

*Can – and should – lawyers be considered ‘appropriate’ appropriate adults?*

Keywords: PACE, appropriate adults, legal aid, lawyers, vulnerable suspects

Abstract: This paper furthers the debate on vulnerable suspects by bringing together research on appropriate adults and criminal defence lawyers. The Police and Criminal Evidence Act (PACE) 1984 forbids all lawyers from acting as appropriate adults. The courts, in very limited case law, have taken a different approach, leaving a space in which lawyers might be considered suitable to fill the gap left by an appropriate adult’s absence. This account is supported by exploring the views of custody officers on the appropriate adult and its use, drawing upon empirical data. Fieldwork with defence lawyers is then explored to highlight how lawyers might have some of the suitable characteristics of the appropriate adult but could not realistically perform such duties in practice (or conceptually). This paper illustrates that lawyers are ill-equipped to deal with a client’s vulnerability and therefore argues that they should never be viewed as an ‘appropriate adult replacement’.

## **Introduction**

The appropriate adult safeguard was introduced by the Police and Criminal Evidence Act (PACE) 1984 to provide additional protection for vulnerable suspects. Rather than being contained within PACE, the safeguard is found in the Codes of Practice C, D and H (see Home Office 2018a; 2018b; 2017). The appropriate adult should support, assist and advise the suspect, facilitate communication between the suspect and the police, ensure that the police are acting fairly, and ensure that the suspect understands their rights (Home Office 2018a: 11.17). Young suspects, i.e. those under the age of 18 (known under Code C as ‘juveniles’) and adults with who meet one or more of the criteria under the functional test<sup>1</sup> (Home Office 2018a: 1.13d; Note 1G)<sup>2</sup> are considered vulnerable. It is recognised that vulnerable suspects are ‘often capable of providing reliable evidence’ but it is similarly recognised that they may nevertheless ‘without knowing or wishing to do so, be particularly prone in certain circumstances to provide information that may be unreliable, misleading or self-incriminating’ (ibid: Note 11C). In addition to their presence at interview, appropriate adults should also be present during charge (ibid: 16.1) and cautioning (ibid: 7 & 10.12), and when warnings in relation to adverse inferences are given (ibid: 10.11, 10.11A), samples – such as fingerprints, photographs and DNA – are to be taken, or intimate searches conducted (see ibid: Annex A: 2B). Yet, this does not mean that appropriate adults are always present in such circumstances; their absence is particularly marked in relation to adult suspects (see NAAN 2015; XXXX).

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<sup>1</sup> Whether because of a mental health condition, mental disorder or otherwise (Home Office 2018a: 1.13d; Note 1G).

<sup>2</sup> The 2018 iteration of Code C introduces a functional test for adults – see para 1.13d.

This paper brings together two empirical studies, which complement one another by providing an insight into the role of the appropriate adult and the problems with giving such duties to lawyers.<sup>3</sup> It offers largely unpublished material from these studies and extends previous analyses to provide a new argument that takes forward the debate around the appropriate adult safeguard. Study 1 looked at custody officers' operationalisation of the appropriate adult safeguard, using non-participant observation of custody officers at the 'booking-in desk' and semi-structured interviews with officers. Two custody suites were visited (across two English cities) with consent obtained from 31 custody officers (20 from Site 1 (CO1-20) and 11 from Site 2 (CO21-24, 27-31, 33)). Study 2 looked at defence lawyers' treatment of suspects and defendants in a 12-month fieldwork, split between the three largest criminal legal aid firms in another English city. Participant observation of nine months was divided equally between the firms, followed by a month each of semi-structured formal interviews with the same 29 lawyers (F1 L1-10; F2 L11-19; F3 L20-29). For the purposes of the present paper, the data from both studies was analysed using thematic analysis, a method for identifying, analysing and reporting patterns across a data set allowing the authors to draw out new insight for the current exploration (Braun and Clarke 2006). This paper is one of the first to address how custody officers and courts interpret the appropriate adult safeguard while also considering whether lawyers are 'appropriate' appropriate adults. Literature exists on both appropriate adults and criminal defence lawyers separately but the originality of this paper is in bringing these two areas of research together for the first time in academic scholarship. The insight this provides allows for a more holistic understanding of the experience of vulnerable suspects and furthers the debate on the role of the appropriate adult in the criminal justice system.

This paper begins by outlining the role of the appropriate adult safeguard and how this has been interpreted by the courts before addressing the way custody officers have interpreted the appropriate adult's role, focusing on the provision of the safeguard for adult suspects. The paper moves on to look at the role that defence lawyers should perform toward their clients; a role which might make it tempting to suggest that they could perform the appropriate adult's function(s). Thereafter, the paper considers the challenges faced within the lawyer-client

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<sup>3</sup> These studies have each been reported in part elsewhere, wherein fuller statements of their individual research methods are provided: Study 1 on police custody officers (xxxx) and Study 2 on criminal defence lawyers (xxxx). The term lawyer is used generically here. In Code C, the term 'solicitor' is used to refer to solicitors and accredited or probationary representatives (see Home Office 2018a: 6.12).

relationship and the obstacles that render it unwise to accord the role of the appropriate adult to lawyers. In conclusion, the paper argues that lawyers should never be viewed as a replacement for appropriate adults.

### **The appropriate adult safeguard: core dimensions and key challenges**

A range of individuals could act as an appropriate adult: a relative or friend, a volunteer or employed person from a scheme, a social worker, or even someone plucked from the street. The appropriate adult could therefore be well-known to the suspect, someone the suspect is familiar with, or someone completely unknown. As noted above, the appropriate adult should support, assist and advise the suspect, facilitate communication between the suspect and the police, ensure that the police are acting fairly (Home Office 2018a:11.17; NAAN 2011), and ensure that the suspect understands their rights. The suspect's wishes remain paramount. For example, whilst it is typically preferred that an appropriate adult is someone with experience or training in relation to the suspect's vulnerabilities, the wishes of the suspect are, if practicable, respected (Home Office 2018a: Note 1D). Moreover, whilst legal advice can be requested by the appropriate adult, the suspect is not forced to consult with a lawyer against his/her will (ibid: 6.5A).

There is a debate as to which 'type' of appropriate adult is preferable. Parents and relatives, for example, may be preferred by the suspect because they know the suspect better (Jessiman and Cameron 2017. See also Rock 2007). Yet, relatives may be ill-prepared, unsupportive, inactive, combative, or too emotionally involved (Evans 1993; Evans and Puech 2001; Littlechild 1995; Pierpoint 2000; Quinn and Jackson 2007). Relatives may, however, be preferred in the interests of expediency and cost-effectiveness (Pearse 1995; Pierpoint 2001). Volunteers are also relatively cost-less but may be unrepresentative in terms of ethnicity, age, gender, etc., or may be unavailable when called upon. They may also be pro-police, unqualified, or illustrate a reluctance to intervene (Littlechild 1995; Pierpoint 2000; White 2002. See also NAAN 2015). Social workers, whilst better trained (see White 2002; Hodgson 1997), may be incorrectly assumed (by the police) to be familiar with the appropriate adult's role and may therefore not be informed by the police of what the role requires (Pierpoint 2000). They may also be keen to avoid conflict with the police and may be viewed, by suspects, as part of the system (ibid). Whilst professionalisation may provide the solution (Pierpoint 2011), service users may prefer

someone who they can trust and place confidence in, and who knows about their individual needs (Jessiman and Cameron 2017).

The role of the appropriate adult is also somewhat unclear – in part because of vague guidance (HMIC 2015; XXXX) but also because of the appropriate adult’s interpretation of their role (Pierpoint 2006).<sup>4</sup> It is unequivocal that the appropriate adult is independent of the police but this does not mean that he or she should necessarily be ‘on the side’ of the suspect (see Kemp and Hodgson 2016: 142). They may find it difficult to intervene or may be discouraged from doing so (Hodgson 1997; Medford, Gudjonsson and Pearse 2003; White 2002). Appropriate adults must facilitate communication but this could be taken to mean that they are present to assist the police. The appropriate adult must be present to ‘support, advise and assist’ but the extent to which this support, advice and assistance extends remains unclear: does this extend beyond helping the suspect with understanding their legal rights, facilitating communication between the police and the appropriate adult, and ensuring that the police act ‘fairly’? The phrase ‘ensure that the police are acting fairly’ is also far from problem-free. It is difficult to define fairness and enabling an individual to understand their rights is not necessarily the same as empowering them to enforce those rights.

The appropriate adult, even if trained, may be unable to adapt to the specific communicative needs of the suspect, supposing that the appropriate adult knows what these needs are. This aspect of the appropriate adult’s role may be construed to meet police objectives: the appropriate adult could be used to extract, from the suspect, accurate and admissible evidence. Tensions may also arise regarding the right to silence (Brown 1997; XXXX), although Code C now makes it clear that whilst the appropriate adult can assist with communication, he or she must also respect the suspect’s right to say nothing (Home Office 2018a: 2A). Definitional ambiguities may be compounded by inconsistencies in national provision (see NAAN 2015; Perks 2010). These inconsistencies can impact upon the training and general effectiveness of appropriate adults (NAAN members are provided with 20 hours of training and can attend Professional Development Days), and could result in differential or no service (Bradley 2009) and/or delays in the appropriate adult’s attendance (and therefore the suspect’s detention)

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<sup>4</sup> The role can encompass, inter alia, due process, crime prevention, emotional support, and welfare (Jessiman and Cameron 2017; Pierpoint 2011).

(Jessiman and Cameron 2017; Pierpoint 2011; Skinns 2011; Skinns 2011. See also Hodgson 1997).

Ideally, the appropriate adult will have some knowledge of mental health and learning difficulty/disability, in addition to knowledge on the factors influencing vulnerability (see Gudjonsson 2006). Whilst Evans (1996) has suggested that the appropriate adult should have some legal knowledge, it is undoubtedly preferable that, because the appropriate adult is not in a position to give legal advice, he or she obtain a lawyer for the suspect. Perhaps more important is that the appropriate adult know about the role of the custody officer and of the various custody processes. The appropriate adult should also be comfortable with asking the police to explain their role and is prepared to intervene when required, and should be someone with whom the suspect has empathy (Pierpoint 2000: 388 citing *DPP v Blake*).

Jessiman and Cameron (2017) in their recent research involving service users have mapped out what could be considered the ‘ideal’ appropriate adult.<sup>5</sup> The appropriate adult should be calm, caring, and calming. He or she should have psychiatric knowledge and be trained in aspects of learning disability. Service users also highlighted the importance of the appropriate adult being respectful of race, culture, and sexual identity. The ideal appropriate adult is also protective, kind, confident, trustworthy, honest, a people person, a good listener and good communicator, the same gender as the suspect, has an ability to keep matters confidential and knows the correct procedures.

As the role of the appropriate adult is somewhat vague, it is quite difficult to say who and what the appropriate adult should be and is perhaps easier to map out who and what the appropriate adult should not be. The appropriate adult must not be a police officer or someone employed for or engaged in police work, a solicitor, an independent custody visitor (Home Office 2018a: Note1F), or a probation officer (Williams 2000 citing *R v. O’Neill* (1990)). The appropriate adult must also not be someone ‘inappropriate’: that is lacking empathy (*DPP v Blake*), ‘vulnerable’ themselves (*R v Morse*)<sup>6</sup>, unable to speak English adequately<sup>7</sup>, anti-suspect or pro-police (although see *R v Jefferson*). The courts will consider such issues when determining whether a confession should be excluded on the basis that something said or done is likely to

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<sup>5</sup> The exact qualities and knowledge desired differed between those with learning disabilities and those with a mental health condition.

<sup>6</sup> Although see *R v W*. See also Hodgson 1997; Littlechild 1995; Fennell 1994; Pierpoint 2001; White 2002; Williams 2000.

<sup>7</sup> Although see *H and M v DPP*.

have rendered it unreliable under s 76 PACE. The courts may also consider whether the admission of evidence would render the proceedings as a whole unfair under s 78 PACE. Failing to provide an appropriate adult or one that could be considered ‘appropriate’ can be taken into consideration for the purposes of ss 76 and 78 PACE. S 77 also allows for a jury direction. This applies within a trial on indictment, where the prosecution case rests wholly or substantially on confession evidence, and where the defendant is considered ‘mentally handicapped’ within the meaning of s 77 (3)<sup>8</sup> and had confessed in the absence of an ‘independent person’ (i.e. an appropriate adult, a social worker, or a lawyer). Here the jury are warned that the confession was given in such circumstances. Yet, the courts have not always been consistent and have moved towards a less robust approach towards breach of PACE and the Codes, including non-implementation of the appropriate adult safeguard (see Hodgson 1997. See also XXXX).

#### **Appropriate adults and Legal Representation: the approach of the courts**

In what limited case law exists in relation to appropriate adult provision,<sup>9</sup> the courts have considered if and when the absence of an appropriate adult (or one who can be considered ‘appropriate’) should give rise to exclusion of evidence and in what instances the absence of an ‘independent person’ should warrant a warning to the jury. In such cases, the courts have elaborated upon the role of the appropriate adult. The appropriate adult may be ‘a more experienced person’ present to assist a young person who may ‘sometimes say things they do not mean’ either through a fear or inability to express themselves (*R v. Weekes* at 225). For a young suspect, the appropriate adult is someone older who can assist in answering questions and advising them if they cannot (ibid at 227).

The absence of an appropriate adult can be further compounded by a lack of legal advice. For example, in the case *Aspinall*, the appellant (A) challenged the admission of evidence on the basis of s 78 PACE. A, who had been convicted of conspiracy to supply a Class A controlled drug, suffered from schizophrenia and had been seen by the police surgeon on the request of

**Commented [A1]:** This is your section so ignore me if I am wrong. Would it be better for these two paragraphs to come a little earlier? The previous paragraph moves on from what the AA should be by saying that it is easier to say what it should not be – but, with these two paragraphs here, it feels as though we are going back to what it should be, which seems to affect the flow a little bit. Could it go before the bit about the role being unclear?

<sup>8</sup> The defendant must be in a ‘state of arrested or incomplete development of mind which includes significant impairment of intelligence and social functioning’ – s 77 (3) PACE.

<sup>9</sup> Much of the case law is also rather dated. There have been more recent judgments – see *R v Beattie (Alfred David)* [2018] NICA 1; *Miller v DPP* [2018] EWHC 262 (Admin); *R. v W* [2010] EWCA Crim 2799; *R. v Rashid (Yahya)* ([2017] EWCA Crim 2 – however these do not address the question of admissibility of evidence where a solicitor or legal representative has been present but an appropriate adult has not.

the custody officer. The police surgeon assessed A as fit for interview and he was interviewed without an appropriate adult present. Evidence was adduced at trial to suggest that whilst A was 'likely to have understood the nature of the procedure and questions, and would have been able to answer questions' (at 118), he was potentially less capable of coping with questions about his suspected involvement in the offence and may have given answers in a bid to be released early from custody. The court, in considering the appeal, considered that A had a mental illness and that the custody officer was aware of this, thus requiring the attendance of an appropriate adult in accordance with Code C 1.4 considered alongside Note 1G. Yet, the courts also considered that, with the exception of a brief conversation with the duty solicitor, A was not provided with legal advice. This issue, the court noted, compounded the unfairness of the breach of Code C. A's appeal was therefore successful on the basis that the admission of evidence rendered the proceedings, as a whole, unfair.

Evidence can, however, remain admissible where a solicitor has been present but an appropriate adult has not, as in the case of *Lewis*. Here the court considered that nothing was said or done to render the confession unreliable (s 76 PACE) and the admission of evidence, in contrast with *Aspinall*, did not render the proceedings unfair (s 78 PACE). They also considered that, for the purposes of s 77, a solicitor was an 'independent person'. Whilst they had not erred in their interpretation of s 77 (i.e. that a solicitor can be considered an 'independent person'), they had erred in their interpretation of the other two provisions (ss 76 and 78 PACE). They had erred because, although prior to 1991 a solicitor or independent custody visitor could act as an appropriate adult, when *Lewis* was considered, solicitors and independent custody visitors could not act as an appropriate adult (see Palmer and Hart 1996: 63. See also Home Office 2018a: Note1F). Whilst accepting that the solicitor may be devoid of experience in assisting those with a 'mental handicap' (at 261), the courts considered that the roles of solicitor and appropriate adult were 'very similar'. They did not, however, fully discuss the purported similarities. The approach of the courts in this case suggests 'that the role of the appropriate adult could be incorporated into that of the solicitor, potentially negating the need for their presence at all' (Ventress, Rix and Kent 2008: 377). The unsuccessful appeal in *Law-Thompson* was also not helped by the fact that the appellant had a solicitor during his police interview.<sup>10</sup> The courts have interpreted ss 76 and 78 such that the presence of a lawyer

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<sup>10</sup> The appellant – considered 'mentally disordered' for the purposes of Code C – was interviewed without an appropriate adult present and it was submitted that evidence must be excluded in line with s 78 PACE. The appeal court considered not the apparent unlawfulness or irregularity of the evidence

can mitigate a breach of Code C for non-implementation of the appropriate adult safeguard. Thus, where a lawyer is present and, in breach of Code C, an appropriate adult is not, the evidence will nevertheless remain admissible. Therefore, given the way in which the admissibility rules are deployed, the courts have, de facto, allowed for the lawyer to replace the appropriate adult. The question that must herewith be raised is: should the presence of a lawyer be enough to render evidence admissible?

Whilst the courts, for the purposes of ss 76 and 78, must consider reliability and fairness rather than breaches of the Codes per se, it would be within their remit to hold that a breach of the Code by its very nature is likely to render the confession unreliable or the proceedings unfair. The courts do, however, seem to take more seriously the appropriate adult safeguard for young suspects, when compared with adult suspects (see XXXX).<sup>11</sup>

#### **Appropriate adults and Legal Representation: the approach of custody officers**

Custody officers focus predominantly on maintaining the integrity of evidence when deciding whether to call an appropriate adult. This is unsurprising, given that the origins of the appropriate adult safeguard and the rhetoric within Code C focuses almost exclusively on safeguarding evidence (XXXX). It is also unsurprising as custody officers are police officers and will, for the most part, display crime control objectives and values. For example, custody officers may often only invoke the safeguard where they think that the case is likely to end up in the Crown Court and questions be asked regarding admissibility of evidence for non-implementation of the appropriate adult safeguard (ibid). For custody officers, then, the appropriate adult is present mainly to facilitate communication between the suspect and the police and to ensure that the suspect understands what is being asked of him or her:

Obviously as part of the investigation there might be key evidence that comes out or questions that come out that are a bit difficult for them to understand and the appropriate adult...is that safeguard to make sure that they do understand what's happening, do

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but rather 'its effect, taken as a whole, upon the fairness or unfairness of the proceedings' (citing Lord Nolan in *R v Khan (Sultan)*); it was necessary to illustrate how the mental disorder resulted in unreliability.

<sup>11</sup> For example, in the more recent case of *R (on the application of HC)* ([2013] EWHC 982 (Admin)) the courts extended the appropriate adult safeguard to 17-year-olds so as to produce consistency with the remainder of the youth justice system (See XXXX).



understand the reasons why they're here, do understand why the investigation's being conducted the way it is, to assist them with reading documents they might need to read (CO11-1).

Why do we have appropriate adults? It's to help the person understand what's happening and to put it into their terms and to be independent to explain these things rather than it being a police officer.... With an appropriate adult when they're explaining their roles to the detained people, hopefully they'll explain to them they're totally independent, they're not police, they're not solicitors, they're purely to assist them with their learning issues and to guide them (CO22-2).

In the same vein, however, CO22-2, when discussing the Traveller community, said that those who were 'intelligent' but could not read or write would only be provided with an appropriate adult if they were not assisted by a lawyer:

They, as part of their lifestyle, have decided that... they won't do reading and writing the same as I do but, you know, some of these people are extremely intelligent people. So, yeah, they can't read and write, but am I going to get an appropriate adult for them? Not really, not unless...if they don't have a solicitor then, yeah, perhaps I'll consider an appropriate adult purely to help them with their reading and writing.

Thus, for CO22-2 the lawyer could act as an appropriate adult replacement. Such sentiments were echoed by other officers. For example, CO1-1, when explaining when he would not obtain an appropriate adult for someone he thought was vulnerable, stated 'because you could have somebody who doesn't read or write but doesn't need an appropriate adult as they have a solicitor'. Similarly, an appropriate adult may therefore be provided 'because not everybody has a solicitor, not everybody has a legal representative who normally would ensure that all those basic rights are being met' (CO28-2). Where the custody officer was sitting on the fence with regard to the appropriate adult safeguard, the presence of a lawyer may encourage him not to obtain call an appropriate adult:

If they think that an individual is borderline requiring an appropriate adult, if they've asked for a solicitor then we'll perhaps think, 'Well, it's not as if it's going to be them on their own with the interviewing officer, or officers, they've got somebody on their

side, in the form of a solicitor anyway.’ So that kind of replaces the need for an appropriate adult. It’s certainly in terms of...having an ally (CO8-1).

Where a suspect was not supported by a lawyer, the appropriate adult would be used so that ‘they’ve got that back-up of having someone with them’ (CO11-1). Such views were expressed despite the fact that lawyers were viewed as ‘goal-oriented’ and ‘self-interested’. CO2-1 explicitly commented that lawyers may have different motives when compared to the appropriate adult:

The appropriate adult’s motives are purely from a welfare and health perspective, to make sure that that person is OK and understanding everything and I would argue that solicitors’ motives and we, as the police, motives [sic] are not wholly that.

Lawyers are indeed different from appropriate adults and, since 1991, the intention has been to make that distinction clear by preventing lawyers from acting as appropriate adults. The lawyer’s role is ‘to get the client off’ or to obstruct justice (Blackstock et al 2010: 345) whereas the appropriate adult, by contrast, is independent. Yet, because the lawyer provides some sort of ‘back-up’ (CO11-1 above) and is considered to be someone who can facilitate communication and should be able to ensure that the interview is being conducted properly and fairly, the custody officers are content for lawyers to act as appropriate adults. Compounding this issue is the fact that the courts have not condemned such an approach; rather, they have implicitly endorsed it. Yet, unlike the appropriate adult, the lawyer may not provide the reassurance and empathy that the appropriate adult may provide. In the following section, we will map out why, pragmatically and conceptually, the lawyer cannot and should not act as an appropriate adult.

### **Why might lawyers be able to replace the appropriate adult?**

Courts and custody officers<sup>12</sup> have suggested that the criminal defence lawyer can act as an appropriate adult replacement. Through an examination of the nature of the lawyer-client relationship, and issues such as communication and empathy, this section will use empirical research to highlight ways in which lawyers might be considered as ‘appropriate’ in fulfilling

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<sup>12</sup> For further discussion on how the courts interpret the appropriate adult safeguard as compared with how custody officers view the role, see XXXX.

the appropriate adult's role. The ideal lawyer will forge good relations, providing a figure that can be trusted to listen to and support those suspected and accused of crimes. This is certainly what the lawyers in Study 2 aspired to.

There are a range of duties in and around the area of criminal procedure that have been ascribed to appropriate adults, and can understandably be claimed to fall within the existing remit of defence lawyers, particularly on a practical basis. These include ensuring the suspect understands their rights, advising and assisting, and taking an active role to intervene if the police are considered to be acting unfairly. The key role of the defence lawyer is to provide access to justice for their clients, which for Newman (2013: 1-2) is about maintaining fairness through ensuring that criminal procedure is working to uphold the rights of those suspected and accused of crimes. The lawyers in this research recognised such, with the following sentiments echoed across the cohort:

Our job is to make sure justice is done...we are on the side of the suspect, making sure they get justice (F3 L24).

Its lawyers that make sure there is justice...clients need us, the courts need us: we make sure our clients get justice (F2 L15).

As such, lawyers work to facilitate justice and ensure that those suspected and accused of crimes attain justice through communicating rights, providing advice and preventing the police from doing something they should not. Taking such responsibilities a stage further, Raaijmakers et al (2015: 187) argue that:

[T]he role of the lawyer in a criminal procedure is essentially different from the role of other legal actors (e.g. the police, courts and prison guards) as the lawyer is not a legal authority. Whereas, a legal authority is concerned with enforcing the law under orders of the state, the lawyer's role is to safeguard defendants' rights.

One example of this difference is that the lawyer-client relationship is premised on the lawyer carrying out the wishes of the defendant. More than the police, courts or prison guards, it is defence lawyers who are primarily tasked with facilitating the wishes of those suspected and accused of crimes. As such, the lawyer-client relationship should be based on the lawyer's

ability to engage with the client. Other roles of the appropriate adult speak toward more interpersonal issues with the suspect, and between the suspect and police such as emotional support through developing trust with the suspect (see Jessiman and Cameron 2017) or facilitating communication between the suspect and other parties such as the police (see McKinnon, Thorp and Grubin 2015; Bucke and Brown 1997). These qualities of the appropriate adult might also be seen as relevant when considering the importance of developing good relations between lawyer and client in order to realise the professional mandate of the criminal defence lawyer and thus to achieve justice (Newman 2013). The lawyers in this study were aware of the significance of their role in relation to their clients: lawyers placed much importance in their relationship with clients. Client-centred practice was the ideal lawyers in this study purported to provide:

A client-centred firm is what anybody should be. You're not doing it properly if you're not client-centred because that's the whole idea of the job (F1 L6).

Our clients are at the heart of all that we do (F3 L20).

Such a notion draws on Felstiner (2001: 191), for whom 'the production of justice might be defined as a dimension of the relationship of lawyers to clients'. This vision of justice depends on the health of the lawyer–client relationship. Young and Wall (1996: 6) have explained that 'justice seems...to imply access to legal aid and lawyers'. The relationship between lawyers and their clients has thus been established as of great importance. Defence lawyers, then, might be deemed as an 'appropriate' appropriate adult due to the extent that they focus on developing a good relationship with those suspected and accused of crimes. This, in theory, may allow them to fulfil many of the key support mechanisms enshrined in the appropriate adult role.

Lawyers recognised that at the core of their role was the need to foster these good relations with their clients. The ideal approach places the interests of the client at the forefront (Mungham and Thomas 1983). Such rhetoric is outlined in leading criminal practitioner guides such as that offered by Cape (2006: 7), which explains that:

The client may be in a variety of emotional states which will require an approach that is both empathetic and inspires confidence. Empathy may be demonstrated by being willing to listen to what the client has to say...allow the client the time and the

opportunity to express how and what they are feeling.

Lawyers in this study stressed the importance of empathy and the ability to relate to the situation the clients were facing, and recognise the experiences they had gone through. Such can be seen in these quotes:

When you've done this job long enough, you really get a sense for how they work, what makes them tick. I understand what they're feeling, what they need (F2 L24).

They live very different lives [to lawyers] but you have to try to understand them, know what they're talking about (F1 L2).

Taking this further, Binder et al (2004) urge lawyers to focus on the client as a holistic entity and not view the legal problem in isolation. The lawyer–client relationship can be conceptualised as counselling; lawyers need to be willing to listen to clients' concerns. Lawyers in this study would frequently discuss how clients were more than just their criminal acts, recognising the wider social context in which they operated and, as such, the importance of their dealing with the client as a human being not just a criminal. Such understanding is shown in these quotes:

At times, this job is more like social work...it isn't about the law (F1 L8).

These are people who have problems. You need to understand [and] accept that there are problems that need to be dealt with...to help them (F2 L16).

The additional issues lawyers identify includes lack of familial/state support, educational problems, mental health disabilities, learning difficulties and personality disorders. Lawyers, then, recognised clients as potentially vulnerable and did conceive of the importance of seeing their work as about more than simply dealing with legal problems in and of themselves.

Without time and space, the relationship between lawyers and their clients would likely lack rapport, thus hindering communication and restricting understanding (Tickle-Dengen and Rosenthal 1990: 286–87). This perspective has been presented as the 'contact hypothesis', which suggests that interpersonal contact is the only way to construct successful, stable, human

relationships (Allport 1979: 261–82). The ideal approach, then, constitutes the client as a human being. In this research, the lawyers considered it vital that they were to be seen treating their clients with respect:

There has to be that respect there (F1 L4).

You've got to treat them with respect. At the end of the day, it's all about respect. My father always told me to respect other people and that's what I try to do with my clients (F1 L7).

It was through giving the clients respect that the lawyers could earn their trust. Trust was identified at the heart of a functioning lawyer-client relationship:

Clients have to trust us and be able to have confidence in us. So much of our work is repeat work, clients who keep coming back to us.... Clients know they can rely on us (F1 L2).

Ultimately, empathy and communication will be grounded in the trust that lawyers need to earn from their clients – and this was something that these lawyers recognised and claimed to be able to achieve. Lawyers in this study presented an image of a healthy lawyer–client relationship as the ideal form of practice that they aspired to. This appeared to be a relationship constructed upon the positive attitudes that lawyers held towards their clients; clients were important, deserving and at the forefront of all the lawyers sought to do. In such circumstances, it is easy to see how some, such as the courts and custody officers, might be tempted to consider the defence lawyer as a potential appropriate adult. In some ways, the appropriate adult's role could be read as a logical extension of the relationship that lawyers seek to build with clients – this appears to be the line taken by courts and custody officers, as entertained and explored in this section. This ideal of the healthy lawyer-client relationship, though, has been tarnished and faces serious practical impediments. Lawyers simply do not have the resources to act as appropriate adults, particularly with changes to legal aid and the managerial focus of the criminal justice process. Within this, the ideal of treating clients as human beings is increasingly difficult to realise. It appears that lawyers find it hard enough to perform the full functions of their own role without taking on additional duties. More than simply suffering from pragmatic difficulties, though, there are conceptual reasons for rejecting the insinuation

from courts and custody officers that lawyers merit being considered as appropriate adult replacements. The paper goes on to explain that it is an error to assume that the presence of a lawyer should mitigate the absence of an appropriate adult in breach of Code C, thus highlighting that we need also take issue with the courts' and custody officers' contention on a conceptual level.

### **Why might the lawyer be an 'inappropriate' appropriate adult?**

In the previous section, the ideal of the lawyer-client relationship was drawn out to show why the courts and custody officers might see lawyers as 'appropriate' appropriate adults. Using the same empirical research into criminal legal aid lawyers, this section will comment on how such lawyers do not appear to be appropriate both pragmatically and (perhaps more fundamentally) conceptually.

There are barriers restricting criminal legal aid lawyers in their ability to properly carry out their role for defendants. This may mean that they struggle, and often fail, to provide the ideal service previously described (McConville et al 1994; Newman 2013; Smith 2013). Such barriers render lawyers unable to realise the interpersonal ideals of the lawyer-client relationship such as empathy and communication that made them potential appropriate adult replacements. One of the barriers is procedure. Formal regulation has been extended over the past two decades specifically restricting defence lawyers' ability to provide active defence, reducing the bond between lawyers and clients by giving the defence greater obligations to the prosecution through co-option into the mass production of guilty pleas (see McConville and Marsh 2014; Johnston and Smith 2017; Owusu-Bempah 2017). Of greater significance as to whether the lawyer could be an 'appropriate' appropriate adult, though, are the lack of funding, restricting the ability of lawyers to work for their clients. A recent example is the protracted battle – including unprecedented industrial action – between the government and defence lawyers over criminal legal aid fees. The coalition government cut criminal legal aid fees by 8.75% in 2015, which made it increasingly less profitable and is a major contributory factor to the fear most criminal legal aid practices will soon go out of business (Hyde 2015). Those who remain will find it increasingly difficult to turn a profit. This latest example is only part of a fight between governments of all persuasions and the legal profession that stretches back a quarter of a century (see Hynes and Robins 2009; see also Cape and Smith 2017: 63) and has heightened under austerity.

The disincentivisation of the lower fees can only lead to an inferior product being offered to clients by lawyers (Fenn et al 2007). Marketisation of legal services, as identified by Sommerlad (2008), means that even the most committed lawyers reach a point where they feel the need to compromise their principles for practical business concerns. Such is shown in research with solicitors (Welsh 2017) and barristers (Alge 2013). When lawyers are faced with the choice of the best but lengthiest/expensive option versus an acceptable cheaper/quicker option that suits them rather than their clients, they will often go with the latter (see Tata and Stephen 2006). Profitability becomes the be all and end all as firms fight to sustain themselves in a challenging marketplace. The focus thus moves away from doing justice to simply staying in business; it is almost inevitable that attention will thus be drawn away from clients. The goal is to get clients in and out as quickly as possible as recognised by lawyers in this research:

The funding isn't there anymore. It used to be you could do a proper job and feel good about your work (F1 L4).

If you want justice, you need to pay lawyers to do our jobs properly. It's as simple as that (F1 L1).

A key issue was that lawyers no longer felt they had the time to spend with clients. Lawyers had internalised the need to be as efficient as possible as in these quotes:

I don't have time to waste with clients, spending time (with clients) is not what I'm paid to do.... This job is all about efficiency (F1 L2).

You learn to be quick, you have to. You have so much to get through and the funding is just not there to do anything differently (F3 L25).

As a result, lawyers did not feel able to deal with vulnerable clients and those that required more time and effort to support. Lawyers had recognised the social aspect of their work, and even celebrated it at times during the more laid back interviews at their offices. While stressed at court, though, they would often bemoan their being expected to take on a role that took them beyond legal issues. Lawyers felt they did not have time to deal with such additional duties, as in these quotes:



We're not social workers and we shouldn't be expected to do a social work job as well as our own...we simply aren't paid enough, no (F2 L18).

Lawyers are not equipped to deal with the needs of complex clients who might need additional care and attention (see also Swift et al 2013). Going beyond the legal matters relevant to processing a case was considered an extravagance that these lawyers were frequently unable to entertain. Sommerlad (1999; 2001; 2016) has shown that the importation of managerialism into legally aided criminal defence is changing the character of representation provided. The only way for practice to persist is through discontinuous representation, putting business imperatives over service quality as McConville et al (1994) noted amongst the (then) emerging breed of managerial firms. The resulting service that can be provided may not be the service that lawyers want to supply (see Sommerlad and Wall 1999). We have seen the decline of criminal legal aid work from a high status profession toward 'the factory model of practice' (Sommerlad 1999: 315) or the *sausage factory* model of criminal defence (Newman 2013). Law firms have become more efficient, which realistically entails high turnover and swift throughput of clients, with little individual contact. This contact is replaced by an approach to legal practice that treats clients as a mass of criminals to be processed. Many lawyers in this research reflected on how the structural and systematic pressures they now faced had led their work to take on a production-line form:

Compared to how it used to be, it's like a factory these days. You don't spend that much time with people, just deal with them as quickly as possible, rush it all through (F3 L27).

We can only survive by taking a factory approach, and I think the quality will go. We just churn out case after case (F1 L9).

Legal practice for these lawyers was reduced to what one referred to as a 'numbers game':

That wasn't lawyering. That was a numbers game. The point becomes to get through as many clients as quickly as I can. That's how it is now.... There's no time for access to justice – you're just unable to provide any level of service to the clients. All you focus on is working through it as quickly as possible (F1 L5).

The case was one in which the lawyer had not read the file beforehand and was picking it up as the clerk and prosecutor explained what would be happening. The lawyer explained how he had to 'blag' his way through the hearing without making any obvious mistakes. The reality of legal practice was less working for individual clients than it was clearing a set number of names from a list. When it comes to working through the lists, the numbers the lawyers are counting off are largely guilty pleas. As such, lawyers' work is preoccupied with the routine production of guilty pleas, workers on a conveyor belt of justice (McConville et al 1994; Newman 2013). To modify Packer's (1968) crime control analogy – lawyers are simply helping pass clients and cases along from one place to another as they trace their inevitable journey towards conviction. The lawyers in this study no longer felt (willing or) able to stand up for their clients, compromising the lawyers' due process role in the adversarial system of justice. The adversarial ideal has been all but eroded as lawyers are made to fail their clients (Cape 2004; McConville and Marsh 2014; Newman 2016).

A major impact of the focus on efficiency was that lawyers seemed to lack the ability to empathise with their clients. With clients reduced to numbers on a file, products to be passed along a conveyor belt, the lawyers in this research had lost touch with the fellow humanity of their clients: the relationship aspect of the lawyer-client relationship had fallen away. The individual stories, the particular emotions, the essence of that person accused of a crime had been replaced by a focus on dealing with them as quickly as possible. Clients were, at best, a problem to be dealt with and, at worse, an inconvenience to be wished away. The following quotes express sentiments echoed by all lawyers in this study:

The thing you notice with our clients, after a while, is that they're all fools...so much stupidity (F1 L5).

I'm quite glad he hasn't turned up; he's a whinging little git (F3 L 24).

These lawyers were responding to clients who wanted to have something explained pertaining to their case or were worried about what might happen to them. Clients were idiots who should not be listened to or moaners who had to be ignored. Either way, lawyers in this research could ignore the wishes of clients and deign to engage with them. Lawyers were absorbed by their own business needs. They took a profit-centred approach that seemed to close off any client-

centred approach, as would be required to represent the kind of idealised practice earlier described. With empathy denied by the working practices of these criminal legal aid lawyers, their appropriateness as appropriate adults must be questioned.

What we see are criminal defence lawyers struggling to do their own jobs properly in representing clients on legal matters, let alone being in a position from which to take on further duties through being tasked with appropriate adult responsibilities. Lawyers in this study had abandoned their support role and given up on the kind of trust-building needed to develop empathy. With the basics of legal representation under such challenge from legal aid cuts and the rise of the managerial ethos, lawyers are less suitable, in practice, as appropriate adults than they might seem in theory. It is not realistic to expect appropriate adult functions to be incorporated into the work of lawyers, no matter how much overlap there may be supposed between the appropriate adult role and the ideal image of the defence lawyer. Even if one were to take the court and custody officer position that combining duties would be possible and, even, desirable, such change would likely have the impact of providing further strain on lawyers while rendering the appropriate adult safeguard merely symbolic. Lawyer research suggests that those suspected and accused of crimes need more assistance not less. If lawyers cannot fully fulfil the role of ally; it is far from appropriate to take the appropriate adult safeguard away from those defendants that might need it.

These practical differences are not the only cause for concern: conceptual distinctions can be made between the lawyer and the appropriate adult. Whilst the appropriate adult's role is not particularly well-defined (see XXXX), there are, as addressed above, certain tasks that the appropriate adult must fulfil and certain qualities the appropriate adult should have. For example, the appropriate adult should be impartial whereas the lawyer is supposed to be the thorn in the police's side and must act only in the interests of their client; a lawyer is not a go-between, they are first and foremost a *zealous advocate* (Smith, 2013). By these principles firmly grounded in the adversarialism of English criminal justice, the ideal defence lawyer is unabashedly biased in their fighting for defendant interests; the lawyer is a vigorous and fearless partisan for the accused. Further, the purpose of the lawyer is to 'obstruct justice' (Blackstock et al 2010: 345), whereas the appropriate adult must not be obstructive (see Home Office 2018a). Moreover, it must not be forgotten that the appropriate adult's role was established because it was believed that vulnerable suspects required more support, i.e. support in addition to legal advice. Whilst it may be tempting to have a lawyer fulfil the role of the

appropriate adult, they are distinct roles for a reason and should be recognised as such. Thus, even if the practical issues were tackled, blurring these roles would place the lawyer in a difficult position: he or she would be required to act as a middle person between the suspect and the police, whilst also firmly defending his/her client. It would also leave vulnerable suspects with less support. Resolving the practical still leaves behind the conceptual and this cannot be resolved through the provision of greater resources for the lawyer.

### **Are lawyers well-equipped to act as appropriate adults?**

This paper has reflected on the approach taken by the courts and the views of custody officers where they suggest that the presence of a lawyer could mitigate a breach of Code C where an appropriate adult has not been provided. However, empirical research into defence lawyers (Baldwin and McConville 1977; McConville et al 1994; Sommerlad 2001; Smith 2013; Newman 2013) constructs an image of lawyers increasingly struggling to stand up for their clients. By fusing study into appropriate adults and criminal defence lawyers for the first time, this paper shows that it would be misguided to suppose that defence lawyers could take on additional duties as appropriate adults. This paper has shown that defence lawyers may already offer a lesser service to their clients, as they are pushed to prioritise efficiency over personal service to achieve high throughput of clients. It is the most vulnerable clients that lawyers recognise as needing more time and attention. These clients would represent the largest drain on resources. Placing extra responsibilities onto the shoulders of defence lawyers, especially at a time when legal funding is making practice ever more precarious (Smith and Cape 2017), could compromise both the appropriate adult safeguard and the duties of defence lawyers. Lawyers would likely be able to do neither job properly, with both roles taking on a somewhat gestural status of little practical value to those suspected of committing a crime.

That the lawyer replaces the appropriate adult is most likely used for the purposes of expediency. It is easier to co-ordinate the arrival of one person than two, at the same, and to coincide with the availability of the interviewing officer(s) – and, perhaps more importantly, because the overall focus of PACE and its accompanying Codes is on safeguarding evidence. This is why custody officers are less reluctant to call an appropriate adult when the lawyer presses for one (see XXXX). As courts and custody officers are seemingly willing to allow lawyers to take on appropriate adult roles on practical grounds, so this paper has focused chiefly on deconstructing the argument for such a substitution on pragmatic considerations.

Notwithstanding the clear message emerging from the research outlined in this paper – that lawyers cannot practically take on appropriate adult duties in any meaningful way and should not be expected to do so on a conceptual basis – it is important to note that there is one general benefit that may be gained from legal representatives taking on the role of the appropriate adult, at least at a hypothetical level. Unlike appropriate adults, lawyers are subject to legal privilege (Quinn and Jackson 2007. See also Bath 2014; Cummins 2011; Littlechild 1995). This protects confidential communications between a lawyer and their client in the provision of legal advice. Appropriate adults, by contrast, are not subject to legal privilege (Home Office 2018a; *A Local Authority v. B* [2008] EWHC 1017 (Fam)).

The important requirement that the appropriate adult be able to communicate with the suspect (and the other aspects such as developing empathy or offering advice which can stem from this) is challenged by the absence of legal privilege. The appropriate adult needs to know the suspect's side of the story to effectively communicate the narrative to other parties. With their legal privilege, such communication barriers could be overcome in lawyer-client relationships. The existence of a theoretical benefit to be gained from giving defence lawyers appropriate adult duties, though, should not invalidate the central argument of this paper that such additional responsibilities would be inappropriate in practice – as on principal. Defence lawyers are still unlikely to be able to discharge their current or extended duties sufficiently to allow such notional advantages to play out in reality. Rather, the benefits of aligning the appropriate adult with legal privilege should not be seen as an argument in favour of using legal representatives as appropriate adults but, really, provides an argument to ascribe legal privilege to appropriate adults themselves. The lack of legal privilege afforded to appropriate adults can limit the extent to which they are able to perform their role. By extending legal privilege rather than extending the entitlement to serve as an appropriate adult, there is a greater chance of the suspect actually seeing a benefit in terms of communication. Given what we have seen about the difficulties faced in the lawyer-client relationship under criminal legal aid, providing appropriate adults with some of the rights of lawyers offers a far more sensible approach than moving in the other direction, i.e. by requiring or permitting lawyers to act as appropriate adults. Indeed, extending legal privilege in this manner offers a cost-free means to mitigate a little of the communication breakdown witnessed between lawyers and clients, thus helping provide some additional protection to suspects at a time in which legal aid cuts are putting them at greater risk.

The collection and analysis of empirical data and the analysis of case law have illustrated that custody officers and the courts consider the lawyer as an ‘appropriate’ replacement for the appropriate adult. Yet, the empirical data and literature on lawyers here examined has illustrated that, for a range of both practical and conceptual reasons, a lawyer is not an ‘appropriate’ replacement and should never be considered such. It is in bringing the literature and empirical research together that this can be, and has been, demonstrated. As this paper is the first to look at the two roles side-by-side, it is important to note future scholarship could and should probe the issues raised here further. Research that understands the interactions, overlaps and synergies between appropriate adults and defence lawyers would be welcome, as would study into how suspects and defendants understand the various supports they are provided. There is also a need for work that draws out the fundamental variance between lawyers and appropriate adults – they may be superficially similar as aids to those suspected and accused of crimes but they are rooted in different assumptions about what suspects/defendants need and how they experience the criminal justice system. Such research would particularly focus on making clearer the conceptual argument that appropriate adults and lawyers are fundamentally different thus providing protection against the dangerous conflation of the roles suggested by the court and custody officer approach as outlined in this paper.

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