness, generosity and common sense' around disclosure practices (Horwell, 2017: para. 24.9).

The second of Horwell QC's objectives shifted focus to the defence. It was hoped that 'defence lawyers will respond appropriately and play their part by engaging in the disclosure process and not holding problems back until the trial is about to start or is underway' (Horwell, 2017: para. 24.9). The final objective of the Report was, unsurprisingly, that lessons would be learned from the Report itself and the specific forms of errors identified in the Report would not be repeated elsewhere (Horwell, 2017: para. 24.9). As is so often the case with discussions around reform, the problems and failings of disclosure were identified as being not with the law, but with the *application* of the law.

In the same year the Mouncher Report was published, Her Majesty's Crown Prosecution Service Inspectorate and Inspectorate of Constabulary (2017) published a joint thematic report on disclosure. The report noted that police recording of material was routinely poor, that revelation by the police to the prosecution of exculpatory material was rare, and the Crown Prosecution Service (CPS) were accused of not meeting their important disclosure duties by routinely failing to challenge the police about poor quality disclosure schedules (Her Majesty's Crown Prosecution Service Inspectorate and Inspectorate of Constabulary, 2017: para. 1.3).

To add to the cacophony of calls for improvements to the disclosure regime, in early 2018, the CPS, College of Policing and the broader police service issued *The Joint National Disclosure Improvement Plan* (The Improvement Plan). This built upon the Mouncher Report, agreeing with the central position that the disclosure regime was essentially sound, but that the *enforcement* of these provisions undermined the objectives of the framework. The Improvement Plan did not suggest significant additions to that of Mouncher. Rather, it might be read more as a tightly controlled *mea culpas,* acknowledging the obvious disquiet with disclosure practices (Her Majesty's Crown Prosecution Service Inspectorate and Inspectorate of Constabulary, 2017: 3).

The immediate impact of the Mouncher Report is significant. In the first half of 2018, a Justice Select Committee considered the matter of disclosure within the criminal justice system. Evidence was heard from a small number of interested parties, including practitioners and digital forensic experts (Justice Committee Inquiry Report on Disclosure of Evidence in Criminal Cases, 2018). The resulting report mirrored the findings of the Mouncher Report, and clearly consolidated the foundation of the subsequent

7. Swansea Crown Court, unreported.

Attorney General's Review. The subsequent review and guidelines undertaken by the Attorney General reiterated the findings of the Mouncher Report. Horwell QC's first two objectives of the Mouncher Report, the more holistic enforcement of disclosure requirements and the developed involvement of the defence in the disclosure process, have been vigorously translated into the new Attorney General Guidelines.

In 2018, the newly appointed Attorney General published a further review into disclosure within the criminal justice system (Attorney General's Office, 2018). The Review and the resulting AG Guidelines aligned with the Mouncher Report, and the findings of the more recent publications and communications from criminal justice bodies. The 2020 Guidelines have been updated in 2022, and cover a multitude of disclosure-related issues. This discussion now turns to two of these sections of the Guidelines, the impetus to change cultures around disclosure, and guidance as to pre-charge engagement with disclosure.

Shifting cultures: how to get people thinking

Of the Guidelines' recommendations, the requirement that the prosecution must carry out their disclosure obligations through a 'thinking approach' is the one which places the greatest burden upon prosecution teams (Attorney General's Office, 2020b: para. 82) This nebulous sounding obligation belies a signal to prosecutors, and also to judges, that disclosure is moving up the policy agenda, and investigators and prosecutors will be expected to meet a new standard of disclosure practice. The need for a 'cultural change' in disclosure practices was identified in the Mouncher Report, which stressed the need for an holistic shift in the way disclosure obligations are carried out and enforced.

Written in bold in the 2020 Guidelines is the imperative: 'Disclosure should be completed in a thinking manner, in light of the issues in the case, and not simply as a schedule completing exercise' (Attorney General's Office, 2020b: para. 4). This requirement reflects recognition of the wider and more fundamental failing of the disclosure regime, the way disclosure activities are carried out. The rationale behind the 'thinking approach' is misleadingly simple. When assessing what material should be disclosed, the prosecution team ought to reflect upon the purpose of the disclosure exercise, the duty to uphold the Overriding Objective as laid down in the Criminal Procedure Rules, and all relevant professional ethical considerations. These considerations must be considered against a backdrop of the facts of the investigation and case itself (Attorney General's Office, 2020b: para. 59).

The 'thinking manner' doctrine is not a novel introduction by the Guidelines. Post-CPIA disclosure procedures have highlighted perils of the 'keys to the warehouse' approach to disclosure, the approach whereby the prosecution amass a vast amount of evidence and as long as the defence has the opportunity to access this evidence, a fair trial can be assumed (Attorney General's Office, 2020b: para. 9). Such an approach, particularly in complex investigations, could likely obscure exculpatory evidence, and the resources required to analyse all unused material would be beyond the scope of many accused persons and their legal representatives. In revealing the full volume of information collected by prosecutors and investigators, the defence could be swamped by an avalanche of evidence out of which they had neither the capacity, nor the resources to dig themselves (Attorney General's Office, 2020b: paras. 4 and 135). Post-CPIA, the concern surrounding the keys to the warehouse approach led to increasing pressure on prosecutors to provide accurate disclosure schedules outlining all unused materials in a way which was accessible and useful for the defence. Unfortunately, this process of scheduling has largely been reduced to a tick-box exercise to be hastily engaged with shortly before trial.[8]

The new Guidelines partly address investigatory reluctance to treat disclosure scheduling as a core part of the investigation: 'Prosecutors need to think about what the case is about, what the likely issues for trial

8. Despite the requirements under the CPIA that investigators have full schedules available for the charging decision. This box-ticking approach was also highlighted by Thomas LJ in *R* v *Olu, Wilson and Brooks* [2010] EWCA Crim 2975, [2011] 1 Cr App R 33 [42]–[44].

are going to be and how this affects the reasonable lines of inquiry, what material is relevant, and whether material meets the test for disclosure' (Attorney General's Office, 2020b: para. 4). Rather than going through the motions of categorising material post-investigation, it is clearly hoped that investigators and disclosure officers will more closely reflect upon the core issues of the matter and translate this into reflective case management practices.

What does a 'thinking approach' to disclosure require in practice? Responses during the consultation stage to the Guidelines suggest that 87% of the disclosure officers and prosecutors who responded felt confident they understood what was meant by the 'thinking approach' required by the Guidelines (Attorney General's Office, 2020a). This is largely due to guidance from case law which defines disclosure in a 'thinking manner' as: 'Not undertaking the process in a mechanical manner…keeping the issues in mind…being alive to the countervailing points of view…considering the impact of disclosure decisions…[and] keeping disclosure decisions under review'.[9] Assumedly it is hoped that by carrying out disclosure exercises as the investigation develops, exculpatory material is less likely to be lost en route to trial.

The Criminal Bar Association (CBA) notably disagreed with the majority, and argued a clearer definition of a 'thinking approach' was required. This alternative definition of a 'thinking manner' presented by the CBA included: 'Engaging in a considered, thorough, and analytical approach tailored to each case. Those involved in disclosure should not apply the processes mechanistically but rather consider the material in the context of the case' (Criminal Bar Association, 2020: 5). Despite the CBA's protestations, the AG refused to provide additional or alternative explanation, stating how further explanation would encourage a counterproductive approach, and a shift to a more literal and formulaic disclosure practice which would undermine the intended responsive approach (Attorney General's Office, 2020a)

Whether prosecution teams comply with the Guidelines will fall to courts to determine, and it is to the practicalities of enforcement the discussion now turns.

Enforcing cultural change: consequences for the court

The Attorney General may be confident the Guidelines and corresponding case law provides adequate explanation of what constitutes a 'thinking' disclosure regime, but how the courts will judge whether the requirements have been met is another matter.

Building upon the underlying duties of the court under rule 3.2 of the CrimPRs to actively manage cases, if the Guidelines are to have impact, the role of courts will be significantly enhanced, propelling judicial participation further towards a managerial system. Enforcement of the Guidelines takes judicial influence out of the trial, and into the investigation itself. Criminal courts historically limit comment on investigational procedure to issues of abuse of process.[10] This approach was largely in line with adversarial principles as it spoke to the need for the equality of arms. Yet for the most part, courts do not concern themselves with the lines of inquiry or decision-making of investigators. Rather, this questioning is left to the defence who may want to suggest that other reasonable lines of inquiry were missed, thereby casting reasonable doubt on the guilt of the defendant.

Court involvement in trial management has greatly extended in the last 30 years, leading to some describing the current system as 'managerial', rather than 'adversarial' (Jordanoska, 2017; McEwan, 2011, 2013). Since the introduction of the Criminal Procedure Rules, judges are tasked with proactive management of trial processes and timetables. The extent of judicial involvement in trial management is reflected in the 2015 Review of Efficiency in Criminal Proceedings (Leveson, 2015), which highlights the importance of consistent judicial case management.

9. *R* v *Olu, Wilson and Brooks* [2010] EWCA Crim 2975, [2011] 1 Cr App R 33 [42]–[44].
10. For broader discussion on the exclusion of evidence and the 'punishment' of investigators see: Choo (2015: ch. 7); Keane (2006: 65–66); Roberts and Zuckerman (2010: 185–188).

Under the current CrimPRs, active case management extends to matters of disclosure. Whilst the newest version of the Guidelines has introduced requirements for parties to raise issues of non-compliance with the new disclosure regime to the court (Attorney General's Office, 2022: para. 111), the court itself has a duty to actively ensure compliance with disclosure requirements (Ministry of Justice (2005, updated 2020): r.3.2). When ruling as to compliance with the Guidelines, it is yet unclear whether the court must speak to the *process* of disclosure in that investigation, or to the *individual decisions*. Are courts to limit their judgment to the methodology behind the disclosure process, or will they begin to unpick whether the disclosure officer in that case, at that time, carried out a part of the disclosure process in a thinking manner? To assess these questions, the court will need to take an active role in adjudicating whether disclosure requirements are met. The requirement to fulfil disclosure obligations in a thorough and deliberate manner, specific to the investigation in hand, is no simple task, and it is in the enforcement of this change that we find expectations of greater court and judicial management.

If the Guidelines are to be properly followed, a genuine change in police and prosecution practice is required. Such significant change in culture has arguably not been seen since the introduction of the Police and Criminal Evidence Act 1984 (PACE). Like PACE, such a culture change will come slowly and only if courts are willing to effectively punish prosecutorial teams for poor practice. The significance of changing cultures was not lost on commentators and those introducing the CrimPRs (Garland and McEwan, 2012). When measures are introduced in which courts are to fundamentally change role, a broader change in culture is required to ensure all actors in the justice system move in the same direction.

'Culture' is an imprecise term and within the CrimPRs and the new Guidelines, 'culture' refers to attitudes and practices of actors and stakeholders, from suspects to police to lawyers to judges (Attorney General's Office, 2018). When striving for cultural change, the AG will hopefully have learned lessons from the introduction of the CrimPRs, and the consequences for the gatekeepers and enforcers of this change in culture, namely the judiciary, both at first instance and in any appellant courts. When referring to the enforcement of the CrimPRs, McEwan reflected: 'Where participating lawyers do not spontaneously embrace the new cultural ethos, the system inevitably will rely upon judges to encourage or enforce the desired behaviour' (2013: 207). This is as true today as it was then and this is where the role of the court will need to significantly alter if the Guidelines are to take effect.

Changing prosecutorial culture will require judges to probe into investigations, not just pre-trial and trial procedure. The Guidelines have introduced mechanisms to assist the court to judge whether disclosure has been completed in a thinking manner. Since the introduction of the CPIA, the prosecution team has documentation requirements in the form of evidence schedules (Ministry of Justice, 2020).[11] The Guidelines reiterate the requirement for schedules to demonstrate 'a transparent and thinking approach to the disclosure exercise' (Attorney General's Office, 2020b: para. 59) The Guidance introduces further requirements for documentation of the disclosure processes in the form of Disclosure Management Documents (DMDs) to be submitted in the Crown Court and, in some instances, the Magistrates' Court (Attorney General's Office, 2020b: paras. 92–99). This further requirement for documentation of the disclosure process will provide courts with more evidence from which to judge whether the process has been conducted in a thinking manner. There are, however, limits to the potential success of further documentation as creating additional paperwork will be meaningless if the result is the disclosure officer fills in DMDs just before trial, as they often do with the evidence schedules (Horwell, 2017).

If the court is to make any meaningful judgment as to the adequacy of the disclosure process, it will need to delve behind the DMDs and have far greater scrutiny of investigations. Such judicial involvement in investigations, albeit *ex post facto*, is reminiscent of the inquisitorial tradition. As was raised in the Scottish review of disclosure, the Carloway Report, when what occurs pre-trial is determinative of the case, this aligns with inquisitorial systems (Carloway, 2011). At the very least, the Guidelines will

11. These schedules must be submitted using the relevant 'MG6' form.

require the court to take an active managerial approach in order to fully ascertain whether the disclosure practices in any individual case have been executed in a 'thinking manner'.

Pre-charge engagement under the guidelines

The Guidelines introduce a re-envisioning of the role of the suspect and marks a more significant move away from adversarialism than the proposed change in disclosure culture (Attorney General's Office, 2020b; Annex B). In a traditional adversarial system, the defendant is construed as an equal party to the 'fight' for truth. A combatant can use whatever methods are at hand to put up the best defence against their accuser, including non-engagement. Damaska (1973: 563) succinctly identified the role of the parties in the adversarial system: 'The prosecutor's role is to obtain a conviction; the defendant's role is to block this effort.'

The focus of adversarialism is the trial, and so the treatment of suspects rather than defendants often gets overlooked. Pre-charge, the suspect is not yet a defendant and so is subject to different treatment and protections to defendants within the trial. For example, inferences stemming from silence have not traditionally had any impact upon the individual until they become a defendant; investigators may find silence suspicious but the threat of inferences to suspects can only materialise at trial. However, the distinction between the suspect and the defendant should not be overstated. The Royal Commission (1993) concluded the difference between a suspect and a defendant to be only a matter of timing, and case law has settled that the police interview and trial are to be seen as part of the same continuous process.[12] The outcome of the investigation is not yet known to the suspect and so their response to the investigative process is inextricably bound to their potential treatment at trial. This was recognised in the Carloway Report in Scotland: 'The more the interview is perceived as part of the trial, the more that protections, which were traditionally provided only in the context of court room proceedings, will require to be afforded at the outset of a suspect's detention' (Carloway, 2011: 6.0.11).

In a traditional adversarial system, the distinction between the status of a suspect and a defendant is less because the battle lines are drawn from the beginning. In the current managerial-hybrid system of England and Wales, disclosure obligations are placed on the defendant from the first appearance in court (Johnston, 2020; Owusu-Bempah, 2017). The new disclosure Guidelines have the potential to push this obligation back to the first police interview.

The Guidelines reconstitute suspects as central sources of information, with incentives to participate, and a framework within which investigators may feel galvanised to pursue pre-charge engagement. Annex B of the Guidelines fleshes out a vision for voluntary engagement in the disclosure regime between the point of first PACE interview, and charge (Attorney General's Office, 2020b: para. 3). This engagement can be informal and not subject to the protections of or, as is discussed below, the potential negative inferences from, silence which are afforded under PACE or the Criminal Justice and Public Order Act 1994 (Attorney General's Office, 2020b: Annex B, para. 7). A written record must, however, be kept (Attorney General's Office, 2020b: Annex B, para. 20). Annex B gives a non-exhaustive list of the types of engagement this new regime may involve, and these are replicated in full here:

(a) Giving the suspect the opportunity to comment on any proposed further lines of inquiry.
(b) Ascertaining whether the suspect can identify any other lines of inquiry.
(c) Asking whether the suspect is aware of, or can provide access to, digital material that has a bearing on the allegation.
(d) Discussing ways to overcome barriers to obtaining potential evidence, such as revealing encryption keys.

12. *R* v *Howell* (2003) Crim LR 405.

(e) Agreeing any key word searches of digital material that the suspect would like carried out.
(f) Obtaining a suspect's consent to access medical records.
(g) The suspect identifying and providing contact details of any potential witnesses.
(h) Clarifying whether any expert or forensic evidence is agreed and, if not, whether the suspect's representatives intend to instruct their own expert, including timescales for this.

Before considering the potential ramifications of the Guidelines, we should first consider the changes at face value. In the paragraph preceding this list of recommended disclosure activities, the Guidelines state pre-charge engagement to be a: 'voluntary engagement *between the parties* (my emphasis)' (Attorney General's Office, 2020b: Annex B, para. 3). However, Annex B lists disclosure activities indicating the engagement is largely undertaken *by* the suspect, *to* investigators. If followed in their entirety, these provisions would result in the accused: responding to the investigation so far and indicating next steps for the investigators;[13] providing all digital material which may 'have a bearing on' the case alongside passwords and the best way to explore these materials;[14] providing all medical records; directing the investigators to possible witnesses and revealing their contact details; and laying out the defence strategy for expert witnesses. Short of asking suspects to lock themselves into their own cells, it is hard to imagine what else the accused could do to assist the investigators under the new pre-charge regime.

This imbalance struck several responders to the Attorney General's Review. The Magistrates Association raised the concern that pre-charge disclosure exercises must not focus purely on the suspect; both parties must positively engage with the process to allow suspects to understand relevant lines of inquiry, and provide useful information (The Magistrates' Association, 2020) The asymmetry of the new regime is further illustrated by the lack of subsequent guidance to investigators. Though directing the *accused* in how best to engage with pre-charge disclosure, there is no suggestion of how investigators might alter their interview and pre-charge disclosure strategy to facilitate the activities outlined in Annex B. The potential consequences of the new regime are discussed below, but it is important to note at this stage that guidance as to interview procedures and advice has not changed.[15] There have been many updates and reports relating to the National Disclosure Improvement Plan,[16] and the Criminal Procedure and Investigations Act Codes of Practice, the document to which all criminal investigators look for guidance, was updated in 2020 (Ministry of Justice, 2020). This updated version does little more than restate the Guidelines.

The CPS Guidelines on disclosure have been added to by a Disclosure Manual, updated in October 2021 (Crown Prosecution Service, 2021). This manual reads largely as a restatement of the previous CPS guidance with minimal additional reference to the new AG Disclosure Guidelines. There is very little reference to pre-charge disclosure procedures other than deeming it 'essential that disclosure issues are addressed pre charge *where possible* [my emphasis] and that disclosure is approached by both investigator and prosecutor through the exercise of judgment and not simply as a schedule completing exercise' (Crown Prosecution Service, 2021). The focus remains on readiness for trial. There is no new guidance regarding the role of the suspect in pre-charge disclosure. At present, the police, other criminal investigators and the CPS have little direction on the new Guidelines, other than that which is contained in the Guidelines themselves. Consequently, we must look to the Guidelines to understand the new role of investigators under the new regime.

13. This is the collective consequence of paras a and b (Attorney General's Guidelines, 2020).
14. The collective consequence of paras c, d and e (Attorney General's Guidelines, 2020).
15. At least, there is currently no publicly available guidance to police forces or investigators. This does not mean that individual forces or organisations have not internally released guidance.
16. Of the three phases of the National Disclosure Improvement Plan, there have been reports published for phases one and two, and the third phase has been outlined. All reports can be accessed through the CPS website.

Disclosure by investigators is only indicated in paragraph a of Annex B. In the process of 'giving the suspect the opportunity to comment on any proposed further lines of inquiry', the investigators may need to reveal some of the details of these further lines of inquiry (Attorney General's Office, 2020b). More likely is the encouragement of suspects to propose these lines of inquiry, placing the focus of the recommendation firmly on the accused. Investigators may reveal some lines of inquiry, but the purpose of this provision is to elicit comment from the accused on these lines, rather than to directly encourage investigators to reveal details about the investigation. This is significant. It reveals the central purpose of Annex B: to encourage suspects to assist in investigations actively and fully, rather than to create a culture of transparency between suspects and investigators.

The emphasis upon suspect disclosure concerned several respondents to the Review (Attorney General's Office, 2020a), particularly with the need for further protections for suspects in the form of legal advice and assurance that participation in pre-charge disclosure would not raise adverse inferences for the accused (Criminal Bar Association, 2020). There is limited Legal Aid post interview but pre-charge, potentially creating a two-tier system for those who can pay privately and those unrepresented who may not be able to engage with the process, or may do so in a way which further undermines their rights (Criminal Bar Association, 2020). The Guidelines encourage legal advice for suspects engaging with pre-charge disclosure (Attorney General's Office, 2020b; para. 6, Annex B), but does not address the very real financial implications of this.

Concern regarding non-engagement leading to adverse inferences was also stressed during the consultation phase (Criminal Bar Association, 2020). The Guidelines speak to the broader issue of inferences from silence during pre-charge engagement which may occur outside of a formal PACE interview (Attorney General's Office, 2020b: para. 7) However, this part of the guidance is directed at investigators to be cautious as inferences cannot be drawn from silence during engagement other than a formal interview; this does not prevent investigators referring to material disclosed during informal pre-charge disclosure. In fact, investigators are encouraged to do so: 'investigators and prosecutors should be aware of the advantages of holding a further formal interview, including the fact that suspects will have been appropriately cautioned and that any answers given will be recorded' (Attorney General's Office, 2020b: para. 7) there is nothing in the Guidelines which prevents investigators from engaging in pre-charge engagement and then reinterviewing suspects, presenting them with evidence garnered in consequence to pre-charge communication. If this subsequent evidence is presented in compliance with PACE requirements and in line with special cautions under the Criminal Justice and Public Order Act 1994, there is no reason why inferences cannot be drawn in court.[17]

Arguably, much of the information suggested by the Guidelines under Annex B is already asked of the accused during interview. Paragraphs a and b might be reduced to 'if not you, then whom?'. The suggestion that the accused may be given 'the opportunity to comment on any proposed further lines of inquiry' is highly likely in practice to translate into the suspect being asked who else to investigate. These are already standard questions which are used to identify reasonable lines of inquiry. However, the provisions within Annex B must be read holistically. As a list of examples of behaviour suspects are encouraged to engage with, Annex B puts the investigative onus onto the accused. Effectively, the accused is being asked to disprove their guilt by assisting the investigation, an approach directly opposing fundamental adversarial principles such as the presumption of innocence.

In addition to providing alternative lines of inquiry, and identifying potential witnesses and suspects, in effect, the new regime encourages the accused to make gathering of other evidence easier for the investigation team. For example, investigators may discuss 'ways to overcome barriers to obtaining potential evidence, such as revealing encryption keys' (Attorney General's Office, 2020b; Annex B). The only way to 'overcome barriers' to revealing encryption keys will be for the accused to tell the investigators the

17. Barring exclusion under s.78 of PACE.

passwords, or at least, who may have these passwords. The role of investigators will likely be limited to asking the accused to provide this information, and no doubt to remind their legal representative of the provisions within the Guidelines.[18] What of the devices themselves? Paragraph c refers to the accused giving access to digital material, assumedly yet unknown to the investigator: 'whether the suspect is aware of, or can provide access to, digital material that has a bearing on the allegation' (Attorney General's Office, 2020a). Paragraph f relates to suspects consenting to the accessing of medical records. Under the Police and Criminal Evidence Act 1984, these materials are easily obtainable by the investigators where they relate to a reasonable line of inquiry.[19] The provisions in Annex B suggest that the accused might give access to these materials where the police cannot obtain them under their current powers, assumedly because they do not sufficiently relate to a reasonable line of inquiry. This is a troubling development which appears to encourage suspects to provide material beyond that which reasonably refers to the investigation.

The (lack of a) reasonableness requirement

Respondents to the Review raised concerns with the impact pre-charge engagement may have upon the rights to privacy of complainants and witnesses (Attorney General's Office, 2020a). This is expressly addressed in the Guidelines, with investigators reminded to balance the rights of witnesses and complainants against the broader objectives of the investigation (Attorney General's Office, 2020b: para. 13). There is, however, no corresponding concern for the privacy of the suspect. Within the CPIA Code of Practice, investigators are required to pursue all reasonable lines of enquiry which point towards or away from the guilt of the suspect (Ministry of Justice, 2020: 3.5). The language of reasonableness is not harnessed in the Guidelines when advising investigators. The Code of Practice still applies to investigators, but the lack of an explicit reasonableness provision exposes suspects to investigatory fishing tactics.

In place of a reasonableness requirement, the Guidelines lay down an 'appropriate' test: 'In some investigations it may be appropriate for the officer in charge of the investigation to seek engagement with the defence at the pre-charge stage' (Attorney General's Office, 2020b: para. 25). Further definition of 'appropriate' is not given beyond that such engagement is appropriate where it is '*possible* [my italics] that such engagement will lead to the defence volunteering additional information which may assist in identifying new lines of inquiry' (Attorney General's Office, 2020b: para. 25). One reading of this approach is that it allows the investigating officer leeway to decide whether to begin the pre-charge engagement process based upon the circumstances of that case, and where there is a chance of uncovering relevant information. This test could have been written more narrowly, replacing 'appropriate' with 'reasonable', and 'possible' with 'likely'. However, the AG was less concerned about fishing tactics by investigators than some of the respondents to the Review.

Under the auspices of pre-charge cooperation, suspects could be pressured by investigators to reveal increased levels of information, regardless of whether it is pertinent to the current inquiry. This lack of reasonableness requirement is more concerning in light of the provisions under Annex B which can apply where the accused is unrepresented (Attorney General's Office, 2020b: 35). The failure to insert a reasonableness criterion into Annex B is all the more puzzling given there is also no guidance as to the consequences of non-cooperation with pre-charge engagement. There is also no consequence for incidences where the accused deliberately misleads the investigators as to additional material or lines of inquiry. Suspect engagement with pre-charge disclosure currently remains voluntary but there is potential for investigatory exploitation of these provisions.

The landscape into which the Guidelines have been introduced is one in which the role of the defendant is already uncertain. The defendant can no longer choose not to engage with the judicial process

18. The position of s. 49 of The Regulation of Investigatory Powers Act 2000 within the developing disclosure regime will be explored in future research.
19. Section 23(1), The Criminal Procedure and Investigations Act 1996 Code of Practice, para. 3.5.

without facing strategic and evidential consequences, but safeguards have not been introduced to bolster the position of those subject to the accusations of the state. Increasingly accusations by the state are being disposed of pre-trial through guilty pleas and therefore not in a public arena, or with the evidential and procedural safeguards extended to the suspect as are afforded to the defendant (Hodgson, 2020).

In light of the shifting arena of justice from trial to investigation, special consideration will now be given to the right to privilege against self-incrimination, and the central role this right plays within adversarialism and the changing pre-charge disclosure regime.

The right to privilege against self-incrimination

The right to the privilege against self-incrimination underpins the principle of the burden of proof. It is for the state to prove their case, and not for the suspect to assist them in their investigations. Because the state holds the burden of proof, investigators on behalf of the state should treat all suspects as innocent until proven guilty, and a logical consequence of this presumption of innocence is there should be no expectation of compliance or cooperation with investigations (Dennis, 1995; Owusu-Bempah, 2017).

The privilege against self-incrimination can be considered together with the right to silence as both relate to silence. Traditionally, the privilege is triggered at the point the suspect is required to provide incriminating information under some legal duty (Redmayne, 2007). It would be anathema to this privilege if suspects were under a legal duty to comply with criminal investigations on pain of sanction. If the new pre-charge expectations were enforced by sanction, this would create direct conflict with rights against self-incrimination. If enforcement of pre-charge cooperation will not apply to self-incriminating information, this could weaken the effectiveness of the new regime. In practical terms, were pre-charge obligations enforceable though respectful of the privilege against self-incrimination, defence lawyers could circumvent this requirement by advising their clients to invoke their privilege. The problem with such an approach would be the inferences drawn in court, but in practical terms, the sanctions for non-compliance could be rendered worthless.

The right to privilege against self-incrimination only applies to evidence, not all communication with the state (McEwan, 2013). Yet any pre-charge obligation to assist in securing one's own conviction, rails against the spirit of the privilege (Owusu-Bempah, 2013). If the purpose of the privilege is to protect the accused against improper compulsion by the state, as ruled in *Saunders* v *United Kingdom*,[20] then the issue for self-incrimination privileges is not what is then done with the information, but the broader context within which the information is ascertained (Redmayne, 2007). Like the right to silence, the privilege against self-incrimination has significant symbolic value when faced with police interview (Hodgson, 2020). However, whilst use-immunity could be used as a practical tool by investigators to encourage pre-charge disclosure against individuals identified as secondary or less culpable suspects on the condition that the information would not be used at trial, this approach contradicts the argument that the privilege plays a very important role in safeguarding suspects during the investigative stage (Owusu-Bempah, 2017). Moreover, restricting the privilege at interview on the grounds of non-use at trial potentially undermines personal dignity, privacy and the right to distance from the state.[21]

Respondents to the Review raised fears around further dilution of the right to silence and this led to the introduction of provisions whereby even when a suspect exercised their right to remain silent, pre-charge engagement may still proceed, allowing a defence representative to engage and suggest further lines of

20. (1997) 23 EHRR 313.

21. The need to balance the right to privacy with the right to a fair trial is acknowledged within the Guidelines (Attorney General's Office, 2020b: paras.11–13).

inquiry in appropriate cases (Attorney General's Office, 2020a). This provision does not instil use-immunity, nor does it speak directly to the issue of privilege against self-incrimination; a legal team could pass on inculpatory material during pre-charge disclosure without the suspect themselves speaking directly with the investigators.

The ramifications of pre-charge engagement provisions within the Guidelines are discussed at length below, but on the face of the Guidelines, fundamental characteristics of adversarialism are evidently being further eroded.

Suspect assistance and adversarialism

Placing obligations on suspects upsets the adversarial balance. The underlying rationale behind prosecutorial disclosure obligations is the bolstering of the equality of arms (Spencer, 2016) and the connected upholding of the burden of proof upon the state. If obligations are also placed on the defence, this undermines the balancing mechanism of prosecutorial obligations.

Within an adversarial system, the defence team decides how best to respond to the state. This response can include, to some extent, non-participation. Following the Guidelines' extension of suspect engagement with disclosure, a new course is being taken which undermines adversarialism long before charge and which instils a construction of the pre-charge stage more akin to an inquisitorial one, with a centralized state enquiry (Hodgson, 2020)

The adversarial defendant has been greatly altered by procedural initiatives such as the inferences around defendant silence, the introduction of the Overriding Objective imposed on all parties by the Criminal Procedure Rules, and case management procedures which require defence teams to reveal details of their case before trial (Ministry of Justice, 2005 updated 2020).[22] The Overriding Objective fundamentally shifted the duties of defence lawyers and the role of the defendant, from opponents equally matched against the prosecution, to a subject of the court with a remarkable sharing of the duty to acquit the innocent and convict the guilty (McConville and Marsh, 2015).

The Overriding Objectives is being co-opted into the pre-trial process to circumvent trials altogether. Before the introduction of the Guidelines, contesting charges was actively discouraged through defence disclosure requirements and sentence discounts for early pleas (Hodgson, 2020). The Guidelines will likely enhance this circumvention of the trial, with more time spent on pre-charge meetings between investigators and prosecutors, and likely an increase in guilty pleas (Attorney General's Office, 2020a). Respondents to the Guidelines' consultation process raised the concern that the burden of proof might subtly shift to the defence as investigators feel less obliged to find exculpatory lines of inquiry (Criminal Bar Association, 2020).

Looking forward: Ramifications of the new disclosure regime

This article has argued thus far that the changes introduced by the Guidelines reflect a significant move away from adversarial principles towards an incoherent system of justice. Attempts to change prosecutorial cultures, and ultimately compliance with disclosure obligations, will potentially require heavy-handed judicial intervention, moving the system squarely into a managerial position. The consequences of pre-charge expectations resituate the suspect as a source of information, with the potential for the undermining or removal of key safeguards usually available under adversarialism and enforces the

22. Leading to the contradictory cases of *Firth* v *Epping Magistrates' Court* [2011] EWHC 388 (Admin) and *R* v *Newell* [2012] EWCA Crim 650 . The former held that pre-trial case management documents submitted to the court could be used to draw inferences against the court, the latter held this to be undesirable and excluded under s. 78 PACE.

purpose of the investigation to be the finding of truth (Johnston, 2020). This becomes problematic where many police investigations do not result in a trial due to early pleas as the forum for criminal disposal is moved from the public trial, with the safeguards of active defence counsel, to a less-public, pre-trial forum (Hodgson, 2020). Such a system is reminiscent of inquisitorialism, with state-centred investigation and disposal, but with none of the safeguards such as a judicial overseer.

It is when assessing the potential trajectory of these measures that we see their true significance. So soon after the introduction of the 2020 Guidelines, much of this analysis relies on informed conjecture. The following argument is based upon a reading of the Guidelines in a wider history of disclosure amendments and broader changes to criminal investigation and trial, considering the potential consequences of the new cultural changes to disclosure obligations and pre-charge engagement provisions. These consequences are assessed separately for investigators and suspects, the former primarily assessing the potential ramifications of cultural change, and the latter upon the impact of pre-charge disclosure expectations. As the Guidelines largely place obligations on the suspect, more discussion is generated for the potential consequences for suspects.

Consequences for investigators

The likelihood of police and investigator engagement with the new processes of pre-charge disclosure is debatable. Investigators may be keen to assert the pre-charge process, but less enthusiastic about disclosing more information at earlier stages in the investigation. Regarding compliance with demonstrating a 'thinking manner', having repeatedly acknowledged that the police and the CPS fail to satisfactorily comply with existing disclosure requirements, it is rather optimistic of the Attorney General to expect further disclosure of investigation details to suspects pre-charge.

There are three likely consequences of the new Guidelines for investigators. First, the requirement for more resources as documenting a thinking process will take time, as will complicating pre-charge processes. Second, investigations are exposed to the threat of over-expansion due to multiple lines of inquiry and lastly, prosecution teams might be open to court sanctions for disclosure failings.

The requirement for additional investigatory and prosecutorial resourcing is almost inevitable given additional documentation requirements to demonstrate a 'thinking approach' to disclosure (Attorney General's Office, 2020a). The second consequence arises where suspects deliberately lie to investigators under the auspices of engaging with Annex B expectations. The Guidelines warn investigators to be aware of suspects deliberately frustrating investigations through abuse of pre-charge engagement, but beyond suggesting seeking advice from the CPS regarding lines of inquiry, no further guidance is given (Attorney General's Office, 2020b: Annex B, para. 15). Such misleading information could, if resulting in significant divergence of police resources, result in a charge of wasting police time,[23] though such a consequence is rare given the high charging threshold (Crown Prosecution Service, 2019). However, if the pre-charge *expectations* are to turn into pre-charge *obligations*, the introduction of sanctions for non-compliance will likely follow, and it is to such sanctions that the discussion now turns.

Sanctions[24] against the prosecution are seldom used, partly because there is no 'suitable stick' to use against the prosecution team (Johnston, 2020). Severe punishment of the prosecution for procedural breaches in the form of case dismissals arguably punishes the victim(s) of that particular offence, and further wastes public funds. S.10 (2) and (3) of the CPIA indicates that prosecution failings for some disclosure breaches such as failure to comply with time limits, are unlikely to result in staying proceedings unless the accused is denied a fair trial. Lesser sanctions are likely to include reduction in sentence where

23. S.5(2) Criminal Law Act 1967.

24. The court has a broad range of powers to hand down sanctions under r.3.5 of the CrimPRs.

a conviction is secured.[25] When sanctions in disclosure cases were reviewed in 2012, a general exclusionary sanction for failure to comply with disclosure requirements was considered disproportionate (Gross and Treacy, 2012).

Compliance with executing duties in a 'thinking manner' is likely to result in further investigative engagement with suspects during the inquiry process in order to demonstrate the thinking manner. For example, the Guidelines suggests pre-charge engagement measures may include giving the suspect an opportunity to comment on further lines of inquiry. Revealing so much about the investigation at an early stage may seem anathema to some investigators, but the Guidelines suggest the prosecution team are in no way to 'keep their powder dry' (Gross, 2011). Should the courts enthusiastically implement the shift in disclosure culture indicated by the Guidelines, investigators will be under a greater onus to demonstrate steps taken to reach out to the defence early in the investigation, thereby increasing the use of pre-charge engagement.

The systemic consequences of the Guidelines further emphasise the aim to dispose of criminal complaints as efficiently as possible, and ideally pre-trial. The resulting system will increasingly reflect inquisitorial elements such as the greater emphasis on the pre-trial processes as a site of fact-finding (Hodgson, 2020). Consequently, and flagged in the Carloway Report, where cases are most likely determined in a police station rather than a court, that system is effectively inquisitorial (Carloway, 2011). This is problematic in the English and Welsh system which has strict separation between investigation and prosecution teams, and accountability of police conduct is limited (Hodgson, 2020).

Consequences for suspects

The consequences of the new Guidelines upon suspects may be negligible. At present, where a defendant does not voluntarily engage with disclosure processes envisaged by the Guidelines, 'that decision should not be held against him at a later stage in the proceedings' (Attorney General's Office, 2020b: 35). If there are truly no sanctions for not engaging with this process, there seems little advantage for suspects to comply. It is likely that without consequences, defence solicitors will maintain a stance of waiting to see the evidence and then advising accordingly, not actively encouraging their clients to assist investigations.

The Attorney General is likely aware that to effect change in pre-charge engagement, there must be some incentive to participate, or some sanction for refusal to engage. With the introduction of the 2020 Guidelines, the Attorney General has co-opted the charging stage to help motivate suspect cooperation with disclosure. At Paragraph 5 of Annex B lies the seemingly innocuous but very revealing clause that 'Pre-charge engagement is encouraged by the Code for Crown Prosecutors and may impact decisions as to charge.' (Attorney General's Office, 2020b: 35). From the Guidelines, it is unclear as to what impact suspect engagement with disclosure might have, and the CPS Disclosure Manual only refers back to the Full Code Test (Crown Prosecution Service, 2018). The Code makes only two references to disclosure, once to highlight CPS obligations to the court (Crown Prosecution Service, 2018: para. 2.5) and once to restate CPS advisory roles to the police in matters of disclosure and general case management (Crown Prosecution Service, 2018: para. 3.2).

Paragraph 5 of the Guidelines is directed toward the investigatory and prosecution team, than to the suspect. This paragraph intimates that prosecutors are permitted to consider the way the parties have engaged in disclosure, when deciding to charge, and the details of any charge. Such discretion may extend to areas such as the murky waters of turning Queen's evidence, or to broader application of the charging threshold (Crown Prosecution Service, 2019). Future empirical research is needed to better determine the impact of disclosure upon charging decisions.

25. *R* v *R* [2015] EWCA Crim 1941.

If the new regime is to create change, updated Guidelines must introduce enforcement measures. The following discussion explores what these measures might be. Future consequences of non-cooperation with pre-charge disclosure may fall into two broad categories: evidential inferences or sanctions. Inferences for non-cooperation may be suggested by the court, similar to such measures as have been successfully used in encouraging suspects to talk at interview (McConville and Marsh, 2015). There may also be additional procedural sanctions such as the inability for suspects to request further disclosure activity by the prosecution or financial sanctions.[26]

Evidential inferences from non-compliance

When the provisions tempering the right to silence were first suggested, critics clamoured that these measures directly undermined the presumption of innocence.[27] But quickly this inference become an everyday part of the criminal law process. Moving the status of suspect involvement in pre-charge disclosure, from voluntary with no/few consequences, to voluntary but from which the court may draw inferences, is not a great leap.

Gimson (2020) argues that since the limitations to the right to silence, the passive defendant is perceived as guilty. In many ways, what suspects do not say is perceived as being as relevant as what they do say (Hodgson, 2020). Gimson (2020) further raises the thorny issue of expectations around how innocent behaviour is then constructed within the criminal process. Does the innocent accused have nothing to hide and therefore might be expected to speak? The routine use of inferences from non-cooperation with pre-charge disclosure requirements could reconfigure the defendant as being a far more active participant in the criminal process. In this participatory system, the defendant must demonstrate her innocence though participation (Gimson, 2020). In practical terms, the option not to participate may effectively be replaced with a guilty plea.

Participatory systems[28] prioritise efficiency and truth-finding, and do not have the same emphasis upon defendant rights inherent in an adversarial system (Owusu-Bempah, 2013). Again, we see a partial replacement of adversarial principles, without a coherent foundation to backfill the safeguards removed by the change (Johnston, 2020). The result of the reconfiguration of the defendant as performative and as a source of investigatory information moves the defendant out of the adversarial system, and consequently removes the associated protections within adversarialism (Owusu-Bempah, 2013).

It is easy to see how prosecutors might utilise inferences stemming from non-cooperation at interview stage. In particular, cut-throat defences where the other parties were not identified from the beginning will be an attractive target for prosecutors. Arguably, such arguments can be made regardless of the disclosure requirements. Questioning why the specific defence was not raised in interview is a common examination approach. However, this line of questioning will potentially be made all the stronger when bolstered by a judicial summing up which draws specific attention to the lack of pre-charge cooperation by the accused.

Under the current incarnation of the CPIA, defendant non-compliance with disclosure obligations allows the court to 'make such comment as appears appropriate'[29] or the court or jury 'to draw such inferences as appear proper'.[30] These inferences currently refer to defence statements and witness notices, but were inferences to be extended to the refusal to engage in pre-charge disclosure, this could easily be achieved by adding such situations to those already listed within s.11 CPIA. The extent to which defence teams fully comply with their obligations, and how harshly the judiciary respond to such partial compliance, is unclear. It is common for defence statements to lack the required degree of

26. For example, in the case of non-submission of defence statements in Magistrates' Courts resulting in defendants not being able to make applications for further disclosure under s. 8 CPIA 1996, or inferences drawn from non-disclosure in the Crown Court under s. 11 CPIA 1996.
27. For a longer history of the right to silence see: Quirk (2017).
28. Of which inquisitorialism is one as the role of the suspect is as a central source of intelligence.
29. S.11(5)(a) CPIA.
30. S.11(5)(b) CPIA.

detail, but the court rarely resorts to making inferences or directing inferences to be made (Johnston, 2020; Redmayne, 2004). Courts' reluctance to sanction the defence becomes particularly relevant when considering the range of sanctions which courts could use to enforce the substance of the Guidelines.

Sanctions for non-compliance

Courts have a range of sanctions which can be levied against parties failing to comply with procedural obligations.[31] Sanctions range from the general displeasure of the judge (not to be underestimated (Garland and McEwan, 2012)), wasted cost orders, or the more extreme sanction, the exclusion of evidence.[32] The first of these sanctions, the general displeasure and approbation of the judge, is the most common, and courts are reluctant to sanction defence teams beyond this measure for several reasons. One is the potential exposure to appeal. Another is the fear that factually innocent defendants might be denied a defence should exculpatory evidence be excluded (Gross and Treacy, 2012).

Wasted costs orders are a possible but problematic sanction because they often punish the wrong party (Johnston, 2020). When used against the prosecution they just move money around different public bodies. When used against the defence, they are often against individuals and legal teams which are significantly financially stretched. Nonetheless, courts will impose wasted costs orders on defendants, including in the case of disclosure failures where it is found the defence deliberately manipulated court process.[33] The exclusion of evidence is a nuclear option, but such a step may result in the exclusion of important exculpatory evidence which would seriously undermine the fairness of trials, not to mention undermining the Overriding Objective (Garland and McEwan, 2012).

There is a more tactical reason for the avoidance of enforcement sanctions for non-cooperation with pre-charge requirements. If such cooperation is coerced, this may result in suspects refusing to cooperate as any good-feeling or willingness to assist would be damaged by the threat of sanctions (McEwan, 2013). Moreover, the rationale for sanctions is often the rectifying of harm such as the failure to comply resulting in the wasted time and resources of the opposition, for which there ought to be compensation. Repeating a question raised by Redmayne (2007) in relation to the privilege against self-incrimination: what harm does a defendant do by refusing to cooperate in his own investigation?

The harm of non-participation on the part of defendants is dependent upon the role of the defendant within the broader justice system. This harm may be extensive in a system for which the purpose is to call the defendant to account (Duff et al., 2007). In such a system, non-cooperation would undermine the very purpose of the trial. However, suspect non-cooperation in a system which construes the trial as a forum within which the state is called to account for its accusation would have less far-reaching harm (Owusu-Bempah, 2017). There may also be harms to third parties caused by the lack of defendant cooperation. Regardless of the factual guilt of the accused, there could be harm to victims of that particular incident, or harm to future victims should there be reoffending. However, attempts to prevent these harms through blanket sanctions of non-co-operators risks punishing the factually innocent.

Sentencing, utilised either as an incentive or a deterrent, could be harnessed to enforce compliance with pre-charge disclosure expectations. Alongside the acknowledgement of an early plea (Sentencing Council, 2017), reward of the suspect's full cooperation in the investigation could become a reality. An approach which rewards cooperation aligns with current approaches to sentencing in a way in which 'punishment' for non-cooperation would not. It is one thing to reward cooperation, and another

31. Specifically regarding disclosure, sanctions for non-compliance of obligations by the defence are given under s.11 of the CPIA.
32. For an overview of the history of sanctions for the defence non-compliance with r. 1.3 CrimPRs, see (McConville and Marsh, 2015).
33. *R* v *SVS Solicitors* [2012] EWCA Crim 319.

to penalise the defence for non-cooperation. The effect is the same, but introducing a formal system of sentencing recognition for cooperation with investigations would be the easier step in the enforcement of the Guidelines. To some, this is a dystopian future, but again, previous generations thought the same about the tempering of the right to silence.

Regardless of the mechanisms harnessed, obligatory participation in pre-charge disclosure is possibly the next step in the disclosure journey. As with other aspects of criminal process, this next step will likely not be the result of considered design but will result from 'reforms aimed at obtaining the perceived benefits of the defendant's participation, with little, if any, regard for their wider consequences' (Owusu-Bempah, 2017: 179).

Conclusion

The changes introduced by the new Guidelines on disclosure cut the remaining threads between the English and Welsh justice system and adversarialism. This article has demonstrated how steps to change the disclosure culture of investigatory and prosecution teams through the Guidelines 'thinking manner' spell a further injection of managerialism. Courts' requirements to rule on whether disclosure processes have been carried out in a 'thinking manner' may require courts to undertake active and time-consuming steps to delve back through the details of investigations. This requirement radically changes the role of the court, potentially making it an overseer of investigations. Given the newness of the Guidelines, it is not yet clear how members of the judiciary, or indeed members of the investigatory teams, will feel about this intrusion, or whether resources and attitudes will stretch far enough to accommodate the AG's vision for this new culture.

This article has further illustrated how changes to pre-charge disclosure undermine the protections afforded to suspects under adversarialism, with the suspect expected to play an active role in their own investigation. At present, these suggestions for pre-charge cooperation are voluntary, but it would be surprising if these measures are not given teeth in the future. This article has explored the potential ramifications of enforced pre-charge cooperation, postulating the ease with which the role of the suspect might be radically transformed by the new Guidelines. Paying particular attention to the Guidelines' requirements to create cultural change in the execution of disclosure obligations, and the alteration to disclosure expectations during pre-charge engagement, these Guidelines have rendered the status of English and Welsh criminal procedure internally incoherent. The result of this incoherence is the introduction of a new role for courts as adjudicators of criminal investigations, and more significantly, the undermining of suspect and defendant rights.

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