Law Commission
Reforming the law

Unfitness to Plead
Volume 1: Report

50 YEARS

Law Com No 364

The Law Commission

(LAW COM No 364)

UNFITNESS TO PLEAD
VOLUME 1: REPORT

This has been produced along with Volume 2: Draft Legislation as a combined document

Presented to Parliament pursuant to section 3(2) of the Law Commissions Act 1965

Ordered by the House of Commons to be printed on 12 January 2016

HC 714–I

Two volumes not to be sold separately

This publication is available at www.gov.uk/government/publications.

Print ISBN 9781474127134
Web ISBN 9781474127141

ID 23121509 01/16

Printed on paper containing 75% recycled fibre content minimum

Printed in the UK by the Williams Lea Group on behalf of the Controller of Her Majesty's Stationery Office

THE LAW COMMISSION

The Law Commission was set up by the Law Commissions Act 1965 for the purpose of promoting the reform of the law.

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The terms of this report were agreed on 18 December 2015.

The text of this report is available on the Law Commission's website at http://www.lawcom.gov.uk.

THE LAW COMMISSION

UNFITNESS TO PLEAD

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THE LAW COMMISSION

UNFITNESS TO PLEAD

To the Right Honourable Michael Gove MP, Lord Chancellor and Secretary of State for Justice

CHAPTER 1
SUMMARY

BACKGROUND

1.1 In our Tenth Programme of Law Reform in 2008 we stated an intention to examine the law relating to unfitness to plead.[1] The unfitness to plead project looks at how defendants who lack sufficient ability to participate meaningfully in trial should be dealt with in the criminal courts. Defendants may be unfit to plead for a variety of reasons, including difficulties resulting from mental illness (longstanding or temporary), learning disability, developmental disorder or delay, a communication impairment or some other cause or combination of causes. The purpose of the legal test is to identify, accurately and efficiently, those vulnerable defendants who, as a result of such difficulties, cannot fairly be tried. The related procedures then provide for an alternative process by which criminal allegations can be scrutinised and arrangements made, where appropriate, to provide treatment for the defendant and protection for the public. The aim of the law in this area is to balance the rights of the vulnerable defendant who cannot fairly be tried with the interests of those affected by the alleged offence and the need to protect the public.

CONSULTATION PROCESS

1.2 We published a Consultation Paper on unfitness to plead ("CP197") in October 2010, in which we asked questions and advanced provisional proposals regarding reform of the test and the procedure for unfitness to plead.[2] We received 55 written submissions from consultees in response.[3] Those responses endorsed many aspects of our provisional proposals. They also raised fresh issues arising both out of our provisional proposals and in relation to the operation of aspects of the current law on unfitness to plead which consultees considered to be problematic.

1.3 We were unable to work further on the project between January 2011 and early 2013 because we were required to deploy our resources on other projects. During that period there were significant changes to the criminal justice system.

[1] Tenth Programme of Law Reform (2008) Law Com No 311. Unfitness to plead was originally part of a joint project which also looked at the defences of insanity and automatism.

[2] Unfitness to Plead (2010) Law Commission Consultation Paper No 197.

[3] Unfitness to Plead: Analysis of Responses (2013), available at http://www.lawcom.gov.uk/wp-content/uploads/2015/06/cp197_unfitness_to_plead_analysis-of-responses.pdf.

In particular, there has been a very substantial reduction in the budget available for the administration of the criminal courts.[4] However, there have also been significant advances in the way that the criminal justice system responds to vulnerable individuals.[5] Additionally, the Government has made a commitment[6] to a national model for liaison and diversion services. This aims to place mental health and learning disability professionals in police stations and all courts, to assist in the identification and onward referral of offenders with mental health difficulties and learning disabilities.[7]

1.4 In light of these changes, we published an Issues Paper ("IP") in May 2014. This document invited consultees to respond to a series of further questions which sought to refine our original proposals for reform and set out a more detailed framework for reform in the newer areas identified by consultees.

1.5 On 11 June 2014 we held a symposium at the School of Law, University of Leeds. The event was attended by over 100 experts in the field, including members of the judiciary, solicitors and barristers, academics, psychiatrists, psychologists, specialist nurses, intermediaries and representatives from government departments and interest groups.

1.6 There were 45 responses to the Issues Paper from a wide range of stakeholders. The majority were in favour of the approach taken in the Issues Paper.

1.7 We have also benefited from views expressed at conferences and specialist seminars, from meetings with the judges sitting at two very significant court centres (Snaresbrook Crown Court and the Central Criminal Court), as well as from meetings with legal practitioners, leading academics, non-governmental organisations and members of affected government departments.

1.8 We considered it particularly important that we speak directly with stakeholder groups. As a result, we have consulted with family members of victims of

[4] The Ministry of Justice faces a drop in budget of approximately a third over a five-year period, from a budget of approximately £8.7 billion in 2011-2012 (Ministry of Justice, *Annual Report and Accounts 2011-12* (2012) at p 21, https://www.gov.uk/government/publications/ministry-of-justice-annual-report-and-accounts-2011-12 (last visited 11 November 2015)) to a projected settlement of £6.2 billion for 2015-16 (HM Treasury, *Spending Round 2013* (June 2013) at p 10, https://www.gov.uk/government/publications/spending-round-2013-documents (last visited 11 November 2015)).

[5] Particularly in the wider use of special measures to help vulnerable individuals to engage with the criminal justice system.

[6] Subject to a spending review in late 2015 in relation to Liaison and Diversion Services in England.

[7] On 6 January 2014 the Government announced an additional £25 million spending on liaison and diversion services for police stations and magistrates' courts in ten areas across England, with a view to rolling out the scheme nationwide in 2017. This scheme has the potential to revolutionise the identification and screening of defendants with unfitness to plead or capacity issues. See NHS England's Liaison and Diversion Standard Service Specification 2015 (version 8C – in draft). For the comparable services in Wales see: Welsh Government, *Criminal Justice Liaison Services in Wales: Policy Implementation Guidance* (2013), http://www.rcn.org.uk/__data/assets/pdf_file/0006/547062/Welsh_Govern.pdf (last visited 11 November 2015).

homicide in cases involving unfitness issues[8] and conducted a half-day session with a group of consultees with autism spectrum conditions. This session included a visit to a magistrates' court and the Crown Court and a group discussion session.[9]

1.9 Finally, in response to the lack of data in a number of areas addressed by this project, we have conducted our own data-gathering exercise, with the assistance of Her Majesty's Courts and Tribunals Service. We have also worked with NHS England in relation to liaison and diversion services, and directly with academics gathering empirical data, in order to inform our recommendations.

1.10 The recommendations contained within this document have therefore been refined by an iterative consultation process. The policy has been honed specifically to respond to the reduction of funding within the criminal justice system and the changing approach to vulnerability in the court system. The approach that we recommend has broad support from an extremely wide range of consultees.

AN OVERVIEW OF OUR APPROACH

Full trial wherever fair and practicable

1.11 At the heart of our recommendations lies our belief that the normal criminal trial is the optimum process where a defendant faces an allegation in our criminal justice system. We consider that full trial is best not just for the defendant, but also for those affected by an offence and society more generally. This is because the full criminal process engages fair trial guarantees for all those involved, under article 6 of the European Convention on Human Rights ("ECHR"), and allows robust and transparent analysis of all the elements of the offence and any defence advanced. It also offers the broadest range of outcomes in terms of sentence and other ancillary orders.

1.12 Removing any defendant from that full trial process should, we consider, only be undertaken as a last resort. The decision to adopt alternative procedures should be made with great caution and only where it is in the best interests of the defendant, because he or she lacks the capacity to participate effectively in his or her trial. We consider that every effort should be made to afford a defendant whose capacity may be in doubt such adjustments to the proceedings as he or she reasonably requires to be able to participate in the full criminal process, and to maintain that capacity for the whole of the process. However, we do acknowledge that a very small number of defendants will never have the capacity to participate effectively in a trial. (We consider these issues in Chapter 2).

Accurate and efficient identification of defendants who cannot participate effectively in their trial

1.13 We consider that the most important element of a framework to address issues of unfitness to plead is a legal test which accurately and efficiently identifies those defendants who, even considering available adjustments to trial, have such

[8] Kindly arranged by Victim Support.

[9] Our thanks to the participants and to Autism West Midlands and Marie Tidball, then a doctoral candidate at Wadham College, Oxford who organised the afternoon.

impairments in their ability to participate in proceedings that they could not fairly be tried. The current *Pritchard* test[10] used to assess unfitness to plead requires updating and is not consistently understood or applied by clinicians, legal practitioners and the courts. We also consider it essential that those who, although unable to engage with the full trial process, have sufficient understanding and decision-making capacity to enter a plea of guilty, should be enabled to do so. (We address the legal tests in Chapter 3).

1.14 Assessment of such defendants is currently a time-consuming process and in some cases three or more expert reports are prepared, generally by psychiatrists or psychologists, before a defendant is found unfit to plead. The current arrangements often lead to substantial delays, causing uncertainty and anxiety to complainants, witnesses and the defendant. We consider that arrangements can be made to streamline this process, saving time and precious resources, without compromising the robustness or fairness of the outcome. (We discuss these recommendations in Chapter 4).

Diversion out of the criminal process where appropriate

1.15 Following a finding by the court that a defendant lacks the capacity to participate effectively in the full criminal process, we take the view that the court should have the option not to embark on the alternative procedures for scrutinising the allegation. We have in mind, in particular, cases where a disposal[11] imposed by the court is not necessary to protect the public, or to support the individual to avoid future concerning behaviour, and where it is concluded that it is not in the public interest for any further criminal hearing on the matter. We take this position because any procedure which protects the interests of the vulnerable individual, but appropriately scrutinises the allegation in order to justify imposing disposals on that individual, will inevitably be complex, and demanding of jurors, witnesses and defendants alike. In addition, such alternative procedures cannot result in conviction, because the defendant who cannot participate effectively is unable properly to defend him- or herself. As a result, the disposals available to the court are inevitably limited, and cannot involve punishment of the defendant.

1.16 For many individuals who are unfit to plead, the low level of seriousness of the original allegation and the arrangements which can be made in the community, without the court's intervention, mean that further action by a criminal court is unnecessary. We therefore recommend that diversion of such individuals out of the criminal justice system, once they have been found to lack capacity for trial, should be available where the court is satisfied that such an approach is in the interests of justice. (We address this issue in Chapter 5).

[10] *Pritchard* (1836) 7 C & P 303, 173 ER 135.

[11] The term "disposal" is used currently to refer to the arrangements which can be ordered by a court to deal with those defendants who are unfit to plead, but against whom a finding has been made that he or she did the act, or made the omission, which amounted to the offence with which he or she was charged. These disposals can involve the defendant being treated in a hospital which is secure, supervised in the community or discharged entirely without further restrictions.

Fair procedures for scrutinising the allegation

1.17 The alternative procedures to scrutinise the allegation are designed to ensure that a disposal is only imposed on an individual where that is appropriate, considering his or her involvement in the alleged offence. At present the alternative procedures do not require the jury to consider the fault element of the offence, namely what was in the mind of the person at the time of the alleged offence. In addition, the ability of an individual who is unfit to plead to rely on common defences, such as self defence, accident or mistake, is significantly restricted. As a result, we consider that the unfit individual is substantially disadvantaged in comparison to a defendant facing the same allegation in full trial. We recommend removing this disadvantage and introducing procedures which assess the involvement in the alleged offending of an individual who lacks capacity as fully as possible in the circumstances. This brings the alternative procedures closer to the full trial process, but still retains the protection of the individual from conviction. In particular, we recommend that the prosecution be required to prove all elements of the alleged offence and that all full defences be available in the same way as they are in a full trial. (We make recommendations for reform in this regard in Chapter 5.)

Effective and robust community disposals

1.18 We are concerned that the court should have available to it, on conclusion of the alternative procedures, disposals which deliver effective support and assistance to an individual who lacks capacity, so that future offending is avoided. The disposals must also provide robust protection for the public where that is necessary. At present the supervision order (which is the only community disposal available to the court) lacks constructive elements[12] to support the supervised individual and offers little scope for managing an individual who has difficulty complying with such an order. (We make recommendations for enhancing both of these aspects of the supervision order in Chapter 6).

Participation issues in the adult magistrates' and youth courts

1.19 The current legal framework for addressing unfitness to plead does not apply in the magistrates' courts, including the youth court. The statutory measures[13] available in the summary jurisdiction[14] are limited to imprisonable matters only, offer unduly limited disposals and do not focus on the ability of the defendant to participate in the criminal process. Applications to stay the proceedings, pursued as an alternative to the statutory measures, are rarely granted and provide no effective remedy. As a result, the current provisions do not provide suitable outcomes for many, particularly young, defendants. This raises significant public protection concerns. We consider that reform is urgently needed to introduce procedures for addressing participation difficulties in the summary courts

[12] By constructive elements we mean requirements which can be included in a supervision order which oblige the supervising officer to put in place arrangements to address the supervised person's needs, including needs relating to education, training, employment and accommodation.

[13] Mental Health Act 1983, s 37(3) and Powers of the Criminal Courts (Sentencing) Act 2000, s 11(1).

[14] By "summary jurisdiction" and "summary courts" we mean adult magistrates' and youth courts together.

comparable to those available in the Crown Court. (We make recommendations in this regard in Chapter 7).

Enabling the Court of Appeal to remit for rehearing

1.20 At present, where the Court of Appeal overturns on appeal a finding that an unfit individual "did the act or made the omission", the court can only enter an acquittal and cannot remit, or send back, the case to the Crown Court for rehearing. This poses significant public protection concerns. We recommend that this gap in the appeal provisions be closed by the creation of a power to order a rehearing of the alternative procedures for scrutinising the allegation. (We address these issues in Chapter 8).

Resuming the prosecution on recovery

1.21 Many of the conditions which give rise to unfitness to plead are liable to fluctuate. It is possible that an individual who was previously unable to participate effectively in trial might recover, or gain, that capacity after the court process has come to an end. Unfitness to plead procedures suspend the prosecution of the defendant, and at present that prosecution can only be resumed where an unfit individual is being treated in a hospital and the court has imposed restrictions on his or her release.[15] The individual him- or herself has no power to ask for the prosecution to be resumed against him or her.

1.22 We consider that there should be a wider power for the prosecution to resume full trial proceedings against a recovered individual, and that the individual should also have the right to apply for resumption of the prosecution where he or she wishes to clear his or her name. For both parties we propose the introduction of a leave process, by which the court considers whether it is in the interests of justice for prosecution to be resumed, whether that is sought by the prosecution or the defence. (We consider these issues in Chapter 9).

OUR ANALYSIS AND RECOMMENDATIONS IN MORE DETAIL

Chapter 2: Facilitating full trial through trial adjustments: Current law

1.23 The Criminal Procedure Rules ("CrimPR")[16] and the Criminal Practice Directions ("CrimPD")[17] require the court to take "every reasonable step" to "facilitate the participation of any person, including the defendant". This includes ensuring that a defendant is able to "give their best evidence, and enabling a defendant to comprehend the proceedings and engage fully with his or her defence".[18]

1.24 CrimPD 3G extends the trial adjustments previously developed in relation to child defendants to vulnerable defendants more generally. This provides for various measures including: court familiarisation visits, the defendant being able to sit in

[15] Criminal Procedure (Insanity) Act 1964, s 5A(4).

[16] CrimPR 2015 (SI 2015 No 1490), r 3.9(3).

[17] CrimPD 2015 [2015] EWCA Crim 1567, CrimPD I General Matters 3D.2.

[18] CrimPD I General Matters 3D.2.

court with a family member or other supporting adult, the use of frequent breaks to aid concentration, adopting clear language and following "toolkits".[19]

1.25 Statutory entitlement to assistance for vulnerable defendants in communicating with the court is, however, extremely limited in contrast to the provisions for vulnerable witnesses.[20] At present there is only one "special measure" available to vulnerable defendants under statute, which is the giving of evidence at trial via live link.[21]

Chapter 2: Facilitating full trial through trial adjustments: Problems with the current law

Identification of communication or participation difficulties, and of available mechanisms to adjust proceedings to facilitate effective participation

1.26 One of the most significant challenges for unfitness to plead procedures is the accurate and timely identification of those accused who are unfit to plead and those who require trial adjustments to be able to participate effectively in trial. This is especially difficult where the defendant is unrepresented or very young. Some legal professionals (judges and legal representatives) lack sufficient awareness of the conditions that may give rise to participation difficulties and an understanding of how best to address issues when they arise.

Lack of statutory entitlement to assistance from an intermediary leads to inconsistent provision

1.27 There is currently no statutory entitlement to assistance from an intermediary[22] for vulnerable defendants, in contrast to the entitlement for witnesses to have intermediary assistance.[23] In recent years, applications for intermediaries for defendants have been granted on an ad hoc basis by judges in the exercise of their inherent jurisdiction.[24] This has resulted in inconsistent provision.

Lack of statutory entitlement to assistance from an intermediary leads to resourcing difficulties

1.28 Without a statutory entitlement there are also significant resource issues where intermediary assistance is granted for a defendant, particularly in terms of identifying an available intermediary and obtaining funding.

[19] The Advocate's Gateway toolkits provide good practice guidance for professionals preparing for trial in cases involving a witness or defendant with communication needs. They are available at http://www.theadvocatesgateway.org/toolkits (last visited 18 December 2015).

[20] Youth Justice and Criminal Evidence Act 1999 ("YJCEA"), ss 16 to 20.

[21] YJCEA, s 33A. Live link enables a defendant to give live evidence from a room separate from the court room but linked to it by CCTV equipment.

[22] An intermediary is a communication expert whose role is to facilitate a witness' or defendant's understanding of, and communication with, the court.

[23] YJCEA, s 29 makes provision for a witness to be assisted by an intermediary. YJCEA, s 33BA, which makes similar provision for defendants, has not been brought into force.

[24] *C v Sevenoaks Magistrates' Court* [2009] EWHC 3088 (Admin), [2010] 1 All ER 735 and *R(AS) v Great Yarmouth Youth Court* [2011] EWHC 2059 (Admin), [2012] Criminal Law Review 478.

No registration scheme for defendant intermediaries: no quality assurance

1.29 There is no registration scheme for intermediaries assisting defendants as there is for intermediaries when they work with witnesses. As a result, there is no qualification requirement for defendant intermediaries, no professional conduct regulation, nor any continuing professional development monitoring or supervision for them.

No registration scheme for defendant intermediaries: raised costs

1.30 The lack of a registration scheme for defendant intermediaries means that there is no framework for the government to set the level of fees defendant intermediaries can command for their services. In combination with the low numbers of defendant intermediaries, in part because of the lack of a statutory entitlement, this has resulted in defendant intermediaries being paid fees significantly in excess of those for witness intermediaries and in many instances at twice their rates.

Unequal eligibility criteria for defendants and witnesses in relation to live link

1.31 Live link enables evidence to be given by an individual by CCTV link from a room separate from the court room itself. At present, the eligibility criteria for defendants to make use of this facility in giving evidence are different from those that witnesses must satisfy. There is no justifiable basis for this inequality.

Chapter 2: Facilitating full trial through trial adjustments: Key recommendations for reform

Improving identification of defendants with participation difficulties

1.32 We recommend that all members of the judiciary, and all legal practitioners, engaged in criminal proceedings should be required to receive training in understanding and identifying participation and communication difficulties, and to raise their awareness of the available mechanisms to adjust proceedings to facilitate effective participation. This would improve accurate and timely identification of participation difficulties, reducing delays to proceedings and the uncertainty and anxiety caused to complainants and witnesses where the defendant's participation difficulties are raised at the last minute.

Introducing a statutory entitlement to assistance from an intermediary

1.33 Although intermediary assistance is not a remedy for all participation difficulties, we consider that for many defendants with significant difficulties it offers the best mechanism for facilitating their effective participation in trial. With the overwhelming support of our consultees, we recommend that a statutory entitlement be created for a defendant to have the assistance of an intermediary, both for the giving of evidence and otherwise in trial proceedings, where that is required. Under our recommendation, intermediary assistance would only be granted where such assistance is necessary for a defendant to have a fair trial, and only for as much of the proceedings as is required to achieve that aim. Replacing the current ad hoc practice, of the court granting intermediary assistance under its inherent jurisdiction, with a statutory scheme and a clear test for granting assistance would ensure more consistent and cost-effective provision for defendants.

Introducing a registration scheme for defendant intermediaries

1.34 In order to achieve quality assurance and to enable the cost of defendant intermediary assistance to be properly regulated, we recommend the creation of a registration scheme for defendant intermediaries, similar to that which regulates the training, qualification and conduct of witness intermediaries. We also recommend that a Code of Practice be created governing the conduct of intermediaries and their engagement with defendants and the courts.

Eligibility criteria for defendants and witnesses in relation to live link to be equalised

1.35 We also recommend that the eligibility criteria for live link for defendants be brought into line with that for witnesses, so that defendants can engage this assistance on the same basis.

Chapter 3: The legal test: Current law

1.36 The test that the judge applies when deciding if a defendant is unfit to plead is not set out in statute. It is a common law test; that is, one which comes from case law alone. The test for fitness to plead remains that set down in the 1836 case of *Pritchard*.[25] Following the case of *Davies*,[26] this was generally understood to require a defendant to be able to: plead to the indictment, understand the course of proceedings, instruct a lawyer, challenge a juror and understand the evidence. If an accused was found to lack any one of these abilities that would be sufficient for him or her to be found unfit to plead.

1.37 More recently the *Pritchard* test has been interpreted by the courts to make it more consistent with the modern trial process. The most widely favoured formulation comes from the trial judge's directions to the jury in the case of *John M*,[27] which were approved by the Court of Appeal and in which express reference is made to the need to be able to give evidence.

1.38 In that case the judge directed the jury[28] that the accused should be found unfit to plead if any one or more of the following was beyond his or her capability:

(1) understanding the charge(s);

(2) deciding whether to plead guilty or not;

(3) exercising his or her right to challenge jurors;

(4) instructing solicitors and/or advocates;

(5) following the course of proceedings; and

(6) giving evidence in his or her own defence.

[25] *Pritchard* (1836) 7 C & P 303, 173 ER 135.

[26] *Davies* (1853) 3 Car & Kir 328, 175 ER 575.

[27] *M (John)* [2003] EWCA Crim 3452, [2003] All ER (D) 199.

[28] At a time when the jury determined whether a defendant was unfit to plead or not.

Chapter 3: The legal test: Problems with the current law

Inaccessibility and inconsistency of application

1.39 Repeated restatement of the common law *Pritchard* test, particularly to make it compatible with the modern trial process, has led to uncertainty about the formulation of the test itself, its scope and proper application. As a result, the test is not widely understood and is inconsistently applied, both by clinicians and by the courts.

Undue focus on intellectual ability

1.40 The test focuses too heavily on the intellectual ability of the accused, and fails to take into account other aspects of mental illness and other conditions which might interfere with the defendant's ability to engage in the trial process. In particular, it does not capture individuals whose ability to play an effective part in his or her defence may be seriously impeded through delusions or severe mood disorders.

No consideration of decision-making capacity

1.41 The *Pritchard* test requires no explicit consideration of the accused's ability to make the decisions required of him or her during the trial. This contrasts with the focus on decision-making in the civil capacity test (under section 2 of the Mental Capacity Act 2005).

Lack of clarity over alignment with "effective participation" test

1.42 Fair trial guarantees under article 6 of the ECHR require a defendant to be able to participate effectively in proceedings. This has been interpreted as requiring a defendant to have:

> a broad understanding of the nature of the trial process and of what is at stake for him or her, including the significance of any penalty which may be imposed. It means that he or she, if necessary with the assistance of, for example, an interpreter, lawyer, social worker or friend, should be able to understand the general thrust of what is said in court. The defendant should be able to follow what is said by the prosecution witnesses and, if represented, to explain to his own lawyers his version of events, point out any statements with which he disagrees and make them aware of any facts which should be put forward in his defence.[29]

1.43 This concept is closely allied to fitness to plead but there is uncertainty as to the exact correlation of the two principles.

Lack of consideration of ability to plead guilty

1.44 The current test and procedures do not allow a defendant who would otherwise be unfit for trial, but who clinicians consider has the capacity to plead guilty, to do so. This may unnecessarily deny the defendant his or her legal agency. It is also

[29] *SC v United Kingdom* (2005) 40 EHRR 10 (App No 60958/00) at [29].

liable to undermine victim confidence in the system and denies the court the opportunity to impose sentence where appropriate.

Chapter 3: The legal test: Key recommendations for reform

A test of capacity for effective participation in a trial

1.45 In line with the views of the majority of consultees, we recommend that the test be reformulated to prioritise effective participation. This would create a test in keeping with the modern court process and would accommodate advances in psychiatric and psychological thinking. It would remove the current and undue focus on intellectual abilities and provide a test which, our stakeholders confirm, would more appropriately identify those who are unable to engage with the trial process.

A test explicitly incorporating decision-making capacity

1.46 The new test should explicitly incorporate decision-making capacity. This is a recommendation strongly supported by consultees who consider that the absence of decision-making capacity from the current test undermines its ability to identify all those who require the protections available under unfitness to plead procedures.

A test which ensures that defendants are only diverted from the full trial process where absolutely necessary

1.47 We recommend that the test be applied in consideration of the context of the proceedings in which the defendant will be required to participate and taking into account all assistance available to the defendant. This will ensure that defendants are only diverted from the full trial process where absolutely necessary, so that full and fair trial is achieved wherever possible. Such an approach will enhance public protection through criminal prosecution and increase confidence in the criminal justice system on the part of the public and those affected by the offence.

A separate test of ability to plead guilty

1.48 We recommend the introduction of a second test, one of capacity to plead guilty, for defendants who would otherwise lack the capacity to participate effectively in trial. This would enable those defendants who would otherwise be diverted into alternative procedures to plead guilty and be sentenced in the usual way, where they are able and wish to do so. This would enhance the autonomy of vulnerable defendants and would increase the courts' capacity to protect the public whilst contributing to public confidence in the criminal justice process.

A statutory reformulation of the test

1.49 We recommend that the legal tests be set out in statute. We consider this essential to address the inaccessibility, and inconsistency of application, which undermines the current common law test.

Chapter 4: Assessing the defendant: Current law

1.50 A judge sitting alone applies the test to decide whether an accused is unfit to plead, on the basis of evidence from at least two registered medical practitioners,

one of whom must be approved under section 12 of the Mental Health Act 1983 ("MHA").[30] The procedure for this hearing is set out in section 4 of the Criminal Procedure (Insanity) Act 1964 ("CP(I)A").

Chapter 4: Assessing the defendant: Problems with the current law

Unduly restrictive evidential requirement

1.51 Expert evidence from registered psychologists is frequently required for the court to be able to determine an accused's fitness to plead. However, currently an expert report from a psychologist cannot be one of the two reports required for the court to proceed with an unfitness determination. Not infrequently that means the court has to obtain a third expert report, adding extra expense and causing further delays to the proceedings. Those affected by such proceedings have described to us the distress and uncertainty that such delays cause.[31]

Delays in the preparation and service of expert reports

1.52 It remains important that the prosecution should be in a position to challenge the expert evidence relied upon by the defence, and to instruct their own experts where required. However, under the current arrangements this can lead to further delays and a proliferation of expert reports. In some cases the service of defence reports is delayed until the defence are in possession of two expert reports indicating unfitness, and only at that point are the prosecution able and willing to consider, and embark on, instructing their own expert.

Barriers to postponement of the determination of unfitness

1.53 Current court procedures do not encourage the court to consider postponing the determination of unfitness to allow for the recovery, or achievement, of fitness by the accused, even where that is realistic within a reasonable timeframe. Additionally, medical experts are not routinely required to comment on the prospect of recovery when they provide a report on unfitness to plead. This results in opportunities being missed for the accused to undergo full trial in the first instance and raises the prospect of resumption of proceedings following recovery, requiring a second jury process.

Chapter 4: Assessing the defendant: Key recommendations for reform

Relaxing the evidential requirement

1.54 Our consultees' clear view was that two expert reports should continue to be required where the court proposes to deviate from full trial. This is because of the gravity of the consequences that flow from the finding of lack of capacity and the protection provided by scrutiny from two experts. Consultees were, however, substantially in favour of relaxing the evidential requirement, so that expert evidence from a registered psychologist could be relied upon by the court as one of the two experts required for a finding of lack of capacity. There was some support for relaxation of the requirement still further to include others with

[30] Section 12 MHA approval designates a registered medical practitioner as having special experience in the diagnosis or treatment of mental disorder. Section 12 MHA approved registered medical practitioners are generally, but not always, psychiatrists.

[31] Meeting arranged by Victim Support, 13 February 2015.

expertise in this area, such as specialist learning disability or psychiatric nurses. However, no specific qualifications were proposed in this latter regard.

1.55 As a result, we recommend that the evidential requirement be relaxed to allow one of the two required experts to be a registered psychologist or an individual with a qualification appearing on a list of appropriate disciplines and levels of qualification, approved by the Department of Health. This will reduce the proliferation of costly expert reports. It will also reduce delays since the available pool of experts which can be relied on by the court will be enlarged. This will not only reduce costs but also alleviate the distress occasioned by extended delays in such cases.

Timely service and joint instruction

1.56 To address the difficulties arising out of delayed disclosure and the sequential obtaining of reports, we also recommend that there be a requirement to disclose, as soon as reasonably practicable, an expert report obtained by a party which indicates that the defendant lacks capacity for trial. This is coupled with a recommendation that the court be required to order joint instruction (between defence and prosecution) of the second expert, unless that is not in the interests of justice. This will result in fewer adjournments occasioned by delayed disclosure and the late obtaining of reports, and will reduce the number of cases in which a third expert report is prepared.

Encouraging postponement of the determination of capacity where appropriate

1.57 We also recommend that, prior to determining whether a defendant lacks capacity to participate effectively in the trial, there should be a statutory requirement for the court to consider whether it is appropriate to postpone proceedings for the defendant to achieve capacity for trial. This, we consider, should be subject to an interests of justice test, taking into account, amongst other factors, whether there is a real prospect of recovery and whether delaying the determination is reasonable in all the circumstances. We recommend that such a postponement should be limited to a maximum term of 12 months, save in exceptional circumstances. These recommendations aim to ensure that all efforts are made to allow for the defendant to recover capacity and be tried in full, before a determination of lack of capacity is formally considered. Postponement should also prevent, in some cases, the need for prosecution to be resumed where a defendant subsequently recovers capacity for trial.

Extension of remands to hospital for treatment under section 36 of the Mental Health Act 1983

1.58 In order to support recovery where that is a realistic prospect, we propose that the current limitation on remand to hospital for treatment under section 36 of the MHA[32] should be extended to 12 months for defendants facing proceedings in the Crown Court, with a twelve weekly review period. This will also prevent the court having to rely on section 48 MHA transfers[33] from custody, which can make it

[32] Available only in respect of a defendant who would otherwise be remanded in custody.

[33] Under MHA, s 48 a defendant remanded in custody can be transferred to hospital where he or she suffers from a mental disorder and is in urgent need of treatment.

difficult to achieve continuity of treatment for the defendant and can be more time consuming and costly.[34]

Chapter 5: The procedure for the defendant who lacks capacity for trial in the Crown Court: Current law

1.59 Following a finding that an individual is unfit to plead, the court must proceed to a hearing to determine the facts of the allegation according to a procedure set out in section 4A of the CP(I)A.[35] There is no criminal trial in the usual sense, and the individual cannot be convicted of the offence. Rather, a jury is required to consider whether it is satisfied beyond reasonable doubt that he or she "did the act or made the omission charged against him as an offence". If it is not so satisfied, the jury must return a verdict of acquittal.

1.60 In establishing that the individual "did the act or made the omission" the prosecution is only required to prove the external elements of the offence.[36] The prosecution is not required to prove that the individual had the state of mind which would be necessary to prove the offence at full trial, known as the fault element.[37]

Chapter 5: The procedure for the defendant who lacks capacity for trial in the Crown Court: Problems with the current law

No discretion not to proceed to a determination of facts hearing under section 4A of the CP(I)A

1.61 There is currently no discretion for the court to decline to proceed to the determination of facts hearing following a defendant being found unfit. This is problematic because in some cases it will have become clear during the determination of unfitness that the individual is not suitable for any of the disposals currently available following the section 4A hearing. In other cases, similar support for the individual, and protection for the public, could be achieved by diverting the individual out of the criminal justice system at that point.

Difficulty in dividing the external and fault elements of an offence

1.62 Identifying for the jury in the determination of facts hearing (section 4A of the CP(I)A) what the "act or omission" consists of, and which aspects of the offence are fault elements which need not concern the jury, is extremely difficult in many common offences. This has resulted in piecemeal development of the law, leading to uncertainty and inconsistency.

[34] MHA, s 48 requires the Secretary of State to be satisfied by reports from at least two registered medical practitioners that the person is suffering from a mental disorder of a nature or degree which makes hospitalisation appropriate and that he or she is in "urgent need of such treatment".

[35] As amended by the Criminal Procedure (Insanity and Unfitness to Plead) Act 1991 and the Domestic Violence, Crime and Victims Act 2004.

[36] The "external elements" of an offence are the physical facts that must be proved. They divide into: conduct elements (what the defendant must do or fail to do); consequence elements (the result of the defendant's conduct); and circumstance elements (other facts affecting whether the defendant is guilty or not).

[37] *Antoine* [2001] 1 AC 340, [2000] 2 WLR 703.

1.63 For example, in relation to the offence of voyeurism, the Court of Appeal concluded that in proving that the appellant "did the act or made the omission" the external elements included the appellant's purpose to obtain sexual gratification in observing the private act of another. However, the appellant's knowledge that the person observed did not consent was held to be part of the fault element and so not a matter for the jury to consider.[38]

1.64 This contrasts with the approach taken by the Court of Appeal in the case of *Young*,[39] which concerned an offence of dishonest concealment of a material fact.[40] In that case the Court of Appeal held that the appellant's purpose in the concealment, and his dishonesty, were part of the fault element of the offence and therefore not for the jury's consideration. However, the Court concluded that the question of whether the appellant had the intention alleged against him, and whether he had concealed the fact, were external elements to be proved by the Crown.[41]

Inchoate offences

1.65 Inchoate offences, such as attempts or conspiracy to commit an offence, are also problematic when considered in section 4A hearings. This is because the external elements of such offences are often not themselves unlawful, but are made so by what was in the defendant's mind. However, the jury in a determination of facts hearing under section 4A, focusing as they must on the external elements alone, will not be required to consider the fault element. In many cases, therefore, the jury will find it difficult to distinguish lawful and unlawful conduct on the part of an unfit individual charged with an inchoate offence.

Full defences unavailable in the absence of objective evidence

1.66 The unfit individual is also disadvantaged in comparison to the fit defendant because he or she is unable to rely on common defences, such as self-defence, unless there is objective evidence, that is evidence not from the accused him- or herself, which supports that defence. This means that in some cases an unfit individual is denied the opportunity to be acquitted in relation to the allegation, where a fit defendant in the same situation would be able to advance that particular defence at trial.

Chapter 5: The procedure for the defendant who lacks capacity for trial in the Crown Court: Key recommendations for reform

A discretion not to proceed to an alternative finding hearing

1.67 We recommend the introduction of a judicial discretion not to proceed to a hearing to consider the allegation following a finding that the defendant lacks the capacity to participate effectively in the trial. This recommendation is supported

[38] *B(M)* [2012] EWCA Crim 770, [2013] 1 WLR 499 at [515] to [516] and case comment by R D Mackay, *R v B* [2013] *Criminal Law Review* 90 for criticism.

[39] [2002] EWHC 548 (Admin), [2002] 2 Cr App R 12.

[40] An offence under what is now Financial Services Act 2012, s 89.

[41] See also discussion in *Wells and others* [2015] EWCA Crim 2, [2015] 1 WLR 2797 at [13] and [14].

by consultees on the basis that it will avoid the need to proceed to a jury hearing where it is clear that none of the available disposals are appropriate, or where more suitable provision can be made for the individual in the community. We consider that introducing the flexibility to divert an individual out of the criminal justice process following a finding of lack of capacity is critically important.

1.68 Such a discretion should be subject to an interests of justice test, to be applied by the judge taking into account various factors, including:

(1) the seriousness of the offence;

(2) the effect of such an order on those affected by the offence;

(3) the arrangements made (if any) to reduce any risk that the individual might commit an offence in future, and to support the individual in the community; and

(4) the views of the defence and the prosecution in relation to the making of such an order.

1.69 We recommend, however, that the exercise of such a discretion should not prevent the prosecution from applying for leave to resume prosecution, in appropriate cases, where that individual subsequently achieves capacity for trial.

Introducing a fair but robust fact-finding procedure

1.70 We recommend that the prosecution be required to prove all elements of the offence at the fact-finding hearing. There was resounding support amongst our consultees for such a recommendation. This approach would afford individuals who lack capacity the same opportunity to be acquitted as is enjoyed by defendants who have capacity, enabling them to engage all available full defences. This requirement would therefore address the disadvantage currently experienced by unfit individuals in the section 4A hearing, which many of our consultees considered to be objectionable.

1.71 Proof of all elements would also remove the need for the external and fault elements of an offence to be split for the purposes of the fact-finding hearing and the need to identify the objective evidence required to engage a defence. This has been the cause of considerable uncertainty in the law, and the issue in the majority of the significant number of unfitness cases (proportionately) which are the subject of appeal. We have consulted closely with the Crown Prosecution Service on this issue, and it is satisfied that, in general, proof of all elements of an offence would not impose on prosecutors a significantly greater burden in alternative finding procedures than prosecutors bear in full trial.

1.72 The resulting finding at the hearing would not be a conviction, since the individual who lacks capacity is unable to participate effectively in trial, but an alternative finding that the allegation is proved against him or her. We therefore propose to call that hearing the “alternative finding procedure”.

Partial defences to murder not available

1.73 We recommend that partial defences to murder (diminished responsibility, loss of control and acting in pursuance of a suicide pact) should not be available at the

alternative finding procedure to an individual who lacks capacity. We take that approach because these verdicts do not result in full acquittal but in conviction for manslaughter. Therefore, even were a partial defence to succeed at an alternative finding procedure, the individual would still be subject to a disposal in any event.[42]

Including a special verdict

1.74 There will inevitably, however, be some individuals who lack capacity at the time of trial but who were also suffering from the same condition, or some other substantial disorder or condition, at the time of the alleged offence. At full trial a fit defendant in that situation might be entitled to a special verdict of not guilty by reason of insanity. The jury would return a special verdict if satisfied that at the time of the offence the defendant was suffering from a "disease of the mind" which resulted in him or her being unable to understand the nature and quality of what he or she did. Or where, as a result of that condition, the defendant did not understand that that act was legally wrong.[43] This is a qualified acquittal which, in order to provide protection to the public where that is necessary, results in the same disposal options as would be available following unfitness to plead procedures.

1.75 We recommend that a special verdict of not guilty by reason of insanity, having the same scope as that at full trial, should also be available at the alternative finding procedure, to address the same public protection concerns. The introduction of such a special verdict was broadly supported by respondents to CP197. Such verdicts are complex and we have discussed elsewhere the difficulties that the current formulation of the insanity verdict gives rise to at full trial.[44] Nonetheless, we consider that it is important to make available a special verdict at the alternative finding procedure to address those very rare occasions where such a verdict is appropriate and necessary. This special verdict would trigger the imposition of the same disposals as are available for an individual against whom all elements have been proved at the alternative finding procedure.

Judge-only alternative finding procedure

1.76 We explored with consultees to the IP whether the alternative finding procedure should be presided over by a judge alone, sitting without a jury. Whilst a significant proportion of consultees approved the proposal, there were also a significant number of consultees who objected, on practical and principled bases. On balance, whilst we do not recommend judge-only procedures in every case, we do consider that there are some substantial advantages in a judge-only procedure. In particular, the greater capacity for less formal proceedings and the reasons which would be provided by the judge in reaching his or her findings. We conclude that for some individuals a judge-only procedure would be welcome and beneficial, and therefore recommend that the defendant who lacks capacity should be entitled to choose a judge-only procedure.

[42] We also make recommendation for the lifting of the mandatory restriction order in murder cases under CP(I)A, s 5(3).

[43] *M'Naghten's Case* (1843) 10 Cl & Fin 200, 8 ER 718.

[44] Criminal Liability: Insanity and Automatism (July 2013) Law Commission Discussion Paper.

Chapter 6: Disposals: Current law

1.77 Currently, an unfit individual who has been found to have "done the act or made the omission" must be made subject to one of three disposals (under section 5 of the CP(I)A). The disposals are not intended to punish the accused, since he or she has not been convicted, but to provide treatment and support for the individual and to protect the public, where either or both of these functions is necessary. The disposals are:

(1) A hospital order (with or without a restriction order): the individual is securely treated in a hospital and, where a restriction order is in place, cannot be released without the approval of the Secretary of State.

(2) A supervision order (with or without a treatment requirement): the individual is supervised by a probation officer or social worker in the community and can be subject to a requirement to live in a particular place and to submit to out-patient treatment by a doctor.

(3) An absolute discharge.

1.78 There are a number of other available ancillary orders and notification requirements which are applicable to an individual found at a section 4A hearing to have "done the act or made the omission". Of particular relevance to our recommendations are Multi-Agency Public Protection Arrangements ("MAPPA").[45] These are engaged where an individual, as a result of the unfitness procedures and subsequent disposal, is made subject to sex offender notification requirements.[46] An individual will also be subject to MAPPA where he or she has been found to have done the act of murder, or a specified violent or sexual offence,[47] and has received either a hospital order or a guardianship order.[48]

Chapter 6: Disposals: Problems with the current law

Difficulties identifying a supervising officer for supervision orders

1.79 Unfit individuals can currently be supervised on such orders by either probation officers or social workers. Social workers and probation officers have the power to refuse to consent to being the supervising officer under such an order.[49] The result is that for some individuals for whom a supervision order would be appropriate, and necessary for public protection, no supervision order can be made because no supervisor is willing to undertake that supervision. The only alternative is often an absolute discharge, which raises public protection concerns. In extreme cases a hospital order may have to be imposed instead.

[45] MAPPA were introduced by the Criminal Justice Act ("CJA") 2003, s 325. They are designed to protect the public, including previous victims of crime, from serious harm by sexual and violent offenders. MAPPA require local criminal justice, and other, agencies to work together to assess and manage the risk posed by such individuals.

[46] Under the Sex Offenders Act 1997, Part 1.

[47] As listed in CJA 2003, sch 15.

[48] CJA 2003, s 327(4). The Domestic Violence, Crime and Victims Act 2004 ("DVCVA") repealed CP(I)A, s 3, which provided for guardianship orders as an available disposal for unfit defendants. The CJA 2003 retains a reference to guardianship orders because some orders made before the DVCVA came into force may still be live.

[49] CP(I)A, sch 1A para 2(2).

1.80 The recent Transforming Rehabilitation reforms of probation services make no provision for the National Probation Service or Community Rehabilitation Companies to supervise unfit individuals subject to supervision orders under section 5 of the CP(I)A.

Difficulties monitoring and ensuring compliance with the order

1.81 The court imposing a supervision order has no mechanism by which it can review and monitor the supervised person's progress on the order. Likewise, the supervisor has no power proactively to manage a supervised person's compliance with the order, nor can any action be taken where that individual breaches the requirements of the order.

Lack of constructive elements

1.82 The supervision component of the current order is limited to a requirement for the supervised person to "keep in touch" with the supervising officer in accordance with any instructions required and to notify the supervisor of any change of address. No further constructive requirements can be imposed under the order. There are no requirements to enable the supervisor to provide constructive support for the supervised person to prevent future concerning behaviour.

Chapter 6: Disposals: Key recommendations for reform

Clear responsibility for supervising individuals who lack capacity

1.83 We recommend the removal of the option for probation officers, or providers of probation services, to supervise adults subject to an adverse finding.[50] We do so, first, because our consultees made clear the inappropriateness of probation providers supervising individuals who have not been convicted of an offence. Secondly, we consider that social workers within local authorities are better placed to co-ordinate the socially supportive and health elements of the order than probation providers. Finally, we take note of the changes within probation services referred to above.[51]

1.84 The position is somewhat different for those under 18 years of age. Youth Offending Teams are multi-disciplinary teams, which by law must include an individual with social work experience (or in Wales a social worker) and a person nominated by a local Clinical Commissioning group or Local Health Board.[52] As a result, the necessary close links with clinical services are present in many YOTs, as is a range of experience beyond the more risk management approach of other probation providers. We therefore recommend that, for those under 18 years of age, the supervising officer be a social worker, or person with social work experience, selected either from the youth offending team, or children's services, whichever appears to be more suitable for the particular individual.

[50] By "adverse finding" we mean that the offence was found proved against the individual who lacked capacity, or a special verdict was returned in respect of the offence, at the alternative finding procedure.

[51] Para 1.80.

[52] Crime and Disorder Act 1998, s 39.

1.85 We recommend the amendment of supervision orders so that local authorities are obliged to nominate a social worker to supervise individuals made subject to a supervision order. This will prevent public protection concerns arising in relation to individuals for whom supervising officers cannot be identified, and will facilitate the safe support in the community of individuals who are subject to an adverse finding.

Introducing constructive elements

1.86 Our recommendations will enhance the constructive measures which can be included in supervision orders, in order to provide effective support in the community for individuals who have received an adverse finding. These measures include supervision meetings for the supervised person. We also recommend an optional constructive support requirement which focuses on making arrangements to address the individual's needs in areas such as education, training, employment and accommodation. Such measures would be included in supervision orders with a view to supporting the individual and preventing a repetition of behaviour which poses a risk of harm.

Monitoring the order and arrangements to ensure compliance

1.87 We make a number of recommendations in this area. In particular:

(1) That the court have the optional power to review the order and receive reports on the supervised person's engagement and progress.

(2) That a reviewing court have the power to make a finding that the supervised person is in breach of the order.

(3) That, following this finding, the court have the power to impose more restrictive elements as part of the order (such as curfew and electronic monitoring).

(4) That on breach, and where a previous notice has been given, the court have the power, exercisable in exceptional cases, to impose, on a supervised adult, custody for breach of the order.

Extending the maximum period for the order

1.88 We also propose that the maximum length of the order be extended from two years to three years, providing greater flexibility for the judge when imposing the disposal and extending the time period within which the individual can receive constructive support in the community.

Multi-Agency Public Protection Arrangements ("MAPPA")

1.89 We also recommend that individuals charged with a specified sexual or violent offence who receive an adverse finding and a supervision order should also be made subject to MAPPA for the period of the order. This will provide enhanced protection for the public by means of further risk-assessment and co-ordinated management of such individuals in the community.

Chapter 7: Effective participation in the magistrates' and youth courts: Current law

1.90 Unfitness to plead provisions do not apply in the magistrates' and youth courts. Where a defendant is charged with an imprisonable offence, the court has the power to adjourn proceedings for a report to be prepared on the defendant's condition (under section 11(1) of the Powers of Criminal Courts (Sentencing) Act 2000 ("PCCSA")) and to make a hospital order or a guardianship order[53] without convicting a defendant (under section 37(3) of the MHA).

1.91 Alternatively, a defendant in the magistrates' court can apply for proceedings to be stayed on the basis that he or she is unable to participate effectively in trial. No disposal can be imposed following a stay.

Chapter 7: Effective participation in the magistrates' and youth courts: Problems with the current law

No specific consideration of "fitness to plead" in the magistrates' courts

1.92 The limited alternative procedures that are available in the magistrates' courts do not consider unfitness to plead specifically. They focus rather on whether the accused requires hospitalisation or a guardianship order instead. The lack of suitable procedures is liable to result in full trial being proceeded with where the defendant cannot effectively participate, proceedings being stayed without positive outcome or the defendant having to choose Crown Court trial, where available, for unfitness to plead issues to be addressed.

No statutory procedures available for non-imprisonable matters

1.93 The alternative procedures do not apply to non-imprisonable offences in the magistrates' courts. There is no statutory function by which a magistrates' court can address participation difficulties arising in such a case, where trial adjustments are not sufficient.

Alternative procedures unduly limited

1.94 Section 37(3) MHA procedures for a hospital order or guardianship order to be imposed without convicting the defendant are only applicable to those suffering from a mental disorder within the terms of section 1 of the MHA. For example, section 37(3) of the MHA is not applicable to a defendant who is unable to participate effectively as a result of a learning disability not associated with "abnormally aggressive or seriously irresponsible conduct".[54]

Stay of proceedings problematic

1.95 For a defendant charged with a non-imprisonable offence, or who is unsuitable for an order under section 37(3) of the MHA, the only alternative is for his or her representative to apply to the court to stay proceedings. The basis for such an application would be that the accused could not have a fair trial because he or she could not participate effectively in the process. Stays are an exceptional

[53] Under a guardianship order, the individual is placed under the responsibility of a local authority or a person approved by the local authority.

[54] MHA 1983, s 1(2A).

remedy and very rarely granted, especially before evidence in the trial has been heard. Additionally, a stay simply stops the proceedings, providing no ongoing support or supervision for the defendant. Our consultees raised significant concerns about public protection where stays are imposed in cases of this sort.

Disposals

1.96 The disposals which are available under section 37(3) of the MHA are too limited. There is no absolute discharge available and the guardianship order is only available for those aged 16 years or over. As a result, many youths only have the option of a hospital order where section 37(3) MHA procedures are used to address participation difficulties. Such limitation on disposal is particularly undesirable since in-patient hospital treatment will rarely be appropriate, particularly for a child or young person for whom the availability of such beds nationally is very limited.

Chapter 7: Effective participation in the magistrates' and youth courts: Key recommendations for reform

Introducing into the magistrates' (including youth) courts procedures to address capacity to participate effectively in trial

1.97 Our consultees argue that there is an urgent need for reform in the summary jurisdiction in respect of participation difficulties, particularly for children and young defendants. They resoundingly supported the recommendation to introduce into the magistrates' courts procedures to address capacity to participate effectively in trial, comparable to those which we proposed for the Crown Court. This is essential to address the current inadequacy of statutory procedures in the summary jurisdiction. Our recommendations extend such provisions to all non-imprisonable matters.

1.98 In cases where the defendant's capacity is raised as an issue, we take the view that the case should be reserved to a district judge (magistrates' courts) for all future hearings. We consider this recommendation offers both the most practical arrangement, and the most appropriate, to ensure consistency in dealing with these complex cases.

Lack of capacity to be addressed before venue is decided, in cases where the defendant has power to choose

1.99 Some cases for adult defendants, called "either way cases", can be heard in either the Crown Court or the magistrates' courts. In such cases, where the magistrates' court has decided that it has the sentencing powers, and the capability, to hear the case, the defendant has the right to choose to agree to trial in the magistrates' court. Alternatively, the defendant can choose, or "elect", trial before a jury in the Crown Court. In such cases, where the defendant's lack of capacity to participate in a trial is identified as an issue before the time for making that choice, we recommend that the defendant's lack of capacity, or otherwise, is determined before that choice is made. We also recommend that, if the defendant is found to lack capacity, the case should remain in the magistrates' court for all subsequent procedures. This measure will ensure that a defendant who may lack capacity is not required to engage in the significant decision whether to elect Crown Court trial. It will also prevent the Crown Court being

overburdened with cases where capacity is in issue but which would otherwise be suitable for the magistrates' courts.

Disposals

1.100 Making available a wider range of disposals for individuals found to lack capacity is critical to improving procedures in the magistrates' courts. Under our recommendations, the same disposals would be available in the magistrates' (including youth) courts as in the Crown Court, save in four respects:

(1) For reasons of proportionality, the power to impose a hospital order would only be available where the original offence charged was an imprisonable matter.

(2) The magistrates' courts would not have the power to impose a restriction order. However, the magistrates' courts would have the power to commit, or send, cases to the Crown Court if a restriction order is considered, potentially, to be appropriate (and the individual is aged 14 years or over). This is on the basis that a restriction order is a substantial deprivation of liberty beyond the normal disposal powers of the summary courts.

(3) The magistrates' courts would not have the power to impose a custodial term where an individual is found to be in breach of a supervision order. We consider that such a sanction should be exceptional, and ought not to be required in cases involving adults who lack capacity, where the court retained jurisdiction in respect of the original charge.

(4) Where a child or young person has been found to be in breach of a supervision order, the youth court should have the power to impose a youth rehabilitation order with intensive supervision and surveillance. Such a sanction would only be available where the original offence charged was imprisonable and where notice had been given previously. We make this recommendation in consideration of the more serious cases which may be retained by the youth court, but taking the view that a custodial term is not appropriate in such cases.

Identifying capacity issues amongst young defendants

1.101 Early identification of young defendants with participation difficulties is key to ensuring suitable and effective procedures in the youth court. We therefore recommend in principle that all defendants appearing for the first time in the youth court should be screened for participation difficulties. We anticipate that this screening could be conducted by liaison and diversion practitioners based in the magistrates' and youth courts, or clinicians operating as part of Youth Offending Teams. Should liaison and diversion services be extended to all areas of England and Wales,[55] we consider that it will be practical to make this recommendation in respect of all defendants and young people under the age of 18. Should such roll-out not be approved, we consider that we can only sensibly

[55] Extension of liaison and diversion services across England is subject to the spending review being conducted in late 2015. Such a service is already available across Wales, called the Criminal Justice Liaison Service.

recommend a mandatory requirement in respect of all defendants under the age of 14 appearing for the first time in the youth court.

Training in relation to trying youths

1.102 Finally, to support accurate identification and provision of suitable assistance for young defendants with participation difficulties, we recommend that there should be mandatory specialist training on issues relevant to trying youths. This training should be mandatory for all legal practitioners and members of the judiciary engaged in cases involving young defendants in any court. In particular, this should involve awareness training in relation to participation and communication issues arising out of learning disability, mental health difficulties, developmental immaturity and developmental disorders.

Chapter 8: Appeals: Current law

1.103 An unfit individual can appeal to the Court of Appeal against a determination of unfitness, a finding of fact at the section 4A hearing or a disposal imposed upon him or her in the Crown Court.[56]

Chapter 8: Appeals: Problems with the current law

No power to order a rehearing

1.104 Where an appellant successfully appeals against a finding of fact made by a jury under section 4A of the CP(I)A, the Court of Appeal cannot order a rehearing of that section 4A CP(I)A procedure. The Court can only acquit the appellant.[57] This raises significant public protection concerns since the individual may represent a danger to the public and may have been charged initially with an extremely serious offence.

Limit on who can exercise the unfit individual's right of appeal

1.105 In addition, the power to exercise a right to appeal against a finding under the unfitness to plead procedures lies only with the unfit individual him- or herself. It cannot be exercised by anyone acting on his or her behalf. If the individual remains unfit to plead, this has the potential to act as a barrier to a proper appeal being pursued.

Chapter 8: Appeals: Key recommendations for reform

A power to order a rehearing

1.106 We propose to address the current and concerning gap in the Court of Appeal's powers. We therefore recommend that, where the outcome of the alternative finding hearing has been overturned on appeal, but the finding of lack of capacity remains, the Court of Appeal should have the power to send the case back to the Crown Court for a rehearing of the alternative finding procedure.

[56] Criminal Appeal Act 1968, s 15. The defendant must obtain leave, or the trial judge must have granted a certificate that the case is fit for appeal.

[57] Criminal Appeal Act 1968, s 16(4).

Appeal rights exercisable by legal representatives

1.107 We also recommend that the appeal rights of the individual who lacks capacity for trial should be exercisable by the person appointed by the court to put his or her case at the alternative finding procedure.

Appeal from the magistrates' courts

1.108 Finally, we recommend that there should be rights of appeal, from the magistrates' court, in respect of a finding of lack of capacity to participate effectively in proceedings, an adverse finding at the alternative finding procedure or the imposition of a disposal. Such rights of appeal should mirror the right of appeal against sentence and conviction to the Crown Court under section 108 of the Magistrates' Courts Act 1980.

Chapter 9: Resumption of the prosecution: Current law

1.109 A finding of unfitness to plead simply suspends the prosecution of the defendant for the original offence. There are limited circumstances in which that prosecution can be begun again, or resumed, and the individual tried in the usual way. At present it appears that only an unfit individual who is subject to a hospital order with a restriction order still in place, and who has subsequently achieved fitness to plead, can have proceedings resumed against him or her.[58] The Secretary of State has the power to remit, or send back, such an individual to the court for the prosecution on the original offence to be resumed.[59]

Chapter 9: Resumption of the prosecution: Problems with the current law

Prosecution power to resume prosecution unduly limited

1.110 At present, the prosecution's power to resume prosecution for the original offence where an unfit individual recovers is limited to cases where the individual is, at the time of recovery, subject to a hospital order with ongoing restriction. The prosecution cannot be resumed against an unfit individual who received a hospital order without a restriction order, a supervision order or an absolute discharge.

No power for the recovered individual to clear his or her name

1.111 For an individual who recovers fitness following unfitness to plead procedures, there is no mechanism by which he or she may apply for the prosecution to be resumed.[60] Unless the prosecutor decides to resume the prosecution, the individual is unable to clear his or her name on recovery, and thereby lift ancillary orders or requirements, should he or she choose to do so.

Problems where a defendant is found again to be unfit to plead

1.112 Under current arrangements, where a defendant against whom prosecution is resumed is again found to be unfit to plead, it is necessary to hold the section 4A

[58] NOMS, CPS and HMCTS, *Resuming a Prosecution when a patient becomes fit to plead* (2013), https://www.justice.gov.uk/downloads/offenders/mentally-disordered-offenders/resuming-guidance-prosecution-fit-to-plead.pdf (last visited 11 November 2015).

[59] CP(I)A, s 5A(4).

[60] See *Sultan* [2014] EWCA Crim 2648 at [9].

hearing a second time.[61] Disposals, which at present lapse on the individual's return to court,[62] also have to be considered afresh.

Chapter 9: Resumption of the prosecution: Key recommendations for reform

Widening prosecution power to resume proceedings

1.113 There was significant support amongst our consultees for a widening of the prosecution's powers to resume proceedings where an individual has recovered capacity, but a clear view that this power should be subject to restrictions. Accordingly, we recommend that the Crown's power to resume prosecution be widened to apply on recovery of the individual to all cases where an allegation of a specified sexual or violent offence[63] has been found proved. We also extend this power to cases where a special verdict was returned in respect of a murder allegation, at the alternative finding procedure. The power to resume would only be exercisable where the court granted leave for the prosecution to be resumed. The court would do so on applying an interests of justice test, including consideration of, amongst other factors: the position of witnesses, complainants and others affected by the alleged offence, the seriousness of the original offence and the likely sentence on conviction.

A right for the individual to apply for prosecution to be resumed

1.114 There was also support from the majority of our consultees who addressed the issue for the right to apply for resumption to be extended to a recovered individual. This was considered an important right, as a matter of principle, although there was general agreement that it would rarely be exercised. We therefore recommend the introduction of a right for a recovered individual to apply to the court for leave for the prosecution to be resumed. The court would apply an interests of justice test in considering the application, similar to that proposed for the prosecution application. However, we recommend that the individual should be entitled to make such an application in respect of any adverse finding made against him, regardless of the nature of the original offence.

Addressing procedural difficulties

1.115 To address the procedural difficulties considered above, we make a number of further recommendations. First, we recommend that any disposal live at the time of resumption of the proceedings should remain in place until the conclusion of the resumed proceedings or further order by the trial judge.

1.116 Secondly, where a defendant is found again to lack capacity for trial, we recommend that he or she should not be subject to a second alternative finding procedure, unless it is in the interests of justice for that procedure to be conducted afresh.

1.117 Finally we recommend that, where the finding(s) from the original alternative finding procedure remain in effect, or where the second alternative finding

[61] See *R (Julie Ferris) v DPP* [2004] EWHC 1221 (Admin), [2004] All ER (D) 102.

[62] CP(I)A, s 5A(4).

[63] As specified in the Criminal Justice Act 2003, sch 15, parts 1 and 2.

procedure yields the same finding(s) as previously returned, any original live disposal should remain in effect, subject to further order by the court.

ACKNOWLEDGEMENTS

1.118 This report is the product of a long and wide-ranging consultation process. Many individuals and organisations assisted us in the preparation of the Consultation Paper which we published in 2010. We acknowledged their substantial contribution in our Consultation Paper at paragraphs 1.36 and following.

1.119 We would like to thank all those who responded to our Consultation Paper and to our Issues Paper for their observations, which have informed the final recommendations set out in this report. We are also grateful to all those who attended our Symposium on Unfitness to Plead on 11 June 2014, and to the School of Law, University of Leeds for generously hosting the event.

1.120 We are particularly grateful to all the many individuals who gave up their time to assist the project by meeting with us to discuss aspects of the project, speaking at our symposium, considering early drafts or facilitating our wider consultation with other groups. These include:

(1) Academics: Professor Ronnie Mackay, Dr Arlie Loughnan, Rosemary Kayess, Professor Penny Cooper, David Wurtzel, Laura Hoyano, Dame Joyce Plotnikoff DBE, Richard Woolfson, Professor Jill Peay, Helen Howard, Professor Heather Keating, Ann Creaby-Attwood, Natalie Wortley, Marie Tidball, Professor Don Grubin, Dr Charles O'Mahoney, Professor Anna Lawson, Rebecca Parry, and Professor Rob Poole.

(2) Members of the Judiciary: the judges sitting at the Central Criminal Court and Snaresbrook Crown Court, Master Michael Egan QC, The Hon. Mr Justice Goss, HHJ Jeremy Richardson QC, HHJ Stephen Ashurst, HHJ Peter Collier QC, HH Robert Atherton, Naomi Redhouse DJ(MC), and Mignon French (JP).

(3) Legal practitioners: Treasury Counsel, particularly Mark Heywood QC, Carolyn Taylor, Shauneen Lambe, Rudi Fortson QC, Deepti Patel, and Andrew Hadik.

(4) Clinical experts: Dr Penny Brown, Dr Tim Rogers, Charles de Lacy, Dr Callum Ross, Dr Emily Glorney, Dr Nigel Blackwood, Dr Mike Watts, Dr Eileen Vizard CBE, Dr Nuruz Zaman, Dr Ian Gargan, Karina Hepworth, Janine Lees, Leah Glass, and Alexis Sweby.

(5) Organisations: Autism West Midlands, Victim Support, David Hines (National Victims' Association), James Bullion (Association of Directors of Adult Social Services), Jon Sutcliffe (Local Government Association), and Together (Mental Health Charity).

(6) Government: Tony Apperley and Amrita Dhaliwell (Her Majesty's Courts and Tribunals Service), Glyn Thomas (NHS England), Jonathan Solly (Criminal Procedure Rules Committee), Tish Jennings, Lindsay McKean, Neil Stone and Jacqueline Ashby (National Offender Management Service), Ben Connah, Nick Peel, Richard Chown, Rachel Atkinson,

Isabel Sutcliffe and Richard Bishop (Ministry of Justice), Andrew Glover and Neil Moore (Crown Prosecution Service), Anne MacDonald (Department of Health), Niall MacEntee Creighton and Bill Kerslake (Youth Justice Board), Judicial College, Ceri Hopewell (Office of the Lord Chief Justice), and Richard Jolley and Ben Bryant (Home Office).

CHAPTER 2
FACILITATING FULL TRIAL THROUGH TRIAL ADJUSTMENTS

INTRODUCTION

2.1 This chapter considers adjustments that may be made to the trial process for defendants with participation difficulties that do not render them incapable of participating effectively in proceedings. In this chapter we look first at the rationale for addressing trial adjustments for defendants as part of this report and then consider the current legal framework for trial adjustments and special measures. We turn then to address problems with the current position, looking in particular at awareness and understanding of the issues, and then at the inequality in the provision for witnesses and defendants, particularly in relation to intermediary assistance. Finally, we analyse those problems, in light of consultee responses on the issues, and make recommendations for reform.

Key recommendations in this chapter:

1) All members of the judiciary engaged in criminal proceedings in the Crown and magistrates' courts, and all legal representatives appearing in such proceedings, should be required to receive training to assist them in understanding and identifying participation and communication difficulties experienced by vulnerable defendants. The training should also raise their awareness of the available mechanisms to adjust proceedings to facilitate the defendant's effective participation.

2) The introduction of a statutory entitlement for a defendant to have the assistance of an intermediary for as much of the proceedings as is required. That entitlement should be both for the giving of evidence and in the wider trial process, where the court is of the view that such assistance is necessary for the defendant to have a fair trial.

3) The introduction of a registered scheme for intermediaries assisting defendants including, in its implementation, the creation of a code of practice, or guidance manual, for defendant intermediaries.

RATIONALE FOR ADDRESSING TRIAL ADJUSTMENTS

2.2 As we set out in Chapter 1, our overarching approach to this project is that the normal criminal process is the optimum one for a defendant facing a criminal allegation. Where prosecution is required in the public interest, the full trial process is the best approach for all concerned. We take this view because the full criminal trial process engages fair trial guarantees for all those involved, under

article 6 of the European Convention on Human Rights ("ECHR"). It also allows robust and transparent analysis of all the elements of the offence, and any defence advanced, whilst offering the broadest range of sentences and other ancillary orders.

2.3 Our exploration of the shortcomings of the current procedures for addressing unfitness to plead, in our view, reinforces this position. However reformed, unfitness to plead procedures are by their nature limited. Once an individual is found to be unfit to plead, or, under our recommendations, lacking in capacity to participate effectively in the proceedings, the court's ability to investigate the alleged offending, and to put in place measures to prevent future offending and protect the public is reduced, as is the defendant's ability to engage in the proceedings.

2.4 Our deepening engagement with stakeholders has further strengthened our view in this regard. Those who are involved in criminal trials on a daily basis advocate all efforts being made to achieve trial wherever possible and appropriate.[1] In addition, discussions with the families of homicide victims,[2] victim groups[3] as well as groups working with and representing those with disability,[4] emphasise the value and importance of the normal, full trial process where that can be achieved.

2.5 Throughout this report we acknowledge that there will remain a small number of individuals whose difficulties engaging with the court process are so significant that full trial will never be appropriate. In particular, we have in mind those with significant cognitive difficulties and mood disorders. Adjustments to trial are not a panacea for all participation difficulties. However, we consider that an essential part of our work in this area is to strive to ensure that the pool of individuals who may have to undergo alternative trial procedures is as small as possible. Thus it is essential that we make recommendations to ensure that the criminal justice system is suitably equipped to support full trial wherever that can fairly be achieved.

2.6 To that end, we place at the heart of our recommendations for reform of the law surrounding unfitness to plead recommendations to enhance the ability for defendants with participation difficulties to engage in full trial wherever that is possible and appropriate. As the criminal justice system becomes more adaptable and more capable of using technology to support engagement in the trial process of ever younger and more vulnerable witnesses, we see scope for improvement in the system's ability to accommodate defendants with different participation difficulties.

2.7 In addition, as we set out at Chapter 3 paragraph 3.61 below, we recommend that in applying the legal test to determine a defendant's ability to participate effectively, the judge should take into account all assistance available to the

[1] Views of Council of HM Circuit Judges (response submitted by the Criminal Sub-Committee), Criminal Bar Association and Bar Council.

[2] Meeting arranged by Victim Support, January 2015.

[3] Meeting with Policy Officer at Victim Support; CP197 and IP response from Victim Support; symposium observations by David Hines from the National Victims' Association.

[4] Response of Mind, a national mental health charity, to the Law Commission's Consultation Paper on unfitness to plead ("CP197").

defendant to facilitate his or her participation in the trial. As we note at paragraph 3.56 of that chapter, whilst endorsing such an approach, a number of consultees raised concerns about the availability and resourcing of such special measures. We address those concerns in this chapter, in particular in relation to intermediaries for defendants.

THE CURRENT POSITION

2.8 Special measures, and reasonable adjustments to ensure effective participation, have developed independently of the law relating to unfitness to plead. Consideration of the assistance that such measures might provide to a defendant is not technically part of the test for unfitness to plead, although methods to alleviate participation difficulties are often raised in instructions provided to clinicians. In addition, in the case of *Walls,*[5] the Court of Appeal made it clear that consideration should be given to the use of an intermediary, or other methods for the defendant's difficulties to be accommodated within the trial process, before the very significant step of moving to a determination of unfitness to plead.[6]

Reasonable adjustments: the Criminal Procedure Rules and Criminal Practice Directions

2.9 The Criminal Procedure Rules ("CrimPR")[7] and the Criminal Practice Directions ("CrimPD")[8] require the court to take "every reasonable step" to "facilitate the participation of any person, including the defendant". This includes ensuring that a defendant is able to "give their best evidence" and enabling a defendant to "comprehend the proceedings and engage fully with his or her defence. The pre-trial and trial process should, so far as necessary, be adapted to meet those ends".[9]

2.10 CrimPD 3G[10] extends the trial adjustments previously developed in relation to child defendants to vulnerable defendants.[11] These measures are wide-ranging, including amongst other adjustments:

(1) The early consideration of severance for vulnerable defendants in multi-handed cases (3G.1).

(2) Court familiarisation visits (3G.2).

(3) The defendant being free to sit with a family member (or other in a like relationship), and with "some other suitable supporting adult such as a social worker" at trial (3G.8).

5 *Walls* [2011] EWCA Crim 443, 2 Cr App R 6, CA.

6 See also the discussion in CP197, paras 4.1 to 4.15.

7 CrimPR 2015 (SI 2015 No 1490), r 3.9(3).

8 CrimPD 2015 [2015] EWCA Crim 1567, CrimPD I General Matters 3D.2.

9 CrimPD 2015 [2015] EWCA Crim 1567, CrimPD I General Matters 3D.2.

10 CrimPD 2015 [2015] EWCA Crim 1567, CrimPD I General Matters 3G.

11 Defined as including "those under 18 years of age and people with a mental disorder or learning disability; a physical disorder or disability; or who are likely to suffer fear or distress in giving evidence because of their own circumstances or those relating to the case". CrimPD 2015 [2015] EWCA Crim 1567, CPD I General Matters 3D.1.

(4) The court bearing an ongoing duty throughout the trial to "ensure by any appropriate means, that the defendant understands what is happening and what has been said by those on the bench, the advocates and witnesses" (3G.9).

(5) The use of breaks in proceedings to address concentration difficulties (3G.10).

(6) The use of clear language that can be understood by the defendant, short clear questions and the following of "toolkits" (3G.10).[12] Additionally, CrimPD 3E advocates the use of ground rules hearings to plan the questioning of a vulnerable defendant.

(7) Removal of advocates' wigs and gowns, and the wearing of civilian clothing for custody officers (3G.12).

Special measures

2.11 Statutory entitlement to assistance for vulnerable defendants in communicating with the court is much more limited. In contrast to the provisions for vulnerable witnesses,[13] at present there is only one "special measure" which is available under statute to a defendant, the giving of evidence at trial via live link.[14]

Live link

2.12 Section 33A of the Youth Justice and Criminal Evidence Act 1999 ("YJCEA") provides for a defendant to give evidence via live link. However, this will only be granted where the court is satisfied that such a measure would be in the interests of justice and, critically, where the defendant satisfies one of the following eligibility criteria:

(1) the defendant is under 18 and his or her ability to participate effectively in the proceedings as a witness is compromised by his or her level of intellectual ability or social functioning, and live link would enable him or her to participate more effectively in the proceedings;[15] or

(2) the defendant is over 18 and he or she is unable to participate effectively in the proceedings as a witness because of a mental disorder (within the meaning of the Mental Health Act 1983) or other significant impairment of intelligence and social function, and live link would enable him or her to participate more effectively in the proceedings.[16]

[12] The Advocate's Gateway toolkits provide good practice guidance for professionals preparing for trial in cases involving a witness or defendant with communication needs. They are available at http://www.theadvocatesgateway.org/toolkits (last visited 18 December 2015).

[13] Youth Justice and Criminal Evidence Act 1999 ("YJCEA"), ss 16 to 30.

[14] YJCEA, s 33A. Live link enables a defendant to give evidence from a room separate from the court room, but linked to it by CCTV equipment.

[15] YJCEA, s 33A(4).

[16] YJCEA, s 33A(5).

Defendant intermediaries

2.13 Section 29 of the YJCEA provides for the examination of a witness, other than a defendant, to be conducted through an intermediary. Intermediaries have an independent role to facilitate a witness' understanding of, and communication with, the court, and are officers of the court. Their professional skills are matched with the needs of the individual witness, and they are often, but not always, speech and language therapists.

2.14 However, although section 104 of the Coroners and Justice Act 2009 introduced provision[17] for a defendant who gives evidence to be examined through an intermediary, this section has not yet been brought into force.

2.15 Despite the lack of statutory entitlement, judges and magistrates do order that particular defendants should be assisted by an intermediary at trial. They do so relying on their inherent powers[18] to ensure that the defendant has a fair trial.[19] However, even where the Court has ruled on the desirability of the defendant being assisted by an intermediary, the court's intention can be defeated by lack of funding or difficulties identifying a suitable intermediary who will be available when the case is listed for trial.[20]

2.16 In the vast majority of cases where judges rule that an intermediary should be made available to assist the defendant, that assistance is granted for the whole of a trial including trial preparation, rather than just for the giving of evidence.[21] This contrasts with the position taken by the Divisional Court in *OP*, in which Lady Justice Rafferty suggested that, where necessary at all, the intermediary's involvement should be limited to assisting the defendant when giving oral evidence.[22]

[17] Inserting into the YJCEA 1999, ss 33BA and 33BB, from a day to be appointed.

[18] And duty under CrimPR 2015 (SI 2015 No 1490), r 1.1 to take any steps necessary to ensure that a defendant has a fair trial.

[19] *C v Sevenoaks Magistrates' Court* [2009] EWHC 3088 (Admin), [2010] 1 All ER 735 and *R (AS) v Great Yarmouth Youth Court* [2011] EWHC 2059 (Admin), [2012] Criminal Law Review 478.

[20] See CrimPD 2015 [2015] EWCA Crim 1567, 3F.4 which makes plain that where this inherent power is used "the direction will be ineffective if no intermediary can be identified for whom funding would be available". Also *Cox* [2012] EWCA Crim 549, 2 Cr App R 6.

[21] P Cooper, *Highs and Lows: The 4th Intermediary Survey* (2014) p 12, http://www.city.ac.uk/__data/assets/pdf_file/0011/280496/INTERMEDIARY-SURVEY-REPORT-5-July-2015.pdf (last visited 24 November 2015). Communicourt, *Report 1 – "Number Crunching": Understanding the vulnerable defendant population* (August 2014). Additionally, our snapshot data (collected with the assistance of Her Majesty's Courts and Tribunals Service) reveals that the vast majority of grants for defendant intermediaries in Crown Courts across England and Wales between September and November 2014 were for the whole of trial.

[22] *R (on the application of OP) v Secretary of State for Justice* [2014] EWHC 1944 (Admin), [2015] 1 Cr App R 7.

PROBLEMS WITH THE CURRENT POSITION[23]

Awareness and appreciation of the communication issues

2.17 Limited only by what is reasonably required, the CrimPRs and CrimPDs offer truly broad scope for the adjustment of proceedings to facilitate participation. However, anecdotal observations and empirical research[24] suggest that such adjustments could be much more widely deployed to achieve meaningful participation on the part of defendants, especially those with communication difficulties.[25] Whilst improvement is being made all the time, the extent to which these provisions are complied with, and appropriate adjustments made, is heavily dependent on the knowledge and awareness of the judge and representatives involved in the case. Additionally, in the pressured climate of a criminal trial, special measures and adjustments for defendants, such as regular breaks or reduced sitting times, are sometimes allowed to lapse in the face of time pressures, for example to complete a witness' evidence or accommodate a juror's commitments.[26]

Inequality in the provision for witnesses and defendants

2.18 Secondly, but critically, there is a fundamental inequality between the provision for vulnerable witnesses (prosecution or defence) and vulnerable defendants, particularly young vulnerable defendants.[27] This takes two forms in particular:

(1) The statutory eligibility criteria for access to special measures are more stringent for vulnerable defendants than for vulnerable witnesses. In particular, a witness who is not a defendant and is under the age of 18 is eligible for assistance by virtue of his or her age alone. A defendant under the age of 18 would have to have "a level of intellectual ability or social functioning" which compromised his or her ability to participate effectively in the proceedings to be eligible for assistance. [28] Additionally,

[23] See also the discussion in CP197, paras 4.10 to 4.15.

[24] See for example J Jacobson, G Hunter and A Kirby, *Inside Crown Court: Personal Experiences and Questions of Legitimacy* (2015) pp 40 to 43.

[25] See for example, submissions to the Independent Parliamentarians' Inquiry into the Operation and Effectiveness of the Youth Court (June 2014) which revealed that the CrimPD is "overlooked" or "ignored" and adherence to it "rarely occurred" in the Crown Court where youths were on trial.

[26] See observations by intermediaries in P Cooper, *Highs and Lows: The 4th Intermediary Survey* (2014). Also, J Plotnikoff and R Woolfson, "'*Registered Intermediaries in action': Messages for the CJS from the Witness Intermediary Scheme SmartSite*" (2011) p 8. See also the case of *Jordan Dixon* [2013] EWCA Crim 465, [2014] 1 WLR 525, where concerns were raised on appeal in respect of the lack of ground rules hearing and other adjustments to the trial of a defendant assisted by an intermediary.

[27] The inequality between provision for vulnerable witnesses and vulnerable defendants has been widely criticised: see for example L Hoyano, "Coroners and Justice Act 2009 – Special Measures Directions Take Two: Entrenching Unequal Access to Justice?" [2010] *Criminal Law Review* 345, and J Talbot, *Fair Access to Justice? Support for vulnerable defendants in the criminal courts. A Prison Reform Trust briefing paper* (2012), http://www.prisonreformtrust.org.uk/Portals/0/Documents/FairAccesstoJustice.pdf (last visited 24 November 2015).

[28] See YJCEA, s 16(1)(a) for a non-defendant witness, in comparison to YJCEA, s 33A(4) regarding live link for a defendant and s 33BA(5) regarding intermediary assistance for a defendant.

an adult witness could be eligible for special measures as a result of difficulties arising from a "physical disability" or "physical disorder". By contrast, an adult defendant is not eligible for special measures on the basis of difficulties arising from such a condition.

(2) There is no statutory entitlement (in force) for a vulnerable defendant to have the assistance of an intermediary and no registered intermediary scheme for defendants.

2.19 At present this disparity is overcome by reliance on the trial judge's inherent discretion to direct that measures be taken to ensure effective participation. However, difficulties concerning the availability and resourcing of special measures for vulnerable defendants mean that the operation of that discretion can have inconsistent results, and there are delays and difficulties in obtaining funding.[29]

Intermediary assistance for defendants

2.20 It is in relation to the provision of intermediary assistance for defendants that the most significant concerns arise. Intermediaries are only registered for the purposes of assisting witnesses. Intermediaries assisting defendants, therefore, are not operating through a regulated scheme, with approved training and support. Additionally, the Ministry of Justice prioritise their statutory obligation to provide witness intermediaries over any obligation to provide the same for defendants,[30] and there is an increasing demand for such assistance. This means that identifying and securing an intermediary to support a defendant is increasingly difficult, and the funding arrangements remain complicated.[31]

ANALYSIS AND DISCUSSION

Issue: Training for members of the judiciary and legal representatives in relation to vulnerable defendants

2.21 During the course of our consultation process we were fortunate enough to attend both the Crown and magistrates' courts with a group of consultees who have autism spectrum conditions.[32] Observing court proceedings with them, and discussing with them afterwards how they experienced those proceedings, revealed just how many barriers there are to effective participation for that group, in both jurisdictions. However, their observations also revealed an array of simple practical measures which would, those consultees felt, have considerably

[29] CP197 responses of Just for Kids Law (Just for Kids Law provide support, advice and legal representation for young people in difficulty) and the Prison Reform Trust.

[30] In particular in their provision of a matching service for witness intermediaries, referred to as the Witness Intermediary Service. See *R (on the application of OP) v Secretary of State for Justice* [2014] EWHC 1944 (Admin), [2015] 1 Cr App R 7 at [29].

[31] See P Cooper and D Wurtzel, "A day late and a dollar short: in search of an intermediary scheme for vulnerable defendants in England and Wales" [2013] *Criminal Law Review* 4.

[32] The consultation session was kindly arranged by Autism West Midlands, with the considerable assistance of Marie Tidball, then doctoral student at Wadham College, Oxford, and the staff at Queen Elizabeth II Law Courts and Birmingham Magistrates' Court.

improved their prospects of participating effectively, were they to find themselves in the dock.[33]

2.22 What was immediately apparent from that group session was that such trial adjustments can be easily achieved and cost-effective. However, they require the representative or the court to be able to indentify vulnerability and to have a better understanding of the difficulties likely to be experienced as a result.

Discussion: Training for members of the judiciary and legal representatives in relation to vulnerable defendants

Currently available training resources

2.23 As outlined above we already have, in the CrimPR and CrimPD, an ideal framework for ensuring that suitable trial adjustments are made and there are excellent resources available to assist judges and representatives to address communication difficulties. In particular, the Advocate's Gateway continues to add to its toolkits which provide best practice guidance on identifying vulnerabilities, making reasonable adjustments and planning effective communication.[34] In the magistrates' courts, the Prison Reform Trust and Rethink Mental Illness have collaborated with the Magistrates' Association and the Justices' Clerks' Society. Together they have produced an online resource addressing issues relating to mental health and learning disabilities to assist those involved in hearings in magistrates' courts.[35]

Training currently provided

2.24 Progress on training is being made. There is currently an emphasis on judges who sit in the Crown Court being trained to deal with vulnerable witnesses. This is a half-day training module which is mandatory for all circuit judges.[36] Although vulnerable defendants do feature briefly in that training, there is no significant focus on the different issues that arise in relation to vulnerable defendants, and the different adjustments which might be appropriate.[37] In addition, the Criminal Bar Association's conference on 6 December 2014 focussed on vulnerable defendants and witnesses, but inevitably could only cater for a fraction of barristers practising in crime.

[33] For example, use of natural light rather than strip-lighting, care taken to ensure undue distress is not caused for defendants with sensory sensitivity.

[34] Accessible at http://www.theadvocatesgateway.org/toolkits (last visited 18 December 2015). In December 2015 six new toolkits were added.

[35] See P McConnell and J Talbot, *Mental Health, Autism and Learning Disabilities in the Criminal Courts: Information for magistrates', district judges and court staff* (2013), http://www.mhldcc.org.uk/media/493/RMI_PRT_MHLDCC_Sept2013.pdf (last visited 24 November 2015).

[36] Meeting with Judicial College 15 April 2015.

[37] Email 22 July 2014, Judicial College joint Course Director for Crown Court continuation training.

2.25 The Magistrates' Association has a system of mental health "champions"[38] and have included training sessions on mental health and learning disability issues at a number of their events. Likewise, the Prison Reform Trust working with Keyring and their Working for Justice Group[39] provided a training session on these issues at all district judge and deputy district judge training events in 2014.

2.26 There are already various providers who offer tailored training programmes in this area. For example, KeyRing offer free learning disability and autism awareness training sessions for people working in the criminal justice system as part of their Comic-Relief funded "Equal and Fair Project".[40] The Royal College of Speech and Language Therapists also offers a free e-learning module in this area. Alternatively, they offer a two-day training programme, "The Box", which is designed to give staff and professionals in the criminal justice sector the skills required to work more efficiently and confidently with people who have communication difficulties.

Conclusion: Training for members of the judiciary and legal representatives in relation to vulnerable defendants

2.27 There are, as will be apparent, a range of excellent resources and training opportunities in this area. However, despite recent advances such training is not universally undertaken and coverage of training courses is uneven. Unsurprisingly, observations from a range of perspectives, particularly court users and former defendants,[41] professionals operating in the courts[42] and intermediaries suggest that adherence to the CrimPR and enlightened use of trial adjustments is excellent in some areas, and by some individuals, whilst being inadequate in others.[43]

2.28 It is plain to us that more needs to be done to promote amongst the judiciary and legal practitioners an awareness of issues relating to participation and communication difficulties suffered by vulnerable defendants, and to ensure that training is provided to all.

[38] Mental Health Champions work to promote and encourage all opportunities to raise awareness amongst magistrates, court staff and others of issues relating to mental health, learning disabilities and other vulnerabilities, and to encourage opportunities for training.

[39] KeyRing is a charity which works to place vulnerable people at the heart of their community, sharing their skills and talents for the benefit of all. Working for Justice is a service user group run by KeyRing which enables individuals with a learning disability and direct experience of the criminal justice system to give feedback on their experiences to help to inform others working in the criminal justice system.

[40] For example, see http://www.keyring.org/cjs-training (last visited 24 November 2015).

[41] See for example J Jacobson, G Hunter and A Kirby, *Inside Crown Court: Personal Experiences and Questions of Legitimacy* (2015) and presentation "Inside Story" by Kids Company staff and former offenders at the Intermediaries for Justice Conference 14 March 2015. Kids Company was a charity that provided therapeutic, emotional and practical support, including legal assistance, to vulnerable children and young people.

[42] See for example submissions to the Independent Parliamentarians' Inquiry into the Operation and Effectiveness of the Youth Court (June 2014).

[43] See also P Darbyshire, "Judicial case management in ten Crown courts" (2014) 1 *Criminal Law Review* 30.

2.29 A number of different bodies have recommended training for the judiciary and legal practitioners in this regard,[44] and we consider that it is appropriate to add our voice to that increasingly insistent call.

2.30 **We** therefore **recommend that all members of the judiciary engaged in criminal proceedings in the Crown and magistrates' courts and all legal representatives appearing in such proceedings should be required to receive training:**

(1) to assist them in understanding and identifying participation and communication difficulties experienced by vulnerable defendants; and

(2) to raise their awareness of the available mechanisms to adjust proceedings to facilitate the defendant's effective participation.

Issue: Statutory intermediary provision for defendants

2.31 In light of the concerns outlined at paragraphs 2.18 to 2.20 above, in Part 3 of the Issues Paper ("the IP") we asked a single further question:

> Do consultees consider it desirable and practicable for defendants to have a statutory entitlement to the support of a registered intermediary, for as much of the proceedings, including pre and post trial, as is required, where the court is of the view that such assistance is necessary to ensure that the defendant receives a fair trial?[45]

2.32 The written consultation submissions on this question were overwhelmingly positive.[46] This response has been sustained in subsequent stakeholder meetings and conference discussions.[47] However, whilst strongly supportive, a number of consultees have raised concerns about the practical difficulties of implementing such a scheme, particularly resourcing concerns.[48]

[44] See the developed recommendations for training in the Advocacy Training Council's report *Raising the Bar: The Handling of Vulnerable Witnesses, Victims and Defendants in Court* (2011) pp 40 to 47, http://www.advocacytrainingcouncil.org/vulnerable-witnesses/raising-the-bar (last visited 24 November 2015). Also the Independent Parliamentarians' Inquiry into the Operation and Effectiveness of the Youth Court (June 2014), http://www.ncb.org.uk/media/1148432/independent_parliamentarians__inquiry_into_the_operation_and_effectiveness_of_the_youth_court.pdf (last visited 24 November 2015).

[45] IP Further Question 12, paras 3.15 to 3.22.

[46] 28 out of 33 respondents who answered the question agreed unreservedly with the proposal. Four selected "other" and raised concerns about practicability, and one selected "disagree" (Dr Linda Monaci), but her concern related to the limited mental health expertise of many intermediaries.

[47] For example, round table discussions with members of the judiciary sitting at Snaresbrook Crown Court and the Central Criminal Court, discussions at the Criminal Bar Association Conference on Vulnerable Defendants and Witnesses, 6 December 2014 and the intermediaries for Justice Conference on Working with Defendants, 14 March 2015.

[48] IP responses of David Wurtzel (barrister and academic), Council of HM Circuit Judges, Holroyde J, Charles de Lacy (clinical nurse specialist), Professor Penny Cooper (academic), Faculty of Forensic and Legal Medicine, and the Youth Justice Board. We address these concerns at para 2.77 and following below.

2.33 Some consultees also expressed concerns that intermediaries should not be seen as a "panacea" for all participation impairments or cognitive difficulties.[49] We agree with criminal solicitor Nigel Barnes' observation in this regard, that care should be taken to ensure that the introduction of a defendant intermediary scheme does not lead to an "implicit assumption that all fitness issues can be resolved in this way".

2.34 The further question that we posed included a number of different issues. We therefore discuss below consultee responses in relation to each of those issues separately before arriving at our recommendations. We address the question of a statutory entitlement to intermediary assistance for defendants first, before turning to the question of a registered defendant intermediary scheme.

Discussion: Statutory intermediary provision for defendants

A statutory entitlement to intermediary assistance for defendants

2.35 A number of consultees addressed directly the reason why a statutory entitlement is of critical importance:

(1) The lack of statutory entitlement may be in contravention of the defendant's rights under article 6 of the ECHR (Nigel Barnes, Council of HM Circuit Judges, Just for Kids Law).

(2) Legislation will at least start to recognise the true position in practice, which is that intermediaries are becoming a "de facto aspect of a fair trial process for some defendants" (Charles de Lacy[50]).

(3) "Legislation in the longer term may lead to a more systemised approach to the use of intermediaries" (Charles de Lacy).

(4) "A statutory provision would ensure consistency across all regions" (Mind).

2.36 Several consultees expressed the view that there is no "good reason"[51] for the distinction between the statutory entitlement to an intermediary enjoyed by witnesses and the very different position of defendants. In particular, Professor Penny Cooper described the lack of a statutory entitlement for defendants as "wrong in principle".

2.37 We consider that the creation of a statutory entitlement to an intermediary in appropriate circumstances is essential for the reasons enunciated by consultees. We are particularly persuaded by:

[49] Laura Hoyano (academic), Carolyn Taylor (solicitor specialising in criminal and mental health law), the Law Society.

[50] A psychiatric nurse, working in a liaison and diversion role at the Central Criminal Court.

[51] Council of HM Circuit Judges. See also CP197 responses from Prison Reform Trust, Carolyn Taylor, Law Society.

(1) The inequity of the current lack of statutory provision when compared with the position of prosecution and defence witnesses.[52] This has also been the subject of recent judicial concern in the case of *R (On the application of OP) v Secretary of State for Justice,*[53] in which Lady Justice Rafferty noted the "risk of unfairness or at its lowest a perceived risk of unfairness" to defendants arising out of the current legal framework.

(2) The current difficulties in securing intermediary assistance for defendants with disabilities, arising substantially from the lack of statutory provision, may leave the Ministry of Justice open to challenge under the Equality Act 2010.[54] There are also concerns that the current position might conflict with articles 12 and 13 of the United Nations Convention on the Rights of Persons with Disabilities ("UNCRPD").[55]

(3) The fact that the number of defendant intermediaries being granted by judges exercising their inherent jurisdiction continues to increase.[56] A statutory footing would recognise, and provide a proper framework for, what has become a practical reality.

(4) A statutory entitlement has been proposed in other reviews of this area, in particular the Bradley Review Five Years On,[57] the Independent Parliamentarians' Inquiry into the Operation and Effectiveness of the Youth Court[58] and the Criminal Justice Joint Inspection 2014.[59]

[52] See L Hoyano, "Coroners and Justice Act 2009 – Special Measures Directions Take Two: Entrenching Unequal Access to Justice?" [2010] *Criminal Law Review* 345.

[53] *R (on the application of OP) v Secretary of State for Justice* [2014] EWHC 1944 (Admin), [2015] 1 Cr App R 7 at [46].

[54] In particular the duty to make reasonable adjustments under the Equality Act 2010, s 20.

[55] UNCRPD, art 12(3) requires states to "take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity". Article 13 requires states to ensure "effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations". HM Government's Office for Disability Issues recognises that article 13 is applicable to trial adjustments. Office for Disability Issues, *UK Initial Report on the UN Convention on the Rights of Persons with Disabilities* (May 2011) para 122 and following, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/345120/uk-initial-report.pdf (last visited 24 November 2015).

[56] See P Cooper, *Highs and Lows: The 4th Intermediary Survey* (2014) and Communicourt, *Report 1 – "Number Crunching" Understanding the vulnerable defendant population* (August 2014).

[57] Centre for Mental Health, *The Bradley report five years on: An independent review of progress to date and priorities for further development* (June 2014), recommendation 2c, http://www.centreformentalhealth.org.uk/the-bradley-report-five-years-on (last visited 24 November 2015).

[58] Independent Parliamentarians' Inquiry into the Operation and Effectiveness of the Youth Court (June 2014), p 28.

[59] Criminal Justice Joint Inspection, *Achieving Best Evidence in Child Sexual Abuse Cases – A Joint Inspection* (December 2014) pp 31 to 32, https://www.justiceinspectorates.gov.uk/cjji/wp-content/uploads/sites/2/2014/12/CJJI_ABE_Dec14_rpt.pdf (last visited 24 November 2015).

(5) A statutory right is essential to ensure provision and funding for defendant intermediaries.[60]

Intermediary assistance for defendants beyond the giving of evidence

2.38 A number of consultees, particularly those who work most closely with defendant intermediaries, stressed the critical importance of intermediary assistance for as much of the proceedings as is required. Their observations included:

(1) "We have repeatedly expressed the view that it is essential that the facility of an intermediary should be available to a defendant who is under a disability not only in order to give evidence but throughout the case. This means not only during the hearing but also for proper preparation. We regard it as more than desirable but may be the only way in which a defendant is able properly to understand and to participate effectively in a case. One wonders how it would be practical to bring in an intermediary at the moment the decision is taken by the Defence to call the defendant" (Council of HM Circuit Judges).

(2) "Our statistics show 40% [of defendants] do not take the stand [to give evidence]. Section 104 (CJA 2009) suggests the involvement of intermediaries for giving evidence only. However, as we know, the decision to give evidence is often made an hour beforehand. And without the assistance of an intermediary, the defendant may not be able to participate in the decision. My experience is that the idea of public speaking is enough to put them off, and only sensitive support will help them. And of course if they haven't understood their trial, how can they prepare for giving evidence. Unworkable in short" (Paula Backen, Communicourt).[61]

(3) "The giving of evidence is not a discrete process. It comes towards the end of the trial, but also in the context of what has preceded it. An intermediary who only deals with evidence-giving has missed out on a wealth of detail, e.g., how well the defendant has coped with the trial process and what concepts the defendant has been able to understand as the trial has gone on" (David Wurtzel).

(4) "It is significant that judges, who are as acutely aware as anyone of the scant court resources, usually appoint an intermediary for more than just the defendant's evidence. My most recent intermediary survey shows

[60] Mind also note in their response, reflecting on the difficulties seen in the provision of the Appropriate Adult Scheme in England and Wales that, in addition to a statutory entitlement, it is desirable for legislation to be explicit as to the body or agency which has a statutory duty to make such provision.

[61] Paula Backen is a speech and language therapist and registered intermediary. Communicourt is nationally the largest private provider of intermediaries to assist adult defendants.

> that out of 64 reported defendant intermediary appointments only 1 was just for the defendant's testimony" (Professor Penny Cooper).[62]

2.39 Several consultees raised the need for intermediary involvement to begin in the police station.[63] While this is beyond the scope of our unfitness to plead project, which commences with the defendant's first attendance at court, we think that this is an important issue and one which would benefit from being reviewed in any implementation scheme. In Northern Ireland, where the provision for intermediary assistance for the defendant, matching section 104 of the Coroners and Justice Act 2009, is in force,[64] a defendant intermediary pilot scheme has included the provision of intermediaries to suspects at the police station. The Post-Project Review suggests that there has been good take-up of the provision, that it has been introduced without difficulty and with positive results.[65]

2.40 Although our consultees expressed overwhelming support for the provision of intermediary assistance, where necessary, for the whole of trial, there are other viewpoints. The difference of opinion arises out of the contested scope of the intermediary's role and the resourcing implications of intermediary assistance throughout trial.

The judgment in OP[66] and the role of the defendant intermediary

2.41 We recognise, as do several of our consultees,[67] that support for the provision of intermediary assistance throughout trial, where required, is in contrast to the position taken by the Divisional Court in *R (on the application of OP) v Secretary of State for Justice*.[68] In her judgment in *OP*, whilst she did not exclude a grant for the whole of the trial, Lady Justice Rafferty favoured the grant of an intermediary solely for the defendant's testimony. In doing so she discerned two roles for an intermediary during a trial. The first she considered to be "founded in general support, reassurance and calm interpretation of unfolding events". This role, Lady Justice Rafferty felt is:

> …readily achievable by an adult with experience of life and the cast of mind apt to facilitate comprehension by a worried individual on trial. In

[62] Referencing P Cooper, *Highs and Lows: The 4th Intermediary Survey* (2014), http://www.city.ac.uk/__data/assets/pdf_file/0011/280496/INTERMEDIARY-SURVEY-REPORT-5-July-2015.pdf (last visited 25 November 2015).

[63] David Wurtzel, Laura Hoyano.

[64] Criminal Evidence (Northern Ireland) Order 1999, art 21BA.

[65] Department of Justice, *Northern Ireland Registered Intermediaries Schemes Pilot Project: Post-Project Review* (January 2015), http://www.dojni.gov.uk/index/publications/publication-categories/pubs-criminal-justice/ri-post-project-reviewfeb15.pdf (last visited 25 November 2015).

[66] *R (on the application of OP) v Secretary of State for Justice* [2014] EWHC 1944 (Admin), [2015] 1 Cr App R 7.

[67] David Wurtzel, Professor Penny Cooper.

[68] [2014] EWHC 1944 (Admin), [2015] 1 Cr App R 7.

> play are understandable emotions: uncertainty, perhaps a sense of territorial disadvantage, nervousness and agitation.[69]

2.42 The second role, Lady Justice Rafferty considered, requires "developed skills" of the sort possessed by registered intermediaries, but that:

> The most pressing need for the help of an intermediary self-evidently bites at the point of maximum strain, that is when an accused should he do so elects to give an account of himself by entering the witness box and submitting to cross-examination.[70]

2.43 Lady Justice Rafferty concluded:

> We are not persuaded that it is essential a RI [registered intermediary] be available to all defendants for the duration of their trials. In many instances the provision of help centred upon the cast of mind and life experience we have described are likely to prove sufficient.[71]

The position in Northern Ireland

2.44 As set out at paragraph 2.39 above, in Northern Ireland a provision equivalent to section 104 of the Coroners and Justice Act 2009 is in force. The Department of Justice pilot scheme provides for intermediary assistance, under a registered scheme, for defendants only for oral evidence. A "court defendant supporter", generally a person known to the defendant or a volunteer appropriate adult, is to be used where assistance is required during the rest of the trial process beyond oral evidence.

2.45 The Department of Justice provide two reasons for taking this more restrictive approach. First, they consider that to support a defendant during the trial other than for oral evidence would conflict with the intermediary's role as an officer of the court, who must be "neutral, impartial, objective and transparent in all that they do".[72] The involvement of a defendant intermediary in a long trial inevitably raises the risk that partiality, or perceived partiality, will arise.

2.46 Secondly, the Department of Justice consider that the supporting role is best conducted by a person who "already has a relationship of trust and a strong

[69] *R (on the application of OP) v Secretary of State for Justice* [2014] EWHC 1944 (Admin), [2015] 1 Cr App R 7 at [35].

[70] *R (on the application of OP) v Secretary of State for Justice* [2014] EWHC 1944 (Admin), [2015] 1 Cr App R 7 at [36].

[71] *R (on the application of OP) v Secretary of State for Justice* [2014] EWHC 1944 (Admin), [2015] 1 Cr App R 7 at [41].

[72] Department of Justice, *Northern Ireland Registered Intermediaries Schemes Pilot Project: Post-Project Review* (January 2015) at [5].

rapport" with the defendant, and otherwise can be adequately fulfilled by a volunteer "court defendant supporter".[73]

2.47 Unfortunately, although the Northern Ireland pilot scheme ran for 18 months from May 2013, no defendant required the assistance of an intermediary at trial in the allotted time period, and so it is not possible to analyse the performance of the Northern Ireland scheme for defendants in this regard.[74]

The "worried individual on trial"

2.48 In cases where the defendant can be adequately described as a "worried individual on trial" coping with "uncertainty, perhaps a sense of territorial disadvantage, nervousness and agitation"[75] we agree with Lady Justice Rafferty. That defendant's effective participation in the trial proceedings, other than when he or she gives oral evidence, could most likely be facilitated by a supporter who would not need specialist communication skills or forensic mental health experience. To require an intermediary to be engaged for the whole of trial for such a defendant would indeed be an unnecessary use of resources. There is already provision in the Criminal Practice Direction for support of that sort.[76]

Defendants in need of specialist assistance throughout trial

2.49 However, the sort of defendants whose difficulties we have particularly in mind in proposing this extended statutory entitlement could not adequately be described as "worried individuals". The examples given by intermediaries and representatives of those who require an intermediary throughout trial are most often defendants who have: autism spectrum conditions, dissociative identity disorder (multiple personality disorder), or a significant learning disability combined with, for example, extremely limited working memory or Attention Deficit Hyperactivity Disorder ("ADHD"). The anxiety or agitation experienced by such defendants could not be adequately addressed by "an adult with experience of life and the cast of mind apt to facilitate comprehension".[77]

2.50 Many of these defendants need specialist assistance throughout the trial process in order to be able to understand and follow proceedings so that they can give instructions to their representatives in the manner required in *SC*[78]. The majority of intermediaries operating in the criminal courts do not only have specialist speech, language and communication expertise. Many also have additional specialist qualification, or experience in assisting, for example, very young

[73] Department of Justice, *Northern Ireland Registered Intermediaries Schemes Pilot Project: Post-Project Review* (January 2015) at [6]. The latter in Northern Ireland provided by the Mindwise scheme, which provides appropriate adults in police stations, and now "court defendant supporters" in Northern Ireland.

[74] Although at time of writing it is understood that there is a current pilot area case involving a defendant intermediary.

[75] *R (on the application of OP) v Secretary of State for Justice* [2014] EWHC 1944 (Admin), [2015] 1 Cr App R 7 at [35].

[76] CrimPD 2015 [2015] EWCA Crim 1567, 3G.8.

[77] *R (on the application of OP) v Secretary of State for Justice* [2014] EWHC 1944 (Admin), [2015] 1 Cr App R 7 at [35].

[78] *SC v United Kingdom* (2005) 40 EHRR 10 (App No 60958/00) at [29].

children or individuals with autism spectrum conditions, or significant learning disabilities.

2.51 In order to facilitate the defendant's engagement in the proceedings, intermediaries describe assisting the defendant in managing his or her mental state and/or behaviour in court, and providing mechanisms to relieve stress or facilitate concentration during the proceedings.[79] This role has been described as akin to a "treatment" role[80] and can be a vital element in maintaining the defendant's engagement.[81]

2.52 In addition to this role of mental-state management, the courts have recognised that the defendant intermediary's communication role is much wider than simple facilitation of the defendant's oral evidence as set out in section 33BA(4) of the YJCEA.[82] As His Honour Judge Brian Barker CBE QC observed[83] (endorsing Professor Penny Cooper's description)[84] the role can include:

> assessing a person's needs and advising those in the justice system how best to communicate with that person. In addition the role can involve planning and managing court familiarisation, helping advocates to properly word their cross-examination, assisting lawyers to take instructions from their client and assisting lawyers to explain the trial outcome.

2.53 So as well as facilitating the giving of oral evidence by the defendant, the intermediary ensures that during the rest of the trial process the defendant is able to follow and engage with the proceedings as a whole as far as he or she can. In order to facilitate that, the intermediary also assists the court and other participants to adjust proceedings throughout the trial. An unqualified supporter would neither have the skills nor the standing to take on such a role. Nor could an intermediary attending only for the defendant's oral evidence achieve this wider communication role.

2.54 As will be apparent from the consultation responses at paragraph 2.38 above, and the continued grant by judges of intermediaries for the duration of the trial,

[79] Catherine O'Neill and Gaynor Miles at the Intermediaries for Justice Conference 14 March 2015, and IP response of Paula Backen. See also J Plotnikoff and R Woolfson, *Intermediaries in the Criminal Justice System: Improving communication for vulnerable witnesses and defendants* (2015), pp 265 to 270.

[80] Observations of HHJ Brian Barker CBE QC in *P* and the IP response of Charles de Lacy.

[81] The National and Specialist CAMHS Forensic Psychology Service also acknowledge in their IP response the assistance that intermediaries with sufficient training could provide in this regard.

[82] See P Cooper and D Wurtzel, "Better the second time around? Department of Justice Registered Intermediaries Schemes and lessons from England and Wales" (2014) 65(1) *Northern Ireland Legal Quarterly* 39.

[83] *Piggin* (March 2015) (unreported, Recorder of London).

[84] P Cooper, *Highs and Lows: The 4th Intermediary Survey* (2014), p 3.

this expanded intermediary role is highly valued and generally very effectively undertaken.[85]

The perception of partiality

2.55 We consider now the concerns of the Northern Ireland Department of Justice that the intermediary ought not to assist a defendant throughout trial because this will undermine his or her independent role as an officer of the court.

2.56 The former Recorder of London, His Honour Judge Brian Barker CBE, QC presiding over a recent lengthy trial in which concerns were raised in this regard noted:

> The intermediary in the defence context carries a heavy burden in balancing on the one hand the inevitable closeness over a period of time to the client and sympathy with the problems, with on the other the necessity to be scrupulous in observing responsibility to the court and to the administration of justice.[86]

2.57 In his view ground rules hearings, as required by the Criminal Procedure Rules, "should counter the problem but not every potential problem can be foreseen." We would add that a registered scheme, with a code of practice or guidance manual, would also significantly enhance intermediary skills in addressing these issues and provide support where partiality or ethical issues arise.

2.58 Intermediaries themselves are conscious of the challenges which arise in maintaining their impartial position during a long or difficult trial.[87] However, difficult though this role can be, we see no reason why partiality concerns should act as a bar to intermediary assistance in the wider trial process. Nor do we see why a suitably trained and registered intermediary cannot provide ongoing assistance to an individual defendant whilst acting as an officer of the court. We bear in mind that defence representatives owe a similar duty to the court to "act with independence in the interests of justice" which overrides any other inconsistent obligations to their client.[88]

Practical concerns for intermediary assistance only for the giving of evidence

2.59 There are, in addition, significant practical concerns about how the use of a supporter, with an intermediary for oral evidence only, would function. As Professor Penny Cooper observes:

> … one wonders how it would be practical to bring in an intermediary at the moment the decision is taken by the Defence to call the

[85] See J Plotnikoff and R Woolfson, *Intermediaries in the Criminal Justice System: Improving communication with vulnerable witnesses and defendants* (2015), p 252.

[86] *Piggin* (March 2015) (unreported, Recorder of London).

[87] See doctoral thesis of Brendan O'Mahoney (forensic psychologist and registered intermediary), *How do intermediaries experience their role in facilitating communication for vulnerable defendants?* (2013), http://eprints.port.ac.uk/12434/ (last visited 25 November 2015).

[88] Bar Standards Board, *Bar Standards Board Handbook* (2nd ed 2015) part 2: "Code of Conduct", r C3.

> defendant. Should the intermediary be kept on standby? When and how would the intermediary (who would presumably have already assessed and built rapport with the defendant before the trial) re-establish rapport? Would the intermediary be given the opportunity (as she ought) to check that the defendant's communication needs have not changed now that the defendant is mid-way through a stressful trial and about to be cross-examined? Would the intermediary be given the opportunity to ascertain the key vocabulary in the trial? Would the intermediary have the opportunity to discuss (as is good practice) with trial advocates how best to conduct the examination and cross-examination? And if the intermediary is for only the defendant's testimony who will help the legal team communicate with the defendant and take instructions? In short, it is simply not fair on anyone, particularly the defendant, that an intermediary is merely parachuted in for testimony.

2.60 Intermediaries have expressed concern that in some cases it is the critical decision whether to give evidence, and preparing the defendant for that task, for which the intermediary's presence is particularly required, in advance of the oral evidence itself. Such assistance cannot adequately be provided in every case by an intermediary who attends only for the defendant's evidence.

> **Example 1** In the case of *Piggin*,[89] the intermediaries involved, Catherine O'Neill and Gaynor Miles, describe the significant task of assisting the defendant to decide whether to give evidence using picture prompt cards, and how they prepared him to be able to give evidence by practice sessions for the defendant using general knowledge questions in the witness box. The process was iterative and took place over several days.

2.61 It is noteworthy that the major providers of defendant intermediary services, Communicourt and Triangle, have now decided to decline instructions where the requirement is for oral evidence only.[90]

Conclusion: Statutory intermediary provision for defendants

2.62 Weighing all these issues, we come to the conclusion that it is essential for a defendant to have a statutory entitlement to the assistance of an intermediary. We consider that this entitlement should encompass intermediary assistance both for the giving of evidence and for as much of the wider trial proceedings as is necessary for the defendant to have a fair trial.

2.63 We acknowledge that there may be cases, as envisaged by Lady Justice Rafferty,[91] where a supporter can assist the defendant during trial and an intermediary step in when the defendant gives evidence. However, for some defendants with really significant communication or participation difficulties

[89] Intermediaries for Justice Conference, 14 March 2015 in respect of *Piggin* (March 2015) (unreported, Recorder of London).

[90] Email from Communicourt 21 September 2015.

[91] *R (on the application of OP) v Secretary of State for Justice* [2014] EWHC 1944 (Admin), [2015] 1 Cr App R 7 at [36].

continuous specialist assistance is essential for fair trial, as current practice and our consultees' views reveal. As the Council of HM Circuit Judges observed in their response to the IP, such provision "may be the only way in which a defendant is able properly to understand and to participate effectively in a case."

2.64 Although we stress that in those cases what is required is continuous assistance, the recommendations that we make must be compatible with the current statutory framework for the provision of special measures for vulnerable witnesses and defendants in the criminal courts. Part 2 of the YJCEA, which makes provision for special measures, concerns the "Giving of Evidence or Information for Purposes of Criminal Proceedings". Our recommendation for a statutory entitlement for intermediary assistance for a defendant beyond the giving of evidence is liable to fall outside the scope of that legislation. Thus our recommendation for statutory intermediary assistance for a defendant is necessarily split into two separate provisions: one for assistance in the giving of evidence and one for assistance during criminal proceedings other than during the giving of evidence.

2.65 In relation to the giving of evidence itself, it will be apparent that we do not endorse the simple implementation of section 104 of the Coroners and Justice Act 2009 (bringing into force sections 33BA and 33BB of the YJCEA). We acknowledge that in most cases a defendant who requires intermediary assistance will be able to satisfy the more stringent criteria imposed on defendants by section 33BA.[92] Nonetheless, we can see no justifiable reason why the current inequality between witnesses and defendants should remain. We anticipate that there will be cases, particularly where effective participation difficulties may arise as a result of sensory difficulties or physical impairment, where the defendant in need will not be eligible under the current provisions.

2.66 **We** therefore **recommend, in relation to intermediary assistance for the giving of evidence by a defendant, that section 33BA of the Youth Justice and Criminal Evidence Act 1999 (examination of an accused through an intermediary) be amended so that a defendant would be eligible for a direction for intermediary assistance for the giving of evidence where he or she is:**

(1) under 18 years of age; or

(2) his or her ability to participate effectively in the proceedings is likely to be diminished by reason of mental disorder (as defined in section 1(2) of the Mental Health Act 1983), a significant impairment of intelligence and social functioning, or a physical disability or disorder.

2.67 **The making of a direction for such assistance should remain subject to the court being satisfied that the making of the order is "necessary in order that the accused receives a fair trial"[93]** (see draft Bill clause 63).

[92] In comparison to those imposed on witnesses under YJCEA, s 16. See para 2.18 above for discussion.

[93] YJCEA, s 33BA(2)(b).

2.68 For this first part of our recommendations on intermediary assistance to be implemented it would be necessary for sections 33BA (as amended) and section 33BB of the YJCEA to be brought into force.

2.69 **We** also **recommend that a statutory entitlement be created for intermediary assistance to be extended to a defendant during or in connection with the proceedings, other than for the giving of evidence, subject to the following restrictions:**

(1) That the court is satisfied that the defendant's ability to participate effectively in the proceedings is likely to be diminished to the extent that granting intermediary assistance is necessary for the defendant to have a fair trial; and

(2) That the defendant is:

(a) under 18 years of age; or

(b) his or her ability to participate effectively in the proceedings is likely to be diminished by reason of mental disorder (as defined in section 1(2) of the Mental Health Act 1983), a significant impairment of intelligence and social functioning, or a physical disability or disorder.

(3) The extent of the intermediary assistance granted should be limited to that which is necessary to ensure that the defendant can have a fair trial (see draft Bill clause 61).

Alternative position

2.70 The recommendations that we make above set out what we consider to be the necessary and appropriate reforms required to address the provision of intermediary assistance to a defendant. Nonetheless, we appreciate that resource constraints are such that these recommendations may not be adopted in the short- to mid-term. Taking a pragmatic approach, we consider that there is an alternative, albeit less desirable, short-term solution. If Government decided that our recommendations could not at this time be implemented in full for financial reasons, we would urge at least that our recommendations in relation to intermediary assistance for the giving of evidence should be implemented. This would entail (as set out at paragraphs 2.66 to 2.68 above) the amendment of section 33BA of the YJCEA and the bringing into force of sections 33BA (as amended) and section 33BB of the YJCEA. Such an approach would at least provide a statutory entitlement for a defendant to intermediary assistance for the giving of evidence, on terms comparable to the provision for witnesses.

2.71 We have considered whether the implementation of section 33BA of the YJCEA, amended as we recommend, would have the adverse effect of limiting the trial judge's inherent jurisdiction to grant intermediary assistance to a defendant for the proceedings other than for the giving of evidence. Since Part II of the YJCEA relates to the giving of evidence only, we conclude that the implementation of Section 33BA could not possibly limit the trial judge's inherent jurisdiction to adjust other aspects of the trial to facilitate effective participation of the defendant. In exercising that discretion the trial judge would continue to apply the

CrimPR,[94] which require the court to take "every reasonable step" to "facilitate the participation of any person, including the defendant", and the CrimPD. [95]

Issue: A registered defendant intermediary scheme

2.72 Our IP consultees were unanimous in supporting the introduction of a registered scheme for defendant intermediaries. Amongst observations made in this regard were:

(1) The lack of registration for defendant intermediaries stands in direct contrast to the provision of registered intermediaries for other prosecution and defence witnesses. There is no good reason for this distinction, which should be addressed (Council of HM Circuit Judges, Prison Reform Trust).

(2) Without registration defendant intermediaries have no approved training or level of qualification, guidance or code of practice, CPD requirement, or complaints procedures (Professor Penny Cooper, National and Specialist CAMHS Forensic Psychology Service).

(3) Provision of a registration scheme would enhance public confidence in defendant intermediaries (David Wurtzel).

(4) The defendant intermediary role is "pushing some of the boundaries of traditional court procedure" (Paula Backen). The need for guidance on the role of the intermediary, to assist all parties, is critical.

Discussion: A registered defendant intermediary scheme

An agreed role and procedures

2.73 The scope of the intermediary's role remains contested and there are still many judges and representatives who have not yet worked with a defendant intermediary. As a result, it is essential that a code of practice or guidance manual is introduced so that the defendant intermediary role, different as we have discussed from that of the witness intermediary, is clearly delineated, and approved procedures are put in place. Without a code of practice, problems do arise in relation to the extent of the intermediary's role. As His Honour Judge Brian Barker CBE QC observed in relation to the case of *Piggin*:

> The present general position is unfortunate in that those acting with defendants are not regulated. Further, both intermediaries and the other significant participants in the trial process can misunderstand the role, and are often not clear as to their legal status and to the legal limits of their roles.[96]

2.74 Guidance is required in particular to assist intermediaries to deal with the difficulties of the role. For example, guidance on whether the intermediary should

[94] CrimPR 2015 (SI 2015 No 1490), r 3.9(3).

[95] CrimPD 2015 [2015] EWCA Crim 1567, CrimPD I General Matters 3D.2 (see para 2.9 and following above).

[96] *Piggin* (March 2015) (unreported, Recorder of London).

be able to provide support to the defendant outside the court without the presence of a third party, whether something akin to legal professional privilege should apply to disclosures made to an intermediary and on maintaining impartiality during long trials would be very welcome.[97] Additionally, clarification on the preparation and content of intermediary reports would assist to allay conflict of interest concerns, addressed at paragraph 2.86 and following below.

Training and support

2.75 There is no approved training, continuing professional development requirement or support in place for defendant intermediaries, although the larger providers, Communicourt and Triangle, have their own programmes for employees.[98] The role of the defendant intermediary is a demanding one, especially where the judge or the participants are unused to working with an intermediary. Observations by intermediaries in discussion groups suggest that such support would be welcomed.[99]

Quality assurance

2.76 At present there is no standardised qualification or experience requirement for defendant intermediaries. A registered scheme would enable the Ministry of Justice to fix minimum levels of qualification or experience, and would allow for oversight by the Quality Assurance Board (who regulate and monitor professional standards for registered witness intermediaries) or a like body. It might also allow for areas of specialist expertise (for example, clinical or psychological qualifications or experience in assisting individuals with particular conditions or difficulties) to be properly recognised, where that is appropriate. There seems to be no reason why the Intermediary Regulation Board and Quality Assurance Board, who currently maintain the register of witness intermediaries, could not perform the same function for defendant intermediaries. A registered scheme could also provide for a formal complaints procedure.

Resourcing concerns

2.77 The most widely expressed reservation with regard to a statutory entitlement to intermediary assistance for defendants was how such a scheme would be resourced, particularly if it were to be a registered scheme. Inevitably there would need to be a significant recruitment and training exercise, and the setting up of a registration scheme would incur additional costs in a time of scarce resources.

2.78 Nonetheless, the overwhelming view of those who responded to the intermediary question in the IP[100] was that the resourcing difficulties should not be a bar to the

[97] Charles de Lacy, Brendan O'Mahony's doctoral thesis, *How do intermediaries experience their role in facilitating communication for vulnerable defendants?* (2013), http://eprints.port.ac.uk/12434/ (last visited 25 November 2015).

[98] Meeting with Communicourt August 2014.

[99] Arising in discussion groups held at the Intermediaries for Justice Conference, 14 March 2015.

[100] IP Further Question 12: "Do consultees consider it desirable and practicable for defendants to have a statutory entitlement to the support of a registered intermediary, for as much of the proceedings, including pre and post trial, as is required, where the court is of the view that such assistance is necessary to ensure that the defendant receives a fair trial?"

implementation of what is, in the view of many respondents, clearly a necessary scheme:

(1) "We are conscious that resources are limited but that is no reason to give priority to one party to the exclusion of the other" (Council of HM Circuit Judges).

(2) "I believe those resources would be entirely justified in order to ensure a fair trial for every defendant" (David Wurtzel).

(3) "The YJB accepts that there are practical difficulties to achieving this aim; particularly funding and the number of trained and registered intermediaries available. The YJB is happy to work with partners in government to find solutions to these difficulties" (Youth Justice Board).

(4) "The CPS agrees that resource implications should not be a reason for not using an intermediary and on a practical point would encourage the registration of greater numbers of suitably qualified intermediaries" (Crown Prosecution Service).

2.79 We are, of course, acutely aware of the limited funds available to the criminal justice system, and acknowledge that the introduction of a registered defendant intermediary scheme would at the outset have significant cost implications. However, we agree with consultees that the principled arguments in favour of the introduction of such a scheme are unanswerable, and that resourcing difficulties cannot justify allowing the current discriminatory system to persist.

2.80 However, we also consider that the cost of such a system in the mid to long term may not be as significant as some consultees suggest. Whilst acknowledging that there would be transitional costs in introducing a system of registration and in recruiting a significant number of new intermediaries,[101] we consider that there are cost benefits to the introduction of a registered and regulated provision:

(1) The financial risk of the currently unregulated system is already significant. All available data suggests that the use of defendant intermediaries continues to increase.[102] The largest provider of defendant intermediaries is currently charging £495 per day, plus travel and accommodation costs for a defendant intermediary to attend court. By contrast, registered witness intermediaries receive £252 per day (based on £36 per hour[103] and attendance on the defendant of seven hours in

[101] A number of consultees refer to the low numbers of intermediaries currently available for defence and specialist work, and the likely rise in demand under the proposed scheme: Dr Susan O'Rourke, Charles de Lacy, David Wurtzel, Professor Penny Cooper, Ministry of Justice Victim and Criminal Proceedings Policy (Government Group Meeting 7 October 2014).

[102] P Cooper, *Highs and Lows: The 4th Intermediary Survey* (2014). Communicourt, *Report 1 – "Number Crunching" Understanding the vulnerable defendant population* (August 2014).

[103] CPS, *Special Measures, Annex F: Rates of remunerations for Registered intermediaries* http://www.cps.gov.uk/legal/s_to_u/special_measures/index.html#a06 (last visited 15 October 2015).

the day,[104] excluding the costs of travel, subsistence and overnight stays).

(2) A registered scheme would allow for a more tightly regulated fee structure, which would offset in the longer term some of the costs of the initial implementation.

(3) The use of initial screening, where the possible need for intermediary assistance is identified, would reduce the need for the obtaining of fuller and more costly reports in some cases.

(4) Intermediaries can often help to lower costs in a trial. By enabling a defendant to understand the case against him or her, the time required for instructions to be taken, trial preparation, and in some instances facilitate the entering of an appropriate guilty plea can be reduced (Paula Backen, Communicourt).

(5) An expanded registered scheme promises greater engagement in the criminal justice process, with the prospect of better compliance and less costly criminal justice interventions for vulnerable defendants in the future.

2.81 The Witness Intermediary Scheme currently provides a matching service which identifies an intermediary with appropriate experience to assist the witness in question, and with availability to attend court at the time required. The matching service functions from a central call centre operated by the National Crime Agency. This is inevitably a labour-intensive process and a significant cost of the scheme. Whilst it is beyond the scope of our recommendations to make specific proposals in relation to the operation of a registered scheme, we do not consider that such a matching service would necessarily be required for defendant intermediaries.[105] We take that view because defence representatives, in contrast to the police and prosecutors in the case of witnesses, are likely to have more opportunity to identify the particular needs of the defendant. They also have experience in identifying and instructing experts required in trial preparation. We anticipate that were the register of defendant intermediaries, with identified areas of specialisation, to be available to defence representatives, for example through the court or liaison and diversion services, then such a matching scheme may not be required. It may be, for example, that an online platform to support the matching process may represent a cost-effective alternative mechanism to a call centre matching service.

Meeting the challenge of setting up a defendant intermediary training programme

2.82 Although a different training programme would need to be devised for defendant intermediaries, those who provide training for registered witness intermediaries

[104] Although a Crown Court day is estimated by HMCTS at 4.5 hours, we anticipate that a defendant assisting an intermediary is likely to be required at court to assist the defendant both before and after sitting hours, and for some time during the lunch break.

[105] The fact that the witness intermediary matching service is operated by the police means that defence representatives express some reservations about the use of the same matching service for defendants.

indicate that they would be able to devise a suitable programme for defendant intermediaries.[106]

Conclusion: A registered defendant intermediary scheme

2.83 Taking all these issues into account, we consider that a registration scheme for defendant intermediaries is essential to provide a cost-effective and properly regulated defendant intermediary service.

2.84 **We** therefore **recommend that intermediaries assisting defendants should be required to be registered according to a scheme administered by a suitable body, we anticipate under the authority of the Ministry of Justice. This registration scheme should include, in its implementation, the creation of a code of practice, or guidance manual, for defendant intermediaries. This code of practice should address, amongst other matters, the scope of the intermediary's role in court, the position with regards to disclosures made to the intermediary and guidance for out of court contact with the defendant.**

Issue: Perceived conflict of interest

2.85 At present the court grants an intermediary for a defendant on the basis of a report prepared by an intermediary who has assessed the defendant. There is concern that there may be a vested interest in the report writer concluding that the defendant needs the services of an intermediary, because it is he or she, or his or her employer, who will then, most probably, be engaged to provide that assistance. A number of consultees, particularly members of the judiciary, have expressed disquiet about the potential subjectivity of that assessment and the conflict of interest to which it may give rise.[107]

Discussion: Perceived conflict of interest

Independent, objective opinion

2.86 One option for addressing this concern would be to introduce an independent assessment by another expert, such as a registered psychologist or a speech and language therapist. Following that expert's indication that an intermediary could assist, a referral could then be made to an intermediary with the appropriate skills to assess the defendant and provide recommendations for the court to support his or her communication at trial.

2.87 Whilst this would be desirable, the cost implications, and delay, involved in instructing a separate expert would, we anticipate, be unjustifiable if required in every case. However, in cases where there is doubt over the need for an intermediary, or where it may be unclear what special expertise the particular intermediary may need to have, it may be that a more cost-effective option would be to engage forensic mental health practitioners, operating at court as part of

[106] David Wurtzel and Professor Penny Cooper. They have already provided training for defendant intermediaries in Northern Ireland, although as discussed above that scheme currently extends only to the giving of evidence by defendants.

[107] Charles de Lacy, Ministry of Justice Victim and Criminal Proceedings Policy, judicial consultees at Snaresbrook Crown Court and the Central Criminal Court.

liaison and diversion schemes.[108] Such individuals would be well-placed to conduct an initial assessment of a defendant's participation needs in a short space of time and to consider whether referral for an intermediary to prepare a report would be appropriate. We consider that, where available, this could offer a safeguard against the vested interest of the commercial provider, without requiring a second full expert report to be produced.

2.88 Such a screening process would not be definitive, should the defence wish to pursue the issue further. However, it would assist the court and the defence in arriving at a judgement as to whether intermediary assistance, and the referral for a report to be prepared, is likely to be required.

2.89 The updated specification for NHS England's Liaison and Diversion Service (Version 8c) makes specific reference, within the functions of the screening process, to the identification of a vulnerable defendant's ability to participate effectively in proceedings. The specification also makes reference to the making of recommendations for reasonable adjustments where appropriate.[109]

Registration and training

2.90 Intermediaries[110] identify that a registered intermediary scheme for defendant work, with formalised training and a code of practice setting out the duties of the intermediary, including their role as officers of the court, and the purpose and content of the assessment report, should assist to allay these concerns. They consider training to raise awareness amongst the judiciary and representatives as to the role and expertise of the intermediary would also assist.

Conclusion: Perceived conflict of interest

2.91 **We recommend that:**

(1) where there are concerns about the need for an intermediary, or uncertainty surrounding the particular intermediary specialism required; and

(2) where the service is available at court;

the court or defence should consider obtaining an initial independent assessment of the need for a defendant intermediary from a liaison and diversion practitioner at court. Such an approach should be incorporated into the CrimPD at 3F.5.

[108] On 6 January 2014 the Government announced an additional £25 million spending on liaison and diversion services for police stations and magistrates' courts in ten areas across England, with a view to rolling out the scheme nationwide in 2017 (subject to spending review in late 2015). For the comparable Criminal Justice Liaison Services in Wales see the Policy Implementation Guidance (2013) at http://www.rcn.org.uk/__data/assets/pdf_file/0006/547062/Welsh_Govern.pdf (last visited 24 November 2015).

[109] NHS England, *Liaison and Diversion: Standard Service Specification 2015* (Version 8c, September 2015) (in draft). See for example section 2.5.1.4 (children and young people) and 2.5.2.4 (adults).

[110] Observations made in discussion sessions with intermediaries and registered intermediaries at the Intermediaries for Justice Conference, 14 March 2015.

Issue: Amendment to section 33A of the Youth Justice and Criminal Evidence Act 1999

2.92 Our recommendation at paragraph 2.66 above in relation to the amendment of section 33BA of the YCEA raises the question of whether it is appropriate to amend the similar provision for a live link direction for a defendant, section 33A of the YJCEA. Like section 33BA, section 33A of the YJCEA has more stringent eligibility criteria for defendants to engage such assistance than apply to non-defendant witnesses, under section 16 of the YJCEA.

Discussion: Amendment to section 33A of the Youth Justice and Criminal Evidence Act 1999

2.93 The same argument for adopting the same eligibility measures for witnesses and defendants in relation to section 33BA of the YJCEA in relation to intermediaries, discussed at paragraph 2.65 above, applies in relation to a live link direction. There is no justifiable reason why a defendant should have to satisfy eligibility criteria in relation to the granting of assistance for the giving of evidence which are more stringent than those imposed upon witnesses who are not defendants. As we observed at paragraph 2.65 above in relation to intermediary assistance, most defendants who may require the assistance of live link to give evidence will be likely to be able to satisfy the more stringent eligibility criteria imposed on defendants. However, there will inevitably be some defendants who require such assistance who cannot satisfy those criteria. The prospect of such difficulty was raised in the case of *Hamberger*,[111] in which it was considered that the defendant would be likely to benefit from live link for the giving of evidence but whose triggering condition, angina combined with the stress of the proceedings, did not satisfy the eligibility criteria stipulated in section 33A(5) of the YJCEA.

Conclusion: Amendment to section 33A of the Youth Justice and Criminal Evidence Act 1999

2.94 **We** therefore **recommend that the eligibility criteria for the use of live link for the defendant contained within section 33A(4) and (5) of the Youth Justice and Criminal Evidence Act 1999 be amended so as to provide that a defendant will be eligible for such assistance where he or she is:**

(1) under 18 years of age; or

(2) his or her ability to participate effectively in the proceedings as a witness giving oral evidence is likely to be diminished by reason of mental disorder (as defined in section 1(2) of the Mental Health Act 1983), a significant impairment of intelligence and social functioning, or a physical disability or disorder (see draft Bill clause 62).

[111] *R (on the application of Hamberger) v Crown Prosecution Service* [2014] EWHC 2814 (Admin) at paras [19] to [20].

CHAPTER 3
THE LEGAL TEST

INTRODUCTION

3.1 In this chapter we look at the legal test which is currently applied by the court when deciding whether the defendant is unfit to plead. We analyse the difficulties identified with the test for unfitness to plead as it is currently understood, consider whether it requires reform and, if so, how that should be achieved. In doing so we do not simply focus on the elements of the test itself. We also consider how it can be reformulated so that it can be readily understood by all those who need to use it or who are affected by its application, and so that it is consistently applied by legal practitioners, clinicians and the courts.

3.2 In our original Consultation Paper ("CP197") we proposed that any new test for unfitness to plead should be centred upon the defendant's decision-making capacity, taking the view that such an approach would be informed by the principle of effective participation. However, responses to both CP197 and the subsequent Issues Paper[1] ("the IP") have revealed strong support for the introduction of a test which prioritises the capacity for effective participation, with decision-making capacity being explicitly incorporated. We consider in this chapter how such a test should be formulated. We also address whether the question of the defendant's capacity to participate effectively in a trial, and the defendant's capacity to plead guilty, should be considered separately for certain categories of defendant and make recommendations on how that should be achieved. Finally we consider whether the new legal test that we recommend is compatible with the United Kingdom's obligations under the United Nations Convention on the Rights of Persons with Disabilities ("UNCRPD").

[1] The Law Commission published a second consultation document in respect of unfitness to plead: Unfitness to Plead: An Issues Paper (May 2014), available at http://www.lawcom.gov.uk/wp-content/uploads/2015/03/unfitness_issues.pdf.

Key recommendations in this chapter:

1) A legal test of capacity for effective participation in a trial which:

a) is set out in statute;

b) is applied in the context of the particular proceedings faced by the defendant, and takes into account any assistance available to him or her;

c) provides a list of relevant abilities which taken together must be sufficient to enable the accused to participate effectively in trial; and

d) explicitly incorporates the need for the defendant to be able to make decisions and identifies key decisions that the accused may be required to make.

2) A separate legal test of capacity to plead guilty, to be applied only:

a) to defendants who have been found to lack capacity for trial;

b) where there is expert opinion considering whether the defendant nonetheless has capacity to plead guilty; and

c) where the defendant applies to the court to determine the issue.

THE CURRENT POSITION[2]

3.3 Where adjustments to the proceedings are considered, or found to be, inadequate to address the defendant's difficulties participating in his or her trial, representatives and the court will turn to the question of whether the defendant may be unfit to plead.

3.4 The legal test for unfitness to plead is not set out in statute, but is derived from the common law, that is decisions made by the courts. It remains that set down by Alderson B in the 1836 case of *Pritchard*:[3]

[2] Discussed more fully in CP197, paras 2.44 to 2.87.

[3] *Pritchard* (1836) 7 C & P 303, 173 ER 135.

> There are three points to be enquired into: - First, whether the prisoner is mute of malice or not; secondly, whether he can plead to the indictment or not; thirdly, whether he is of sufficient intellect to comprehend the course of proceedings on the trial, so as to make a proper defence - to know that he might challenge any of you [jurors] to whom he may object - and to comprehend the details of the evidence.[4]

3.5 The later case of *Davies*[5] added the requirement that the defendant be able to instruct his or her legal adviser. Thus the *Pritchard* criteria were then understood to require the defendant to be able to: plead to the indictment, understand the course of proceedings, instruct a lawyer, challenge a juror and understand the evidence. If an accused was found to lack any one of these abilities that would be sufficient for him or her to be found unfit to plead.

3.6 More recently, the *Pritchard* test has been interpreted by the courts to make it more consistent with the modern trial process. Probably the most widely favoured formulation comes from the trial judge's directions to the jury in the case of *John M*,[6] which were approved by the Court of Appeal and in which express reference is made to the need to be able to give evidence.

3.7 In the case of *John M*, the judge directed the jury that the defendant should be found unfit to plead if any one or more of the following was beyond his capability:

(1) Understanding the charge(s).

(2) Deciding whether to plead guilty or not.

(3) Exercising his or her right to challenge jurors.

(4) Instructing solicitors and/or advocates.

(5) Following the course of the proceedings.

(6) Giving evidence in his or her own defence.[7]

The scope of the Pritchard criteria

3.8 The focus of the *Pritchard* criteria is on cognitive deficiency, primarily the inability to understand proceedings. In the case of *Podola*,[8] amnesia resulting in total failure to recall the alleged event was found not to give rise to unfitness in the

4 *Pritchard* (1836) 7 C & P 303, 173 ER 135 at 304. Approved in *Berry* (1876) 1 QBD 447 and *Robertson* [1968] 1 WLR 1767, 3 All ER 557.

5 *Davies* (1853) 3 Car & Kir 328, 175 ER 575.

6 *M (John)* [2003] EWCA Crim 3452, [2003] All ER (D) 199. See CP197, paras 2.53 to 2.56, for the trial judge's full elaboration of the meaning of these criteria. At that time the determination of fitness was a question for the jury.

7 We discuss the development of the *Pritchard* criteria in more detail in CP197 paras 2.44 to 2.59. *M (John)* was decided before the Domestic Violence, Crime and Victims Act 2004 which introduced judge-only determinations of the defendant's unfitness under Criminal Procedure (Insanity) Act 1964, s 4.

8 *Podola* [1960] 1 QB 325, [1959] 3 WLR 718.

absence of some other difficulty. In *Robertson*, the Court of Appeal decided that the mere fact that an accused may not be capable of acting in his or her best interests was not sufficient to warrant a finding of unfitness to plead. The quality of the defendant's instructions to counsel, or of any evidence that he may wish to give, was not important. The Court observed:

> On the evidence here [the defendant] appears to have had a complete understanding of the legal proceedings and all that is involved and, although he suffers from delusions which at any moment might interfere with a proper action on his part, that is not a matter which should deprive him of his right to be tried.[9]

3.9 This approach was followed in the case of *Berry,* where the defendant's mental state was described as "grossly abnormal" such that whilst he was aware of the nature of his actions, he was unable to view them in "any sensible sort of manner". Following *Robertson*, the Court of Appeal took the view that such a defendant would not necessarily be considered to be unfit to plead.[10]

3.10 This restrictive focus of the test has been highlighted in a more recent line of authority, derived from murder cases where the defendants refused to advance a case of diminished responsibility. The Court of Appeal in these cases confirmed that a defendant will be fit to plead according to the *Pritchard* criteria even where, as a result of delusions or mood disorder, he or she is unable to engage in rational decision making processes.[11] In the case of *Moyle*, for example, the Court of Appeal concluded that the defendant had been fit to plead despite evidence that his delusions would have "significantly impaired his ability to take a proper or valid part in his trial and significantly affected his capacity to be properly defended in legal proceedings".[12] As Lord Justice Toulson observed in *Murray,* "psychiatric understanding and the law in relation to mentally ill defendants do not always sit comfortably together."[13]

PROBLEMS WITH THE CURRENT POSITION[14]

Inconsistent with the modern trial process

3.11 The case of *Pritchard,* heard in 1836, settled the test for unfitness to plead in the context of criminal proceedings very different from those engaged today. At that time access to representation was not widespread, the defendant was not entitled to give evidence in his own defence and was tried by a jury very differently constituted from the modern jury. As a result, in its original formulation, the *Pritchard* test does not reflect the modern trial process, in particular being silent as to the defendant's ability to give evidence and instruct counsel.

9 *Robertson* [1968] 1 WLR 1767, 3 All ER 557. See also *Taitt v State of Trinidad and Tobago* [2012] UKPC 38, [2012] 1 WLR 3730 at [16].

10 *Berry* (1978) 66 Cr App R 156, [1977] Criminal Law Review 750.

11 *Murray* [2008] EWCA Crim 1792, *Moyle* [2008] EWCA Crim 3059, [2009] Criminal Law Review 586, *Diamond* [2008] EWCA Crim 923, [2008] MHLR 124.

12 *Moyle* [2008] EWCA Crim 3059, [2009] Criminal Law Review 586 at [27].

13 *Murray* [2008] EWCA Crim 1792 at [6].

14 Discussed more fully in CP197, paras 2.60 to 2.106.

Resulting inconsistency of application

3.12 As a result, when clinicians and the court apply the *Pritchard* test today, it is almost always as approved in later case law. Following the case of *Davies*[15] the criterion of ability to instruct a lawyer or representative is routinely included in recitation of the *Pritchard* test. In addition, the more modern formulation of the test, as approved in *John M,* has introduced the ability to give evidence as one of the criteria, although that criterion, of course, is absent in the *Pritchard* test as originally formulated.

3.13 In this way the original *Pritchard* test has been developed by the courts to address its inconsistency with the modern trial process. But this has come at the expense of clarity. Although the formulation approved in the case of *John M* is commonly used by clinicians and the court, this is not invariable, with the result that the *Pritchard* test is inconsistently applied by clinicians[16] and the courts.[17]

Ability to challenge a juror

3.14 Additionally, it is debatable whether the capacity to object to jurors continues to justify the emphasis given to it under the *Pritchard* criteria, even as updated in *John M.* There is no longer a right to challenge a juror without cause.[18] Whilst important, the ability to challenge a juror *for cause*[19] might be considered to require a lower level of cognitive ability than several of the other criteria in the *Pritchard* test.

Sets the threshold for unfitness too high

3.15 Arguably, the threshold for being found unfit to plead is set too high. This has the worrying consequence that a defendant with a serious degree of mental abnormality which may impede his or her ability to participate effectively in the proceedings, such as the defendant in the case of *Berry*,[20] may be found to be fit to plead.

[15] *Davies* (1853) Car & Kir 326, 328.

[16] See for example R D Mackay and G Kearns, "An upturn in unfitness to plead? Disability in relation to the trial under the 1991 Act" [2000] *Criminal Law Review* 532, 538.

[17] Contrast for example *Moyle* [2008] EWCA Crim 3059, [2009] Criminal Law Review 586 following *M (John)* [2003] EWCA Crim 3452, [2003] All ER (D) 199, with the summary of the test in *Wells and others* [2015] EWCA Crim 2, [2015] 1 WLR 499 at [1], which omits reference to the giving of evidence. See para 3.24 below in relation to empirical research addressing this issue.

[18] There is no longer a right to challenge a juror without cause. This right to "peremptory challenge" was abolished by the Criminal Justice Act 1988, s 118(1).

[19] Juries Act 1974, s 12. The defendant's right to challenge *for cause* is effectively limited to a challenge on the basis that the juror is not qualified or on the ground of some presumed or actual partiality.

[20] (1978) 66 Cr App R 156, [1977] Criminal Law Review 750. The Court of Appeal considered that the jury, properly directed as to the *Pritchard* criteria, might well have considered the defendant Berry fit to plead, despite his mental state at the time of trial being so "grossly abnormal" and "disturbed" by his paranoid schizophrenia that he was considered by a psychiatrist to be unable to view his actions in "any sort of sensible manner" at 156 to 157.

Example 2 A defendant, A (who has paranoid schizophrenia), has a good understanding of the trial process and understands the purpose of the proceedings and the roles played by the different parties. A is also able to instruct his representative and could give evidence. However, as a result of his highly delusional state he is convinced that if he pleads not guilty he will be destroyed by the devil. He has no insight into his condition and insists on pleading guilty to an assault charge even though the evidence suggests that he may have acted in lawful self-defence. Under the current test the defendant would be likely to be found fit to plead.

Disproportionate emphasis on intellectual ability

3.16 The *Pritchard* test focuses on the intellectual abilities of the defendant, rather than on disorders of mood and other aspects of mental illness which might interfere with the defendant's ability to make decisions and to engage in a rational way with the proceedings.[21] This is perhaps unsurprising since *Pritchard*[22] and *Dyson*[23] were both cases involving not mental disorder on the part of the defendant but deaf-mutism.

Example 3 A defendant, B (who has paranoid schizophrenia and depression), is charged with theft of high value items from her sheltered accommodation. B's account on being challenged by staff calls into question whether she intended to permanently deprive the proprietor of the accommodation of the items, and so she may a have defence to the allegation. B's understanding of the trial process is not impaired to a significant degree. However, her overwhelming feelings of guilt and her depression prevent her from deciding in a rational way about how she should plead and she insists on pleading guilty. Under the current test the defendant would be likely to be found fit to plead.

Discrepancy between unfitness to plead and capacity as defined in the Mental Capacity Act 2005

3.17 Under section 2(1) of the Mental Capacity Act 2005 ("MCA 2005"), a person lacks capacity in relation to a civil matter if at the material time he is unable to make a decision for himself in relation to that matter because of an impairment of, or a disturbance in, the functioning of the mind or brain. Under the MCA 2005, being able to make a decision requires being able to understand the information relevant to the decision, retain that information, use or weigh it in the decision making process, and communicate the decision arrived at.[24]

3.18 By contrast, in criminal proceedings an accused will be found fit to plead even where his or her delusional or emotional state "might have affected his [or her] ability correctly to appraise, believe, weigh up and validly use information

[21] See, for example, the cases of *Robertson* [1968] 1 WLR 1767, [1968] 3 All ER 557; *Murray* [2008] EWCA Crim 1792; *Diamond* [2008] EWCA Crim 923, [2008] MHLR 124.

[22] (1836) 7 C & P 303, 173 ER 135.

[23] (1831) 7 C & P 303, 173 ER 135.

[24] MCA 2005, s 3(1).

regarding legal proceedings".[25] This gives rise to a significant discrepancy between the test for fitness in criminal proceedings and the test for capacity in civil proceedings.[26] This discrepancy creates the potential for seemingly conflicting assessments of the same individual who, for example, could be found fit to plead in relation to a murder allegation, but lacking in capacity for litigation about the less critical issue of an inheritance dispute. Indeed, such conflicting assessments could arise in respect of a single event, such as an instance of false imprisonment, which could give rise to liability for criminal prosecution or civil action. In such a case the individual might be determined to lack capacity to defend him or herself in a tort action in respect of that behaviour, but found fit to plead at his or her trial for the offence of false imprisonment.

Alignment with "effective participation" test under article 6 of the ECHR

3.19 It is unclear how the *Pritchard* criteria align with the separate test of "effective participation" required by article 6 of the ECHR.[27] Some consultees consider that there remains a tension between the test for unfitness to plead and the concept of effective participation, whilst others consider that there is no conflict between the two.[28]

3.20 We have in mind in particular the requirements set out in *SC v United Kingdom*:

> "effective participation" in this context presupposes that the accused has a broad understanding of the nature of the trial process and of what is at stake for him or her, including the significance of any penalty which may be imposed. It means that he or she, if necessary with the assistance of, for example, an interpreter, lawyer, social worker or friend, should be able to understand the general thrust of what is said in court. The defendant should be able to follow what is said by the prosecution witnesses and, if represented, to explain to his own lawyers his version of events, point out any statements with which he disagrees and make them aware of any facts which should be put forward in his defence.[29]

[25] *Moyle* [2008] EWCA Crim 3059, [2009] Criminal Law Review 586 at [27].

[26] L Scott-Moncrief and G Vassall-Adams, "Yawning gap: capacity and fitness to plead" (2006) *Counsel Magazine* 14.

[27] See *Stanford v United Kingdom* App No 16757/90 in which the European Court observed:

"Article 6 (art. 6), read as a whole, guarantees the right of an accused to participate effectively in a criminal trial. In general this includes, inter alia, not only his right to be present, but also to hear and follow the proceedings. Such rights are implicit in the very notion of an adversarial procedure and can also be derived from the guarantees contained in sub-paragraphs (c), (d) and (e) of paragraph 3 of Article 6 (art. 6-3-c, art. 6-3-d, art. 6-3-e), - "to defend himself in person", "to examine or have examined witnesses", and "to have the free assistance of an interpreter if he cannot understand or speak the language used in court"".

See also, *T v United Kingdom* App No 24724/94 and *V v United Kingdom* App No 24888/94, reported as a joint decision in (2000) 30 EHRR 121, and *SC v United Kingdom* [2005] 40 EHRR 10 (App No 60958/00).

[28] See for example the contrasting positions of Just for Kids Law (CP197 response), who discern a difference between the two, with Holroyde J (IP response) who sees no conflict.

[29] *SC v United Kingdom* (2005) 40 EHRR 10 (App No 60958/00) at [29].

3.21 This formulation of "effective participation" requires the defendant to be able to maintain a level of active involvement in his or her trial, including being able to make some decisions during the course of the trial itself. The latter ability in particular is not adequately encapsulated by the *Pritchard* criteria.

ANALYSIS AND DISCUSSION

3.22 Responses to CP197[30] and the IP reveal widespread agreement that the test for unfitness to plead is inadequate and requires reform, particularly with regard to young defendants.[31] We consider those arguments for reform and how this should best be achieved in more detail below.

Issue and Discussion: The need for a statutory test

Inconsistent application of the test

3.23 The courts' repeated restatement of the common law test,[32] devised before the criminal trial settled into its current form, has led to uncertainty about the formulation of the test itself, its scope and proper application. Consultees confirm that, as a result, the test is not widely understood and is inconsistently applied, both by clinicians and the courts. As HHJ Wendy Joseph QC observed in her response to CP197, "No-one could disagree that the *Pritchard* test is neither properly understood nor properly applied by very many psychiatrists. It is vague, clumsy and does not serve its purpose".

3.24 Empirical research supports these concerns. An examination of a sample of pre-trial psychiatric reports revealed that a high number of reports failed to address all the accepted criteria for unfitness to plead. Indeed in 89 of the 641 reports considered in the sample, the defendant was considered to be fit or unfit simply by virtue of the diagnosis and/or relying wholly on other criteria without the psychiatric report addressing the established legal criteria.[33]

3.25 Not only is there inconsistency in identifying the relevant criteria, there is also inconsistency in their application. For example, the Forensic Psychiatrists South West Yorkshire NHS Foundation Trust note in their response to the IP, a "wide variation" amongst clinicians in applying the test. They endorse the approach of some clinicians who incorporate assessment of capacity and the ability to participate effectively into their reports, whilst others, they note, "adhere strictly to the literal, intellectual understanding of the criteria" which they recognise to be the approach favoured by the courts.

[30] Discussed more fully in the IP, paras 2.20 to 2.22, and in the Analysis of Responses ("AR"), paras 1.8 to 1.14.

[31] Discussed in more detail in the IP, paras 2.1 to 2.10 and 2.20 to 2.22.

[32] *Pritchard* (1836) 7 C & P 303, 173 ER 135.

[33] R D Mackay, B Mitchell and L Howe, "A continued upturn in unfitness to plead - more disability in relation to the trial under the 1991 Act" [2007] *Criminal Law Review* 530, 536.

A clearer picture for legal representatives

3.26 Given the low numbers of defendants found to be unfit to plead each year,[34] few legal representatives have direct experience of formal determinations in which the legal test for unfitness to plead is applied by clinicians and the court. We consider that a clear test, readily locatable in statute, would assist legal representatives in advising clients in this unfamiliar area.

Accessibility

3.27 In addition, the decision by a court that an accused is unfit to plead has a profound effect on the outcome of criminal proceedings, in that it brings the normal trial process to an end. It reduces the defendant's autonomy in the proceedings while shielding him or her from being held to account in the full trial process and from the danger of conviction and sentence. Our discussions with Victim Support[35] and with victims' families[36] revealed that where the defendant is or may be unfit to plead, complainants, witnesses, and others affected by the alleged offending, are liable to experience considerable uncertainty. They often have only a partial understanding of what unfitness to plead means and how the court decides the issue. The complexity and inaccessibility of the current law is a significant barrier to their engagement, and undermines their confidence in the criminal justice system. Complainants and those who support them, who are themselves often volunteers with no legal expertise, would welcome an easy to locate, readily understandable test, set out in statute. Leaving the test to be hunted out in case law is inconsistent with efforts to make the criminal law accessible to those affected by it.

In keeping with the treatment of other procedural arrangements

3.28 Academic Dr Arlie Loughnan notes[37] that other procedural aspects of the trial are set out in statute, and it is in keeping with this approach for the legal test for unfitness similarly to be given a statutory footing.

Conclusion: The need for a reformed statutory test

3.29 We have considered the different difficulties which arise as a result of, or that are exacerbated by, the common law form of the test. We conclude, that a statutory reformulation is essential to make the law clear and accessible, and to encourage consistent application of the criteria.

3.30 **We** therefore **recommend that the test for unfitness to plead be reformulated in statute** (see draft Bill clauses 3 and 32 (magistrates' proceedings) for our proposed statutory formulation).

[34] Currently standing at approximately 100 individuals found to be unfit to plead per year in England and Wales: R D Mackay, "Unfitness to Plead – Data on Formal Findings from 2002 to 2014", Appendix A available at http://www.lawcom.gov.uk/project/unfitness-to-plead/.

[35] Meeting with Victim Support, 13 January 2015.

[36] Group discussion session with families of homicide victims in cases where unfitness to plead in issue, arranged by Victim Support 13 February 2015.

[37] Meeting with Dr Arlie Loughnan, 29 July 2015.

Issue and Discussion: What should the focus of the test be?

3.31 The overwhelming view of consultees to CP197 was that, in light of the various difficulties outlined above, reform of the test for unfitness to plead is essential.[38] In particular, consultees were concerned that the test is too narrow and sets the threshold for unfitness too high. As Dr Arlie Loughnan observed, the test is "overly restrictive" and that "what is currently meant to be a protection for defendants with mental illness and intellectual and other impairments is failing to function as such."[39] Nottinghamshire NHS Trust similarly noted that "the breadth of important impairments is not well-detected by applying the *Pritchard* criteria".[40]

Effective participation prioritised

3.32 In CP197 we proposed that the *Pritchard* test be replaced with a test of decision-making capacity, drawing on the formulation in the MCA 2005,[41] but "taking into account all the requirements for meaningful participation".[42] However, responses to CP197, whilst endorsing the inclusion within the test of a criterion relating to decision-making capacity, also suggested that the requirement for effective participation, as set out in the case of *SC*,[43] should be more explicitly incorporated. Indeed the thrust of the CP197 responses was that effective participation should be prioritised as the concept most likely to capture the meaningful engagement with which fitness to plead is centrally concerned.[44]

3.33 In the IP[45] we sought to confirm this position. Consistent with responses to CP197, the IP responses reveal a continued enthusiasm both for reform of the test, and for the focus of the test to combine the elements of effective participation with decision-making capacity in some form.[46] Support for a test prioritising effective participation, but which explicitly incorporates decision-

[38] See AR, para 1.8 and following.

[39] See AR, para 1.10.

[40] See AR, para 1.11.

[41] Decision-making capacity as defined by s 3(1) of the MCA 2005 requires being able to understand the information relevant to the decision, retain that information, use or weigh it in the decision making process, and communicate the decision arrived at.

[42] Discussed in more detail at CP197 paras 3.1 to 3.41.

[43] See para 3.20 above.

[44] Discussed more fully in the IP, paras 2.23 to 2.32.

[45] Further Questions 1 and 2.

[46] In favour: Council of HM Circuit Judges (response submitted by the Criminal Sub-Committee), HHJ Tim Lamb QC, HM Council of District Judges (Magistrates' Court) (response submitted by the Legal Committee), Holroyde J, The Law Society, The Justices' Clerks' Society, Carolyn Taylor (solicitor specialising in criminal and mental health law), Rudi Fortson QC, Dr Eileen Vizard CBE (consultant child and adolescent psychiatrist), the Royal College of Psychiatrists, Dr Penelope Brown (consultant forensic psychiatrist), Dr Susan O'Rourke (clinical psychologist), Dr Linda Monaci (consultant clinical neuropsychologist), Charles de Lacy (clinical nurse specialist), Centre for Evidence and Criminal Justice Studies, the Crown Prosecution Service (the "CPS"), the Prison Reform Trust, Laura Hoyano (academic), Karina Hepworth (senior nurse specialist, learning disabilities), Dr Tim Rogers (consultant forensic psychiatrist) and the judges at Snaresbrook Crown Court.

making capacity, was resounding, particularly amongst legal and judicial respondents.[47]

A modernising approach

3.34 We also have in mind that the current terminology, a finding of "disability" such that the defendant is deemed "unfit to plead", is out-dated. It risks labelling a defendant in a way that may be objectionable to him or her and to others affected by the proceedings. For lay people, a finding of "unfitness to plead" provides no clear statement of what the court has considered or concluded. The test, even as currently formulated, does not look only at the ability to enter a plea, but also at other abilities required for a defendant to engage meaningfully in trial. To reformulate the test as one which assesses the defendant's capacity to participate effectively in his or her trial describes in much more accessible terms exactly what the focus of the investigation is.

Conclusion: What should the focus of the test be?

3.35 **We recommend the reformulation of the legal test as an assessment of the defendant's capacity to participate effectively in a trial** (see draft Bill clauses 3(2) and 32(2) (magistrates' proceedings)).

Issue: A test applied in the context of the particular proceedings

3.36 Before we turn to look in detail at what abilities comprise the capacity to participate effectively in a trial, we propose to clarify how we consider that such a test should be applied. We address this issue first because it informs how the relevant abilities which make up a capacity to participate effectively should be framed.

3.37 The first question which arises when considering whether a defendant is capable of participating effectively is the question of what it is that the defendant is required to be able to participate in. We do not consider that the issue of capacity for effective participation, logically, can be determined without some assessment of the demands which the trial process will make of the accused.

3.38 In CP197 we asked consultees whether the judge in applying the test should take account of the "complexity of the particular proceedings and gravity of the outcome."[48] There was no clear consensus in response to this question.[49] Some respondents raised concerns around assessing the gravity of the outcome of the proceedings, and whether it would be difficult for a trial judge to analyse the complexity of the proceedings in advance of the trial.[50] In particular there were concerns as to whether this would involve micro-management of the case by the judge[51] and/or trespass on privileged material.[52] However, other respondents

[47] For example, the responses of the Law Society and Carolyn Taylor.

[48] Provisional proposal 4.

[49] See IP paras 2.52 to 2.55. There was also some confusion amongst respondents since not all appreciated that provisional proposal 4 (referred to at para 3.38 above) was offered as an alternative to provisional proposal 3 (which asked whether there should be a test which is applied at one time for all purposes in relation to trial).

[50] See response to CP197 of Mind.

[51] See response to CP197 of Council of HM Circuit Judges.

[52] See response to CP197 of HHJ Tim Lamb QC.

noted that some trials are plainly "more demanding of a defendant than others"[53] and that there is an intuitive attraction to a capacity decision which takes into consideration all the circumstances of the case.[54]

3.39 In the IP[55] we reasoned that adjudicating on the gravity of the outcome of a trial, and isolating the standard by which that judgement should be made, would be highly problematic. However, we agreed with consultees that, plainly, some trials are more demanding of a defendant than others. In light of this, we considered that applying the test in context could be appropriate for a number of reasons.

3.40 First, and most importantly, we focused on the fact that to conclude that an individual lacks capacity for trial is to restrict the defendant's fundamental right to legal autonomy. Such a curtailment of an individual's access to justice should only occur where absolutely necessary in the circumstances, and where it is essential to protect other fundamental rights of the defendant, in this situation the right to a fair trial.[56] Secondly, it is our view, as stated above, that it is in the interests not only of the accused, but of all those affected by an alleged offence, that all those who can fairly be tried for an offence in the usual way should be. Taking into account the actual demands of the proceedings would be likely to permit the effective participation of more individuals than might be the case if a general categorisation of capacity for trial were applied.

3.41 Thirdly, we also considered that the concerns surrounding the assessment of the complexity of proceedings at the outset could be adequately addressed. We took the view, in keeping with the principles of effective participation, that the defendant would be required to have, not a perfect level of engagement with every legal argument, for example, that may subsequently arise at trial. Rather, that an ability to have a "broad understanding" of the proceedings and a comprehension of the "general thrust" of what is said in court would suffice.[57] What the judge would need to examine to be satisfied that the defendant is able to participate to this extent in the trial proceedings would not, we considered, require close analysis of matters of detail. It ought not, for example, to require examination of issues which are likely to be covered by legal privilege.

3.42 The issues which the court would need to consider include the likely length of the trial, the number of defendants involved and the likely extent of the challenge to the prosecution case (where known). We concluded that these issues would not be beyond that which is ordinarily required of the judge in his or her active case management role under the Criminal Procedure Rules ("CrimPR").[58] We therefore invited consultees to the IP to consider whether they would approve a

[53] See response to CP197 of HHJ Wendy Joseph QC.

[54] See, for example, the responses to CP197 of Dr Arlie Loughnan, the Royal College of Psychiatrists and the British Psychological Society.

[55] See IP paras 2.60 to 2.67.

[56] See IP paras 2.69 to 2.82 for further discussion of the UNCRPD.

[57] See *SC v United Kingdom* (2005) 40 EHRR 10 (App No 60958/00) at [29].

[58] CrimPR 2015 (SI 2015 No 1490) r 3.2. Indeed development of the Criminal Procedure Rules continues to enhance the robustness of the judge's case management powers.

test of capacity for effective participation "in determination of the allegation(s) faced".[59]

3.43 There was broad enthusiasm amongst IP respondents for such an approach. Indeed, some consultees took the view that such decisions are already made in context and that no amendment of the current test would be required to achieve this (Centre for Criminal Justice and Evidence Studies). However, those who endorsed the approach noted a number of areas in which care was required:

(1) There should not be an assumption (especially in the youth court which deals routinely with serious criminal offences) that summary matters are necessarily less complex than Crown Court matters (HM Council of District Judges (Magistrates' Court)).

(2) Care should be taken to ensure that the process is not made too case specific because it is important that reports have continued relevance in future prosecutions (Nigel Barnes, solicitor specialising in criminal law).

(3) Overly minute consideration of more complex cases might mean that in such cases the threshold for a finding of lack of capacity could be set too low (Dr Penny Brown, consultant forensic psychiatrist).

3.44 There was also some concern that there might be difficulties for defendants who face multiple charges in the same case (Carolyn Taylor and the Law Society).

Discussion: A test applied in the context of the particular proceedings

3.45 Our provisional view in the IP was confirmed by the responses of the majority of consultees to the IP: any decision about a defendant's ability to participate in proceedings must be made in context, in consideration of the demands of the particular proceedings faced.

No explicit reference to the gravity of the outcome of the proceedings

3.46 We remain of the view, however, that there should be no explicit requirement for the judge to take into account the gravity of the outcome of the proceedings when applying the test in the context of the proceedings. Not only would the gravity of the proceedings be likely to be contested between the parties, but its inclusion in every application of the test would risk setting a higher threshold for lack of capacity for serious offences, and those dealt with on indictment. As a matter of principle we also have in mind Lord Bingham's observation that a fair trial and a just outcome are equally important, "whether the offence charged be serious or relatively minor".[60]

Defendants facing multiple charges

3.47 We do not consider that there would be difficulty in relation to a defendant facing multiple charges in the same trial. The clinicians would simply assess the

[59] IP Further Question 9.

[60] Observation made in *Jones (Anthony)* [2002] UKHL 5, [2003] 1 AC 1, HL at [14], in relation to removing the requirement for the court to consider the "seriousness" of the offence when determining whether trial should proceed in the absence of the defendant or not.

defendant's ability to participate effectively in proceedings on the basis of a joint trial of all the charges on the indictment or information.

Defendants facing more than one set of proceedings

3.48 We have also considered whether there might be difficulties for defendants who face more than one set of proceedings, especially of significantly varying complexity. We acknowledge that, where an assessment of an accused's participatory abilities is made in context, there might arise situations where a defendant is considered able to participate effectively in a straightforward trial, but not in another prosecution in which he or she faces a more complex series of allegations.

> **Example 4** A defendant, F, faces a straightforward theft allegation where the incident was observed by a store detective. He is also charged in separate proceedings, with an allegation that he was engaged in a series of robberies in relation to which his involvement is said to be established by complex forensic evidence and mobile telephone analysis. F, who has an autism spectrum disorder and a mild to moderate learning disability, is found to have capacity for the theft trial, but to lack capacity for the multi-handed robbery trial.

3.49 We do not consider such an outcome to be necessarily problematic. Indeed it would, we think, be appropriate in the case of F in the example above. Plainly, as with all cases where the defendant faces separate proceedings, the defendant's position would benefit from a degree of communication between the courts as to progress in each matter. However, we do not consider that the outcomes, in terms of the imposition of sentence and disposal, would necessarily be more problematic in such cases than in situations where a defendant faces sentence in relation to two or more separate trial proceedings.

> **Example 5** Following a trial on the theft allegation the defendant, F, is sentenced to a fine. In the other proceedings, having been found to lack capacity for trial, but where the robbery allegations are proved against him, F receives a supervision order.

Reports relevant to future prosecutions

3.50 We agree with Nigel Barnes that it is helpful if expert clinical reports prepared to consider a defendant's capacity for trial continue to have relevance for any future prosecution that may be brought against him or her. We consider that this will be the case, even where assessments are made in the context of the current proceedings. This is because, although the clinician will have in mind the proceedings with which the defendant will have to engage, the substantial focus of the clinician will be on the defendant's abilities. For example, a clinical psychologist will use psychometric tests to arrive at an assessment of the defendant's intelligence quotient ("IQ"). The issue of context will feature more significantly in the judge's application of the legal test, informed by the clinician's assessment of the defendant's abilities.

3.51 Thus clinical expert reports, where they are available for subsequent proceedings, will in many cases continue to be of assistance to parties and the court. However, if the issue of capacity is to be pursued to a formal determination

in later proceedings, inevitably updated or addendum reports will most likely be needed in any event. These would be required to consider the defendant's current abilities in light of any change in the defendant's condition, and in the context of the fresh proceedings.

Avoiding overly minute and detailed consideration

3.52 We take the view that the understandable concerns raised about the danger of overly minute and detailed consideration of the demands of a trial are reduced by a number of features of the reformulated test that we recommend:

(1) As set out at paragraph 3.41 above, the focus on "effective participation" itself promotes a broad consideration of the defendant's abilities in relation to the trial, rather than a minute analysis.

(2) The *Pritchard* test required a defendant to be found "unfit to plead" if he or she lacked any one of the capabilities identified. This determinative approach is liable to emphasise isolated scrutiny of particular abilities. However, as we set out below at paragraph 3.75, we recommend an assessment of whether the defendant's relevant abilities "taken together" are sufficient to enable his or her "effective participation". We anticipate that this will also discourage unduly detailed consideration of the shape of the forthcoming trial.

(3) We recommend[61] that the court and parties should be required to keep under review the defendant's capacity to participate effectively in the proceedings and that there should be the opportunity to raise the issue of capacity up until the close of the evidence. Such an approach should discourage a judge from engaging in unnecessary examination of potential issues which are nonetheless unlikely to arise in trial. In the unusual event that a trial becomes complicated in a manner not anticipated when the legal test was applied by the court, there remains the option for the issue of capacity to be raised or reopened should the defendant become unable to participate effectively at a later stage in the trial.[62]

Conclusion: A test applied in the context of the particular proceedings

3.53 We conclude that the test should be applied in the context of the particular proceedings. **We recommend** therefore **that the test for capacity to participate effectively in a trial should require the defendant to be able to participate effectively "in the proceedings on the offence or offences charged", and that assessment of the defendant's abilities in that regard should reflect consideration of the actual proceedings** (see draft Bill clauses 3(2) and (4) and 32(2) and (4) (magistrates' proceedings)).

[61] See Chapter 4 para 4.16(2) below.

[62] Given that fluctuation in a defendant's capacity may occur, it is essential that the scheme includes a duty to keep capacity under review and the facility to reopen the question of capacity up until verdict. However, we appreciate that this may prompt some representatives to raise capacity issues repeatedly during the proceedings. We are confident that the trial process and robust case management by the judge will be sufficient to address such issues.

Issue: Taking into account reasonable adjustments in the application of the test

3.54 In CP197 we asked consultees whether in determining a defendant's fitness to plead, the judge should take into account the assistance of special measures, or any other reasonable adjustments which are available, which might improve the defendant's abilities to participate.

3.55 There was significant support for this proposal amongst CP197 respondents. Observations in support included:

(1) Current practice already takes account of the potential impact of special measures (Carolyn Taylor).

(2) Reform without the incorporation of special measures into the test would be "counter-productive" (Kids Company).[63]

(3) This aligns the criminal assessment with that in the MCA 2005, which requires "all practicable steps to help" the individual to have capacity to have been taken "without success" before a finding of lack of capacity can be reached.[64]

(4) This aligns the legal test with the approach required in the Criminal Practice Directions ("CrimPD").[65]

(5) Such an approach accords with the "clear responsibility of the legal system to treat each individual appropriately according to their specific needs" (National Steering Group with Responsibility for Health Policy on Offenders with Learning Disability).

3.56 However, reservations were expressed by consultees about the resourcing and availability of special measures and other reasonable adjustments. Our focus in the IP was on addressing these concerns, especially in terms of equalising the availability of special measures for defendants with those for vulnerable witnesses, and in making statutory provision for intermediary assistance for defendants.

Discussion: Taking into account reasonable adjustments in the application of the test

3.57 We agree with the resounding enthusiasm of consultees for a test which requires the judge, in making an assessment of a defendant's capacity, to take into account all the assistance which may be available to a defendant. Such an approach is in keeping with our recommendation that the test be applied in the context of the particular proceedings. Additionally, taking into account assistance available to the defendant supports our approach that a finding of lack of capacity should only be made as a last resort. It also reinforces our approach that every effort should be made to support a defendant against whom the prosecution

[63] Kids Company was a charity that provided therapeutic, emotional and practical support, including legal assistance, to vulnerable children and young people.

[64] MCA 2005, s 1(3).

[65] CrimPD 2015 [2015] EWCA Crim 1567, CrimPD I General Matters 3G.

propose to proceed, so that he or she can be tried in the usual way where that can fairly be achieved. To move to a finding of lack of capacity without such consideration is illogical and would remove defendants inappropriately from the full trial process where that could otherwise be avoided.

3.58 We remain, of course, conscious of the resource issues that consultees raise, and address those concerns in detail in Chapter 2 above. We also make a recommendation for members of the judiciary sitting on criminal matters in the Crown and magistrates' courts and legal practitioners doing criminal work to receive training in relation to communication and participation difficulties. This is to ensure that the need for such reasonable adjustments can be more widely identified and deployed.

3.59 At present, although not a part of the *Pritchard* test, following the case of *Walls*,[66] the courts are required to take into account special measures when making a determination of fitness. However, we take the view that this requirement should be incorporated explicitly into any new statutory test, so as to ensure that this aspect is consistently applied and all options for assistance are considered. This is particularly important since we are shifting the focus to a participation based test. We take the view that the provision should make reference to the assistance that is "available". A defendant who has not been found to lack capacity is entitled to refuse assistance, but should not, in our view, thereby be able to force a determination of lack of capacity where the decision is a purely tactical one.[67]

3.60 We intend the reference to "assistance" to be capable of encompassing the assistance provided by a legal representative. We take this approach because the availability of a legal representative will in many cases be a critical factor in an individual with participation difficulties being able to engage meaningfully with the proceedings. Currently an individual who may lack capacity is likely to qualify for legal aid for representation in criminal proceedings.[68] However, we appreciate that this might not always be the case.

Conclusion: Taking into account reasonable adjustments in the application of the test

3.61 **We recommend that the test of capacity to participate effectively in trial should require the court, in applying the test, to take into account the assistance available to the accused in the proceedings** (see draft Bill clauses 3(3) and 32(3) (magistrates' proceedings)).

Issue and Discussion: How should the test of capacity for effective participation be structured?

3.62 There appear to be three issues which arise when we consider how the new test of capacity for effective participation should be structured:

[66] *Walls* [2011] EWCA Crim 443, 2 Cr App R 6, CA at [37].

[67] See *Stanford v UK* App No 16757/90 at [23] where the defendant's tactical decision not to seek help for his hearing did not render him unable to participate effectively in the trial.

[68] Legal Aid, Sentencing and Punishment of Offenders Act 2012, s 17(2)(c). Subject to means assessment, such an individual is likely to qualify for representation on the basis that without representation he or she "may be unable to understand the proceedings or to state his or her own case".

Should there be any specified abilities or criteria?

3.63 The first issue is whether the test should be simply stated as requiring the court to decide whether the defendant has the capacity to participate effectively in the proceedings. Is it necessary to have any further identification of what criteria should govern that determination, or what abilities such a capacity consists of?

3.64 At our symposium held in Leeds,[69] Don Grubin, Professor of Forensic Psychiatry, proposed the removal of criteria entirely, and favoured a test which asks simply whether the defendant could have a fair trial. Although the issue of fair trial is wider than the issue of effective participation (the latter being an included component of the right to a fair trial), Professor Grubin's proposal serves as a useful discussion point.

3.65 On one view the idea of a test without specific criteria or abilities has merits. This is especially so because a significant complaint raised by a number of consultees is that the current test is unduly restrictive.[70] A formulation without criteria would provide ample flexibility to embrace the wide range of conditions which give rise to effective participation problems. However, the virtue of specific criteria or abilities is that they provide a framework against which the various professionals who have to apply the test can arrive at a judgement. They also assist in ensuring that the same approach is taken, the same considerations applied, by the wide range of clinical practitioners who assess defendants. As academic Helen Howard summarised it, a test such as that proposed by Professor Grubin, without such a framework, would result in "uncertainty and lack of predictability". We share her concerns.[71]

An exhaustive list of determinative criteria

3.66 On one view the *Pritchard* test represents the antithesis of Professor Grubin's proposal. The *Pritchard* test is interpreted as requiring that, if the court is satisfied that a defendant lacks any one of the abilities required in *John M,* then he or she will be found unfit to plead. The absence of any one ability is determinative of the issue, but the list is exhaustive. In our view this is equally problematic, because it prevents the court from considering any difficulties which are not specified in the list of criteria, but may have a significant bearing on the defendant's ability to participate. Additionally, it allows no consideration of whether, although the defendant may be able to demonstrate to a limited degree all the specified abilities, his or her competence is so impaired that taken together those deficiencies make him or her unfit to plead.

A non-exhaustive list of criteria

3.67 Rudi Fortson QC proposed another alternative at our symposium. He favoured the approach taken in the Scottish statutory test of fitness for trial in section 53F of the Criminal Procedure (Scotland) Act 1995. This test requires the court to "have regard to" a number of listed factors and "any other factor which the court

[69] Law Commission Symposium on Unfitness to Plead, 11 June 2014, at the School of Law, University of Leeds.

[70] See discussion at para 3.31 above.

[71] Only one respondent to the IP endorsed Professor Grubin's proposal, being the academic Laura Hoyano.

considers relevant".[72] This approach has the advantage of allowing the court to take into account relevant factors not specified as part of the test, whilst still providing a framework to assist clinicians and practitioners.

3.68 In considering this test we were initially concerned that the inclusion of "any other factor" might provide too wide a discretion and result in inconsistency. However, in drafting CP197 we commissioned research to be conducted evaluating the effectiveness of the Scottish unfitness to plead framework, and the results suggest that this more flexible framing has caused no notable difficulties.[73]

Conclusion: How should the test of capacity for effective participation be structured?

3.69 The challenge in settling a structure for the test is to provide the degree of flexibility sought by consultees, but also to retain clarity and promote consistency whilst not allowing the threshold for lack of capacity to fall too low.

3.70 We prefer the approach taken in the Scottish formulation, as advocated by Rudi Fortson QC, to the alternative approaches, in *Pritchard* or as advanced by Professor Don Grubin. We consider that it is important that the court has flexibility to take into consideration any relevant ability or impairment which may affect the accused's capacity to participate effectively in the proceedings. **We** therefore **recommend that the test should specify a list of relevant abilities and that the court be entitled to consider "any other ability that appears to the court to be relevant in the particular case"** (see draft Bill clauses 3(4) and 32(4) (magistrates' proceedings)).

Issue: Establishing an appropriate threshold

3.71 However, we remain concerned that the threshold for lack of capacity should be established and maintained at an appropriate level. This is particularly important because we propose, as set out below, to introduce additional factors to those identified in *Pritchard*, particularly decision-making capacity.

3.72 In the IP[74] we invited consultees to consider whether the test should contain an explicit reference to a "satisfactory" or "sufficient" level of capacity. We had in mind in particular that effective participation does not require a perfect level of engagement in what can often be complex proceedings, but merely a "broad understanding" of the proceedings, their significance and of the "general thrust" of what is said in court.[75] This sort of qualification would reflect the approach taken in capacity assessment in civil proceedings, which the British Psychological Society remind us require only a "good enough" level of participation.

[72] Criminal Procedure (Scotland) Act 1995, s 53F(2).

[73] C Connolly, "Unfitness to Plead and Examination of the Facts Proceedings: A Report Prepared for the Law Commission of England and Wales" (March 2010).

[74] Further Question 4.

[75] *SC v United Kingdom* (2005) 40 EHRR 10 (App No 60958/00) at [29].

Discussion: Establishing an appropriate threshold

3.73 Some consultees endorsed the approach of specifying a level of capacity, generally favouring "sufficient" over "satisfactory".[76] However, an explicit statement of a standard, without more, was considered problematic by a number of consultees. Several felt that the provisionally proposed terms were both "ill-defined" and/or "difficult to apply".[77] Others remained to be convinced that such qualification was necessary or would assist in clarifying the level of capacity required.[78] As Rudi Fortson QC observed in his IP response "participation is either effective or it is not", whilst others noted that effective participation does not entail a perfect standard of engagement and comprehension.[79]

Conclusion: Establishing an appropriate threshold

3.74 On consideration, we agree with consultees who doubted whether the insertion of "sufficient" or "satisfactory" alone would provide any clarity as to the level of capacity required. We are also assisted by the reminder that the level of participation that we endorse is already qualified by the requirement that it be "effective". We have reflected on these observations, and on our concern that the judge should be entitled to take a view in the round of the defendant's collective abilities.[80] We conclude that the most suitable way of structuring the test is to allow the judge to give whatever weight he or she considers appropriate to the relevant abilities of the defendant. The test would also require that the abilities taken together be sufficient to enable the accused's "effective participation".

3.75 **We** therefore **recommend that the test should be structured so that the defendant will be considered to lack capacity where his or her relevant abilities are not, taken together, sufficient to enable the accused to participate effectively in the proceedings** (see draft Bill clauses 3(2) and 32(2) (magistrates' proceedings)).

Issue: What should the relevant abilities be?

3.76 We turn now to consider what abilities the test should specify as being relevant to an assessment of the defendant's capacity for effective participation.

Consultation responses

3.77 Consultees to the IP, whilst resoundingly in favour of an effective participation test incorporating decision-making capacity, were more split on exactly what should be specified as the abilities required for effective participation. There was significant support for the formulation of the required abilities working from the

[76] HHJ Tim Lamb QC, Royal College of Psychiatrists, Helen Howard, Charles de Lacy, Nigel Barnes.

[77] Council of HM Circuit Judges, Holroyde J.

[78] Dr Penny Brown, Professor Ronnie Mackay (Professor of Criminal Policy and Mental Health), the Centre for Evidence and Criminal Justice Studies, Prison Reform Trust, Laura Hoyano.

[79] HM Council of District Judges (Magistrates' Court), British Psychological Society.

[80] See para 3.70 above.

John M criteria.[81] Indeed, with one exception,[82] legal and judicial consultees who responded approved of introducing an effective participation test incorporating some or all of the *John M* criteria. Both the Council of HM Circuit Judges and the Law Society observed that the *John M* criteria have proved workable in their application and are familiar to practitioners and clinicians.

3.78 Mr Justice Holroyde[83] favoured a formulation which drew more heavily on the wording in *SC v UK*,[84] observing that in his view "there is no conflict between the criteria stated in *John M* and the criteria stated in *SC v UK"*. Dr Penny Brown also suggested that framing an effective participation test around the *SC* criteria, potentially incorporating some of the *John M* criteria, with a test for decision-making capacity might present the most appropriate reformulation. In a similar vein, the Prison Reform Trust preferred the *SC* criteria.

3.79 Academics Helen Howard and Professor Jill Peay endorsed the importance of both decision-making capacity and effective participation but remained of the view that the original formulation advanced in the CP (a test based on decision-making capacity) would implicitly and sufficiently encompass effective participation. Both, however, accepted that if that did not find favour, the approach advocated in the IP[85] was the most appropriate.

3.80 Finally, Dr Penny Brown[86] felt that the capacity to refuse representation, or to represent oneself, might be included in the test as one of the competencies which are required to be fit to plead. This was also an issue that concerned Professor Bonnie in his response to CP197.[87]

Discussion: What should the relevant abilities be?

Working with John M, but introducing elements from SC

3.81 We consider that the *John M* criteria provide a useful starting point for outlining the abilities required for effective participation. Where the criteria in *John M* and the observations in *SC* overlap, especially in relation to participation during court proceedings, generally the judgment in *SC* provides a helpful expansion of the *John M* criteria. Like Mr Justice Holroyde, we find no conflict between the two cases. However, for the statutory formulation of the test itself, on those

[81] Council of HM Circuit Judges, HM Council of District Judges (Magistrates' Court), HHJ Tim Lamb QC, Carolyn Taylor, Nigel Barnes, the Law Society, Dr Eileen Vizard CBE, Charles de Lacy, Centre for Evidence and Criminal Justice Studies, CPS, Professor Graeme Yorston (academic, consultant forensic psychiatrist and neuro-psychiatrist) (the abbreviated form of *John M*), Karina Hepworth.

[82] Laura Hoyano, who had reservations about drawing an artificial line between decision-making and effective participation by setting them out in separate limbs. She felt that the two were "inextricable in reality".

[83] Writing in his personal capacity, but his comments endorsed by the Lord Chief Justice, Lord Thomas.

[84] *SC v United Kingdom* (2005) 40 EHRR 10 (App No 60958/00) at [29].

[85] As formulated in Further Question 2.

[86] In answer to IP Further Question 11, which asked whether the difficulties presented by defendants who refuse legal representation in the initial stages of the prosecution could be met by adjustment to the legal test.

[87] See AR paragraph 1.65 for discussion of his concerns in this regard.

overlapping abilities, in general we favour the shorter, and tested, formulation of *John M*, but on the understanding that scope of those abilities is informed by the corresponding observations in *SC*. We propose that this be made clear in the explanatory notes to the bill.

3.82 However, there are some aspects of the judgment in *SC* which are not captured by *John M.* These include*,* for example, the ability of the accused to understand the nature of the trial process and to appreciate what is at stake for him or her, which we would want to incorporate into an effective participation test.

3.83 Likewise, there are also some aspects of *John M* which are not specifically reflected in *SC*. The ability to give evidence, a criterion in *John M* not reflected in *SC,* is one which we consider critical to effective participation and would retain. Conversely, the ability to exercise the right to challenge a juror, also a criterion in *John M* not reflected in *SC*, is one which we consider less critical to establishing the level of capacity. We address both issues separately below.

3.84 We agree in principle with Laura Hoyano that it is artificial to try to distinguish between effective participation and decision-making ability; the latter being an essential part of the former. However, in order to ensure that the ability to make decisions in a rational way is sufficiently identified as a part of the capacity to participate effectively, it is, we think, necessary to address that ability separately in the test itself. For ease of discussion as to how that should be achieved we address decision-making capacity, and the decisions required of the defendant in criminal proceedings, separately below.

The relevant abilities: understanding

John M first criterion: "understanding the charges"

3.85 This is plainly an essential element of effective participation. However, as formulated in *John M,* it is not clear whether this ability requires an accused to have a general appreciation of what the criminal charge means, namely the particular wrongdoing that an offence of burglary is aimed at, for example. Or whether it also embraces an appreciation of how the charges are put in the particular case, that is the evidence relied on by the prosecution. What is important is for the defendant to be able to understand the case against him or her, and to advance his or her own version of events (or provide instructions to his or her representative to do the same). In order to be able to do that we consider it critical that the accused should understand not just what the charge is, but in broad terms how the prosecution say it is made out against the accused him or herself. **We recommend that the ability to understand the charges should require the defendant to have an understanding of what the charge means, its nature, and also an understanding of the evidence on which the prosecution rely to establish the charge in the particular case** (see draft Bill clauses 3(4)(a) and (b) and 32(4)(a) and (b) (magistrates' courts)).

From SC: "a broad understanding of the nature of the trial process, and of what is at stake for him or her including the significance of any penalty which may be imposed"

3.86 This ability is one which is not included within the *John M* criteria. We consider that this requirement, that the defendant understand in broad terms the purpose

of the trial process and how the different outcomes might affect him or her, is different from an understanding of the charges, and the prosecution case. It might be argued that this ability is subsumed within the ability to decide whether to plead guilty or not. However, we consider that this element is sufficiently important to justify explicit reference in the statutory test. **We** therefore **recommend that the test include an ability to understand the trial process and the consequences of being convicted** (see draft Bill clauses 3(4)(c) and 32(4)(c) (magistrates' courts)).

The relevant abilities: exercising the right to challenge a juror

John M third criterion: exercising the right to challenge a juror

3.87 The criteria in *John M* include the requirement that the defendant be capable of exercising the right to challenge a juror. However, a number of consultees have observed that such a requirement is no longer necessary, given the removal of the right of peremptory challenge. The Council of HM Circuit Judges observe, "It is clear that reference to the ability to challenge a juror is obsolete" (echoed by St Andrew's Consultant Psychiatrists, Professor Jill Peay, and Helen Howard)[88] whilst Mr Justice Holroyde responded:

> I do not agree that the ability to challenge a juror is now of less significance, following the removal of the former right of peremptory (and, it may be, capricious) challenge. The right of challenge is now limited to a challenge *for cause*, but that is precisely the area in which a defendant's fitness to exercise the right of challenge is most important.

3.88 In seeking to reconcile this difference of judicial opinion we take the view that the ability to challenge a juror *for cause,*[89] whilst critical, requires a lower level of cognitive ability than several of the other factors in the proposed test. Thus were this requirement removed, we are confident that any individual who might be incapable of challenging a juror would be found to lack the requisite ability in relation to a number of other requirements as well.

3.89 On balance, and in the interests of avoiding unnecessary complication of the test itself, we would recommend the removal of the ability to challenge a juror. This would not prevent the judge from taking into consideration an inability to do so if the capacity of an accused, whose condition prevented him or her being able to challenge a juror, was in doubt. As will be apparent in the discussion at paragraph 3.70 above, we recommend that there be included in the test scope for a judge to take into account any other ability which appears to the court to be relevant in the particular case.

3.90 **We** therefore **recommend that the ability to exercise the defendant's right to challenge a juror should not be a specified factor in the test.**

[88] See also in response of the Justices' Clerks' Society to CP197.

[89] Challenging a juror *for cause* in essence requires recognition of the juror by the defendant and for the defendant to raise the issue with his or her representative or the court.

The relevant abilities: instructing representatives

John M fourth criterion: "instructing solicitors and counsel"

3.91 This remains a critical ability and one which, we consider, must be explicitly included in the test. The question is whether the formulation in *John M,* the ability to "instruct" a representative, is sufficient without more, or whether it should be elaborated upon in the statutory test.

3.92 The judge in *John M* provided further commentary to the jury on what this might mean which was approved by the Court of Appeal. He stated:

> This means that the defendant must be able to convey intelligibly to his lawyers the case which he wishes them to advance on his behalf and the matters which he wishes them to put forward in his defence. It involves being able (a) to understand the lawyers' questions, (b) to apply his mind to answering them, and (c) to convey intelligibly to the lawyers the answers he wishes to give.[90]

3.93 Likewise, the judgment in *SC* provides further elaboration on what the giving of instructions entails in the course of a trial: "to explain to his own lawyers his version of events, point out any statements with which he disagrees and make them aware of any facts which should be put forward in his defence."[91]

3.94 We consider that both formulations capture relevant features of what constitutes an ability to give instructions. In short, there are three elements:

(1) an ability to give the representative the accused's own version of events;

(2) an ability to identify any parts of the evidence relied on by the prosecution with which he or she disagrees; and

(3) an ability to impart this information to the representative, either volunteered or in answer to questions.

3.95 In considering whether these three elements need further clarification in the statutory test itself we bear in mind, first, that what instructions consist of in this context is not heavily contested. We also bear in mind that elements of this ability are protected in other aspects of the test: namely in understanding the evidence on which the prosecution rely, in following the proceedings and in the ability to make decisions required of him or her during the course of the trial (which includes the communication of those decisions).

3.96 Taking this into account, and considering these abilities as constituting together the ability to participate effectively, we are not persuaded that the statutory test requires elaboration of the ability to "instruct" or "give instructions" beyond the *John M* criterion.

[90] [2003] EWCA Crim 3452, [2003] All ER (D) 199 at [21].

[91] *SC v United Kingdom* [2005] 40 EHRR 10 (App No 60958/00) at [29].

No requirement for plausibility or reliability of instructions

3.97 We also agree with the first instance judge's observation in *John M* that the defendant's instructions need not be "plausible, believable or reliable".[92] As the judge observed, many "fit" defendants provide implausible or unreliable instructions. The defendant's right to instruct a representative to pursue an implausible or unreliable version of events is a general principle in criminal proceedings.[93] We therefore do not consider that it is necessary for the defendant's right to instruct in this way to be specified in the statutory test. What would be concerning, and potentially indicative of a lack of capacity to participate effectively, is where in providing instructions the defendant displays decision-making processes that are flawed or irrational (rather than the outcome or decision arrived at being irrational). This difficulty is addressed below in relation to decision-making capacity.

Amnesia or partial recall

3.98 Likewise, the defendant's inability to recall the events giving rise to the allegation ought not, in our view, to amount to an inability to give instructions liable to result in the defendant being found to lack capacity. This is an issue which may affect, to a varying degree, any accused whatever his or her abilities to participate in the proceedings. As a general principle allowance is not made for a defendant in full trial if he or she does not recall some, or all, of the alleged incident. We consider that the position in the case of *Podola*,[94] that amnesia should not give rise to protection from conviction as part of unfitness to plead procedures, should continue under our recommended reforms. We are aware that some other statutory provisions addressing fitness to plead, for example section 53F(3) of the Criminal Procedure (Scotland) Act 1995, make specific reference to this position in the statutory test. We, however, do not consider that it is necessary to restate this general principle in statute.[95]

The ability to refuse representation or represent oneself

3.99 Consultant psychiatrist Dr Penny Brown raised the question of whether an ability to refuse representation or to represent oneself following such a refusal ought to be reflected in the statutory test. As discussed above in relation to reasonable adjustments (paragraph 3.59), a tactical decision to refuse available assistance ought not to result in the court having to find a defendant lacking in capacity for trial. However, we anticipate that Dr Brown is concerned rather more about a defendant who, through mood disorder, paranoia or some other condition, refuses support and is then unable to defend him or herself such that he or she could not be said to have a fair trial. Should the ability to make a rational judgement about representation be a separate specified ability?

92 [2003] EWCA Crim 3452, [2003] All ER (D) 199 at [21].

93 Subject to some restrictions, such as the requirement for credible material before making an allegation of fraud (Bar Standards Board, *Bar Standards Board Handbook* (2nd ed 2015) Part 2: Code of Conduct, r C9.2.c).

94 *Podola* [1960] 1 QB 325, [1959] 3 WLR 718.

95 An individual who suffered from anterograde amnesia (amnesia affecting the ability to recall the recent past) to the extent that they were unable to retain the information required to make decisions, would be likely to be found to lack decision-making capacity (discussed below at paragraph 3.98).

3.100 We agree with Dr Brown's concerns about such defendants, because their decision to refuse representation could have a devastating effect on their ability to defend themselves. However, we do not recommend that this issue be included within the relevant abilities, for two reasons. First, we do not consider that difficulties in this regard arise sufficiently frequently to justify specific inclusion in the test. Rather, we consider that such a difficulty could be considered by the judge either under the ability to make "any other decision that might need to be made by the defendant in connection with the trial" (see paragraph 3.117 below) or under "any other ability" (under draft Bill clauses 3(4)(j) and 32(4)(k)). Alternatively, this issue might be taken into account when the judge considers the context in which the defendant's participation is required. Secondly, we agree with Dr Brown's alternative assessment that this issue can be dealt with in a code of practice for clinicians (discussed below at paragraph 3.158 and following).

3.101 In conclusion, we arrive at the position that the fourth *John M* criterion should be replicated, without elaboration or substantial amendment, in the recommended statutory test. **We** therefore **recommend that the ability to give instructions to a legal representative should be included within the statutory test** (see draft Bill clauses 3(4)(d) and 32(4)(d) (magistrates' courts)).

The relevant abilities: following the proceedings in court

John M fifth criterion: "following the course of proceedings"

3.102 This ability to follow what is said in court is expanded upon in *SC*[96] as requiring that the defendant be able to "understand the general thrust of what is said in court" and "follow what is said by the prosecution witnesses". The purpose of the defendant being able to follow what occurs in court is to facilitate an understanding of the case, so that he or she can advance an alternative account, or instruct a representative to do so on his or her behalf. This, it seems to us, is critical to the ability to play an active part in the proceedings, described in *Stanford v UK* as "implicit in the very notion of an adversarial procedure".[97]

3.103 We prefer to remove the reference to the "course" of proceedings, since that phrase may be taken to indicate a general understanding of the progress of the case, rather than an ability, with assistance, to engage with what is actually said in court. We also favour a formulation of this requirement which does not focus on "prosecution witnesses" since in order to be able to participate effectively the accused will need to be able to follow, with assistance, other aspects of proceedings apart from the evidence of prosecution witnesses, for example when co-defendants give evidence. **We** therefore **recommend that the statutory test include the ability to "follow the proceedings in court"** (see draft Bill clauses 3(4)(h) and 32(4)(i) (magistrates' courts)).

[96] *SC v United Kingdom* (2005) 40 EHRR 10 (App No 60958/00) at [29].

[97] *Stanford v United Kingdom* App No 16757/90 at [26].

The relevant abilities: giving evidence

John M sixth criterion: "giving evidence in his own defence"

3.104 This is an additional factor introduced in the case of *John M* (the *Pritchard* criteria being settled before it was possible for defendants to give evidence in their own defence). It does not feature in *SC*, although it might be said to be implicit in the right to defend oneself in person that is underpinned by the right to participate effectively in trial.[98]

3.105 We consider this factor to be of fundamental importance. The giving of evidence is a demanding activity. It requires not only an understanding of the questions asked, applying one's mind to answering the question and being able to convey the response, but also raises issues of suggestibility and the ability to recount events in an intelligible and coherent manner.

3.106 Elaborating on what giving evidence requires does not appear to us to be appropriate or helpful in a statutory test. This is currently one of the *Pritchard* criteria, as inserted by *John M*, and the lack of elaboration does not appear to be problematic as the test is currently framed.

3.107 **We** therefore **recommend the inclusion of the ability to give evidence as part of the statutory test** (see draft Bill clauses 3(4)(i) and 32(4)(j) (magistrates' courts)).

The relevant abilities: decision-making

3.108 As discussed above, our consultees strongly supported the proposal that the reformed test, whilst focusing on effective participation, should include a requirement that the defendant be able to make decisions: a "decision-making capacity" element. We agree with that approach, and discuss here how decision-making capacity might most effectively be incorporated into the test.

3.109 A particular issue in relation to the incorporation of decision-making capacity is that, in the civil context at least, this capacity is considered to be decision-specific. What that means is that when a clinician is considering whether a person has decision-making capacity under the MCA 2005, the clinician is considering whether the person is able to make a particular decision. For example, whether to consent to certain treatment rather than whether the person has a general ability to make decisions. The Forensic Psychiatrists SW Yorkshire NHS Foundation Trust[99] suggested that there is a danger of introducing vagueness into the legal test if a generic capacity test is introduced.[100] We understand that concern and think that it is important to have this issue in mind when considering how decision-making capacity can be reflected in the test.

[98] See *Stanford v the United Kingdom* App No 16757/90 at [26].

[99] This was a response to the IP from a group of forensic psychiatrists then employed by the South West Yorkshire NHS Foundation Trust.

[100] The Edenfield Centre similarly observed in response to CP197 that decision-making capacity could be "difficult to apply to a trial as a whole".

Issue: A minimum list of decisions for which capacity is required

3.110 In addition to the question of decision-specificity, concerns were raised by respondents to CP197 that incorporating a decision-making capacity element might lower unduly the threshold of lack of capacity to participate effectively. In light of those concerns we asked in the IP whether consultees considered that incorporating into the legal test an exhaustive list of decisions for which the defendant requires capacity would assist in maintaining the threshold for lack of capacity at a suitable level.[101]

3.111 This provisional proposal was not widely embraced by consultees.[102] It was unpopular for a number of reasons, notably because consultees considered that it would be difficult to produce such a list,[103] it would be likely to be insufficiently flexible to cater for all eventualities,[104] and would introduce unwelcome complexity.[105]

3.112 There was some support for a non-exhaustive list of the minimum decisions required of a defendant.[106] There was also some positive endorsement of the decisions already specified within *John M*,[107] particularly if the criteria were to be updated or extended.[108] Finally, there was also an acknowledgment that some delineation of the sort of decisions which would at the very least be required of the defendant might facilitate assessment and assist clinicians.[109]

Discussion: A minimum list of decisions for which capacity is required

3.113 We agree with the concerns raised by consultees about the difficulties of compiling an exhaustive list of decisions which an accused would be required to make in criminal proceedings. For the various reasons that consultees raise we do not propose to recommend that an exhaustive list of the relevant decisions be included in the test. Nonetheless, it is difficult, to consider the ability to make a decision in the abstract, especially when clinicians are familiar with a decision-specific approach.

3.114 There are, however, some decisions in criminal proceedings which are required to be made by the defendant him- or herself. These are the decision whether to plead guilty or not, the decision whether to give evidence or not and, where it arises in the magistrates' courts, the decision whether to elect Crown Court

[101] Further Question 3.

[102] Few consultees (CPS, Prison Reform Trust, Charles De Lacy, Karina Hepworth, Anonymous) were broadly in favour as advanced.

[103] Dr Michael Kavuma (consultant forensic psychiatrist), Royal College of Psychiatrists, Dr Susan O'Rourke, Faculty of Forensic and Legal Medicine.

[104] The Law Society, Dr Susan O'Rourke, Professor Ronnie Mackay.

[105] Dr Penny Brown.

[106] Council of HM Circuit Judges, HM Council of District Judges (Magistrates' Court).

[107] Notably whether to plead guilty or not (the second criterion) and exercising the right to challenge a juror (the third criterion).

[108] Law Society, Professor Ronnie Mackay, Professor Jill Peay.

[109] Justices' Clerks' Society, Dr Linda Monaci.

trial.[110] Those decisions will be supported by advice from a representative, if there is one, but can be made only by the accused him- or herself. There are, of course, many other decisions which have to be made by the defence in criminal proceedings. A defendant who is represented will have a greater or lesser degree of involvement in those decisions, depending on the importance of the decision for the defence case, the defendant's abilities and interest, and the views of the representative. However, almost all those decisions can be, and often are, deferred to the representative, even where the defendant has no participation difficulties.

Conclusion: A minimum list of decisions for which capacity is required

3.115 We conclude that it is appropriate for the test to include express reference to the ability of the accused to make those core decisions which can only be made by the accused him- or herself. The core decisions are namely: the decision how to plead, whether to give evidence and, where it arises, whether to elect Crown Court trial. We come to this conclusion for the following reasons:

(1) These are the critical decisions that, we consider, the defendant must at the very least be able to make to participate effectively in the proceedings.

(2) These decisions are likely to be the most demanding of decision-making capacity, given their complexity and significance for the defendant.

(3) Express inclusion of these decisions provides a framework to facilitate assessment.

(4) Providing some specific decisions will assist clinicians familiar with decision-specific capacity assessments.

3.116 **We** therefore **recommend that the test should include as relevant abilities: the ability to make a decision about whether to plead guilty or not guilty, the ability to make a decision about whether to give evidence, and (where relevant) the ability to make a decision about whether to elect Crown Court trial** (see draft Bill clauses 3(4)(e) to (g) and 32(4)(e) to (h) (magistrates' proceedings)).

3.117 However, we also recognise that there will, in some cases, be other decisions which are critical to the conduct of the defence case and with which the defendant must be able to engage for him or her to be said to be participating effectively in the proceedings. We have in mind, for example, those cases where a decision as to whether to use bad character evidence against a prosecution witness is critical and one which will have substantial ramifications for the defendant and his or her case. As a result, we consider it important to maintain some flexibility with regards to decision-making capacity. **We** therefore **recommend that the test should include as a relevant ability the ability of the defendant to make "any other decision that might need to be made by**

[110] Magistrates' Courts Act 1980, s 20(9). This only applies to an adult defendant who has indicated an intention to plead not guilty and the court has decided that the case is suitable for summary trial.

the defendant in connection with the trial" (see draft Bill clause 3(4)(g) and 32(4)(h) (magistrates' proceedings))**.**

Issue: Whether there should be an explicit reference to decision-making capacity in terms similar to the Mental Capacity Act

3.118 Several consultees to the IP raised the question of how the decision-making capacity element of the test should be framed. In short, they asked how the clinician and the court are to understand what is required by an "ability to decide". They asked in particular whether this aspect will explicitly refer to decision-making capacity in terms of the MCA. Decision-making capacity under the MCA requires a defendant to be able to: understand the information relevant to the decision, retain that information, use or weigh it in the decision making process, and communicate the decision arrived at.[111] Rudi Fortson QC, for example, was concerned that the meaning of decision-making capacity is obscure and lacks a formal psychiatric test. He endorsed the proposal that the judge should "have regard to" whether the defendant's capabilities are deficient in the areas of understanding, appreciation, reasoning and expressing a choice (the "ACED" factors).[112]

3.119 Professor Ronnie Mackay advocates a different model for incorporating decision-making capacity. He favours the decision-making capacity element included in the test of fitness to plead adopted in the Jersey case of *O'Driscoll*.[113] In *O'Driscoll*, the decision-making capacity element of the test is defined as the ability of the accused to make "rational decisions…which reflect true and informed choices on his part".[114]

Discussion: Whether there should be an explicit reference to decision-making capacity in terms similar to the Mental Capacity Act

3.120 We have considered with care how the decision-making capacity aspect should be formulated in the statutory test. Whilst noting the issues raised in relation to adopting the MCA formulation, we consider that framing decision-making capacity in terms reflecting the MCA criteria is the most desirable approach, for the following reasons:

[111] MCA 2005, s 3(1).

[112] Assessment of Capacity for Everyday Decision-Making is a tool developed to assist assessment of patients making decisions with regard to treatment.

[113] See *Attorney General v O'Driscoll* [2003] JRC 117, [2003] JLR 390 at [29]. In *O'Driscoll* Bailiff Balihache, in preference to the *Pritchard* test, proposed a test of "capacity to participate effectively in the proceedings" which required the court, in determining the issue, to have regard to the ability of the accused to:

"(a) to understand the nature of the proceedings so as to instruct his lawyer and to make a proper defence;

(b) to understand the substance of the evidence;

(c) to give evidence on his own behalf; and

(d) to make rational decisions in relation to his participation in the proceedings, (including whether or not to plead guilty), which reflect true and informed choices on his part."

[114] *Attorney General v O'Driscoll* [2003] JRC 117, [2003] JLR 390 at [29].

(1) This would reflect the reality of the approach to decision-making taken by clinicians. A number of responses from clinicians indicate that a reference to decision-making capacity would naturally trigger a response that focuses on the MCA formulation.

(2) To introduce an alternative formulation, such as that in *O'Driscoll*,[115] is liable to raise further uncertainty as to what that decision-making capacity entails and how it is distinguishable from MCA decision-making.

(3) We do not consider that any of the alternative formulations of decision-making capacity proposed (for example, in the case of *O'Driscoll* referenced above or the ACED factors) represent such an improvement on the MCA test that the benefits of their introduction outweigh the concerns raised at (2) above.

(4) There are no psychiatric tests for any formulation of decision-making capacity.

Conclusion: Whether there should be an explicit reference to decision-making capacity in terms similar to the Mental Capacity Act

3.121 **We recommend** therefore **that the ability to make decisions should be defined in the test by specific reference to the Mental Capacity Act criteria** (see draft Bill clauses 3(5) and 32(5) (magistrates' proceedings)).[116]

Issue: Should there be a diagnostic threshold?

3.122 Some tests for unfitness to plead or effective participation include a diagnostic threshold. What we mean by a diagnostic threshold is a requirement that a defendant must be found to have a diagnosis of disease, or some other qualifying condition, before he or she can be determined to be unfit to plead or to lack the capacity for effective participation.[117] The MCA 2005, which considers capacity in a civil context, includes the requirement that the individual be unable to make decisions because of an "impairment of, or a disturbance in the functioning of, the mind or brain."[118] By contrast, the *Pritchard* test currently includes no such diagnostic requirement.

3.123 Although we did not ask a specific question about including a diagnostic threshold in CP197, some consultees expressed views on the issue of a diagnostic threshold. Some respondents to CP197 proposed a qualifying diagnosis as potentially setting suitable parameters on findings of lack of

[115] *Attorney General v O'Driscoll* [2003] JRC 117, [2003] JLR 390 at [29].

[116] We note that this is in line with the conclusions of the Northern Ireland Law Commission report, Unfitness to Plead (2013) NI Law Com No 16, para 2.40.

[117] See, for example, the Scottish test which requires the defendant's participation difficulties to arise "by reason of a mental or physical condition" (Criminal Procedure (Scotland) Act 1995, s 53F). Likewise, in Canada the test for unfitness to plead requires the defendant's difficulties to arise as a result of a "mental disorder" (section 2 of the Criminal Code of Canada).

[118] MCA 2005, s 2(1).

capacity.[119] Others rejected such an approach on the basis that the focus should be on a defendant's abilities in relation to trial and not on his or her diagnosis.[120]

3.124 In the IP[121] we asked specifically whether consultees agreed that a diagnostic threshold would be unlikely to assist in maintaining the threshold for a finding of lack of capacity. We arrived at that provisional position because of the breadth of conditions that would need to be encompassed by that diagnostic threshold, including for example sensory impairment, developmental disorders, mood disorders, learning disability and developmental delay.

3.125 A significant proportion of respondents to the IP agreed that a diagnostic threshold would be unlikely to assist in maintaining the threshold of unfitness at a suitable level.[122] Several consultees stressed that the emphasis should be on "determining the level of [the defendant's] abilities in relation to the trial, rather than on the diagnosis".[123] Others focussed on the potential for incompatibility with the UNCRPD.[124] In addition, as the CPS observed, there is the difficulty of isolating a diagnostic category that would capture all potential conditions.[125]

3.126 However, there were several consultees, particularly those from psychiatric backgrounds, who stressed the importance of diagnosis. This was advanced for a number of reasons:

(1) It would bring the criminal test in line with the MCA 2005 (Forensic Psychiatrists SW Yorkshire NHS Foundation Trust, Helen Howard).

(2) Absence of a diagnostic threshold would undermine the threshold for unfitness (Consultant forensic psychiatrist Dr Andrew Bickle, Helen Howard).

(3) A diagnostic threshold is an important safeguard against malingerers (Dr Andrew Bickle). Dr Bickle explained that there are recognised tools for detecting simulated symptoms, and a focus on evaluating signs and symptoms to arrive at a diagnosis would engage such tools.

(4) A diagnostic threshold is an important safeguard against incompetent assessments (Dr Andrew Bickle). Dr Bickle observed that depriving an individual of moral agency is not a decision to be taken lightly. As Helen Howard noted, "we should be sure of our reasons for doing so" and a diagnostic threshold would "strengthen and support our reasons in this respect".

[119] Royal College of Psychiatrists, Helen Howard and HHJ Wendy Joseph QC.

[120] British Psychological Society and the Centre for Mental Health.

[121] IP Further Question 5.

[122] Council of HM Circuit Judges, HM Council of District Judges (Magistrates' Court), HHJ Tim Lamb QC, Law Society, Dr Eileen Vizard CBE, Dr Penny Brown, Dr Susan O'Rourke, Charles de Lacy, Professor Ronnie Mackay, some of Centre for Evidence and Criminal Justice Studies, Professor Graeme Yorston, Prison Reform Trust, Anonymous, Karina Hepworth, Nigel Barnes, Professor Jill Peay, Holroyde J, Laura Hoyano.

[123] Law Society, echoed by Charles de Lacy.

[124] Dr Penny Brown.

[125] Although Helen Howard disagreed, and felt that this task was not impossible.

(5) Diagnosis provides valuable information about the defendant's prognosis and chances of regaining fitness (Dr Andrew Bickle). Dr Bickle has concerns about unfitness to plead being "evaluated in isolation from the underlying causes".

(6) Subsequent detention is "very difficult to justify… if they do not have a diagnosed mental disorder" (Royal College of Psychiatrists).

(7) A qualifying diagnosis would protect "people who hold profound political or religious views from being found unfit to plead" (Forensic Psychiatrists SW Yorkshire NHS Foundation Trust).

Discussion: Should there be a diagnostic threshold?

3.127 There is no doubt that in many cases diagnosis is essential in predicting whether a defendant will recover or not, and will assist in identifying ability to participate effectively. However, we remain squarely of the view that it should not be a determinative requirement for a finding of lack of capacity for effective participation. We take that view for the following reasons:

(1) We are not convinced that if a diagnostic threshold were isolated which was sufficiently wide to encompass all likely reasons for participation difficulties that it would present any effective barrier to malingerers. The Scottish test, for example, stipulates "a mental or physical condition".[126] We doubt whether that requirement has any effect on the threshold of unfitness.

(2) The absence of a diagnostic threshold does not prevent diagnosis being an important part of some assessments, a helpful guide to identifying malingering and a tool for predicting recovery.

(3) Issues of future detention can be addressed without the need for unfitness to be dependent upon diagnosis. A finding of lack of capacity does not inevitably lead to a consideration of detention.

(4) The greater discretion likely to be achieved in a reformulated test would guard against individuals being found to lack capacity on the basis of profound political or religious views.

(5) There is currently no diagnostic threshold associated with the *Pritchard* test, and we are not aware of any case law, nor have we been presented with any examples of individual defendants, in relation to whom its absence caused difficulty.

(6) We were conversely presented with various examples from consultees of the difficulties which arise in the magistrates' and youth courts in relation to the requirement for a defendant to have a "mental disorder",[127] in the application of section 37(3) of the Mental Health Act 1983.

[126] Criminal Procedure (Scotland) Act 1995, s 53F.

[127] As defined by the Mental Health Act 1983.

Conclusion: Should there be a diagnostic threshold?

3.128 As a result, **we do not recommend the inclusion of a diagnostic threshold as part of the legal test**.

Issue: In what parts of the proceedings must the accused be able to participate effectively?

3.129 By virtue of the inclusion of the ability to decide how to plead and to give instructions, the *Pritchard* test plainly contemplates the abilities of the defendant outside the narrow confines of proceedings in the courtroom itself. However, it is unclear, for example, whether the fifth criterion of being able to "follow the course of proceedings" includes the ability to follow a sentencing hearing, or indeed anticipated confiscation proceedings under the Proceeds of Crime Act 2002. It is clear, however, that the issue of the defendant's unfitness to plead can only be raised up until the opening of the defence case.[128]

3.130 Respondents to CP197 raised the importance of the defendant being able to participate in the whole proceedings, including pre-trial and sentencing. Rudi Fortson QC also raises the question of the extent of any capacity for effective participation in relation to confiscation proceedings in his response to the IP.[129]

Discussion: In what parts of the proceedings must the accused be able to participate effectively?

3.131 Since we recommend a test applied in the context of the proceedings in which the defendant will be required to participate, it is essential that we make clear exactly what aspects of criminal proceedings we consider to be relevant. We agree with consultees' observations that the ability of the defendant to participate effectively in some pre-trial hearings and in sentencing is essential. However, we consider that there should be some qualification to that position.

3.132 In relation to pre-trial arrangements, the ability of the defendant to participate effectively in pre-trial hearings which have a bearing on the conduct of the trial itself is important. This may be achieved by the accused following the proceedings in person or through instructing representatives. We do not, however, consider that an assessment of a defendant's capacity to participate effectively in a trial need encompass consideration of the defendant's ability to participate effectively in ancillary proceedings. These would include proceedings such as bail or custody time limit arguments, which do not directly affect the conduct of the trial itself. Although it may go without saying, an assessment of an accused's capacity ought not to take into account his or her likely ability to participate effectively in the hearing to determine the question of capacity itself. Such hearings may often include complex expert evidence which may be much more difficult for the defendant to follow and understand than the evidence and proceedings on the offence in question.

[128] Criminal Procedure (Insanity) Act 1964, s 4(2).

[129] R Fortson QC, "Reforming Unfitness to Plead for Adults in the Crown Court: A Practitioner's Perspective", ch 1 in B Livings, A Reed and N Wake (eds), *Mental Condition Defences and the Criminal Justice System: Perspectives from Law and Medicine* (2015).

3.133 We do consider it important for a defendant to be able to participate effectively in any sentencing process, although again we do not anticipate that such a requirement is likely to be determinative of a defendant's capacity. We have in mind the ability of the defendant to give instructions in relation to mitigation, to follow the sentencing proceedings in court and to understand the impact of orders which may be made.[130]

3.134 However, we do not consider that an assessment of a defendant's capacity to participate effectively in a trial should include consideration of the defendant's ability to participate effectively in anticipated confiscation proceedings under the Proceeds of Crime Act 2002. We take this view, first, because confiscation proceedings may often be much more complicated than the process which led to the triggering conviction. For example, a case of drugs supply where the trial relates to sale to an undercover officer, for example, could be very straightforward. However, subsequent confiscation proceedings may involve minute examination of the defendant's whole financial history and tracing the movement of funds etc. We consider that it would be wrong for a defendant who could not participate effectively in envisaged confiscation proceedings to be found to be unable to participate effectively in trial proceedings of this sort and thus shielded from conviction.

3.135 Secondly, confiscation proceedings, whilst triggered by convictions, are not an unavoidable part of the prosecution process. In contrast to sentencing which must follow conviction, the prosecution has a discretion whether to institute confiscation proceedings or not,[131] and can discontinue confiscation proceedings once initiated. The court also retains a limited jurisdiction to stay confiscation proceedings for abuse of process if it concludes that the proceedings are oppressive.[132] Confiscation proceedings, although closely aligned to sentencing, are thus separate and distinct from the trial process.

Conclusion: In what parts of the proceedings must the accused be able to participate effectively?

3.136 In line with our observations above, **we recommend that the statutory test for capacity to participate effectively in trial should be reformulated to require the defendant's relevant abilities to be sufficient to enable him or her to participate effectively "in the proceedings on the offence or offences charged".** We consider that this formulation will capture, in addition to trial and sentencing proceedings, pre-trial proceedings which have a bearing on the conduct of the trial itself (see draft Bill clauses 3(2) and 32(2) (magistrates' proceedings)).

3.137 **We** also **recommend that the test explicitly exclude from "proceedings on an offence" proceedings under section 6 of the Proceeds of Crime Act 2002** (see draft Bill clauses 3(6) and 32(6) (magistrates' proceedings)).

[130] Such orders may include, for example, Sexual Harm Prevention Orders under the Sexual Offences Act 2003, s 103A to 103K.

[131] Proceeds of Crime Act 2002, s 6(3)(a).

[132] *Morgan; Bygrave* [2008] EWCA Crim 1323, [2008] 4 All ER 890.

Issue: Separation of capacity to participate effectively in a trial and capacity to plead guilty

3.138 In CP197 we invited consultees to consider a single test of decision-making capacity which would be applied to the entire spectrum of trial decisions required of the defendant.[133] At that stage we expressed the view that a capacity to participate in all aspects of the trial process should be the basis of the legal test.[134] We preferred a single assessment of the accused's capacity for the proceedings, a "unitary approach", rather than a "disaggregated approach", which would break the trial down into particular sections, or discrete decisions, for which decision-making capacity would be required.

3.139 The majority of respondents to CP197 favoured this single assessment approach, on the basis that it would be simpler, more practical and less likely to lead to delay.[135] However, it seems to us that we did not make sufficiently clear to consultees what this alternative "disaggregated approach" would require. We did not explore whether it would require separate consideration of the defendant's capacity in relation to each decision that the defendant might be required to make or, for example, simply the splitting of fitness for trial from fitness to plead guilty. Nonetheless, in their response the Broadmoor psychiatrists considered it necessary to distinguish between the "separate questions of fitness to plead, fitness to stand trial and fitness to give evidence". The Royal College of Psychiatrists also commented that "most forensic psychiatrists would recognise situations where defendants could be considered fit to plead where they intend entering a guilty plea but would not be fit to plead in a contested trial".

3.140 At the time of drafting the IP we asked consultees more specifically about separating capacity for trial and capacity to plead guilty.[136] We considered at that stage that such an approach might not be desirable on the basis of a number of concerns, in particular:

(1) Whether a defendant, who might otherwise be unable to participate in full trial, could sufficiently understand the lasting repercussions of a plea of guilty.

(2) Whether such a defendant would be able to engage adequately in any Newton hearing,[137] or other sentencing procedure.

(3) That a two-stage test considering, first, fitness to plead and then fitness for trial would be unduly cumbersome given the likely numbers who would be fit to plead guilty but not fit for trial.

[133] Provisional Proposal 3.

[134] See CP197, para 3.98.

[135] See AR paras 1.63 to 1.78 for fuller discussion of consultee responses to Provisional Proposal 3.

[136] Further Question 8.

[137] *Newton* (1983) 77 Cr App R 13, [1983] Criminal Law Review 198. A Newton hearing is held to resolve factual issues where a defendant pleads guilty but does not accept all of the prosecution's factual allegations.

(4) Assessment of the accused's capacity would have to extend through to punishment, including the ability to engage in any community orders imposed, for example.

3.141 Legal respondents to the IP generally agreed with our concerns,[138] as did a number of academics and NGOs.[139] Academic Professor Paul Roberts, for example, raised concerns that such an approach might undermine the legitimacy of the criminal justice system to allow individuals who are otherwise unable to participate effectively in proceedings to plead guilty, especially to serious matters. His concern was that the defendant's choice is constrained, insofar as the alternative to his plea is the unfitness to plead procedures with the possibility of indefinite detention.[140]

3.142 A number of clinical respondents, however, took a different view, and did consider it appropriate to draw a distinction between fitness to plead and fitness to be tried.[141] Mr Justice Holroyde was also of the view that "there may be cases where a valid distinction can be drawn".

3.143 Clinical respondents advance various reasons to favour separating the questions of capacity to plead guilty and capacity for trial:

(1) Therapeutic: if a defendant can enter a guilty plea he or she can "get on with treatment" without the worry of fitness procedures and the prospect of proceedings being resumed on recovery (Charles de Lacy).

(2) Victim and witness advantage: if a defendant can plead this is better for victims and witnesses.

(3) Human rights arguments: allowing a fit enough defendant to plead guilty preserves his or her autonomy.

(4) Clinically apt: several respondents observe that a defendant may be unfit for a trial, but may not lack decisional capacity (Dr Tim Rogers, Charles de Lacy).

3.144 We presented our work on the unfitness to plead project at legal and academic conferences during late 2013 and throughout 2014.[142] At those conferences we were approached by a number of forensic psychiatrists who argued in similar terms that the separation of capacity for trial and capacity to plead guilty should be an important feature of any reformed test.

[138] CPS, Council of HM Circuit Judges, HM Council of District Judges (Magistrates' Court), HHJ Tim Lamb QC, Carolyn Taylor, Law Society.

[139] Professor Jill Peay, Prison Reform Trust, Centre for Evidence and Criminal Justice Studies.

[140] In discussion at the Society of Legal Scholars 2014 Conference, 11 September 2014, Criminal Stream.

[141] Dr Linda Monaci, Charles de Lacy, Dr Graeme Yorston.

[142] Socio-Legal Studies Association conference, Aberdeen, 26 February 2014; Royal Society of Medicine, Sleep Disorder Conference, 30 September 2014; Society of Legal Scholars 2014 Conference, 11 September 2014; The Criminal Bar Association: Vulnerable Defendants and Witnesses Conference, 6 December 2014; and the Intermediaries for Justice Conference, 14 March 2015.

3.145 There is academic recognition of this distinction. Professor Ronnie Mackay[143] notes that there may be a difference between the cognitive demands of running a defence and entering a plea, as is recognised in New Zealand.[144] Professor Mackay's empirical research also suggests that there may be significant numbers of individuals who are found unfit to plead on the basis of other deficiencies, yet are considered by clinicians to be able to plead to the charge(s). His research demonstrates that psychiatrists conducting the assessments of defendants more commonly find unfit defendants to have the ability to plead than any other of the required abilities in the *Pritchard* test.[145]

3.146 Finally, the Victorian Law Reform Commission (Australia) ("the VLRC") in their recent project in this area[146] received similarly contrasting responses on this issue, reflecting the same range of concerns and issues. In their analysis the VLRC focus on the importance of understanding that unfitness to be tried (as it is termed in Victoria) is not a binary state but encompasses different levels of capacity. They suggest that the law needs to be sufficiently flexible to reflect that variation. They also note that if a defendant has capacity to make a particular decision then that decision ought to be given effect to, as far as possible.

3.147 The VLRC propose a test for fitness to enter a guilty plea, which would be applicable to those found unfit, where appropriate. The test incorporates specified safeguards, including whether the defendant:

(1) understands the nature of the charge;

(2) understands the actual significance of entering a plea;

(3) understands the nature of the hearing he or she foregoes if entering a plea of guilty;

(4) could follow the course of the sentencing hearing; and

(5) can give meaningful instructions on the issue of his or her plea.

Discussion: Separation of capacity to participate effectively in a trial and capacity to plead guilty

3.148 The introduction in every case of a two-stage test, asking first whether the defendant is capable of pleading guilty and then whether he or she is capable of participating effectively in trial would unduly complicate the determination by the court. This would be undesirable given the likely minority of defendants who would have capacity for a guilty plea, but not capacity for trial.

[143] Speaking at the Society of Legal Scholars 2014 Conference, 11 September 2014, Criminal Stream.

[144] *R v Komene* [2013] NZHC 1347.

[145] R D Mackay, B Mitchell and L Howe, "A continued upturn in unfitness to plead – more disability in relation to trial under the 1991 Act" [2007] *Criminal Law Review* 530.

[146] Victorian Law Reform Commission, *Review of the Crimes (Mental Impairment and Unfitness to be Tried) Act 1997: Report* (June 2014), http://www.lawreform.vic.gov.au/sites/default/files/Review_of_the_Crimes_Mental_Impairment_and_Unfitness_to_be_Tried_Act_0.pdf (last visited 21 October 2015). See discussion at paras 3.71 to 3.84.

3.149 However, clinical opinion and empirical research suggest that there will be some individuals who do not lack the decisional capacity required for a plea, and are able to engage with the sentencing process and any sentence imposed, but would be unable to follow proceedings at trial or give evidence.

> **Example 6** A defendant, D (who has a learning disability and attention deficit disorder), is charged with assault occasioning actual bodily harm. The assault is caught on CCTV. Assessing clinicians conclude that D would be unable to follow the course of a trial and unable to give evidence. Nonetheless, the experts conclude that he is capable of entering a plea of guilty. He understands the evidence against him and appreciates the consequences of doing so.

3.150 To deny defendants such as D the right to give effect to their decision to plead guilty, on the basis that they would not be able to engage in a hypothetical trial, seems unjustifiably to undermine their legal autonomy. Critically, it also denies complainants, witnesses and the general public the optimum outcome namely a completed criminal process, including the imposition of an appropriate sentence. There are inevitably, also, positive resource implications where a plea of guilty can be achieved instead of embarking on a jury process.

3.151 We take the view that the test of capacity to plead guilty should not be applied until after the judge has determined that the accused lacks capacity to participate effectively in trial. This has two benefits. First, it prevents the issue of capacity to plead guilty being addressed in every case. Secondly, it enables the accused to know the nature of the proceedings that he or she would forego in pleading guilty.

3.152 To respond to Professor Roberts' concern, although the choice the defendant makes at that point is constrained, it is no more constrained than that of a defendant who has full capacity and pleads guilty. On one view the defendant who lacks capacity for trial, but not for a guilty plea, is in a more advantageous position because the alternative process which will follow if he does not plead guilty is a fact-finding procedure in which he or she is insulated from conviction.

3.153 We consider that the approach proposed by the VLRC offers the option of allowing defendants to act on decisions which they are capable of making, but without requiring a two-stage test to be applied in every case. Secondly, the creation of a separate test of capacity to plead guilty allows the relevant abilities required of the defendant to be tailored to meet the concerns raised at paragraphs 3.140(1) and (2) above. However, in order to prevent further delay arising, we take the view that the question of capacity to plead guilty should be determined at the same hearing as the question of lack of capacity for trial. As we set out below at paragraph 3.158 and following, we recommend that experts assessing a defendant's capacity for trial should also always be required to assess whether the defendant might nonetheless have the capacity to plead guilty. In a case where the experts have reported that the defendant may, although lacking capacity for trial, nonetheless have the capacity to plead guilty, the defence will be able to indicate that they will be inviting this second ruling should a determination of lack of capacity for trial be arrived at. Therefore, when the expert evidence is called (if heard live) at the determination hearing, the defence would adduce, from the experts, evidence in respect of the defendant's

capacity to plead guilty in addition to evidence in respect of capacity, or lack of capacity, for trial.

> **Example 6 continued** D's case is listed for hearing to determine whether the defendant lacks capacity for trial, on the application of the defence. D's representative indicates that, should D be found to lack capacity (applying the test in clause 3), she will invite the court to determine in addition whether D has capacity to plead guilty (applying the test in clause 6). Both experts are called to give live evidence in relation to both questions: D's capacity for trial and his capacity to plead guilty. The judge, applying the test in clause 3, determines that D lacks capacity for trial. The defence, having received that ruling, formally apply to the court for a determination of whether D has capacity to plead guilty, according to the test in clause 6. The judge determines, on the expert evidence received, that D does nonetheless have capacity to plead guilty to the allegation of assault occasioning actual bodily harm. There is a short adjournment whilst D considers whether he wishes for the charge to be put to him. He decides to plead guilty. He is arraigned and enters his guilty plea. He is sentenced in the usual way.

Conclusion: Separation of capacity to participate effectively in a trial and capacity to plead guilty

3.154 Following our analysis above, **we recommend the separation of the capacity to plead guilty from the capacity to participate effectively in a trial** (see draft Bill clauses 5 and 6, and clauses 34 and 35 (magistrates' proceedings)).

3.155 **We recommend that the separate test of capacity to plead guilty would be one applied only in cases which satisfy the following requirements**:

(1) the defendant has been found to lack the capacity to participate effectively in a trial;

(2) two suitably qualified experts have specifically addressed in oral or written evidence the defendant's capacity to plead guilty notwithstanding the defendant's lack of capacity to participate effectively in a trial; and

(3) the defence apply, immediately following a determination of lack of capacity for trial, for the court to determine whether the defendant has the capacity to plead guilty (see draft Bill clause 5 and clause 34 (magistrates' proceedings)).

3.156 **We** also **recommend that the test of capacity to plead guilty should incorporate a requirement that the defendant has sufficient relevant abilities in relation to his or her understanding of the charge, the evidence adduced in relation to it, what it means to plead guilty and the consequences of doing so. The relevant abilities should also include the defendant's ability to give instructions, follow the remainder of the proceedings and to make the decisions required of him or her in connection with the decision to plead guilty** (see draft Bill clause 6(4) and clause 35(4) (magistrates' proceedings)).

3.157 Care would have to be taken by the judge to ensure that whatever sentence was imposed was one which the defendant was able to understand and comply with, in consideration of the concern that we raised in paragraph 3.140(4) above. However, this is an issue for the sentencing judge, and one which, we consider, may very well merit reserving the case to the same judge, and indeed any potential review or breach proceedings.

Issue: Guidance or a code of practice for clinicians in assessing a defendant

3.158 There are, throughout the responses from consultees to the IP, various references to the inconsistency of the application of the current test by clinicians.[147] Even though a statutory formulation would assist to clarify the substance of the test, a number of clinical consultees raised the need for guidance, or a code of practice, to be drafted for clinicians to use in applying the test.[148]

3.159 Apart from fostering greater consistency in the application of the test by clinicians, consultees felt that a number of specific factors could be usefully covered in such guidance:

(1) Practical examples and case studies (Prison Reform Trust).

(2) Clarification of the sort of decisions which might be required of the defendant in the course of a criminal trial for which he or she would require capacity (Dr Penny Brown).

(3) How to address, in assessment, the likely ability to participate effectively of a defendant who refuses representation (Dr Penny Brown).

Discussion: Guidance or a code of practice for clinicians in assessing a defendant

3.160 We consider that the creation of a code of practice or guidelines for the application of the test would be significantly helpful in:

(1) ensuring greater consistency in the application and interpretation of the statutory test;

(2) ensuring that all necessary matters are addressed in the assessment; and

(3) providing further information about other relevant aspects of the legal process, for example special measures and trial adjustments that might be available.

3.161 We agree that the code of practice or guidelines might usefully include the matters alluded to above, as well as the following:

[147] For example, Prison Reform Trust.

[148] Forensic Psychiatrists SW Yorkshire NHS Foundation Trust, Dr Linda Monaci, Dr Penny Brown.

(1) the need to address whether the defendant may be able to participate effectively with the provision of special measures or other reasonable adjustments;

(2) the need to consider whether there is any real prospect of a defendant achieving, or regaining, the ability to participate effectively in the proceedings, and how long such a process might take (see Chapter 4 paragraph 4.88 and following below for fuller discussion of this issue); and

(3) the need to consider whether a defendant, who might otherwise be unable to participate effectively in the wider proceedings, might nonetheless be able to enter a plea of guilty, in accordance with the provisional test set out at paragraph 3.156 above.

Conclusion: Guidance or a code of practice for clinicians in assessing a defendant

3.162 **We recommend that guidance, or a code of practice, for clinicians in applying the tests should be drafted to accompany the statutory tests themselves.**

Issue: Compatibility with the United Nations Convention on the Rights of Persons with Disabilities

3.163 In the IP[149] we considered whether a capacity test to assess whether an individual is able to participate effectively in trial would be compatible with the United Kingdom's obligations under the United Nations Convention on the Rights of Persons with Disabilities ("UNCRPD").[150] We were concerned that in seeking to protect the individual's right to a fair trial, under article 6 of the European Convention on Human Rights ("ECHR"), the proposed reforms might conflict, in particular, with article 12 of the UNCRPD.

3.164 Article 12 of the UNCRPD establishes that people with disabilities have equal recognition before the law and the right to enjoy legal capacity on an equal basis with others. The Committee on the Rights of Persons with Disabilities[151] is critical of systems which deny legal capacity on the basis of "perceived or actual deficits in mental capacity", and instead impose substitute decision-making arrangements for the individual. The current unfitness to plead provisions and our proposed reforms are such systems.

3.165 In considering this potential incompatibility, we reasoned in the IP that our obligation in the first instance is to ensure that the defendant's article 6 rights are safeguarded. We considered that, for those few individuals who were unable to gain, or recover, the capacity to participate effectively, and for whom special measures and adjustments could not achieve effective participation, the

[149] IP paras 2.69 to 2.82.

[150] The incompatibility of such a position is raised in: The Committee on the Rights of Persons with Disabilities, *General Comment No 1 (2014): Article 12: Equal recognition before the law*, (April 2014), paras 12 and 13.

[151] The Committee on the Rights of Persons with Disabilities monitors compliance with the UNCRPD.

functional approach taken in the proposed reforms would not necessarily be incompatible with the UNCRPD. We took that view in particular because of the safeguards which we proposed to put in place[152] and in light of our efforts to ensure that the procedures respected the defendant's "rights, will and preferences" wherever possible, and the restrictions applied "for the shortest time possible".

Discussion: Compatibility with the United Nations Convention on the Rights of Persons with Disabilities

3.166 A significant number of respondents to the IP[153] felt that they could not engage with this issue, rather confirming our concerns that the implications of the UNCRPD are not widely considered or understood by those engaged in criminal work.

3.167 Amongst those who did address the question of compatibility with the UNCRPD,[154] the analysis and approach proposed in the IP was broadly supported across the consultee groups.[155]

3.168 In addition, a number of observations made by consultees confirm aspects of our broader approach to unfitness in general:

(1) The UNCRPD requires more to be done to enable defendants to undergo full trial wherever possible (Dr Penny Brown).

(2) The provision of special measures and intermediaries on a statutory basis is critical to a compatible approach (Professor Jill Peay).

(3) That emphasis should be placed on adjournment if there is the prospect of recovering or achieving full fitness (Dr Penny Brown). Dr Brown suggests that this be reflected in a statutory provision.

3.169 Nigel Barnes was "very uneasy" about both the old and proposed reformed model in the context of the UNCRPD. He suggested that care should be taken to ensure that findings, sanctions and the recording of them against unfit defendants should be clearly distinguished from criminal findings.

3.170 Academics specialising in this area have provided us with considerable advice on these issues. However, they acknowledge that there is no definitive guidance on the implications of the UNCRPD for unfitness to plead provisions,[156] and that such issues were not prominent in the discussions at the drafting stage of the UNCRPD.[157] They stress that the focus must be on considering in the round the adjustments and supports that can be provided to the individual rather than

[152] As required under UNCRPD, art 12(4).

[153] IP Further Question 10.

[154] In responding to Further Question 10.

[155] Council of HM Circuit Judges, HM Council of District Judges (Magistrates' Court), Rudi Fortson QC, Dr Eileen Vizard CBE, Charles de Lacy, Professor Ronnie Mackay, Professor Jill Peay, Centre for Criminal Justice Studies, CPS, Professor Graeme Yorston.

[156] IP response of Professor Anna Lawson and Rebecca Parry.

[157] Meeting with academic Rosemary Kayess, 30 June 2014.

assessing the individual's capacity. Additionally, it is plainly important that any such assessment should be achieved with the participation of the individual defendant. As academic Rosemary Kayess[158] summarised it, the UNCRPD is about doing things "with" vulnerable individuals rather than "to" them.

3.171 Understandably, no disability rights academic particularly welcomed the suggestion that there may be a small group of defendants in criminal cases who will be unable, no matter the assistance provided, to participate effectively in trial. However, all acknowledged that this is liable to occur and that public protection concerns would require ongoing criminal proceedings in some form in some cases.

3.172 In their joint response, Professor Anna Lawson and academic Rebecca Parry acknowledged that in those circumstances the trial itself might need to be significantly different, perhaps in the form of the reformed alternative finding procedure, discussed in Chapter 5 below. Indeed their view was that this might be conceived of as a reasonable adjustment in itself (although they note that such a procedure would not strictly satisfy the accepted understanding of a reasonable adjustment as a measure to allow engagement on an equal basis with others).

3.173 Rosemary Kayess felt that our proposed approach would not necessarily be incompatible with the UNCRPD. This would be especially so if all appropriate efforts were made to give effect to the will and preference of the defendant and if he or she was involved in, for example, the selection of his or her representative. She counselled against an unduly rigid reading of the UNCRPD, and felt that it may be helpful to view the interface between the defendant's article 6 rights and his or her autonomy rights under the UNCRPD as a "balancing exercise". Where the two could not both be given effect to, she agreed that the defendant's right to legal autonomy might have to be superseded by his or her article 6 ECHR rights. She stressed, however, that the focus should be on the individual's rights and not on his or her "best interests".

Unrepresented defendants

3.174 In the context of compatibility with the UNCRPD, we also asked in the IP what the court's approach should be to defendants who refuse representation in the initial stages, but about whom there are concerns as to their capacity to participate effectively in the proceedings.[159] In the IP we took the provisional view that, prior to a finding of lack of capacity, there would be no justifiable basis to impose representation if that was contrary to the defendant's wishes. However, we felt that where such concerns have been identified, the court should ensure that the defendant has been provided with sufficient opportunity to consider the benefits of representation and with any support that he or she require to facilitate the making of that decision.

[158] Visiting fellow at the University of New South Wales.

[159] IP paras 2.86 to 2.88.

3.175 This approach was supported by respondents.[160] Although Nigel Barnes felt that there may need to be amendment to the Duty Solicitor Rules to ensure that duty solicitors are able to assist defendants when needed, or where the court took the view that their input would be beneficial.[161]

Conclusion: Compatibility with the United Nations Convention on the Rights of Persons with Disabilities

3.176 The ramifications of the UNCRPD for a number of areas of criminal law have yet to be fully analysed and assimilated by government and policy-makers. Giving full effect to some of the principles of the UNCRPD would require much more fundamental change to the criminal justice system than is likely to be achievable at this time, or within the scope of this project. We take the approach in this report that our recommendations should be compatible as far as possible with the aims of the UNCRPD, whilst observing our other obligations under the ECHR. In particular we consider it important to put in place as far as possible the safeguards and procedural accommodations that articles 12 and 13 require.

3.177 Taking that stance, we are satisfied that the approach to the legal test set out above is not incompatible with the United Kingdom's duties under the UNCRPD, given the safeguards that we recommend be put in place.

3.178 Having considered carefully articles 12 and 13 of the UNCRPD in particular, the safeguards that we have in mind are set out below. We address them in more detail in subsequent chapters as they arise :

(1) The emphasis of our proposals should be on supporting all those who can to undergo full trial.

(2) There should be statutory inclusion of a power to adjourn to allow for the attainment or recovery of the ability to participate, where that is identified as a realistic prospect by the experts (discussed further in Chapter 4 at paragraph 4.82 and following below).

(3) There should be a statutory entitlement to a registered intermediary where necessary for a fair trial (discussed further in Chapter 2 at paragraph 2.62 and following above).

(4) The defendant should be enabled to be fully involved in his or her assessment and in selecting measures to support and assist him or her.

(5) The defendant's identified will and preference should be observed as long as that is in keeping with his or her right to a fair trial (see Chapter 5 at paragraph 5.133 and following below).

[160] Law Society, Nigel Barnes. Rosemary Kayess also stresses the importance of a defendant being assisted to be able to represent themselves if that is their preference.

[161] The Duty Solicitor Manual (version 7: May 2006) sets out that duty solicitors are "only able to advise individuals who are either in custody or charged with an imprisonable offence" (para 2.5(2)). This would need to be widened if all offences are to fall under a reformed framework.

(6) The defendant, whose ability to participate effectively is in doubt, should not be required to have representation. In such a case, the defendant should have the opportunity to consider the benefits of representation, with any support that he or she requires to facilitate the making of that decision.

CHAPTER 4
ASSESSING THE DEFENDANT

INTRODUCTION

4.1 This chapter considers the process by which a court arrives at a finding that the defendant lacks the capacity to participate effectively in the trial. It addresses five different issues:

(1) whether there should be a statutory presumption that all defendants have capacity for trial unless it is established otherwise;

(2) what requirement there should be for expert evidence to inform a court's finding that a defendant lacks capacity for trial;

(3) the use of adjournment to allow the defendant to achieve, or recover, capacity for trial;

(4) whether there should be a consequential amendment to sections 35 and 36 of the Mental Health Act 1983 ("MHA");[1] and

(5) whether there should be a mechanism for overturning a finding that a defendant lacks capacity for trial.

4.2 We deal with each of these issues separately below.

Key Recommendations in this chapter:

1) There should be a statutory presumption that every defendant has the capacity to participate effectively in trial.

2) The parties and the court should be required to keep the issue of capacity under review, and the court should have the power to investigate and determine lack of capacity of its own motion.

3) A determination of the defendant's lack of capacity to participate effectively in the trial should only be made where it is based on expert evidence, whether written or oral, from two experts. One of the experts must be a registered medical practitioner approved under section 12 of the Mental Health Act 1983.[2] The other expert should be either a registered medical practitioner, a registered

[1] MHA, s 35 creates the power for the court to remand an accused person to hospital for an assessment of his or her condition. MHA, s 36 creates the power for the court to remand an accused person to hospital for treatment. These sections will be discussed in further detail in para 4.101 and following below.

[2] MHA, s 12 approval designates a registered medical practitioner as having special experience in the diagnosis or treatment of mental disorder. Section 12 MHA approved registered medical practitioners are generally, but not always, psychiatrists.

psychologist or an individual on a list of appropriate disciplines and levels of qualification, approved by the Department of Health.

4) Where there is a real prospect that the defendant might achieve capacity within a reasonable period, the court must consider adjourning proceedings to allow this to occur.

THE CURRENT POSITION: PRESUMPTION OF CAPACITY FOR TRIAL, BURDEN AND STANDARD OF PROOF

4.3 There is currently no statutory presumption of fitness to plead. However, the criminal courts proceed on the assumption that a defendant is fit to plead until it is established otherwise. The Court of Appeal confirmed in the case of *Ghulam*[3] that this is the appropriate approach. Lord Justice Stanley Burnton held that the requirement for evidence from two registered medical practitioners[4] ("RMPs") in section 4(6) of the Criminal Procedure (Insanity) Act 1964 ("CP(I)A") refers only to a determination that an accused is unfit to plead, rather than a determination that the defendant is fit to plead.[5] By contrast, there is a statutory presumption of capacity for civil proceedings. Section 1 of the Mental Capacity Act 2005 requires that a person "must be assumed to have capacity" unless it is established otherwise.

4.4 Although the question of whether an accused is unfit to plead will generally be raised by the defence, the prosecution and the court may also raise the issue.[6] The judge has an additional duty to keep the defendant's fitness to plead under review and to raise the issue with the defendant's legal advisers if any question arises in that regard.[7]

4.5 At present, if the defence contend that the defendant is unfit to plead, then the burden of proof lies on the defence and it is discharged if the court is satisfied on the balance of probabilities that the defendant is unfit.[8] If the prosecution raises the issue, the burden lies on the prosecution to establish the defendant's unfitness to the criminal standard of proof.[9] It is unclear where the burden of proof lies, and what standard of proof applies, where the court raises the issue. There is no case law on point, although *Halsbury's Laws* suggest that the burden would then lie on the prosecution to disprove the defendant's unfitness.[10]

3 *Ghulam* [2009] EWCA Crim 2285, [2010] 1 WLR 891.

4 One of whom must be approved under MHA, s 12.

5 *Ghulam* at [15] to [17].

6 Criminal Procedure (Insanity) Act 1964, s 4(1).

7 *Erskine* [2009] EWCA Crim 1425, [2010] 1 WLR 183 at [89]. See also *M* [2006] EWCA Crim 2391 at [21].

8 *Podola* [1960] 1 QB 325, [1959] 3 WLR 718.

9 *Robertson* [1968] 1 WLR 1767, [1968] 3 All ER 557 at [695].

10 *Halsbury's Laws of England and Wales*, (vol 27 2015), para 357, fn 5.

ANALYSIS AND DISCUSSION: PRESUMPTION OF CAPACITY FOR TRIAL, BURDEN AND STANDARD OF PROOF

Issue: A statutory presumption of capacity for trial

4.6 In the Issues Paper ("IP")[11] we asked consultees whether it would be helpful to have a statutory presumption of fitness.[12] Consultee support for this proposal was almost unanimous in relation to adult defendants. In particular, respondents felt that any other position would be unworkable. A number of consultees[13] observed that this would bring the criminal test in line with the Mental Capacity Act 2005 ("MCA");[14] others that "it is a potentially important protector of liberty".[15]

4.7 Some consultees felt that such a statutory presumption may be unnecessary, given that it is implicit following the Court of Appeal's decision in *Ghulam*.[16] However, the Council of HM Circuit Judges[17] noted that if new statutory provisions were to replace the common law, a presumption might be appropriate "for the avoidance of any doubt".

4.8 There were several caveats expressed in responding to this issue:

(1) HHJ Tim Lamb QC stressed that this should be no more than a presumption.

(2) Dr Susan O'Rourke (clinical psychologist) raised the danger of the erroneous assumption of capacity in cases involving deaf individuals.

(3) Mr Justice Holroyde[18] proposed that the judge should have the power to raise the issue of unfitness, and there be created a judicial power to require the prosecution to investigate unfitness.

4.9 However, there was more variation in opinion with regard to juveniles. HM Council of District Judges (Magistrates' Courts)[19] found "much attraction in a proposition that the assumption might be reversed for particularly young defendants". Dr Eileen Vizard CBE (consultant child and adolescent psychiatrist), who disagreed with a presumption for any defendant, focussed her concerns on a presumption being "particularly unsuitable for developmentally immature children

[11] Available at http://www.lawcom.gov.uk/wp-content/uploads/2015/03/unfitness_issues.pdf.

[12] IP Further Question 6.

[13] Royal College of Psychiatrists, Dr Penny Brown (consultant forensic psychiatrist), Dr Linda Monaci (consultant clinical neuropsychologist).

[14] Under the MCA, s 1(2) "A person must be assumed to have capacity unless it is established that he lacks capacity".

[15] Charles de Lacy (clinical nurse specialist), Prison Reform Trust.

[16] Professor Ronnie Mackay (academic), Centre for Evidence and Criminal Justice Studies.

[17] Response submitted by the Criminal Sub-Committee of the Council of HM Circuit Judges.

[18] Writing in his personal capacity, but his comments endorsed by the Lord Chief Justice, Lord Thomas.

[19] Response submitted by the Legal Committee of HM Council of District Judges (Magistrates' Court).

and young people". The Faculty of Forensic and Legal Medicine responded in relation to children by calling for a raise in the age of criminal responsibility.

4.10 Academic Laura Hoyano objected to any such presumption, for either adults or children, on the basis that it is ultimately a matter for the court to decide if an individual is fit. She endorsed the concerns raised by Mr Justice Andrew Smith in *Davison and Hopkinson*[20] about where the burden of proof should lie; an issue that she felt would be distorted by a rebuttable presumption. We address this issue at paragraphs 4.17 to 4.24 below.

Discussion: A statutory presumption of capacity for trial

4.11 For all the reasons outlined by consultees at paragraph 4.6 above, we agree that, as is currently the case, the court should continue to regard an accused as having capacity for trial unless and until the court determines otherwise under the new procedures. We also agree with the Council of HM Circuit Judges' observation that this approach should be explicitly referred to in the statutory scheme, for the avoidance of doubt. We take that view in particular because the position taken by the Court of Appeal in the case of *Ghulam* is dependent upon the statutory interpretation of section 4(6) of the CP(I)A, which will be repealed should our draft Bill be enacted.

4.12 However, clearly this "presumption"[21] should not displace the onus on the parties, and the court, to ensure that appropriate enquiries are made where concerns in relation to the defendant's capacity for trial arise.[22] The "presumption" would of course be rebuttable, where sufficient evidence is placed before the court.

A statutory presumption for young defendants?

4.13 We have examined with care the different concerns and issues which arise in relation to young defendants. Whilst we have some sympathy with the proposal for a presumption of lack of capacity for the youngest defendants this seems to us to be unworkable in practical terms, particularly in relation to resourcing. However, we consider that screening of juvenile defendants (10 to 17 years) to assess their ability to participate in criminal proceedings, would allow the court to respond to the prevalence of participation issues arising as a result of developmental immaturity, developmental disorders, mental health problems, and learning disability amongst young defendants. We discuss this proposal in more detail in Chapter 7 at paragraph 7.108 and following below.

Keeping the defendant's condition under review

4.14 We also consider that it is essential that the defence, the prosecution and the court should be required to keep the defendant's ability to participate effectively under review so that, should it deteriorate, the appropriate response can be

[20] *Davison and Hopkinson* (June 2013) (unreported).

[21] For ease we refer to this position as a presumption. It is, we consider, technically a "presumption without basic facts" which operates in the same way as a rule relating to the incident of a legal or evidential burden, without the need for proof or admission of any basic or primary facts.

[22] *Walls* [2011] EWCA Crim 443, [2011] 2 Cr App R 6 [37] to [38].

triggered. This should be accompanied by a requirement for the parties to raise the issue promptly where concerns arise. We consider that this is particularly important in light of the increase in the numbers of unrepresented defendants, and the difficulty in some cases of identifying when there may be participation problems, as noted by Dr Susan O'Rourke. We take the view that this latter point adds force to arguments that there is a need for training on mental health, learning disability, and participation issues, across the judiciary and legal representatives. This is important if we are to ensure that the statutory presumption is accompanied by a live awareness of likely issues and how they may present themselves, especially in the youth and magistrates' courts.[23]

The court's powers in determining the issue of capacity to participate effectively in the trial

4.15 We agree with Mr Justice Holroyde's suggestion that the court should have the power to require an investigation of the defendant's capacity. As we discuss below at paragraph 4.74 and following, we consider that liaison and diversion services at court would be well-placed to provide, at the request of the court or the parties, an initial assessment of the defendant's ability to participate effectively in the proceedings. There will be cases where a more formal assessment is considered to be required, but the defence decline to pursue the issue, rather than creating a power for the court to order the prosecution to investigate the defendant's capacity to participate effectively. We consider that in such cases the court itself should have the power to order a full assessment of the defendant, similar to the power of the court to order a psychiatric report for sentence.[24] Finally, in keeping with this approach, our view is that it should remain within the court's power to determine the issue of the defendant's ability to participate effectively in the trial of its own motion.[25]

Conclusion: A statutory presumption of capacity for trial

4.16 As a consequence, **we recommend that:**

(1) **There should be a statutory presumption of capacity to participate effectively in trial, for both adult and juvenile defendants** (see draft Bill clauses 1(3) and 30(2) (magistrates' proceedings)).

(2) **It should be a duty of the prosecution, defence, and the court, to keep the defendant's ability to participate under review and to raise the issue of lack of capacity promptly where concerns arise.** (We propose that this be included within the Criminal Procedure Rules ("CrimPR"), by amendment of CrimPR Part 3 (Case management)).[26]

(3) **The court should have the power to order an investigation into the defendant's capacity to participate effectively in the trial and to determine the defendant's capacity to participate effectively in the**

[23] Training for the judiciary and legal practitioners is raised at paras 2.21 to 2.30 above.

[24] Criminal Justice Act 2003, s 157.

[25] CP(I)A, s 4(1) leaves open the possibility of the court raising unfitness.

[26] CrimPR 2015 (SI 2015 No 1490), part 3.

trial of its own motion (see draft Bill clauses 1(5) and 30(4) (magistrates' proceedings)).

Issue: The role of the judge and the burden and standard of proof

4.17 In *Walls*,[27] Lord Justice Thomas, as he then was, stressed the "very serious step" that a finding of unfitness to plead represents and emphasised the duty on the court to "rigorously examine evidence of psychiatrists adduced before them and then subject that evidence to careful analysis against the *Pritchard* criteria". As he observed, "a court would be failing in its duty to both the public and a defendant if it did not rigorously examine the evidence and reach its own conclusion."

4.18 Mr Justice Andrew Smith in the unreported case of *Davison and Hopkinson*[28] considered that the "textbook statements about burden and standard of proof do not engage with" the Court of Appeal's position in *Walls* and that the raising of the situation by defence counsel in accordance with his or her duty to the court is not "analogous to where the defence makes an application". In Mr Justice Smith's view "the [ECHR] requires the court to satisfy itself that the trial can properly proceed".

Discussion: The role of the judge and the burden and standard of proof

4.19 As will be apparent from paragraphs 4.14 to 4.15 above, we consider that the court should play an active role in ensuring that the issue of the defendant's capacity to participate effectively in the trial is investigated, and determined where necessary. We also agree with Lord Justice Thomas's observation in *Walls* that the court should rigorously examine the evidence at a hearing to determine whether the defendant is able to participate effectively in the proceedings.

4.20 However, even recasting the test in terms of effective participation, we do not agree with Mr Justice Smith that where the defence raise the issue of unfitness "the position is not analogous to where the defence makes an application" and that the usual imposition of a burden on the defence is problematic. A finding of lack of capacity has significant consequences, both because it fundamentally curtails the autonomy of the defendant and because it brings to a halt the ordinary prosecution process. For those reasons it is, in our view, essential for the court to benefit from the scrutiny that an adversarial application process achieves. We are satisfied that the current position with regard to the burden and standard of proof is appropriate, where the defence or prosecution make the application. We do, however, consider that it would be of assistance for this position to be set out in statute for the avoidance of doubt.

4.21 The position is less clear where the court determines the defendant's capacity of its own motion. We consider that the court is likely to exercise its power to proceed of its own motion in very limited circumstances. Such a process is only likely to occur where:

[27] *Walls* [2011] EWCA Crim 443, [2011] 2 Cr App R 6 at [37] to [38].

[28] *Davison and Hopkinson* (June 2013) (unreported).

(1) two expert reports have been prepared and at least one suggests that the defendant lacks capacity for trial;

(2) the defence contend that the defendant has capacity, but most probably because the defendant will not allow his or her representative to pursue the issue of lack of capacity; and

(3) the prosecution also contend that the defendant has capacity, despite the content of the expert report(s) (otherwise the application would, we anticipate, be made by the prosecution).

4.22 Which party, if any, should bear the burden to prove or disprove the defendant's lack of capacity and what standard of proof should be required in such a situation? The position proposed by *Halsbury's Laws*[29] is that the burden should lie on the prosecution to disprove the defendant's lack of capacity. The difficulty with this approach is twofold. First, the prosecution and the defence would both be taking the same position, and the court would not have the benefit of an adversarial examination of the issue. Secondly, under the usual principles a failure to discharge a burden would result in a finding to the contrary, in this case a finding of lack of capacity. However, in such a situation if the Crown failed to prove beyond reasonable doubt that the defendant had capacity this might result in the judge making a finding of lack of capacity when not even satisfied on the balance of probabilities that the defendant was indeed lacking in capacity.

4.23 It is plain to us that it is appropriate to place a burden on the prosecution to assist the judge in pursuing the issue. However, we consider that the burden should be on the prosecution to establish the defendant's lack of capacity, against the defence's assertions to the contrary. The usual standard of proof for the prosecution would be beyond reasonable doubt. However, in such a circumstance, we consider that the issue of the defendant's lack of capacity is being determined by the court only because the defendant is unable to pursue the issue him- or herself. In effect, the court is determining the issue of its own motion as a protective measure. As a result, we consider it appropriate that the standard of proof should be the balance of probabilities rather than beyond reasonable doubt.

Conclusion: The role of the judge and the burden and standard of proof

4.24 **We** therefore **recommend that:**

(1) Where the defence raise the issue of lack of capacity, they should bear the burden of establishing lack of capacity on a balance of probabilities.

(2) Where the prosecution raise the issue of lack of capacity, they should bear the burden of establishing lack of capacity beyond reasonable doubt.

(3) Where the court determines the issue of capacity of its own motion, the prosecution should bear the burden of establishing lack of

[29] *Halsbury's Laws of England and Wales*, (vol 27 2015), para 357, fn 5.

capacity on behalf of the court, but the standard of proof should be the balance of probabilities.

(4) **The burden and standard of proof in these different situations should be set out in the statute for the avoidance of doubt** (see draft Bill clauses 2(2) and 31(2) (magistrates' proceedings)).

THE CURRENT POSITION: THE REQUIREMENT FOR EXPERT EVIDENCE FOR A FINDING OF LACK OF CAPACITY

4.25 At present, a court cannot make a determination as to the accused's unfitness to plead "except on the oral or written evidence of two or more registered medical practitioners at least one of whom is duly approved" under section 12 of the MHA (the "evidential requirement").[30] Section 12 MHA approval designates a registered medical practitioner as having special experience in the diagnosis or treatment of mental disorder. Section 12 MHA approved registered medical practitioners are generally, but not always, psychiatrists. In practice this means that a consensus of psychiatric opinion is required for a finding of unfitness.

PROBLEMS WITH THE CURRENT POSITION: THE REQUIREMENT FOR EXPERT EVIDENCE FOR A FINDING OF LACK OF CAPACITY

4.26 The majority of respondents to CP197 proposed amendment of the current evidential requirement, raising a number of issues, including:

(1) It is out of step with the MHA, under which the evidential requirement has been broadened to "responsible clinician", which embraces other professionals such as psychologists, occupational therapists and social workers[31] (Just for Kids Law).[32]

(2) The opinion of two RMPs is not relevant in all cases, for example where the question is one of communication difficulty such as deafblindness (Sense),[33] or where the issues concern learning disability and effective participation (Sense, Just for Kids Law, clinical psychologist Graham Rogers). This leads to rubber stamping of other expert opinion by psychiatrists which is an unnecessary use of scarce resources.

(3) Psychologists are routinely involved in assessing, formulating and treating mood and cognitive disturbances, and in capacity assessments on which courts already place substantial reliance (Council of HM Circuit Judges, Dr Linda Monaci).

[30] CP(I)A 1964, ss 4(6) and 8(2). See also *Webb* [1969] 2 QB 278, [1969] 2 WLR 1088.

[31] This point was acknowledged in CP197, paras 5.20 and 5.21. See also explanatory notes to the Mental Health Act 2007, para 48.

[32] Just for Kids Law provide support, advice and legal representation for young people in difficulty.

[33] Sense is a national charity supporting and campaigning for people who are deafblind and those with sensory impairments.

(4) Consideration of the assistance required for defendants to participate effectively in the trial process is more squarely within the expertise of psychologists than that of psychiatrists (Graham Rogers).

(5) There are insufficient forensic psychiatrists to cope with the possible increase in demand likely to arise in light of amendments to the test. (Royal College of Psychiatrists). Widening the range of experts which can be relied upon would alleviate delays caused by this shortage.

(6) The requirement for "objective medical expertise" under article 5 of the European Convention on Human Rights ("ECHR") does not apply to fitness to plead findings, only to the restriction of liberty by virtue of making a hospital order.[34] The evidential requirement could be maintained for the latter, without the need for it to remain for findings of unfitness (Nigel Shackleford, National Offender Management Service ("NOMS")).

(7) "…the important issue is that the training and experience of the individual expert makes them competent for the task." (Royal College of Psychiatrists).

4.27 No similar complaints were made by consultees in respect of the evidential requirements for the making of a hospital order, restriction order,[35] or a treatment requirement as part of a supervision order.[36] These orders are different in kind from determinations of unfitness to plead, since they involve the deprivation of liberty or enforced medical treatment. We do not propose to make any recommendations for change in respect of the evidential requirements for these orders.

ANALYSIS AND DISCUSSION: THE REQUIREMENT FOR EXPERT EVIDENCE FOR A FINDING OF LACK OF CAPACITY

4.28 There are two central issues in relation to the question of expert evidence:

(1) The number of expert reports required.

(2) The qualification of the experts required.

[34] As an exception to the right to liberty, article 5(1)(e) provides for the lawful detention of "persons of unsound mind" only on the basis of "objective medical expertise". (*Winterwerp v Netherlands* (1979) 2 EHRR 387 (App No 6301/73), [39]). In contrast to the imposition of orders under the MHA 1983, ss 37 and 41, assessments of unfitness to plead do not of themselves engage the protection of article 5(1)(e), because the deprivation of liberty does not inevitably follow from the finding of unfitness. A hospital order can only be imposed on a defendant found to be unfit, if he or she is also found to have "done the act or made the omission", and if the conditions under s 37 of the MHA are satisfied. Those conditions of course require the opinion of two RMPs (CP(I)A, s 5(4)).

[35] When the court makes a hospital order in relation to a defendant it can also impose a restriction order, under s 41 of the MHA. A restriction order prevents a hospitalised defendant being granted leave, transferred or discharged from hospital without the consent of the Secretary of State.

[36] Except in exceptional cases for public protection, where the defendant is found to have done the act of murder, but is not suitable for hospitalisation under s 37(2) of the MHA.

4.29 We also consider further mechanisms to reduce the cost to the court and the delays which are occasioned in very many cases in assessing the defendant and satisfying the evidential requirement.

Issue: Number of experts

4.30 In the IP we did not suggest reducing the requirement for two expert reports. We took the provisional view that a finding of inability to participate effectively is a significant deprivation of important rights which continues to justify expert evidence from, at the very least, two expert witnesses competent to address the defendant's particular condition. However, a number of consultees raised questions about the number of experts which should be required.

A single expert could be sufficient

4.31 Several consultees felt that a second expert report may not necessarily be required, where there is agreement on the issue from all parties and the judge.

4.32 Some consultees considered that an appropriate system might involve the initial instruction of an expert by a party (generally the defence). On receipt of the report, the opposing party, or the court, would have the option to accept the contents of the report or to instruct (jointly where appropriate) a second expert. If the initial report is accepted by all parties, and the court, then a second expert report would not be required.[37] If the disposal is to be a hospital order then a second expert report could be obtained at that point, presumably by a RMP who would have care of the defendant in hospital and can confirm that a bed is available for him or her.

4.33 In a similar alternative proposal, consultant forensic psychiatrist Andrew Bickle expressed "reasonable confidence" in the adoption of a single joint expert. Whilst the Forensic Psychiatrists SW Yorkshire NHS Foundation Trust felt that a single expert could be sufficient, they proposed that the expert be instructed by the court. They were particularly concerned at the proliferation of reports as parties engage in a "strength of arms" contest.

4.34 The obvious advantages of requiring only a single expert lie in the reduction in delays to the process and the reduction in the number of, often lengthy, assessments that the defendant will be required to undergo, as well as the obvious cost savings. In addition, although they were of the view that two experts were required, the Council of HM Circuit Judges noted that not uncommonly the second expert report is "scarcely more than a rubber stamp".

[37] Proposed by Carolyn Taylor (solicitor specialising in criminal and mental health law), the Law Society, Dr Linda Monaci, HM Council of District Judges (Magistrates' Courts).

Two experts favoured

4.35 The greater weight of opinion, however, favoured retention of the requirement for two experts as a minimum.[38]

4.36 Consultees expressed a number of reasons for taking that approach:

(1) It is justified because of the gravity of the decision, and its possible consequences (Council of HM Circuit Judges). Dr Penny Brown makes a similar point in acknowledging that a single expert is required for civil determinations but would, in her view, be insufficient for criminal cases.

(2) A second report might filter out rogue opinions. As HHJ Tim Lamb QC observes, it is more difficult for a "hack" to persuade a colleague than to persuade the court (although he felt that only one expert need attend the section 4 CP(I)A hearing).

(3) Single experts might give rise to more frequent appeals and applications to reopen fitness (Nigel Barnes, solicitor specialising in criminal law).

Three experts preferable?

4.37 In her response to the IP, Dr Eileen Vizard CBE stressed the frequency of co-morbidities[39] amongst vulnerable defendants which would require full mental health assessment by an approved psychiatrist. She took the view that a second psychiatrist would be required where loss of liberty were contemplated, in addition to a psychologist, given the high prevalence learning disability amongst the offending population. She would, therefore, favour two psychiatrists, approved under section 12 of the MHA, and an experienced clinical psychologist. However, she was realistic about resourcing, and in the alternative considered that the least detrimental alternative would be for two experts, one approved psychiatrist and one experienced clinical psychologist.

A maximum number of experts?

4.38 Forensic Psychiatrists SW Yorkshire NHS Foundation Trust raised the possibility of imposing a maximum number of experts to counter the proliferation of expert reports in "strength of arms" contests.

Discussion: Number of experts

4.39 Whilst there will be situations where more than two experts will be required, and funding properly obtained, we consider that it is neither necessary, nor an appropriate use of scarce resources, to impose three experts as the minimum requirement in all cases. Dr Vizard plainly acknowledges this reality.

[38] Council of HM Circuit Judges, Professor Jill Peay (academic), Dr Eileen Vizard CBE, Professor Graeme Yorston (academic, consultant forensic psychiatrist and neuropsychiatrist), Faculty of Forensic and Legal Medicine, Nigel Barnes, Dr Penny Brown, Charles de Lacy, Holroyde J, HHJ Tim Lamb QC. See also Criminal Liability: Insanity and Automatism (July 2013) Law Commission Discussion Paper at paras 7.36 to 7.52.

[39] The simultaneous presence of more than one condition, disorder or disability.

4.40 Likewise, we can see no firm basis, or need, for the imposition of an upper limit on the number of experts which can be relied upon. Whilst we appreciate the concerns of the Forensic Psychiatrists SW Yorkshire NHS Foundation Trust, there needs to be flexibility to address fluctuating conditions and further indicated examinations. The difficulty of securing funding for additional, not wholly necessary, reports should prevent this being a problem.

4.41 There are obvious cost benefits of a minimum requirement of a single expert, as well as desirable savings in time, and in stress to the defendant. However, we are on balance persuaded by the majority view that two experts remains the appropriate level, on the three bases set out at paragraph 4.36 above. In reality, given co-morbidity rates, and the prevalence of learning disability alongside mental health difficulties, we consider that in practice two experts will routinely be required to address the defendant's global deficits in any event. In addition, the opportunity for the opposing party to obtain their own report or reports on the defendant would often result in the production of a second report in any event. As a result, we are not persuaded that the risks of having a single expert are outweighed by a potential advantage which is unlikely to materialise.

4.42 Furthermore, we consider that complainants and witnesses are likely to have greater confidence in a finding that results in the defendant being protected from conviction if that judicial decision is arrived at on the consideration of two expert opinions. Such an approach is also in keeping with the rigour required of the court's scrutiny in the case of *Walls*.[40]

Conclusion: Number of experts

4.43 In consequence, **we recommend that the minimum requirement for a determination of the defendant's lack of capacity to participate effectively in the trial should be written or oral evidence from two experts** (see draft Bill clauses 2(1) and 31(1) (magistrates' proceedings)).

Issue: Qualification

Greater diversity of disciplines required to encompass all conditions

4.44 There was significant acknowledgement amongst IP consultees that greater flexibility is required in the qualification and specialisation of the experts on which the court might rely in reaching a finding of lack of capacity.

4.45 The need for a broadening of the disciplines on whom the courts can rely was widely and variously expressed:

(1) "We acknowledge that there will be circumstances where a psychiatrist will not be the most appropriate expert in making the assessment. It is therefore important that there is sufficient flexibility for the relevant expert to be instructed in the individual case" (Mind).[41]

[40] [2011] EWCA Crim 443, [2011] 2 Cr App R 6.

[41] Mind is a national mental health charity. Response submitted by the Legal Unit.

(2) "The requirement should not be limited to registered medical practitioners, but rather it should be open for the instruction of an expert who is competent to address the particular defendant's condition" (Law Society, giving an example of a clinical psychologist for assessment of a defendant with an autism spectrum condition).

(3) What is the basis for continuing with the requirement for psychiatric evidence alone when "the evidence of other experts on the issue of unfitness may be of equal or more value?" (Professor Ronnie Mackay).[42]

(4) "The important issue is that the training and experience of the expert makes them competent for the task" (Prison Reform Trust).

(5) "Essential that expertise of other disciplines is engaged in appropriate cases" (HM Council of District Judges (Magistrates' Courts)).

(6) Section 12 MHA approval is not necessarily relevant or required, (for example, in cases of dementia) (Professor Jill Peay).[43]

(7) The Crown Prosecution Service ("CPS") recognises that "expertise other than purely psychiatric will often be required".

Limited support for maintaining the status quo

4.46 Indeed, in contrast, only two consultees submitted responses which suggest approval of the status quo (Forensic Psychiatrists SW Yorkshire NHS Foundation Trust and Dr Andrew Bickle). Their approach is predicated, to an extent, on their submission that a diagnostic threshold should be imposed. For the reasons outlined above at paragraph 3.124 and following, our view is that such a requirement is not necessary.

4.47 Those consultees in favour of retaining the current evidential requirement also place importance upon:

(1) The "very stringent oversight and regulation" of RMPs' practice (Forensic Psychiatrists SW Yorkshire NHS Foundation Trust).

(2) RMPs' knowledge both of diagnosis and treatment, which other practitioners do not have, and which would enable them to assess whether the condition might improve in future (Forensic Psychiatrists SW Yorkshire NHS Foundation Trust).

(3) A potential difficulty for the courts in balancing conflicts between experts where they have a range of different areas of expertise (Forensic Psychiatrists SW Yorkshire NHS Foundation Trust). However, it is right to say that juries already perform such a balancing act in diminished responsibility cases (and indeed in unfitness cases where psychologists provide additional evidence) without difficulty (Charles de Lacy).

[42] R D Mackay, "Unfitness to plead- some observations of the Law Commission's consultation paper" [2011] *Criminal Law Review* 433 at [439].

[43] Particularly if the screening tool being worked on by Dr Nigel Blackwood, Rebecca Brewer, Professor Jill Peay and Mike Watts were adopted. See para 4.72 below.

No specific qualification?

4.48 We asked in IP Further Question 14 whether competence to address the defendant's particular condition ought to be the minimum requirement (rather than a specified qualification/discipline).[44] A number of consultees appeared to endorse this approach.[45]

4.49 However, the greater number of consultees indicated that they favour qualification by discipline, although they varied as to what those disciplines should be:

(1) RMP or psychologist (Carolyn Taylor, Law Society, Charles de Lacy).

(2) Two RMPs (Mind).

(3) At least one section 12 MHA approved RMP, the second either an RMP or a psychologist (Nigel Barnes, Royal College of Psychiatrists).

(4) One section 12 MHA approved RMP and one clinical psychologist (Dr Eileen Vizard CBE).

(5) Two RMPs, one section 12 MHA approved, or possibly a single jointly instructed expert (Forensic Psychiatrists SW Yorkshire NHS Foundation Trust, Dr Andrew Bickle).

(6) At least one RMP (Dr Penny Brown (in contemplation of duplication of reports if hospital order is contemplated), Faculty of Forensic and Legal Medicine, CPS).

(7) At least one section 12 approved RMP (Professor Graeme Yorston, Mr Justice Holroyde, HHJ Martyn Zeidman QC[46]).

[44] As we noted in the IP at para 4.23, there is no evidential requirement at all in Scotland. The removal of the previous requirement (in s 22 of the Mental Health (Care and Treatment) (Scotland) Act 2003) was justified on the basis of lack of "clear policy reason" for its initial introduction and the support of consultees for the removal of the requirement given the breadth of conditions which might give rise to unfitness as a plea in bar of trial. See the Scottish Law Commission's Report on Insanity and Diminished Responsibility (July 2004) SE 2004/92 paras 5.60 to 5.63. For an alternative view see the recommendation of the Northern Ireland Law Commission (Report: Unfitness to Plead (2013) NI Law Com No 16, paras 5.48 to 5.53) which suggests that the Court should be able to take into account evidence from experts other than medical professionals, but advocates retaining the minimum requirement for evidence from medical professionals, one appointed by the Regulation and Quality Improvement authority for the purposes of assessing patients who have been compulsorily admitted to hospital for assessment.

[45] Council of HM Circuit Judges, HM Council of District Judges (Magistrates' Court), Rudi Fortson QC, Dr Susan O'Rourke, Karina Hepworth (senior nurse specialist, learning disabilities), Professor Ronnie Mackay, Prison Reform Trust.

[46] Speaking at the round table discussion with judges sitting at Snaresbrook Crown Court, 17 July 2014.

Registered psychologists

4.50 Under a broadened expertise requirement, there is plainly a substantial degree of support for the inclusion of registered psychologists amongst those who can provide the required reports.

4.51 Only three consultees suggested a purely medical focus for the expert reports (Forensic Psychiatrists SW Yorkshire NHS Foundation Trust, Dr Andrew Bickle and Mind), and, given their respective positions on diagnosis and their expertise, this is perhaps unsurprising. However, this approach is not widespread amongst psychiatrists. Indeed the Royal College of Psychiatrists endorse the suggestion that the second expert could be a "suitably qualified professional" psychologist.

4.52 In fact, even though he advocates retaining the current evidential requirement, Dr Andrew Bickle notes that psychiatrists often work with psychologists, and the psychometric testing more commonly conducted by psychologists, in completing their own assessments. He observes that it is "something of a false opposition" to set up the one in isolation from the other.

Specialist nurses and other healthcare disciplines

4.53 Beyond psychology, there was no substantial support for broadening the minimum requirement to encompass other specific disciplines. Of our two specialist nurse respondents, Karina Hepworth favoured the approach in Further Question 14,[47] but Charles de Lacy, whilst acknowledging that nurses and social workers could be appropriate experts, identified some practical difficulties with encompassing these other disciplines:

(1) Difficulties which might arise from the potentially significant gulf between the expertise and experience of a specialist nurse or social worker and a psychiatrist or clinical psychologist who take an opposing approach to the abilities of the defendant (Charles de Lacy).

(2) The need for "a rigorous approach to training to ensure that robustness was not lost" (Charles de Lacy).

Intermediaries or speech and language therapists as experts?

4.54 Although this was not specifically raised in the IP, Paula Backen, herself an experienced intermediary, notes in her response that increasingly the courts are expecting intermediaries to act as expert witnesses, presumably in reliance upon their professional qualification (and experience) as speech and language therapists ("SLTs"). If reliance on their expertise is already to an extent occurring, this begs the question whether there ought to be the scope for suitably qualified intermediaries or SLTs to act as experts in determinations of capacity to participate effectively.

4.55 On one view, intermediaries are extremely well-placed to identify the defendant's likely abilities in terms of communication and his or her foundational ability to

[47] Further Question 14 asked "Do consultees agree that the evidence of two expert witnesses, competent to address the defendant's particular condition, should be the minimum requirement for a finding of lack of capacity?"

engage in trial. Thus Paula Backen asks, with additional training in court proceedings, could an SLT be a suitable expert witness in the field of communication to report on the issue of capacity to participate effectively?

4.56 Whilst there are obvious areas of SLT expertise contained within the test criteria, it seems unlikely that an intermediary or SLT, save those who are also registered psychologists, would be in a position to address issues such as whether the defendant is able to make a decision as to plea or a decision whether to give evidence or not.

4.57 There nonetheless remains the difficulty, identified by Paula Backen,[48] that there are occasions where the court has concluded that the defendant is fit to plead, with the help of an intermediary, on the basis of psychiatric/psychological reports. However, a subsequent intermediary report then states that they feel that an intermediary cannot adequately assist the defendant to engage effectively in trial.

Discussion: Qualification

4.58 The weight of response in favour of qualification by discipline, as opposed to competency alone, is substantial. Whilst in principle we favoured the focus on competency to advise on the particular condition, we recognise consultees' preference for qualification by discipline, and the practical difficulties of retaining a robust requirement with no specific qualification requirement.

4.59 The other area of significant consensus was on the need for one of the experts to be an RMP. This was stressed by a large number of consultees.[49] We are particularly persuaded by the point made by Dr Penny Brown that if both experts are non-medical then there is a real risk of incurring significant extra costs in the obtaining of reports for disposal.

4.60 A significant number of those in favour of at least one RMP felt that the RMP should be section 12 MHA approved.[50] Although few elaborated on the reason for their preference, we found persuasive Dr Andrew Bickle's observation that a psychiatrist is "often at the head of multidisciplinary teams, "synthesises" the views of the team by weighing up competing factors to produce a coherent formulation that hopefully acknowledges all factors or at least attempts to".

4.61 We balance this against the observation made by some consultees that there will be some conditions that give rise to an inability to participate effectively, but

[48] And also raised in discussion at the Leeds Symposium.

[49] Faculty of Forensic and Legal Medicine, Dr Penny Brown, CPS, Professor Jill Peay, Professor Graeme Yorston, Nigel Barnes, Royal College of Psychiatrists, Forensic Psychiatrists SW Yorkshire NHS Foundation Trust, Dr Andrew Bickle, Holroyde J and Dr Eileen Vizard CBE.

[50] Professor Graeme Yorston, Nigel Barnes, Royal College of Psychiatrists, Forensic Psychiatrists SW Yorkshire NHS Foundation Trust, Dr Andrew Bickle, Holroyde J and Dr Eileen Vizard CBE.

would not require assessment by a psychiatrist, rather than another RMP.[51] We are also aware of the prevalence of learning disability, developmental delay and autism spectrum conditions amongst those who offend. We consider that in some such cases the opinion of a section 12 MHA approved practitioner, having special expertise in mental disorder, may not always be the primary expert required.

4.62 In weighing up these issues, we come to the conclusion that a very significant majority of cases, in which an inability to participate effectively arises, will require the input of a psychiatrist. Where psychiatric evidence is called for, we take the view that section 12 MHA approval is an appropriate requirement. In contrast, for those fewer cases where psychiatric input would not be the most obvious requirement, we bear in mind two features. First, we consider that the restriction on the second expert should be sufficiently flexible to encompass professionals capable of addressing the specific condition of the defendant. Secondly, we believe that the section 12 MHA approved practitioner remains of substantial value to the court. This is both because of that expert's forensic experience, and because of the multi-disciplinary lead-role that he or she can take in the assessment of the defendant, as described by Dr Andrew Bickle above at paragraph 4.60. On that basis we recommend that at least one expert report be prepared by a section 12 MHA approved RMP.

4.63 Turning to the other expert, we consider it essential that, however framed, the minimum evidential requirement be broadened to allow registered psychologists to act as the second expert relied upon by the court. We arrive at this view not only in recognition of the strong support given by consultees, but also considering the change of focus for the proposed test towards effective participation, and the prevalence of learning disability amongst the offending population. As Charles de Lacy puts it, psychologists are the "obvious other discipline to be included".

4.64 The question remains whether that second expert could be from a broader range of disciplines than an RMP or a registered psychologist. Although consultees expressed limited enthusiasm for broadening the requirement still further to encompass particular categories (detailed at paragraphs 4.54 to 4.57 above), we take the view that this remains an area in which further consideration by the Department of Health may be fruitful.

4.65 We adopt that approach for three reasons. First, because of the broad range of issues which may give rise to participation difficulties, and the depth of knowledge of a particular defendant that might be acquired by an individual such as a specialist social worker. Secondly, we note the relaxation of evidential requirements under the MHA by the Mental Health Act 2007, which allows many roles under the MHA to be performed by a wider range of professionals including psychologists, occupational therapists and social workers.[52] We have in mind in particular the potential for reduction in delay if the criminal restriction is relaxed

[51] Although in the example given by Professor Jill Peay, and the Faculty of Forensic and Legal Medicine (in relation to Alzheimer's disease), we understand that the most appropriate expert is likely to be a psychiatrist specialising in old age, who would, we gather, be likely to have s 12 MHA approval in any event.

[52] See Mental Health Act 2007, explanatory notes paragraph 48. Discussed more fully at CP197 paras 5.20 and 5.21.

further. Finally, it is plain to us from our consultation work that there are other practitioners who are capable of providing expert evidence in relation to participation matters. In particular, there are some specialist nurses who are more than expert to advise the court on the issue of capacity for effective participation. However, we do not consider ourselves equipped to dictate which of the vast range of other clinical qualifications, such as nursing or social work specialisms, would ensure the levels of expertise required of the role.

4.66 We consider it important that the provisions emphasise the need for the expert, in addition to suitable qualification, to be competent to advise on the defendant's particular condition or difficulty. A number of consultees, particularly at our symposium, made reference, for example, to the concerning frequency with which adult psychiatrists were instructed to assess child defendants.

Conclusion: Qualification

4.67 In consequence, **we recommend that:**

(1) The minimum evidential requirement for a determination of effective participation be two experts competent to advise on the defendant's particular condition.

(2) One of those experts must be a section 12 MHA approved registered medical practitioner.

(3) The other expert, should be either a registered medical practitioner, or a registered psychologist or an individual having a qualification appearing on a list of appropriate disciplines and levels of qualification, approved by the Department of Health (see draft Bill clauses 2(1) and (6) and 31(1) and 68(1) (magistrates' proceedings)).

Issue: Other mechanisms to address issues of cost and delay

4.68 For all the reasons set out above we are satisfied that the conclusion that we have arrived at is justified, given the serious and adverse effects on a defendant that a finding of lack of capacity can have. Nonetheless, in arriving at that conclusion we have very much in mind the delay and cost occasioned by retaining what is still a high threshold for expert evidence. We are particularly conscious of the anxiety and distress caused to those affected by alleged offending where cases are delayed, or processes remain uncertain, whilst expert assessment is occurring.[53] However, we do think that there may be two ways in which delay and cost might be reduced.

Discussion: Other mechanisms to address issues of cost and delay

Use of screening to reduce cost and delay

4.69 First, we agree with Charles de Lacy that there are strong arguments for the use of screening, or an initial assessment by a forensic mental health or learning disability practitioner at court where available, to consider effective participation

[53] This was stressed to us by Victim Support and our discussions with the families of homicide victims where the perpetrator was considered to be unfit to plead.

difficulties. Our data collection exercise, conducted with the assistance of HM Courts and Tribunals Service, supports anecdotal evidence which suggests that the issue of unfitness to plead is currently raised, and reports prepared, in very many more cases than result in a finding of unfitness.

4.70 For example, we take, as a snapshot from our study, three significant Crown Court centres: Wood Green Crown Court, the Central Criminal Court and Manchester Minshull Street Crown Court over a four month period between 1 September 2014 and 31 December 2014. Across the three court centres unfitness to plead had been raised as an issue in 68 cases which were live in the sample period. Of those 68 cases, in just under half of them (33) the issue of unfitness to plead had been resolved by the end of the period. In none of those 33 cases was a defendant found to be unfit to plead. Yet at least 50 expert reports were prepared in those 33 cases. We discuss this data collection exercise in more detail in our Impact Assessment.[54]

4.71 It would therefore appear that there are many cases where representatives have sufficient concerns to justify obtaining psychiatric or other clinical reports, but where the individual did not in fact satisfy the current test. We identify this not to criticise representatives who are not clinically trained and who are under a professional duty to investigate concerns as to capacity when they arise. However, these striking data raise strong arguments for considering the use of initial assessment or screening in cases where the capacity of the defendant is unclear.

4.72 An initial assessment might obviate the need, in some cases, for a full report to be prepared, with all the attendant costs and delays, or at least identify more clearly the appropriate expert to approach. We hope that the work currently being conducted on screening tools might also assist in making screening robust and effective.[55] Of course, an initial assessment that the defendant had capacity would not be a bar to representatives seeking fuller assessment by experts if their concerns persisted and they were able to obtain prior authority from the Legal Aid Agency.

4.73 We note that the Advocacy Training Council in its report "Raising the Bar", which addresses the handling of vulnerable people in court, also proposes the use of psychiatric and specialist nurses at court conducting "triaging" of defendants and identification of those in need of full assessment and referral.[56]

4.74 It seems to us that practitioners based in court centres as part of NHS England's Liaison and Diversion Programme, or NHS Wales' Criminal Justice Liaison Services, are ideally placed to provide an initial assessment at court (particularly in the magistrates' courts) for the representative who has concerns in relation to

[54] Appendix B, available at http://www.lawcom.gov.uk/project/unfitness-to-plead/.

[55] Dr Nigel Blackwood, Rebecca Brewer, Professor Jill Peay and Mike Watts are working on a screening tool for adults. We understand that Dr Eileen Vizard CBE and Laura Hoyano are working on a screening tool for young defendants.

[56] Advocacy Training Council, *Raising the Bar* (2011), para 19.2 and recommendation 42, http://advocacytrainingcouncil.org/images/word/raisingthebar.pdf (last visited 13 November 2015).

their client's capacity to participate effectively.[57] This work was envisaged in the original contract specification for the NHS England Liaison and Diversion Programme although it was not well developed in the earlier stages of the pilot. However, even without full development of this function, early indications from the evaluation of the Liaison and Diversion programme suggest that the permanent presence of Liaison and Diversion schemes at court, delivering timely reports, has resulted in the court avoiding the need to adjourn for full psychiatric reports in many cases. Where such reports are required, they are being commissioned and delivered within a shorter timeframe.[58]

4.75 That role is being further developed now. The updated specification for NHS England's Liaison and Diversion Service makes specific reference, within the functions of the screening process, to the identification of a vulnerable defendant's ability to participate effectively in proceedings and to the making of recommendations for reasonable adjustments where appropriate.[59]

4.76 NHS England are due to submit a full business case to the Treasury in late 2015 for the intended roll out of the programme to cover 100% of English court centres by 2017/18.

Timely service of reports and joint instruction of experts

4.77 It remains important that the prosecution should be in a position to challenge the expert evidence relied upon by the defence, and to instruct their own experts where required. This can, however, also cause significant delays, and in some cases the proliferation of expert reports. There is in some areas a tendency for expert reports to be obtained sequentially, rather than the prosecution being engaged at an early stage with the issue of unfitness. This, we understand, sometimes arises as a result of the defence delaying the service of reports until they are in possession of two reports indicating unfitness. Alternatively, in some cases, we understand that the prosecution do not consider that their duty to investigate is triggered until they have received two reports satisfying the evidential requirement.

4.78 We take the view that efforts should be made to reduce the risk of delays occasioned in this way, and that it is appropriate to recommend measures to ensure that the obtaining of the necessary expert evidence occurs as swiftly and cost-effectively as possible. We consider that, once a party is in possession of a report which indicates that the defendant lacks capacity for trial, there should be a requirement that that report be served on the court and the opposing party as soon as practicable. We appreciate that this is a novel requirement. However, we consider that the capacity of the defendant is a matter in which the court and both parties have a fundamental interest, and early service is essential to enable

[57] Criminal Justice Liaison Services in Wales provide a comparable scheme in Wales. See Welsh Government, *Criminal Justice Liaison Services in Wales: Policy Implementation Guidance* (2013), http://gov.wales/docs/dhss/publications/131010criminalen.pdf (last visited 13 November 2015).

[58] Email of NHS England, 15 July 2015.

[59] Liaison and Diversion Standard Service Specification 2015 (Version 8c – in draft), September 2015. See for example section 2.5.1.4 (re children and young people) and 2.5.2.4 (re adults).

subsequent reports to be prepared as soon as possible. We consider that such a proposal is in keeping with the tighter case management powers in the Criminal Procedure Rules and appropriate to avoid unnecessary distress and anxiety to complainants, witnesses and the defendant him- or herself.

4.79 Secondly, we recommend that, where a party has disclosed a first expert report indicating an inability to participate effectively, the court should then be required to order that the second expert be jointly instructed by defence and prosecution, unless such a course is not in the interests of justice. Again we appreciate that this is a novel requirement,[60] but we consider that it is appropriate in order to prevent delay and to enable the parties to challenge or investigate further the issue of capacity without requiring unnecessary replication of assessments and reports. Of course, there will be situations where joint instruction will not be appropriate, for example where the defendant's condition gives rise to paranoia relating to the activity of the prosecution.

Conclusion: Other mechanisms to address issues of cost and delay

4.80 In consequence **we recommend that:**

(1) The Criminal Practice Direction be amended to require the court or the parties to make use of liaison and diversion services at court (where available) to provide an initial assessment of the defendant (subject to his or her consent), where there are doubts as to his or her capacity, but it is unclear whether a full expert assessment is required.

(2) Where a party has obtained an expert report indicating that the defendant lacks the capacity to participate in the trial, that they should be required to serve that report on the opposing party and the court as soon as reasonably practicable (see draft Bill clauses 2(3) and 31(3) (magistrates' courts)).

(3) Where a party has served on the court and opposing party a first report indicating a lack of capacity for trial, that the normal process should be for the court to order that the second expert be jointly instructed by the defence and prosecution, unless such a course would not be in the interests of justice (see draft Bill clauses 2(4) to (5) and 31(4) to (5) (magistrates' courts)).

THE CURRENT POSITION: USE OF ADJOURNMENT TO ALLOW THE DEFENDANT TO ACHIEVE, OR RECOVER, CAPACITY TO PARTICIPATE EFFECTIVELY IN THE TRIAL

4.81 Currently, consideration of the question of the defendant's fitness to be tried can be postponed until any time up to the opening of the case for the defence.[61] The court will need to consider with care whether to postpone the trial of the issue

[60] Although there already exist procedural rules which govern the instruction of a single joint expert by co-defendants (CrimPR 2015 (SI 2015 No 1490) r 19.7 and 19.8).

[61] CP(I)A, s 4(2).

given the consequences that a finding of unfitness has for the defendant.[62] This capacity to delay determination is focused more on enabling the defendant to make a submission of no case to answer at the conclusion of the prosecution case, than on enabling recovery of fitness to plead.

ANALYSIS AND DISCUSSION: USE OF ADJOURNMENT TO ALLOW THE DEFENDANT TO ACHIEVE, OR RECOVER, CAPACITY TO PARTICIPATE EFFECTIVELY IN THE TRIAL

Issue: Adjournment to allow for the achievement or recovery of the capacity for trial where this is a realistic prospect

4.82 As we set out in Chapter 1, we consider that the court should only deviate from the full trial process where absolutely necessary and where to do so is in the best interests of the defendant. We consider, therefore, that all efforts should be made to ensure that the defendant has the opportunity of answering the allegation(s) in the normal trial process, wherever that is practically and fairly achievable. We looked in Chapter 2 at the provision of reasonable adjustments to facilitate effective participation in trial. We consider now how the use of adjournments can facilitate full trial where that is considered a possible outcome.

4.83 Responses to the IP confirmed the importance of allowing time for assessment and treatment, noting in particular:

(1) That time is required to assess fully the defendant's needs and to provide suitable treatment, especially where he or she suffers a previously undiagnosed medical condition (Karina Hepworth).

(2) There will be "court and health savings in the long run" where defendants are helped to become fit for trial (Charles de Lacy).

(3) The use of an adjournment to maximise a defendant's chances to engage in full trial is in keeping with our obligations under the United Nations Convention on the Rights of Persons with Disabilities ("UNCRPD") (Dr Penny Brown).

(4) A determination of facts followed by full trial where the defendant has recovered and been remitted for trial is undesirable (NOMS and the Royal College of Psychiatrists). Wider use of adjournments has the capacity to reduce the likelihood of this outcome.

4.84 In the IP[63] we asked consultees to consider whether an adjournment of up to six months should be available following a finding that the defendant cannot participate effectively in trial, to allow for the defendant's recovery so that he or she can be tried in full.

[62] *Norman* [2008] EWCA Crim 1810, [2009] 1 Cr App R 13 at [34].

[63] IP Further Question 16.

4.85 Respondents who addressed this question were generally in favour in principle.[64] However, respondents made a number of useful observations:

(1) That the power to adjourn after the finding that the defendant lacks capacity for trial was likely to be rarely used. More frequently, where it is considered that treatment may be effective in enabling a defendant to be tried, the court would adjourn arraignment, and delay any determination of unfitness, to allow for the defendant's recovery (Council of HM Circuit Judges).

(2) The power to adjourn for recovery should only be available where there is sufficient evidence indicating a realistic prospect that the defendant may recover within a reasonable time period (Law Society, Centre for Evidence and Criminal Justice Studies).

(3) It may be appropriate to require the consent of the accused to the adjournment (Law Society).

(4) Developmental immaturity raises difficulties in this regard. Inability founded upon this would take longer to resolve but the prejudicial effect of delay on often young defendants would need to be considered (Royal College of Psychiatrists).

(5) That adjournment before the finding should operate as a bar to future remission for trial if the defendant regains or achieves capacity (Nigel Barnes).

(6) Considering that such a delay denies, for the meantime, the defendant the right to his or her determination of facts, it should perhaps only be available where the defendant is hospitalised under section 36 of the MHA[65] (Professor Ronnie Mackay).

(7) Delay will have an impact on complainants and witnesses. However, since this group is likely to favour a delayed full trial over a more swiftly achieved but more limited determination of fact, individual and public concern over such delays might be reduced.[66]

(8) The Centre for Evidence and Criminal Justice Studies raises the question as to how it should be decided that there is a realistic prospect of recovery. They raise consideration of the prospect of the Mental Health Tribunal being used to consider the defendant's likelihood of recovery.

[64] In favour in principle: Council of HM Circuit Judges, Nigel Barnes, Law Society, Dr Eileen Vizard CBE, Forensic Psychiatrists SW Yorkshire NHS Foundation Trust, Charles de Lacy, Professor Ronnie Mackay, Centre for Evidence and Criminal Justice Studies, Dr Susan O'Rourke, Professor Graeme Yorston, Professor Jill Peay, Anonymous (academic and intermediary), Dr Linda Monaci.

[65] MHA, s 36 provides the court with the power to remand an accused to hospital for treatment, on the evidence of two RMPs.

[66] Victim Support confirms that many victims would be likely to favour delay where full trial can be achieved. However, plainly different victims will take different approaches to this issue, depending on the nature of the allegation and other case specific features.

4.86 Carolyn Taylor disagreed with the proposal to allow adjournment at this stage in consideration of the "incredible pressure" on an already vulnerable defendant. The Centre for Evidence and Criminal Justice Studies also raised the issue of the stress and anxiety caused to the defendant by further delay. However, they took the view that this was to be balanced against the primary goal of the adjournment which is to enable the defendant to have a full trial where possible.

4.87 Some consultees proposed that, instead of a maximum period of delay after the finding that the defendant lacks capacity, there should be an overall time limit after which the court must proceed to trial or determination of facts if the charges are not discontinued. The period of 12 months was endorsed by the Centre for Evidence and Criminal Justice Studies[67] and Charles de Lacy, although at least one respondent group[68] felt that a time limit would not be helpful given the wide variation in recovery times.

Discussion: Adjournment to allow for the achievement or recovery of the capacity for trial where this is a realistic prospect

4.88 We consider it essential that adjournment be used where appropriate to enable those defendants who have a realistic prospect of gaining, or regaining, the capacity to participate effectively to do so. We consider that approach appropriate:

(1) in the interests of ensuring that all those who can fairly have a full trial are enabled to do so, full trial being the best outcome for all parties;

(2) to reduce the frequency of resumption of the prosecution on recovery; holding a second jury procedure is undesirable for complainants and witnesses (who may have to give evidence twice), as well as for defendants;

(3) it best honours the UK's obligations under the UNCRPD not to restrict the legal agency of the defendant unless absolutely necessary. Wherever it is possible and appropriate, time should be given to enable a defendant to recover, or gain, the capacity for trial so that he or she can exercise his or her full legal rights in the usual trial process ; and

(4) because assessment and treatment may take some time, where medical conditions are complex or newly diagnosed.

4.89 We agree with those consultees who observed that more frequently the power to adjourn to enable recovery is exercised in advance of the determination of the defendant's capacity to participate effectively. We also agree that the power to adjourn between a finding that the defendant lacks that capacity and the determination of fact will rarely be required. Nonetheless, we do consider it proper to allow such a power to be exercised when appropriate.

[67] In discussion of the approach taken in New South Wales.

[68] Royal College of Psychiatrists.

4.90 In order for adjournment to be considered in every case in which it may prove fruitful, we consider that the prospect of recovery should be specifically addressed by experts whenever they are instructed to assess the defendant's capacity to participate effectively in the trial. For example, where the expert evidence before the court indicates that the defendant currently lacks capacity for trial, but that he or she is likely to achieve capacity for trial if the determination of capacity were to be delayed. In this situation, we take the view that there should be a statutory requirement to consider whether an adjournment would be appropriate to allow capacity to be achieved, before the judge proceeds to making a formal finding of lack of capacity, or before advancing to the alternative finding procedure.

Interests of justice test

4.91 We do, however, think that in considering whether adjournment is appropriate, great care needs to be taken in balancing the interests of all parties in achieving full trial, against the uncertainty and anxiety occasioned to complainants, witnesses and defendants alike by further delay. As a result, we consider that in applying the interests of justice test the court should take into account in particular whether there is a real prospect of the defendant achieving capacity if the proceedings were delayed. The court should also take into account whether such a delay is reasonable in the circumstances.[69]

12 month maximum time period

4.92 However, in order to ensure that cases are not allowed to be postponed indefinitely, for the benefit of witnesses as well as defendants, we provisionally propose that there be a maximum anticipated period of time within which the determination of capacity, alternative finding procedure or trial should begin. We agree with those consultees who proposed that 12 months is an appropriate time period. This period accords with observations from the liaison and diversion service at the Central Criminal Court,[70] which sees a greater number of cases of unfitness to plead than almost all other courts in the jurisdiction. The available empirical research also suggests that 12 months would be a suitable period.[71] In

[69] See draft Bill clause 4(2).

[70] Observation of Charles de Lacy, clinical nurse specialist permanently assigned to the Central Criminal Court in a liaison role, meeting on 8 October 2014.

[71] Dr Brown and Professor Mackay identified American research into recovery of competence rates. D A Pinals, "Where Two Roads Meet: Restoration of Competence to Stand Trial from a Clinical Perspective" (2005) 31 *New England Journal on Criminal and Civil Confinement* 81; P A Zapf and R Roesch, "Future Directions in the Restoration of Competency to Stand Trial" (2011) 20 *Current Directions in Psychological Science* 43, which suggest that 75 to 90% of hospitalised defendants are "restored" to competence within six months. More recent research includes P A Zapf, *Standardizing Protocols for Treatment to Restore Competency to Stand Trial: Interventions and Clinically Appropriate Time Periods* (January 2013). Also D R Morris and N J De Young, "Long-Term Competence Restoration" (2014) 42 *The Journal of the American Academy of Psychiatry and the Law* 81, which looks at longer term recovery, suggesting that 12 months should be sufficient for most cases, although some successful recoveries are achieved within a longer time frame, up to two years. It should, however, be noted that North American competency restoration programmes generally involve a specific education component not proposed in this jurisdiction.

addition, such a period appears to work well in other jurisdictions.[72] However, in recognition of the observation by the Royal College of Psychiatrists that recovery periods do not correspond to fixed time limits, we would propose to include a safety valve provision that, in exceptional circumstances, the period might be extended. We also consider that such a safety valve may be necessary to accommodate unavoidable listing difficulties, which may arise, for example, in relation to the availability of witnesses, particularly clinical experts, or to co-ordinate with trial arrangements for co-defendants.

Developmental immaturity

4.93 We agree with the Royal College of Psychiatrists that developmental immaturity presents a difficult issue in terms of considering an adjournment for capacity to be achieved. We do not anticipate that the sort of adjournments that we have in mind (up to 12 months at most in the absence of exceptional circumstances) would be long enough to address issues of developmental immaturity in many cases. We would not expect that, in balancing the interests of justice, a judge would consider appropriate a lengthy delay to allow significant developmental progress, especially for a young defendant for whom significant delay is more damaging. We consider that proper application of the interests of justice test should identify those few cases of developmental immaturity where a delay might be appropriate.

Adjournment as a bar to resumption of the prosecution?

4.94 We are not persuaded by Nigel Barnes' proposal that adjournment before the alternative finding procedure might function as a bar to future resumption of the prosecution on recovery. We consider that lengthy delay in advance of the alternative finding procedure might be a factor which the court could take into account in considering whether it is in the interests of justice for prosecution to be resumed against a recovered defendant.[73] However, we would not want to fetter the court's power more generally to grant leave to resume proceedings against the defendant. We have in mind the potential for a defendant charged with a very serious offence, perhaps murder, to show signs of likely recovery which might justify adjournment for capacity to participate effectively to be regained. However he or she might subsequently make insufficient progress to be tried within a reasonable time. Yet, following the imposition of a hospital order (with restriction) under the alternative procedures, it is not inconceivable that such a defendant might make an unexpected recovery. It would be an affront to witnesses, the defendant, and the public generally then to suggest that he should be insulated from trial because of an adjournment which was, at the time, granted because it was in the interests of those same groups.

Retaining section 4(2) of the CP(I)A 1964?

4.95 Section 4(2) of the CP(I)A currently allows the postponement of the determination of unfitness up until the close of the prosecution's case. This is primarily a

[72] For example, New South Wales, as raised by the Centre for Evidence and Criminal Justice Studies.

[73] See Chapter 9 para 9.37 where we discuss the factors to be taken into account by the court in considering an application for leave to resume.

mechanism to allow the defence to make a submission of no case to answer at the close of the prosecution case, rather than to allow time during trial for the recovery of fitness. However, as Master Egan QC noted at the symposium, this provision is rarely used. This is likely to be the result of the practical difficulties of proceeding to the close of the prosecution case working with the instructions of a defendant who is unfit, and the difficulties such a course presents for case management more generally.

4.96 Were our recommendations to be enacted we do not think that there would be any advantage in the power to postpone the determination for reasons other than recovery remaining. The prospect of achieving an acquittal because the prosecution cannot prove an essential element of the case would, under our recommendations, be available at the close of the prosecution case in the fact-finding procedure in any event. Rather, we consider that, where recovery is not a realistic prospect, in the interests of avoiding delay and further anxiety to all involved, the determination of capacity should be proceeded to as soon as practicable.

Conclusion: Adjournment to allow for the achievement or recovery of the capacity for trial where this is a realistic prospect

4.97 **We recommend that:**

(1) **The need to address the defendant's prospects for recovery, and the likely timeframe for achieving capacity for trial should be addressed by all experts instructed to assess the capacity of the defendant. The code of practice drafted to accompany the legal test should stipulate this as a requirement of every assessment.**

(2) **Once two expert reports have been prepared, and prior to commencing a hearing to consider the defendant's capacity to participate effectively in trial, there should be a statutory requirement for the court to consider whether it is appropriate to postpone proceedings for the defendant to achieve the capacity to participate effectively** (see draft Bill clauses 4(1) and 33(1) to (2) (magistrates' proceedings)).

(3) **The proceedings should only be adjourned where it is in the interests of justice, taking into account in particular whether there is a real prospect of the defendant having capacity to participate effectively after a period of adjournment and whether it is reasonable to delay proceedings in the circumstances** (see draft Bill clauses 4(2) and 33(3) (magistrates' proceedings)).

(4) **Save in exceptional circumstances, the period between postponement and the beginning of the determination of capacity, alternative finding procedure or full trial should not extend beyond 12 months** (see draft Bill clauses 4(4) to (6) and 33(5) to (7) (magistrates' proceedings)).

THE CURRENT POSITION: AMENDMENTS TO SECTION 35 OR 36 OF THE MENTAL HEALTH ACT 1983?

4.98 In their responses, both Professor Ronnie Mackay and Dr Penny Brown address the question of the remand status of the defendant during any delay in the proceedings. We consider now whether the sections of the MHA used by the courts for the assessment and treatment of defendants awaiting trial or determination of fact, are adequate in light of this 12 month period.

4.99 Section 35 of the MHA provides for remand of a defendant to hospital for a report on his or her mental condition to be prepared. It is applicable to any defendant arraigned before the Crown Court for an offence punishable with imprisonment, including murder, prior to conviction.[74] It is not available in the summary courts prior to conviction or a finding that the defendant did the act, unless the defendant consents.[75] This remand is limited to 28 days, with the right of further remand for periods of 28 days up to 12 weeks in total.[76]

4.100 Section 36 of the MHA provides for the remand of an accused to hospital for treatment. It is applicable to any individual in the Crown Court in custody awaiting trial for an imprisonable offence, other than an offence the sentence for which is fixed by law.[77] It is therefore not applicable to a defendant awaiting trial or determination of facts in relation to a murder charge. It is not available in the magistrates' court. Section 36 has the same time limitation as section 35.[78]

PROBLEMS WITH THE CURRENT POSITION: AMENDMENTS TO SECTION 35 OR 36 OF THE MENTAL HEALTH ACT 1983?

4.101 The fact that section 36 of the MHA is not applicable before conviction in cases where the allegation is murder causes significant difficulties.[79] Currently, in a murder case where the defendant requires treatment in hospital in advance of the trial or determination of facts, the court relies on section 35 of the MHA to achieve the remand of the defendant to hospital. Then, because section 35 does not confer the power to treat, the responsible clinician uses section 3 of the MHA (civil sectioning) to add a treatment component alongside the section 35 remand.

[74] MHA, ss 35(2)(a) and 35(3).

[75] MHA, s 35(2)(b).

[76] MHA, s 35(7).

[77] MHA, s 36(2).

[78] MHA, s 36(6).

[79] See the response of Charles de Lacy to the IP for fuller detail.

4.102 The section 35 MHA remand reaches its maximum extension at 12 weeks. Then, where the defendant still requires treatment, the court has to rely on agreeing with the Ministry of Justice for a section 48 MHA transfer on the basis that the defendant is in "urgent need of treatment"[80] to avoid the defendant inevitably being remanded in custody. The only alternative is to grant the defendant bail and rely on his continued detention in hospital under a civil sectioning order. But in the latter circumstance the court would lose all control over the release of the defendant.

ANALYSIS AND DISCUSSION: AMENDMENTS TO SECTION 35 OR 36 OF THE MENTAL HEALTH ACT 1983?

Issue: Extension of section 36 of the MHA

4.103 In the IP[81] we asked consultees whether they considered it appropriate to extend the maximum period of remand for treatment under section 36 of the MHA to 24 weeks, should the power to adjourn the determination of facts be introduced.

4.104 This proposal received overwhelming support.[82] Those few that dissented did so on the basis of the following concerns:

(1) That hospital beds may not be available for treatment for a six month period (minority of the Centre for Evidence and Criminal Justice Studies).

(2) That there should be no significant extension without right to appeal to the Mental Health Tribunal or the court for discharge of the order (minority of the Centre for Evidence and Criminal Justice Studies).

4.105 In addition, for the reasons set out above, Charles de Lacy endorsed the extension of section 36 to be applicable to allegations of murder prior to conviction. Professor Jill Peay also made the observation that section 36 of the MHA does not extend to the magistrates' court. (We address that issue at paragraph 7.106 below, in proposing that the applicability of sections 35 and 36 in the magistrates' courts should reflect their applicability in the Crown Court).

Discussion: Extension of section 36 of the MHA

4.106 Looking first at section 36 of the MHA, there are three particular issues to address.

Extending section 36 to be applicable to offences where the sentence is fixed by law, namely murder

4.107 First, we consider that there is no obviously logical basis for the exclusion from section 36 of the MHA of defendants awaiting trial or determination of facts for

[80] MHA, s 48(3).

[81] IP Further Question 17.

[82] Council of HM Circuit Judges, HM Council of District Judges (Magistrates' Court), Law Society, Dr Eileen Vizard CBE, Forensic Psychiatrists SW Yorkshire NHS Foundation Trust, Royal College of Psychiatrists, Charles de Lacy, Karina Hepworth, Professor Ronnie Mackay, Professor Jill Peay, the majority of the Centre for Evidence and Criminal Justice Studies, Nigel Barnes, Dr Susan O'Rourke, Professor Graeme Yorston, Dr Linda Monaci.

murder allegations. Although the sentence is fixed by law, in advance of a conviction there may very often be issues arising in relation to the defendant's mental health which necessitate treatment in hospital. The current approach that the court is forced into (using section 35 alongside a civil sectioning order and then relying on negotiating a transfer under section 48) is cumbersome and gives cause for concern. We understand in some cases that the Ministry of Justice do not consider the need for "urgent treatment" made out. The defendant who may be moving towards recovery such that he can have a full trial, will then either be transferred to custody, where there may be deterioration in his or her condition, or is detained solely under a civil sectioning order. The latter situation raises concerns as to public protection since the court, in such circumstances, cedes control entirely to clinicians.

4.108 There is evidence that this is causing a problem in practice,[83] and we therefore see good reason to recommend the extension of section 36 to apply to defendants facing murder allegations prior to conviction.

Extending the time limit on section 36 remands?

4.109 Secondly, we need to consider whether we should extend the time limit on a section 36 MHA remand. The question asked in the IP, proposing an extension to six months, met with resounding support. However, the recommendation above, suggesting that adjournment be allowed up to a total period of 12 months prior to determination or trial, raises the question of whether that period should be extended to 12 months instead.

4.110 We appreciate that this is, of course, a significant extension from the 12 weeks to which the remand is currently limited. In balancing the competing interests in such a proposal we take into account, in particular, the following:

(1) That the purpose of the extension would be to allow the defendant to regain or gain the capacity to participate effectively so that he or she can have a full trial.

(2) Full trial is preferable for all concerned, particularly the complainant(s), any witnesses and the defendant, as well as being in the wider public interest.

(3) Enabling treatment in hospital so that recovery can be achieved avoids the prospect of the defendant and witnesses having to undergo two jury processes (a fact-finding hearing following a determination of lack of capacity and subsequent full trial where prosecution is resumed on recovery).

(4) The remand would still be subject to periodic reviews.

(5) The defendant's right to apply to the court for termination of the remand,[84] and the court's duty to terminate the remand "at any time" "if it

[83] In particular from Charles de Lacy who addresses these issues frequently at the Central Criminal Court.

[84] MHA, s 36(7).

appears to the court that it is appropriate to do so" would remain unchanged.[85] We anticipate that this would more than satisfy the concern of the minority of the Centre for Evidence and Criminal Justice Studies referenced above.

4.111 We note the concern of the Faculty of Forensic and Legal Medicine that there may not be hospital beds available for such treatment. Plainly, inpatient treatment raises a resource issue. But we bear in mind also that currently no such remand will be ordered without the responsible clinician or the hospital managers indicating that arrangements are in place for the admission of the defendant,[86] a requirement that we consider should remain.

Transfer of a defendant hospitalised under section 36 of the MHA to the Mental Health Tribunal?

4.112 Thirdly, in a number of jurisdictions a defendant who is considered to be capable of gaining, or regaining, the capacity to participate effectively in trial is transferred to a specialist mental health tribunal for reviews of his or her progress in that regard.[87] In proposing to extend the period for section 36 MHA hospitalisation in the anticipation of recovery, we are bound to consider whether the case of a defendant in such a position should be transferred to the Mental Health Tribunal ("MHT").[88]

4.113 This proposal has the advantage of engaging a tribunal that has medical expertise, and the MHT is generally convened at the hospital in which the patient is resident. However, we consider that whether this would result in significant benefit to the defendant is somewhat speculative, and the proposal has a number of potential drawbacks. In weighing these issues we focus on the following points:

(1) Most importantly, where the decision of the MHT is that the defendant no longer meets the criteria for the section 36 remand, then the defendant would need to be brought before the criminal court in any event to decide whether he or she should be remanded in custody or on bail. In our view it would be less cumbersome for the criminal court to hear applications for further remand, or any appeal against the section 36 remand, and then be available to amend the defendant's remand status accordingly.

(2) The decision as to whether the defendant continues to suffer from a mental health disorder which makes treatment appropriate, is, we consider, within the capability of a circuit judge or a recorder[89] with the assistance of evidence from the responsible clinician. There is no evidence to suggest that judges at present are failing to respond appropriately to defence challenges to applications for further remand.

[85] MHA, s 36(6).

[86] MHA, s 36(3).

[87] For example, in Canada and in New South Wales.

[88] This was also raised in the response of the Centre for Evidence and Criminal Justice Studies.

[89] A recorder is an experienced legal practitioner who is trained to sit part-time as a judge in the Crown Court.

(3) Referring cases to the MHT would not necessarily reduce the need for an unwell defendant to be required to leave hospital to attend hearings. The perceived advantages of MHT review are achievable within the current system, where the defendant is already entitled to waive the requirement to attend the review hearings in the Crown Court, subject to his authorised representative being given opportunity to be heard.[90]

(4) The criminal courts have greater flexibility than the MHT to hear an application to terminate a section 36 MHA remand as and when it arises. We note again the power of the Crown Court to terminate the remand "at any time" if that appears appropriate.[91]

Conclusion: Extension of section 36 of the MHA

4.114 Considering all these issues, **we recommend that section 36 of the Mental Health Act 1983 be amended as follows:**

(1) section 36 of the MHA be extended to apply to defendants remanded in custody for offences for which the penalty is "fixed by law", namely murder, prior to conviction or determination of the facts;

(2) the duration of a section 36 MHA remand be extended to a maximum of 12 months; and

(3) a section 36 MHA remand be reviewed by the Crown Court every 12 weeks[92] (see draft Bill clause 65).

Section 36 remand in the magistrates' court

4.115 In chapter 7 below we make recommendations for reform of the procedures in the magistrates' courts for dealing with defendants who have participation difficulties. Were those recommendations to be enacted then we would also recommend the extension of section 36 of the MHA to be applicable in the magistrates' court, with some adjustment, where the defendant faces trial on imprisonable matters. We address this issue at paragraph 7.105 below.

Discussion: Extension of section 35 of the MHA

Duration

4.116 In light of our recommendation to extend the availability and duration of a section 36 MHA remand, we do not consider that extension of the duration of section 35 MHA is necessary. We bear in mind in particular:

[90] MHA, s 36(5).

[91] MHA, s 36(6).

[92] We appreciate that this is a significant extension beyond the current 28 day remand. However, we bear in mind that any further remand would continue to require the written or oral evidence of the responsible clinician that a further remand is warranted (MHA, s 36(4)), and that the defendant will retain the right to apply for termination of the remand at any time (MHA, s 36(6) and (7)).

(1) That 12 weeks should be ample for preparation of a report on the defendant's condition.

(2) After 12 weeks, where hospitalisation continues to be appropriate, we would anticipate that the defendant would be remanded under section 36 of the MHA for treatment.

(3) Further reports could be prepared whilst the defendant is subject to a section 36 MHA remand.

(4) We have received no indication from consultees that section 35 of the MHA requires reform in relation to the duration of the remand.

Extension of section 35 of the MHA to defendants on bail

4.117 It was suggested by the Faculty of Forensic and Legal Medicine that section 35 MHA assessments might be helpfully supplemented by the power to require an individual to attend a clinic or hospital for examination as a day patient.

4.118 At present section 35 of the MHA only addresses the preparation of reports on the defendant as an in-patient. The purpose of section 35 of the MHA is to provide for in-patient observation where it would be "impracticable for a report on his mental condition to be made if he were remanded on bail".[93] The section is effective precisely because the defendant is not at liberty. It is difficult to see how the MHA could be used to ensure compliance for a defendant who is on bail in criminal proceedings.

4.119 It seems to us that the more likely vehicle for ensuring the compliance of a defendant whilst on bail is the Bail Act 1976, under which conditions can be imposed on the defendant's bail. Whilst the Bail Act 1976 does not set out an exhaustive list of conditions which might be imposed, it already provides for two conditions related to the preparation of medical reports. The first relates only to a defendant facing a charge of murder, and requires a defendant, in the absence of satisfactory reports on the defendant's mental state, to undergo examination and comply with the preparation of reports by two RMPs. One of the RMPs must be duly approved under section 12 of the MHA.[94] This condition relates to the availability of partial defences at trial, although on the face of the section it could also be applied in relation to effective participation issues.

4.120 The second condition requires a defendant to make him- or herself available for the preparation of any reports required at sentence.[95] This condition is distinguishable from the situation currently being contemplated by virtue of the defendant's conviction. There are no other provisions in the Bail Act which make compliance with medical examination, absent agreement, a condition of bail.

4.121 Having considered the current provisions, we take the view that extending the MHA or the Bail Act 1976 to compel a bailed defendant to comply with medical

[93] MHA, s 35(3)(b).

[94] Bail Act 1976, s 3(6A).

[95] Bail Act 1976, s 3(6)(d).

assessment (facing a charge other than murder) is inappropriate, for the following reasons:

(1) It would be a serious infringement of the defendant's autonomy, to enforce his or her compliance with medical assessment. Consultees have reaffirmed the importance of respecting the defendant's autonomy in this regard.[96] As we reflected in the IP, the most the court can do is to ensure that appropriate opportunity has been given for the defendant to consider the advantages of expert assessment, with whatever support he or she requires for the making of that decision.

(2) It would therefore, we consider, be wrong to make co-operation in the preparation of a medical report a condition of bail. The defendant who sought to exercise his or her autonomy, or was simply unable to attend the appointment by virtue of his or her undiagnosed or unmanaged medical condition, could find themselves in breach of bail and in danger of being remanded into custody.

(3) It is in situations such as this that section 35 of the MHA is designed to operate, namely where the offence is imprisonable, there is evidence to suggest that the defendant suffers form a mental disorder and obtaining a report on bail is impracticable.

4.122 In cases of the sort described in (3) above, the court is generally able to find a way to achieve sufficient expert evidence to engage section 35, even where the defendant is unable or unwilling to engage.[97] We agree with the Council of HM Circuit Judges' observation[98] that such an approach may not always be wholly compatible with articles 12 to 14 of the UNCRPD. However, where the defendant's right to legal autonomy comes into direct conflict with the defendant's right to participate effectively in his or her criminal trial (as here), we take the view that preservation of the latter right is more important and that remand to hospital for treatment in such cases can be appropriate.

Magistrates' courts

4.123 We do, however, propose that the application of section 35 of the MHA in the magistrates' court be extended to cover all defendants who are awaiting trial or determination of the facts on imprisonable matters. We discuss this extension and make this recommendation in Chapter 7 paragraph 7.105 and following below.

[96] Responding to IP Further Question 24 and CP197 Provisional Proposal 2.

[97] Observations of Council of HM Circuit Judges, Royal College of Psychiatrists, Dr Penny Brown, Faculty of Forensic and Legal Medicine, Professor Graeme Yorston in response to IP Further Question 15.

[98] IP response.

Issue: Overturning the finding that the defendant lacks capacity for trial

4.124 As we set out in the IP,[99] there is currently no procedure to address the situation where a defendant who has been found unfit recovers fitness before the determination of facts. This has caused difficulties in practice, and is described by the Court of Appeal as an "unsatisfactory lacuna in the law".[100]

4.125 In the IP we provisionally proposed that a finding that a defendant is unable to participate shall remain valid unless and until the contrary is established on the evidence of two suitably qualified experts.[101]

4.126 There was almost unanimous support from consultees for the introduction of such a mechanism. The dissenting consultee (Dr Penny Brown) raised the concern that if a defendant is unfit until it is established otherwise, on the basis of a significant evidential requirement, this might be incompatible with UNCRPD requirements that safeguards relating to the exercise of legal capacity should apply for the shortest time possible.

4.127 Consultees in support did, however, also raise some attendant issues to address:

(1) What should the evidential requirement be? Some consultees doubted whether evidence from two experts should be required (Law Society, Justices' Clerks' Society, Dr Linda Monaci).

(2) It should be clear that evidence from lay witnesses could be of significance in reversing a finding (HHJ Tim Lamb QC).

Discussion: Overturning the finding that the defendant lacks capacity for trial

4.128 We think that Dr Brown's concern in relation to the UNCPRD would be met by the recommendation at paragraph 4.16(2) above. This would require the parties and the judge keep the defendant's ability to participate effectively under review so that the appropriate application can be made for proceedings to be adjusted as soon as possible. We would also anticipate that, since proceedings would be adjourned to await this redetermination, the curtailment of the defendant's legal agency would not be operative whilst the updated reports were being prepared.

4.129 However, this question does feed into the issue raised by consultees as to what the evidential requirement should be for the overturning of the finding. In favour of two experts are the following factors:

(1) Given the statutory duty to consider adjournment for recovery before advancing to a finding that the defendant lacks the capacity to participate effectively in the trial, this situation should arise rarely.

(2) It is important to avoid the situation where there is a reversal of the finding only to discover that, by the time of trial the defendant's condition

[99] IP para 2.47.

[100] *Omara* [2004] EWCA Crim 431, [2004] All ER (D) 31 at [17].

[101] IP Further Question 7.

has deteriorated again, such that he or she is again unable to participate effectively. Such judgements may be quite finely balanced, and we consider that requiring two experts will provide better protection against such an event.

(3) That since the defendant will already have been the subject of reports from at least two clinicians, obtaining updated reports readdressing ability to participate should not be too onerous.

4.130 Arguments in favour of a single expert include:

(1) Less delay to the proceedings as a whole.

(2) Shorter curtailment of the defendant's legal agency (although see our observations at paragraph 4.122 above).

(3) Lower cost.

4.131 Weighing those factors carefully, we take the view that it is appropriate to retain the requirement for two experts to reverse the finding of inability to participate. We are particularly concerned to avoid the prospect of the reversal of that second finding, and the expense and delay that that would entail. We do agree with HHJ Tim Lamb QC that lay evidence may also be relevant to the judge's consideration in reversing the finding. The requirement for expert evidence is merely a minimum qualifying requirement rather than a provision designed to limit what evidence can be heard in that regard.

4.132 As we set out in the IP,[102] we consider that the standard of proof for a redetermination of capacity should be the balance of probabilities, given the optimal trial process into which the defendant will be returned on a positive finding.

Conclusion: Overturning the finding that the defendant lacks capacity for trial

4.133 **We recommend that:**

(1) A finding that a defendant lacks the capacity to participate effectively in the trial should remain effective in the proceedings unless and until the contrary is established, the court having received evidence from two suitably qualified experts (see draft Bill clauses 1(9) and 8, and clauses 30(10) and 37 (magistrates' courts)).

(2) The standard of proof should be the balance of probabilities, the burden resting on the party raising the issue or the prosecution if the issue is raised by the court (see draft Bill clauses 8(7) and 37(6) (magistrates' proceedings)).

[102] IP para 2.47.

CHAPTER 5
THE PROCEDURE FOR THE DEFENDANT WHO LACKS CAPACITY FOR TRIAL IN THE CROWN COURT

INTRODUCTION

5.1 This chapter considers what procedure should be adopted by the court once a defendant has been found to lack capacity for trial.

5.2 The determination that the defendant is unfit to plead, or under our reform proposals lacks capacity for trial, suspends the usual prosecution process. Such a defendant cannot undergo full trial, and no conviction can result. The purpose of the proceedings which follow such a finding is first to decide whether he or she did the act and then to identify what disposal is most appropriate for the particular defendant. The function of these disposals is not to punish the defendant, but to support the defendant so that he or she does not engage in criminal conduct in the future and, where necessary, to protect the public.

5.3 This chapter analyses how those procedures should be conducted. The challenge is to ensure that the process achieves the correct balance between fairness to the defendant and fairness to complainants, witnesses and those affected by the alleged offending. Where it is decided that the defendant did the act, it must also be ensured that the court has a realistic and effective basis for determining when such disposals should be imposed.

5.4 We also consider in this chapter whether it is necessary in every case for there to be further proceedings in court, or whether it might be appropriate for some defendants to be diverted out of the criminal justice system once a judge has determined that he or she lacks capacity for trial.

Key recommendations in this chapter:

1) The judge should have the discretion to divert the defendant out of the criminal justice system following a determination that the defendant lacks capacity for trial.

2) Where the jury do proceed to consider the allegations faced by the defendant, the prosecution should be required to prove all elements of the offence against the defendant before a disposal can be imposed.

3) However, where the jury conclude that the defendant who lacks capacity did not at the time of the offence know the nature and quality of the act that he or she did, or did not know that it was legally wrong, they should return a verdict of not guilty by reason of insanity. Such a verdict would trigger the imposition of specified disposals.

4) For the court to consider the allegations against him or her, the defendant should be entitled to choose for the hearing to be conducted by a judge alone, without a jury.

THE CURRENT POSITION[1]

5.5 Up until 1991, a defendant who was found to be unfit to plead was subject to mandatory and indefinite hospitalisation. Once the jury had concluded that the defendant was "under a disability",[2] there was no mechanism by which the court could consider the facts of the alleged offence.[3]

The section 4A hearing

5.6 Following the Report of the Committee on Mentally Abnormal Offenders ("the Butler Report"),[4] the Criminal Procedure (Insanity and Unfitness to Plead) Act 1991 ("the 1991 Act") amended the Criminal Procedure (Insanity) Act 1964 ("CP(I)A") to introduce a hearing at which the facts of the alleged offence could be considered by the jury.[5]

5.7 Under the current law, once a defendant has been found unfit to plead, the court cannot proceed to full trial, and any trial which has been begun will be stopped.[6] In either case the court is required to proceed to a section 4A hearing, sometimes called the "trial of facts", at which the jury consider whether the defendant has

1 We set out the current position briefly in this chapter. The development of the current approach to defendants found unfit to plead is discussed more fully in the Consultation Paper ("CP197"), para 6.1 and following.

2 Criminal Procedure (Insanity) Act 1964, s 4(1) as originally enacted.

3 In CP197 at paras 2.2 to 2.42 we trace the historical development of unfitness to plead procedures in more detail.

4 Report of the Butler Committee on Mentally Abnormal Offenders (1975) Cmnd 6244.

5 CP(I)A, s 4A.

6 CP(I)A, s 4A(2).

done the act or made the omission in relation to the offence with which the defendant is charged. If they are satisfied beyond reasonable doubt that he or she did so, then the judge considers what disposal would be appropriate.[7] If there is insufficient evidence that the unfit defendant did the act or made the omission charged, then he or she is acquitted and therefore not subject to any disposal. An acquittal at a section 4A hearing operates as if the jury had returned an acquittal at full trial and so is a bar to future prosecution or to prosecution being resumed on recovery.[8]

5.8 The section 4A hearing does not involve the determination of the defendant's culpability. There is therefore no question of conviction or punishment for the unfit defendant.[9]

What the Crown must establish at the section 4A hearing

5.9 Proof that the defendant "did the act or made the omission" has been interpreted by the House of Lords in the case of *Antoine*[10] to mean that the prosecution only has to prove the external elements[11] of the offence in question. The prosecution are not required to satisfy the jury that the defendant had the state of mind which would be necessary to prove the offence at full trial. We refer to this as the fault element of the offence. It is often what the defendant thought or believed about his or her actions or omissions.

> **Example 7** The defendant is charged with wounding with intent (contrary to section 18 of the Offences Against the Person Act 1861). He is said to have stabbed the complainant with a knife. At a section 4A hearing, the prosecution would be required to prove only that the defendant's actions caused the complainant to receive a wound; in this case that the knife in the defendant's hand pierced the skin of the complainant.[12] The prosecution would not be required to establish that the defendant intended to cause serious harm to the complainant.

7 We discuss disposals in Chapter 6 below.

8 CP(I)A, s 4A(4). In Chapter 9 below we discuss the process for resuming prosecution on recovery where the defendant has been found at the section 4A hearing to have done the act or made the omission.

9 *M (Edward)* [2001] EWCA Crim 2024, [2002] 1 WLR 824.

10 [2001] 1 AC 340, [2000] 2 WLR 703 overturning *Egan* [1998] 1 Cr App R 121, [1997] Criminal Law Review 225 on this point. In *Egan* at [124] and [125], the Court of Appeal held that in order to prove that the accused had done the act it was essential that all the ingredients of the offence (in that case theft) were proved.

11 The "external elements" of an offence are the physical facts that must be proved. They divide into: conduct elements (what the defendant must do or fail to do); consequence elements (the result of the defendant's conduct); and circumstance elements (other facts affecting whether the defendant is guilty or not).

12 We discuss how self-defence, mistake and accident are dealt with at para 5.14 and following below.

Cases where external and fault elements cannot easily be separated

5.10 Following the case of *Antoine*, therefore, the section 4A hearing requires strict division of the external and fault elements of the offence. However, the House of Lords[13] and the Court of Appeal[14] have acknowledged that this is not possible in all offences. There is, as Sir Brian Leveson P observed recently in *Wells and others*,[15] "no bright line" between the external and fault elements in a number of criminal offences.

5.11 For example, in the case of *B(M)*,[16] the Court of Appeal considered how the external and fault elements of the offence of voyeurism should be divided for the purpose of a section 4A hearing. The Court concluded that in proving that the defendant "did the act or made the omission" the relevant act (the external elements) included the defendant's purpose being to obtain sexual gratification in observing the private act of another. However, the defedant's knowledge that the person observed did not consent, was part of the fault element.[17]

5.12 However, by contrast in the case of *Young*,[18] which concerned an offence with elements of dishonest concealment of a material fact,[19] the Court of Appeal held that the defendant's purpose in the concealment, and his dishonesty, were part of the fault element of the offence. Therefore they were not for the jury's consideration. However, the Court concluded that the question of whether the defendant had the intention alleged against him, and whether he had concealed it, were external elements to be proved by the Crown.[20]

Secondary participation

5.13 The courts have also required guidance as to how the external and fault elements should be divided where the unfit defendant was said to have participated in a criminal offence as a secondary party.[21] In *M(KJ)*[22] the Court of Appeal held that the judge should direct the jury as to the minimum facts that would establish "the act" which had to be proved against the defendant. If it was necessary for the jury to be satisfied that the defendant had a particular level of knowledge of the activities of the principal offender, or the surrounding circumstances, then the judge should direct the jury that that was the case. Lord Justice Potter, giving judgment, acknowledged that this would require the jury to enter into an

[13] *Antoine* [2001] 1 AC 340, [2000] 2 WLR 703, by Lord Hutton.

[14] *Attorney General's Reference (No 3 of 1998)* [2000] QB 401, [1999] 3 WLR 1194. *Wells and others* [2015] EWCA Crim 2, [2015] 1 WLR 2797 at [8].

[15] [2015] EWCA Crim 2, [2015] 1 WLR 2797 at [12].

[16] [2012] EWCA Crim 770, [2013] 1 WLR 499.

[17] See [2012] EWCA Crim 770, [2013] 1 WLR 499 at [515] to [516] and case comment by R D Mackay, *R v B* [2013] Criminal Law Review 90 for criticism.

[18] [2002] EWHC 548 (Admin), [2002] 2 Cr App R 12.

[19] An offence under what is now Financial Services Act 2012, s 89.

[20] See also discussion in *Wells and others* [2015] EWCA Crim 2, [2015] 1 WLR 2797 at [13] to [14].

[21] A secondary party to an offence is a person who aids, abets, counsels or procures the principal offender in his commission of the offence.

[22] [2003] EWCA Crim 357, [2003] 2 Cr App R 21, CA.

investigation of the defendant's "state of knowledge". However, he felt that this would be "susceptible of determination upon an objective basis by inference from the facts presented in evidence"[23] rather than from evidence given by the defendant or observations by his or her representative.

Defences

5.14 The case of *Antoine* established that defences will not ordinarily be available for the defendant to pursue at a section 4A hearing, since the jury are not required to consider the fault element of the offence. However, Lord Hutton identified in the same case[24] that in limited circumstances certain defences may be available to an unfit defendant:

> If there is objective evidence which raises the issue of mistake or accident or self-defence, then the jury should not find that the defendant did the "act" unless it is satisfied beyond reasonable doubt on all the evidence that the prosecution has negatived that defence.[25]

5.15 What may amount to objective evidence, as conceived by Lord Hutton, has been the subject of a number of appeals, most recently the conjoined appeals of *Wells and others*.[26] In *Antoine,* Lord Hutton gave the example of objective evidence arising from the account of an eye-witness to the alleged offending, but in *Wells and others*, Sir Brian Leveson P clarified the position further:

> CCTV, cell site, scene of crime or expert forensic evidence are all available to assist a defendant…What would not fall within the category of objective evidence are the assertions of a defendant who, at the time of speaking, is proved to be suffering from a mental disorder of a type that undermines his or her reliability and which itself has precipitated the finding of unfitness to plead. These assertions need not themselves be obviously delusional.[27]

5.16 However, what the defendant said in interview might be admissible where the difficulty which gives rise to his or her unfitness to plead was not present at the time of interview. Sir Brian Leveson P observed:

> It is not difficult to visualise a defendant of full capacity who is involved in an incident and then provides a full account to the police but thereafter suffers an injury which renders him or her unfit to plead. It is not uncommon for such interviews to be admitted into evidence

[23] [2003] EWCA Crim 357, [2003] 2 Cr App R 21, CA at [46].

[24] *Antoine* [2001] 1 AC 340, [2000] 2 WLR 703.

[25] [2001] 1 AC 340, [2000] 2 WLR 703 at [376].

[26] [2015] EWCA Crim 2, [2015] 1 WLR 2797.

[27] *Wells and others* [2015] EWCA Crim 2, [2015] 1 WLR 2797 at [15].

whatever the strict operation of the principles in *Antoine* might otherwise suggest.[28]

5.17 Sir Brian Leveson P acknowledged that "the exclusion of evidence outside this category may put the defendant at a disadvantage; however this is balanced by the fact that these are not criminal proceedings and the disposals are accordingly limited."[29]

Partial defences

5.18 The cases of *Antoine*[30] and *Grant*[31] have confirmed that the partial defences to murder of diminished responsibility[32] and provocation (now loss of control,[33] but we assume that the position is unchanged) cannot be advanced on behalf of the defendant at such a hearing. Nor is it possible to raise an issue as to the lack of specific intent[34] or to pursue a defence of not guilty by reason of insanity.[35]

Representation for the defendant

5.19 The court has a duty to appoint a representative to put the case for the defence at the section 4A hearing.[36] This will not necessarily be the same person who has represented the defendant in the proceedings so far. Rather, the task of the court is to identify a representative who is "the right person for this difficult task".[37] The Criminal Procedure Rules ("CrimPR"),[38] set out factors for the court to take into account in exercising its power to appoint a representative. As we observed in our Consultation Paper on unfitness to plead ("CP197"),[39] the appointed representative, although he or she will obviously discuss the case with the defendant, is not bound to follow the defendant's instructions about the way in

[28] [2015] EWCA Crim 2, [2015] 1 WLR 2797 at [18], relying on *Jagnieszko* [2008] EWCA Crim 3065 and *B(M)* [2012] EWCA Crim 770, [2013] 1 WLR 499. See for discussion K Kerrigan and N Wortley, "Unfitness to Plead: Expanding the Scope of 'Objective Evidence' on the 'Trial of the Facts'" (2015) 79(3) *Journal of Criminal Law* 160.

[29] *Wells and others* [2015] EWCA Crim 2, [2015] 1 WLR 2797 at [15].

[30] [2001] 1 AC 340, [2000] 2 WLR 703.

[31] *R (Grant) v DPP; Grant* [2001] EWCA Crim 2611, [2002] QB 1030.

[32] Homicide Act 1957, s 2.

[33] Coroners and Justice Act 2009, s 54.

[34] *R (Grant) v DPP; Grant* [2001] EWCA Crim 2611, [2002] QB 1030.

[35] Trial of Lunatics Act 1883, s 2(1). *Wells and others* [2015] EWCA Crim 2, [2015] 1 WLR 1194 at [39].

[36] CP(I)A 1964, s 4A(2)(b).

[37] *Norman* [2008] EWCA Crim 1810, [2009] 1 Cr App R 13 at [34].

[38] CrimPR 2015 (SI 2015 No 1490), r 25.10(3).

[39] Unfitness to Plead (2010) Law Commission Consultation Paper No 197. Available at http://www.lawcom.gov.uk/wp-content/uploads/2015/06/cp197_Unfitness_to_Plead_web.pdf.

which the case should be run if the representative does not agree that those instructions are in the defendant's best interests.[40]

Conduct of the hearing

Article 6 not applicable

5.20 In the case of *H*,[41] the House of Lords concluded that proceedings under sections 4 and 4A do not involve the determination of a criminal charge, within the meaning of article 6 of the ECHR, because they cannot result in a conviction or in any punishment which is retributive or deterrent. Provided that the procedure was properly conducted, with scrupulous regard for the interests of the defendant, it was fair and compatible with article 6 rights.[42] In the case of *B*, Sir John Thomas P, as he then was, stressed the "extremely important public interest of ensuring that, where the court proceeds to see whether the defendant did the act, time is taken to ensure that that inquiry is handled justly and fairly".[43]

Evidence

5.21 A defendant may be found to be unfit to plead part way through the trial, where the question of unfitness has been postponed until the close of the Crown's case, or where the issue has not become apparent until after the trial has begun. In such a situation the trial is brought to an end but the jury will proceed to determine the facts on the basis of the evidence already given in trial and any other such evidence as may be adduced by the prosecution, or the representative appointed to put the case for the defence.[44]

5.22 Despite the judgment in *H*,[45] section 4A hearings are "criminal proceedings" within the Criminal Justice Act 2003, and so hearsay provisions apply,[46] and bad character evidence can be adduced in accordance with the provisions of the Criminal Justice Act 2003.[47]

5.23 The defendant's account in interview would be admissible only where the court was satisfied that, even though the defendant was unfit, he or she was able at the time of interview to understand the caution and that it was safe for him or her to be interviewed.[48]

[40] CP197, para 6.3. Indeed the different responsibility placed on the advocate is underlined by the fact that he or she is paid out of central funds rather than through the Criminal Defence Service (*Norman* [2008] EWCA Crim 1810, [2009] 1 Cr App R 13 at [34]).

[41] [2003] UKHL 1, [2003] 1 WLR 411.

[42] See also *Grant* [2001] EWCA Crim 2611, [2002] QB 1030.

[43] *B* [2012] EWCA Crim 1799, [2012] MHLR 310 at [15].

[44] CP(I)A 1964, s 4A(2).

[45] [2003] UKHL 1, [2003] 1 WLR 411.

[46] *Chal* [2007] EWCA Crim 2647, [2008] 1 Cr App R 18, CA, see *M(KJ)* [2003] EWCA Crim 357, [2003] 2 Cr App R 21, CA.

[47] *Creed* [2011] EWCA Crim 144, [2011] Criminal Law Review 644.

[48] *Swinbourne* [2013] EWCA Crim 2329, (2014) 178 JP 34, CA and *Wells and others* [2015] EWCA Crim 2, [2015] 1 WLR 2797. See also *M and another* [2006] EWCA Crim 2391.

Section 4A hearing alongside full trial of co-defendants

5.24 If the unfit defendant is jointly charged with other fit defendants, the jury can determine the facts under section 4A of the CP(I)A in relation to the unfit accused whilst simultaneously hearing the full trial of the fit co-defendants. This is the case regardless of whether the defendant was found to be unfit before the jury were empanelled or after the trial had begun.[49] However, there is also the power for the court to hear a section 4A hearing for an unfit defendant separately from the full trial of his or her co-defendant(s). In the case of *B and others* Lord Justice Toulson, as he then was, observed: "In considering how the court ought justly to proceed, there were four sets of interests to be considered: those of the unfit defendants, the fit defendants, witnesses and the public."[50]

Abuse of process applications

5.25 Any defendant is entitled to apply to the judge to stay proceedings against him or her on the basis that to proceed would be an abuse of process.[51] The Court of Appeal has made clear that, in cases of unfitness to plead, the application can be made either before the determination of unfitness (under section 4A CP(I)A) or after the defendant has been found unfit, but that:

> An abuse application, whenever made, must be founded on matters independent of the defendant's disability, such as oppressive behaviour of the Crown or agencies of the state, or circumstances or conduct which would deprive the defendant of a fair trial, eg destruction of vital documents during a long period of delay or an earlier assurance that he would not be prosecuted.[52]

5.26 The Court of Appeal reasoned that to allow the application to be founded on the basis of the defendant's "disability" would "avoid the whole point of sections 4 and 4A".[53]

PROBLEMS WITH THE CURRENT POSITION[54]

No discretion whether to proceed to consider the allegation

5.27 As set out above, unless the prosecution decide to offer no evidence against the defendant, it is currently mandatory for the court to proceed to hold a section 4A hearing in respect of an unfit defendant. This will require a full jury process, and more often than not witnesses to give evidence. However, in some cases it will have become apparent during the determination of unfitness that none of the range of available disposals is appropriate or necessary in the case of the particular defendant.

[49] *B and others* [2008] EWCA Crim 1997, [2009] 1 WLR 1545.

[50] *B and others* [2008] EWCA Crim 1997, [2009] 1 WLR 1545 at [25]. Also *MB* [2010] EWCA Crim 1684, [2011] MHLR 163.

[51] *R v Telford Justices, Ex parte Badhan* [1991] 2 QB 78, [1991] 2 WLR 866; *Connelly v DPP* [1964] AC 1254, [1964] 2 WLR 1145; *R v Humphrys* [1977] AC 1, [1976] 2 WLR 857.

[52] *M and others* [2001] EWCA Crim 2024, [2002] 1 WLR 824 at [37].

[53] *M and others* [2001] EWCA Crim 2024, [2002] 1 WLR 824 at [37].

[54] Discussed more fully in CP197, paras 6.24 to 6.54.

Division of external and fault elements is problematic in many cases

5.28 The section 4A hearing, following *Antoine*, requires strict division of the external and fault elements of the offence. However, in many common offences this is not easy to achieve.[55] Consider for example, the many offences which involve the defendant being "in possession" of an item. These are difficult to divide into external and fault elements. The commonplace concept of possession is far from straightforward, and most cases of possession involve a mental ingredient of some kind going beyond mere physical control of the item.[56] How that mental ingredient would be approached at a section 4A hearing is unclear, there being no cases addressing this issue directly.

> **Example 8** The defendant M's flat is searched by the police and in it is found a quantity of prohibited drugs, hidden in a suitcase. The flat has recently been used by others, and as far as M was aware the suitcase in question was empty at the time of the search.
>
> At trial, if fit, M would be entitled to an acquittal if the jury concluded that he might have had no knowledge of the contents of the suitcase.
>
> However, if M is unfit it is unclear whether the court would consider that the act of possession was established simply by the defendant being in physical control of the flat and suitcase at the time of the search (the external elements). Or whether the jury would also have to be satisfied that the defendant had some knowledge of the contents of the suitcase itself.

5.29 There are two difficulties with cases such as that in Example 8 above. First, if the court concludes that the act can be proved without any consideration of the mental state of the defendant, there is a real danger of unfair or arbitrary decision-making. The unfit defendant will, in many such cases, be significantly disadvantaged in comparison to a fit defendant in the same position (as in Example 8 above). In the case of *Wells and others*, Sir Brian Leveson P acknowledges that the current provisions can disadvantage unfit defendants but considers that this disadvantage is mitigated by the fact section 4A hearings are not criminal proceedings and that the available disposals are correspondingly limited. However, we retain significant concerns since the disposals available may include indefinite loss of liberty through hospitalisation which, whilst not designed to punish, may have that effect over the course of time. In addition, findings of fact at section 4A hearings can trigger ancillary orders which may result in imprisonment on breach,[57] and, for relevant offences, result in the unfit defendant being the subject of sexual offender notification requirements.[58]

5.30 Secondly, where there remains uncertainty as to how the external and fault elements of offences should be divided, the law will continue to develop in a

[55] See the CP197 response of HHJ Gilbart QC for helpful further examples of the difficulty of separating conduct and fault elements in common offences.

[56] See *Warner v Metropolitan Police Commissioner* [1969] 2 AC 256, [1968] 2 WLR 1303 and *McNamara* (1988) 87 Cr App R 246, (1988) 152 JP 390.

[57] For example a sexual harm prevention order under the Sexual Offences Act 2003, s 103A.

[58] Under Part 1 of the Sex Offenders Act 1997.

piecemeal manner (as we have seen at paragraphs 5.10 to 5.12 above), leading to uncertainty and inconsistency.[59]

Secondary participation

5.31 Liability for a criminal offence by virtue of assisting, encouraging, or causing another to commit an offence presents significant problems for section 4A hearings. This arises because the external elements of these offences are seemingly innocuous in many cases. The liability of a defendant charged as the secondary party can often turn on a consideration of what was in his or her mind, namely what he or she knew or believed about what the principal perpetrator of the offence was going to do. What is required to establish that the unfit defendant was a secondary participant in some cases goes beyond the mere physical act which facilitated the commission of the offence by the principal offender.

5.32 Despite the apparent acknowledgement of this issue by Lord Justice Potter in *M(KJ)* referred to above, the courts have not consistently followed this approach. For example, in the recent case of *Hone*, part of the conjoined appeal of *Wells and others*, despite making reference to the case of *M(KJ),* Sir Brian Leveson P observed in relation to a case of secondary liability:

> When directing the jury in relation to making a finding for the purposes of section 4A of the act, an inquiry into the state of mind or level of knowledge of the person concerned at the time when they did the acts or omissions comprising the offence is not required.[60]

5.33 There remain, we consider, real concerns that, even following *M(KJ),* the procedure may not provide an effective mechanism to identify those in relation to whom it is appropriate to impose a disposal and those who should be acquitted.

> **Example 9** The defendant, P, has a moderate learning disability and is developmentally delayed. P is a member of a group which spontaneously attacks and kills the victim, G. Death is caused by a downward stamp on G's temple by one of the group, K. P was present with the group in the initial attack, and remained throughout the incident, although he did not directly assault G. There is evidence to suggest that prior to the attack K made remarks about "doing in" G. The evidence is that P was also present when those remarks were made but, as a result of his learning disability and developmental delay, it is doubtful whether he would have appreciated the ramifications of what he may have heard.
>
> If fit to plead, P would only be convicted of murder as an accessory, if the jury were satisfied that P was voluntarily present during the attack, that his presence encouraged K and that P realised K might use force with intent to kill or cause serious harm. If the jury concluded that P may not have realised K would act with that intent,

[59] See for example the cases of *Young* [2002] EWHC 548 (Admin), [2002] 2 Cr App R 12 and *B(M)* [2012] EWCA Crim 770, [2013] 1 WLR 499.

[60] [2015] EWCA Crim 2, [2015] 1 WLR 2797 at [61].

they would acquit. In the circumstances, given P's condition, it is not unlikely that the jury might arrive at the latter conclusion.

However, if found unfit to plead, the minimum facts that would establish "the act" at the section 4A hearing in accordance with *Wells and others* would be the presence of P in the group during the attack, and the fact that his presence encouraged K or otherwise facilitated the killing of G. Following *M(KJ)*,[61] it might be argued that the judge should direct the jury that they also need to be satisfied that P was aware of K's intention to "do in" G. Even if that direction were given, it is not clear that the jury would have to be satisfied that, having overheard K's threatening comments, the defendant must have realised that K might act as he did.

5.34 We have two concerns, again, about how unfit defendants in cases of this sort are dealt with under the current law. First, for a trial judge, identifying exactly what the jury must be satisfied of at the section 4A hearing is far from clear, and there is the danger of inconsistent application of the law, raising the risk of unfair outcomes. Secondly, even as extended by *M(KJ)*, the elements of which the jury have to be sure may not distinguish effectively between a defendant whose behaviour, judged externally, justifies the court imposing a disposal to protect the public, and a defendant who, potentially by virtue of the impairment which prompted the finding of unfitness, was not, in fact, a knowing participant in the murder at all. The consequences of a finding that he or she did the act of murder may, for a defendant such as P, be severe.

Inchoate offences

5.35 Similarly, inchoate offences, such as attempts or conspiracy to commit an offence, are also problematic when considered in section 4A hearings. This is because the external elements of such offences are often not themselves unlawful, but are made so by what was in the defendant's mind. However, the jury in a section 4A hearing, focusing as they must on the external elements alone, will in many cases find it difficult to distinguish lawful and unlawful conduct on the part of an unfit defendant charged with an inchoate offence.

Example 10 An unfit defendant, J, is charged with conspiracy to defraud. The prosecution suggest that the fact that she was party to an agreement to defraud can be inferred from the use of her bank accounts by others for the movement of dishonestly obtained funds. The jury might very well be satisfied that the evidence established that there was indeed an agreement to defraud others. However, the jury would be unable to identify whether J was in fact party to that agreement. They would also be unable to identify whether she had intended to play a part in the plan to defraud, or whether she had been exploited by other conspirators, unaware of the fraudulent usage of her bank account. Such matters would be very likely to fall within the fault element of the offence, and thus be outside the jury's enquiry.

[61] [2003] EWCA Crim 357, [2003] 2 Cr App R 21, CA.

Defences

5.36 The approach in *Antoine,* which limits the raising of self-defence, accident and mistake to cases where objective evidence of the defence exists, is also liable to lead to unfairness. It has a similar capacity arbitrarily to disadvantage an unfit defendant in comparison with a fit defendant in the same situation.

> **Example 11** Two defendants, R who is fit to plead and T who is unfit to plead, arm themselves and, in using reasonable force to fend off an attack, inflict grievous bodily harm on L. Both defendants maintain that they acted in self-defence. There is no CCTV footage. The forensic evidence is inconclusive and the incident was not witnessed by any third parties.
>
> The fit defendant will be entitled to an acquittal on the basis that he acted in lawful self-defence, if the Crown cannot disprove his account. The issue of self-defence will be left to the jury where the defendant alone raises the issue in his own evidence at trial, even though there is no objective evidence to support his assertion.
>
> However, for the unfit defendant at a section 4A hearing, the position is more difficult. The defendant will not be entitled to rely on self-defence unless there is objective evidence that his actions might have been in self-defence.

ANALYSIS AND DISCUSSION

Provisional proposals in CP197

5.37 In CP197[62] we considered in detail, and rejected, a number of different options for reform of the determination of facts (the section 4A hearing) to rectify the problems identified above.[63] We favoured a procedure in which the Crown would be required to prove all the elements of the offence, rather than just the conduct element(s) as in the current section 4A hearing. The resulting finding would not be a conviction, but a finding that the accused had done the act or made the omission and there are no grounds for an acquittal.[64] However, an acquittal could be qualified by virtue of a finding that it was by reason of mental disorder existing at the time of the offence. We referred to this qualified acquittal as a "special verdict".[65]

5.38 This formulation sought to ensure a fair outcome for the defendant, by requiring proof of all the elements of the offence beyond reasonable doubt. We considered then that any defence, or partial defence, could therefore be raised on the defendant's behalf, as long as there was sufficient evidential basis for it. We also recognised the greater burden on the Crown in being required to prove all elements against the unfit defendant, and sought to ensure proper protection for

[62] We do not set out that discussion again here, but it can be found in CP197 at paras 6.55 to 6.162.

[63] See Issues Paper ("IP") paras 5.7 and 5.8 for fuller discussion.

[64] CP197 Provisional Proposal 8.

[65] CP197 Provisional Proposal 9.

the public, by providing for the imposition of appropriate disposals where a special verdict had been arrived at.

5.39 We proposed that the "special verdict" should not be available at the jury's initial consideration of the facts. Rather, on the defendant achieving an acquittal, the judge would have the discretion to order a further hearing where the jury would consider whether the acquittal should be qualified by reason of the defendant's mental disorder existing at the time of the offence, the special verdict.[66] We considered that this would provide a clearer and simpler route for the jury in their initial verdicts, and would avoid any prejudice which might arise from the jury hearing medical evidence relevant to the special verdict in the substantive fact-finding hearing.

Responses to the provisional proposals in CP197

5.40 The proposal that the Crown be required to prove all elements of the offence at the section 4A hearing received overwhelming support.[67] Consultees resoundingly supported the need for greater fairness to the unfit defendant, who (consultees felt) should not be disadvantaged in comparison with a fit defendant. The only consultee who rejected entirely a broadening of those matters which the prosecution should be required to prove was the Crown Prosecution Service ("the CPS"). It rejected the suggestion that the unfit defendant is currently disadvantaged, and felt that consideration of the mental element of the offence was neither necessary nor a helpful task for the jury.[68]

5.41 The proposal to introduce a "special verdict" was well received. However, a significant number of respondents rejected the two-stage process for arriving at the special verdict.[69]

5.42 In light of the responses to the proposals in CP197, and considering other questions raised by the respondents, we sought in our subsequent Issues Paper ("IP")[70] to refine these aspects of our provisional proposals which had found

[66] CP197 Provisional Proposal 10 and 11. But see also CP197 questions 3 and 4, inviting consultees to make alternative proposals for the section 4A hearing if not in agreement with the provisional proposals.

[67] Those in support included: HHJ Gilbart QC, Council of HM Circuit Judges (response submitted by the Criminal Sub-Committee), the Justices' Clerks' Society, Carolyn Taylor (solicitor specialising in criminal and mental health law), the Law Society, Dr Arlie Loughnan (academic), Professor Jill Peay (academic). Professor Ronnie Mackay (academic), Professor Rob Poole (academic and psychiatrist), Dr Lorna Duggan (consultant forensic psychiatrist in developmental disabilities), Dr Eileen Vizard CBE (consultant child and adolescent psychiatrist), Just for Kids Law (Just for Kids Law provide support, advice and legal representation for young people in difficulty), the Prison Reform Trust, Victim Support, Mind (a national mental health charity, response submitted by the Legal Unit), Kids Company (a charity that provided therapeutic, emotional and practical support, including legal assistance, to vulnerable children and young people), HM Council of District Judges (Magistrates' Court) (response submitted by the Legal Committee).

[68] See IP paras 5.14 to 5.17 for fuller discussion of the responses in this regard.

[69] HHJ Gilbart QC, Gillian Harrison (Ministry of Justice), the Council of HM Circuit Judges, HM Council of District Judges (Magistrates' Court).

[70] Unfitness to Plead: An Issues Paper (May 2014), available at http://www.lawcom.gov.uk/wp-content/uploads/2015/03/unfitness_issues.pdf.

favour. In addition, we considered a number of further issues which arose from the comments of respondents to CP197 and from subsequent caselaw. We discuss the responses to these issues below.

Issue: Discretion to decline to proceed with the section 4A hearing

5.43 In the IP we asked whether, following a finding that the defendant lacks the capacity to participate effectively in the proceedings, the judge should have the discretion to discontinue proceedings so that the defendant can be diverted out of the criminal justice system into health or related services. We proposed that, if this course were to be followed, there should be a range of factors which the judge was obliged to take into account in exercising his or her discretion. These included the seriousness of the offence charged, the impact on, and views of, the complainant, the risk presented by the defendant, and the availability of services. We suggested that the defendant, or those acting on his or her behalf, should have a right to require the court to proceed to hold a section 4A hearing.

5.44 Consultee responses to this proposal were predominantly positive.[71] Those who were in favour of such a measure focused on the importance of there being capacity for diversion out of the process in the appropriate circumstances, and favoured the additional flexibility that the proposal offered.

5.45 There was strong feeling that the judicial discretion should, however, be carefully exercised; public safety, victim interests and the legitimacy of the process being in play.[72] A number of consultees endorsed the requirement that there be a non-exhaustive list of factors which should be taken into account, of the sort proposed at paragraph 5.31 in the IP and paragraph 5.43 above.[73] HM Council of District Judges (Magistrates' Courts) also proposed a duty to give reasons, which would, we consider, be triggered in any event.

5.46 However, Mr Justice Holroyde[74] opposed the introduction of such a discretion, noting that the court could "no doubt make its views known" at this stage but that if the prosecution "have good reason to wish to pursue the section 4A hearing…then they are entitled to do so". The proposal does create an

[71] IP responses in favour: Council of HM Circuit Judges, HM Council of District Judges (Magistrates' Courts), the Law Society, Carolyn Taylor, Dr Eileen Vizard CBE, Charles de Lacy (clinical nurse specialist), Professor Ronnie Mackay, Faculty of Forensic and Legal Medicine, Centre for Evidence and Criminal Justice Studies, CPS, Nigel Barnes (solicitor specialising in criminal law), Dr Susan O'Rourke (clinical psychologist), Professor Graeme Yorston (academic, consultant forensic psychiatrist and neuropsychiatrist), Karina Hepworth (senior nurse specialist, learning disabilities), Anonymous (academic and intermediary), Dr Linda Monaci (consultant clinical neuropsychologist) and the Prison Reform Trust.

[72] Faculty of Forensic and Legal Medicine, Centre for Evidence and Criminal Justice Studies.

[73] Council of HM Circuit Judges, HM Council of District Judges (Magistrates' Courts), Charles de Lacy, Professor Ronnie Mackay, Centre for Evidence and Criminal Justice Studies.

[74] Writing in his personal capacity, but his comments endorsed by the Lord Chief Justice, Lord Thomas.

"unprecedented new power" and was described by one consultee as "more radical than it first appears to be".[75]

Discussion: Discretion to decline to proceed with the section 4A hearing

5.47 We consider that there remain very strong arguments to support the introduction of such a discretion. We arrive at that position in consideration of a number of factors.

5.48 First, however reformed, the section 4A hearing, because it is not a full trial procedure, cannot determine the culpability of the defendant, nor can it result in a conviction or punishment. It exists to identify those individuals upon whom a protective disposal (and any relevant ancillary orders) should safely be imposed, or to allow for a defendant to be acquitted. Where such a disposal is not required, because arrangements can be made without an order of the court, it is essential to consider with care whether it is necessary for the proceedings to continue against a defendant who lacks capacity.

5.49 For some defendants, diversion out of the criminal justice system following a finding of lack of capacity will not be appropriate, particularly where the seriousness of the offence, or the danger represented by the offender, is high. We have in mind where the defendant is suitable for hospitalisation and he or she represents such a significant risk of harm that a restriction order is required. Other cases might include where a positive finding of fact may be required to achieve an ancillary order, such as a violent offender order,[76] or to bring the defendant within sex offender notification requirements.[77] There will be cases, also, where the views of complainants, witnesses and others affected by the offence, the public interest, or the interest of the defendant in seeking an acquittal, tend in favour of a jury considering the allegations faced by the defendant, however limited that consideration will be.

5.50 Yet, for defendants facing less serious charges or presenting lower risk, we take the view that diversion out of the criminal justice system after a determination of lack of capacity for trial may be desirable. This may be particularly appropriate where a mental disorder or learning disability, or a combination of health and other vulnerabilities, is identified as a significant causal factor in the alleged offending, and where the individual's needs can be addressed without recourse to the disposals available following a section 4A hearing.

5.51 Although we make recommendations for enhancing supervision orders in Chapter 6 below, disposals for individuals who lack capacity remain predominantly supportive arrangements. The extent to which supervision orders can ensure the compliance of a supervised individual is limited by the protective nature of the orders themselves, and the degree to which a defendant who lacks capacity can reasonably be expected to comply with such an order.

[75] Centre for Evidence and Criminal Justice Studies.

[76] Under s 98 of the Criminal Justice and Immigration Act 2008.

[77] Sex Offenders Act 1997, Part 1.

5.52 In such circumstances, where a further hearing or disposal is not necessarily required, we consider that the court should be entitled to decline to proceed to the section 4A hearing. For some witnesses and complainants, being spared the anxiety and distress of giving evidence will be welcome. Additionally, we do not discount the adverse effect that such a process might have on a defendant him- or herself, whatever arrangements are made to facilitate his or her understanding of the process. Finally, we are mindful of the need to conserve precious court resources.

Not a decision as to whether the prosecution should proceed

5.53 We appreciate Mr Justice Holroyde's observation that determining whether a prosecution should proceed is not, apart from cases of abuse of process,[78] in the gift of the judge. We have considered with care whether this proposal may give rise to concerns in terms of judicial independence. However, we do not consider that such a discretion would indeed involve a judge making a decision in relation to stopping a prosecution. It is important to note that the defendant who has been found to lack capacity for trial has already been removed from the full prosecution process, by virtue of the finding that he or she lacks the capacity to participate effectively in the trial. Under this proposal the judge is, therefore, not being granted a power to decide whether the defendant should be prosecuted in a normal criminal trial or not. Instead the judge is being given the power to decide, taking into account the views of all those affected by, and having an interest in, the case, whether it is necessary to proceed to scrutinise the allegation further and/or to impose a protective or supportive disposal on the defendant, should the allegations be proved.

5.54 We appreciate that the discretion which we propose to introduce is novel, and not universally welcomed. It could be severed from our other recommendations without difficulty. However we do not propose to recommend that course. This proposal was endorsed by the majority of our respondents, including the Council of HM Circuit Judges, and the CPS; the latter particularly welcoming the further opportunity for diversion of defendants out of the criminal justice system which the discretion would allow. We too find the additional scope for diverting defendants a compelling argument for the discretion and are persuaded by the widespread support for this proposal. We also note with interest that research into unfitness to plead cases reveals that there are already instances where judges, contrary to the mandatory framing of the unfitness procedures, have declined to proceed with the section 4A hearing. They have done so on the basis that it was not in the public interest.[79]

[78] We discuss abuse of process in the context of unfitness to plead cases at paras 5.25 and 5.26 above.

[79] R D Mackay, B Mitchell and L Howe, "A Continued Upturn in Unfitness to Plead - more disability in relation to the trial under the 1991 Act" [2007] *Criminal Law Review* 530, 538. Of the 252 unfitness to plead cases examined, 12 did not proceed beyond the finding of unfitness. In two cases the judge concluded that it was not in the public interest to proceed with the section 4A hearing. In nine cases the prosecution offered no evidence before a jury was sworn for the section 4A hearing and in one further case the Attorney General entered a *nolle prosequi* in light of the defendant's failing mental health.

Right for the prosecution and defence to apply for leave for proceedings to be resumed on recovery

5.55 However, Mr Justice Holroyde's observations highlight the need for clarity in relation to whether it should be possible, where a defendant is diverted out of the criminal justice system after a finding of lack of capacity, for proceedings to be resumed against him or her on recovery. We consider that where the court declines to proceed to the section 4A hearing, that this should not be a bar to either party applying for leave for proceedings to be resumed against the defendant, should he or she achieve capacity at some later stage. We discuss this issue in more detail in Chapter 9 below.

5.56 In terms of future prosecutions, we bear in mind also that the defendant's arrest and charge with a criminal offence, and the outcome of the process, would remain as a matter of record on the Police National Computer, for the purposes of any future arrest or prosecution.[80]

An interests of justice test

5.57 We remain of the view, originally proposed in the IP at paragraph 5.31, and endorsed by consultees, that the judge should be required to take into account a range of factors in exercising this discretion. We consider that the court should apply an overarching "interests of justice" test and that the statutory provisions should set out a number of factors that the judge is required to take into account in considering whether to make such an order. These factors should include:

(1) the seriousness of the offence or offences charged;

(2) the effect of such an order on those affected by the offence or offences charged;

(3) the arrangements made to reduce the risk (if any) that the defendant would commit an offence in future;

(4) the arrangements made to support the defendant in the community; and

(5) the views of the defendant or prosecutor as regards the making of such an order.

5.58 In respect of the views of the prosecutor, we believe, in particular, that consideration of the likely impact of such an order on the complainant is of critical importance, and the views of complainants and witnesses should be actively canvassed where such an order is contemplated. Following the finding of lack of capacity, the proceedings would no longer "relate to trial on indictment".[81] As a result, were the prosecution to object to the exercise of the discretion, they (and the defendant) would have the right to appeal by way of case stated to the High

[80] Details of all arrests, charge and the outcome of all subsequent court hearings are recorded on the Police National Computer ("PNC"): National Policing Improvement Agency, *PNC Manual* (2012), ch 12.

[81] Senior Courts Act 1981, s 28(2). See *Grant* [2001] EWCA Crim 2611, [2002] QB 1030.

Court,[82] or to apply for permission for judicial review of the decision.[83] However, the prosecution would not, we anticipate, have the right to apply for leave to appeal against the exercise of the discretion under Part 9 of the Criminal Justice Act 2003.

5.59 In respect of the defence position, in our provisional proposal advanced in the IP we suggested that the defence should be able to veto the exercise of the discretion. We had in mind, in particular, the fact that the defendant may wish for the determination of facts to proceed in the hope of achieving a full acquittal. However, we are persuaded by the Council of HM Circuit Judges' proposal that the position of the defendant should instead be one of those factors to be considered by the judge rather than the defendant being able to veto the exercise of the discretion. This more properly accords with the public interest in allowing the court to retain control over the fair disposal of the procedures for defendants who lack the capacity for trial. However, were the defendant to indicate that he or she would prefer the determination of facts hearing to proceed in the hope of achieving an acquittal, we consider that this would doubtless be a powerful factor weighing against the exercise of the discretion.

5.60 The addition of these factors is, in our view, an important protection and to a large extent addresses the concerns raised by some of those who were not in favour of the judge having such a discretion. For example, the requirement to take into account such factors should go a long way towards allaying HHJ Tim Lamb QC's concern that if the judge had this discretion there would be "no consistency of approach". We note the concerns raised by lawyers at our Leeds symposium that there is no significant consistency at present in the approach taken by the CPS to reviewing such cases in any event. Additionally, we would hope that a list of factors to be taken into account, and the giving of reasons, would guard against Professor Jill Peay's concerns that the exercise of this discretion would become the default position.

Conclusion: Discretion to decline to proceed with the section 4A hearing

5.61 **We therefore recommend that:**

(1) the judge in the Crown Court have the discretion to decline to proceed with the alternative finding procedure (see draft Bill clauses 22 and 50 (magistrates' proceedings));

(2) the judge should apply an interests of justice test, with specified factors to be taken into account, in considering whether to exercise this discretion (see draft Bill clauses 22(2) and (4) and 50(2) and (4) (magistrates' proceedings)); and

(3) exercise of the discretion should not act as a bar to resumption of proceedings on recovery, subject to successful application by the

[82] Senior Courts Act 1981, s 28(1).

[83] Senior Courts Act 1981, s 29(3). See *Grant* [2001] EWCA Crim 2611, [2002] QB 1030 and *R (Julie Ferris) v DPP* [2004] EWHC 1221 (Admin), [2004] All ER (D) 102.

prosecution or the defendant (see draft Bill clauses 23 and 24, and 51 and 52 (magistrates' proceedings)).

Issue: The Crown to prove all elements of the offence?

5.62 As we set out at paragraph 5.40 above, there was resounding support from consultees for the prosecution to be required to prove all elements of the offence at the determination of facts hearing. HHJ Gilbart QC's observations summarise the approach of many consultees in this regard:

> It is objectionable as a rule of law to deprive a Defendant, albeit one unfit to plead, of the protection afforded all citizens by the principle that a deprivation of liberty consequent on criminal conduct only occurs if the Prosecution has proved all the requisite elements of an offence.

5.63 The CPS, which had suggested in its response to CP197 that consideration of the mental element of the offence was "neither necessary nor helpful", has in this regard changed its position. The CPS recognised in its response to the IP "the support from stakeholders for the proposal".

Discussion: The Crown to prove all elements of the offence?

The purpose of the procedure for defendants who lack capacity

5.64 In returning to this issue, we consider it important for us to make plain that the purpose of the proposed requirement for the Crown to prove all elements of the offence is not in order to establish the defendant's culpability, or the degree of it, so that some more severe form of disposal can be imposed. Rather, it is to ensure that the defendant, who cannot participate in a full trial, can enjoy the same opportunities for outright acquittal as the defendant who can, including where an essential element cannot be established, or where any defence may be available.[84] We agree with HHJ Gilbart QC, and many other respondents, that to deprive a defendant who lacks capacity of equal opportunity for acquittal is objectionable.

Addressing difficulties arising out of the division of external and fault elements

5.65 Extending what the prosecution must prove to embrace all elements of the offence would plainly address the widely acknowledged concerns discussed in paragraph 5.28 and following above. In particular it would prevent the piecemeal development of the law, and arguably arbitrary outcomes, which have arisen as a result of the difficulties of applying this artificial distinction to the range of criminal offences.

[84] See also the approach of the Butler Committee in making a similar recommendation (Report of the Butler Committee on Mentally Abnormal Offenders (1975) Cmnd 6244 at para 10.24): "the object of this proposal is primarily to enable the jury to return a verdict of not guilty where the evidence is not sufficient for conviction".

Is the requirement to prove all elements unrealistic?

5.66 In considering the introduction of a requirement to prove all elements we must, of course, grapple with the reason why the limitation on what the prosecution must prove currently exists.

5.67 We are not the first to propose that the prosecution should be required to prove all elements of the offence at the determination of facts hearing. When the Butler Committee recommended extension of the requirements in the manner that we propose,[85] there was criticism, endorsed by Lord Hutton in the case of *Antoine*,[86] that such an approach was "unrealistic and contradictory". We do not agree with that assessment and address these two objections in turn.

5.68 We consider, first, whether to expect the Crown to prove all elements of an offence against a defendant who lacks capacity for trial is "unrealistic", in the sense that it places too great a burden on the prosecution. In addressing this question we have been particularly mindful of Lord Hutton's statement in *Antoine* of the need to:

> strike a fair balance between the need to protect a defendant who has, in fact, done nothing wrong and is unfit to plead at his trial and the need to protect the public from a defendant who has committed an injurious act which would constitute a crime if done with the requisite men rea.[87]

5.69 We also agree with Lord Hutton that this is particularly important where the act done has caused "death or physical injury to another person and there is a risk that the defendant may carry out a similar act in the future".[88]

5.70 However, as Lord Hutton himself goes on to observe in *Antoine*, in full trial "in very many cases the prosecution seeks to prove the requisite mens rea for the offence by proving the actions of the defendant and asking the jury to infer the mens rea from those actions". Rarely will there be direct evidence at full trial of a defendant's state of mind consistent with the defendant's guilt, particularly not evidence given or adduced by the defendant him- or herself. For this reason we do not consider that a reformed process, in which the prosecution must prove all elements, will present a significantly greater hurdle to the prosecution than they encounter in establishing the mental element in full trial where a fit defendant makes no comment in interview and declines to give evidence at trial. We do not think that the fact that the defendant has been found to lack capacity for trial will result, in many cases, in the jury being unable or unwilling to reach a judgement about the defendant's ability to form the requisite intent at the time of the offence, save in circumstances where the insanity verdict will be appropriate.[89]

[85] Report of the Butler Committee on Mentally Abnormal Offenders (1975) Cmnd 6244 at para 10.24.

[86] *Antoine* [2001] 1 AC 340, [2000] 2 WLR 703.

[87] [2001] 1 AC 340, [2000] 2 WLR 703 at [375].

[88] [2001] 1 AC 340, [2000] 2 WLR 703 at [375].

[89] We address this position at paragraph 5.90 and following below.

5.71 We have, however, invited the CPS[90] and Treasury Counsel[91] to test the proposition that proving all elements would not impose an unrealistic burden on the prosecution. We asked them to consider a number of examples of cases where establishing the fault element might be viewed as challenging.

5.72 We set out below in Table A some of those difficult case examples. We identify in the table the likely outcomes: at full trial, at a current section 4A hearing and under our recommendation to require proof of all elements.

Table A: Proving all elements, case examples

Scenario	Likely outcome: Full trial of fit defendant	Likely Outcome: Unfit defendant (Current law)	Likely outcome: Defendant lacking capacity (proposed reforms)
Murder: issue as to intent Defendant, T (learning disability and personality disorder), alleged to have caused death of baby by shaking. T states on arrest that she did not appreciate the risk posed by her actions.	Convicted of murder: if jury satisfied that T appreciated that death/serious harm was a "virtual certainty" as a result of her actions (*Woollin*)[92] and jury treat that as intention. Acquitted of murder, convicted of unlawful act manslaughter: if jury find T did not or may not have appreciated the risk.	T found to have done the act of murder. No requirement to prove appreciation of the risk posed by shaking.	Allegation of murder proved: if jury satisfied that T appreciated that death/serious harm was a "virtual certainty" as a result of her actions (*Woollin*) and treat that as intention. Acquitted of murder, unlawful act manslaughter allegation proved: if jury find T did not or may not have appreciated the risk.

[90] Meetings dated 25 November 2014 and 23 February 2015.

[91] Meeting dated 29 January 2015. Treasury Counsel are barristers appointed by the Attorney General to advise and appear on behalf of the prosecution in the most serious or complex cases, especially those of difficulty, sensitivity or profile.

[92] [1999] 1 AC 82, [1998] 3 WLR 382.

Scenario	Likely outcome: Full trial of fit defendant	Likely Outcome: Unfit defendant (Current law)	Likely outcome: Defendant lacking capacity (proposed reforms)
Rape: **reasonable belief in consent** Defendant, L (personality disorder and learning disability), alleged to have raped V, raises reasonable belief in consent.	Convicted of rape: if jury satisfied belief not reasonable, judged by objective standards. Acquitted of rape: if, for example, jury cannot be sure belief is unreasonable given L's impaired ability to read social signals *B(MA)*.[93] Alternatively: found not guilty by reason of insanity (where *M'Naghten* rules satisfied).	L found to have done the act of rape. No requirement for jury to consider reasonable belief in consent (*Wells and others*).[94]	Allegation of rape proved: if jury satisfied belief not reasonable, judged by objective standards. Acquitted of rape: if, for example, jury cannot be sure belief is unreasonable given L's impaired ability to read social signals *B(MA).*[95] Alternatively: special verdict (where *M'Naghten* rules satisfied).
Sexual assault: dementia Defendant, D (vascular dementia arising from stroke post alleged incidents but pre arrest), faces allegations of sexual assault.	Convicted of sexual assault: if jury satisfied D did the act of sexually touching V who did not consent, D not reasonably believing that she consented. Acquitted of sexual assault: jury not sure that D touched V as alleged, or that V did not consent or where consider D might reasonably have believed that V was consenting.	Found to have done the act: jury satisfied D did the act of sexual touching and V did not consent. Acquitted of sexual assault: jury not sure that D touched V as alleged or that V did not consent.	Found to have done the act: jury satisfied D did the act of sexually touching V who did not consent, D not reasonably believing that she consented. Acquitted of sexual assault: jury not sure that D touched V as alleged, or that V did not consent or where consider D might reasonably have believed that V was consenting.

[93] [2013] EWCA Crim 3, [2013] 1 Cr App R 36, CA.

[94] [2015] EWCA Crim 2, [2015] 1 WLR 2797.

[95] [2013] EWCA Crim 3, [2013] 1 Cr App R 36, CA.

5.73 Having considered these difficult examples, both the CPS and Treasury Counsel noted that the burden on the prosecution would be more significant than is currently the case in section 4A hearings (as is plain from the table above). But they concluded that in general the burden on the prosecution would not be significantly greater than at full trial. Mark Heywood QC observed that cases of joint enterprise or secondary liability (of the sort identified in example 9 at paragraph 5.33 above) might be difficult to establish, but on balance also considered that the reforms were workable and appropriate.

5.74 We agree that the burden on the prosecution would indeed be greater under our proposals than under the current section 4A procedures. However, we consider that these difficult cases, set out above, reveal the importance of the proof of all elements in identifying defendants in relation to whom it is justified to impose a disposal, and those on whom imposing a disposal may not be appropriate. Having scrutinised the proposal in this way, we are satisfied that the requirement to prove all elements will result in greater fairness to the defendant who lacks capacity, but that this will not come at the expense of undue difficulty for the prosecution. We take the view that such an approach is proportionate, considering that what is at stake is not a conviction but the imposition of a protective disposal.

Other protections where residual concerns remain

5.75 Turning specifically to any residual public protection concerns, we note in addition, that in respect of many offences there are lesser charges that the jury could be invited to consider, whether included implicitly in the offence charged, or added to the indictment. In most cases the lesser offence is available on proof of a lesser fault element. Thus if the jury are not satisfied on a charge of causing grievous bodily harm with intent (contrary to section 18 of the Offences Against the Person Act 1861), for example, they may consider in the alternative an allegation of causing grievous bodily harm (contrary to section 20 of the Offences Against the Person Act 1861). This lesser offence would require the jury to be satisfied not of intent to do serious harm (required for section 18) but only of intention or recklessness as to the causing of some, non-trivial harm, to the complainant. The disposals available would not be altered by the lesser finding, although the Court's powers on resumption would be affected.[96]

5.76 Finally, we bear in mind that, in the unlikely event of there being an acquittal which caused concern, a defendant who suffered a treatable mental disorder and in relation to whom public protection concerns arose may be subject to civil sectioning under the Mental Health Act 1983 ("MHA") were that considered necessary.[97] Additionally, certain other orders may be available on acquittal, including a restraining order on acquittal[98] and a risk of sexual harm order.[99]

[96] See discussion in Chapter 9 below.

[97] MHA, s 3.

[98] Protection from Harassment Act 1997, s 5A.

[99] Sexual Offences Act 2003, s 123. Although this would require a separate hearing.

Is the requirement to prove all elements contradictory?

5.77 Turning to the second criticism endorsed by Lord Hutton, we consider now whether requiring the prosecution to establish the fault element of an offence at a determination of fact hearing is contradictory.

5.78 First, we do not consider proof of the fault element to be contradictory in light of the lack of conviction at the conclusion of the process. As we set out at paragraph 5.64 above, we consider proof of all elements to be essential to allow the defendant who lacks capacity the same opportunity to be acquitted as would be enjoyed by a fit defendant in the same position.

5.79 Secondly, taking a logical approach, there appears to be no reason why the fact that a defendant may now be unable to participate effectively in a trial necessarily means that it is inappropriate for the prosecution to consider what was in his or her mind at the time of the alleged offence. The fact that the defendant cannot participate effectively of course means that he or she cannot be expected to defend him- or herself against the allegation at full trial, and may be unable to give evidence. However, this does not inevitably mean that requiring the prosecution to prove the matter is also inappropriate.

5.80 Indeed, it is apparent from recent developments in the law surrounding the division of conduct and fault elements, in cases such as *B(M)*[100] and *M(KJ)*,[101] that the courts do not consider it wholly inappropriate for there to be consideration by the jury of some aspects of the defendant's state of mind. Nor is there suggestion that such scrutiny by the jury in relation to unfit defendants has caused difficulty.

5.81 Additionally, under the current law, where "it is expedient to do so and in the interests of the accused" the court may postpone consideration of the defendant's unfitness until the opening of the defence case.[102] In such circumstances a defendant, who may subsequently be determined to be unfit to plead, would be able to make a submission of no case to answer at the close of the prosecution's case. This could be made on the basis that the prosecution had failed to adduce sufficient evidence in relation to the defendant's state of mind on which a properly directed jury could convict the defendant. So, even under the current arrangements, the prosecution can be expected to adduce reliable evidence of the unfit defendant's state of mind in the doing of the alleged act.

5.82 Finally, it is clear from *Jagnieszko*[103] that where a defendant has given an account in interview at a time when he or she may not have been impaired, then that could be adduced and relied upon during a section 4A hearing, with appropriate warnings. As Sir Brian Leveson P concludes in *Wells and others*:

> Where a defendant's disability impacts on his/her ability to take part in a trial but he/she is not otherwise affected by a psychiatric condition

[100] [2012] EWCA Crim 770, [2013] 1 WLR 499.

[101] [2003] EWCA Crim 357, [2003] 2 Cr App R 21, CA.

[102] CP(I)A, s 4(2).

[103] [2008] EWCA Crim 3065.

such as renders what is said in interview unreliable (whether or not the delusional traits are apparent on the face of the interview), there is no reason why the jury should not hear them albeit with an appropriate warning.[104]

5.83 There seems therefore to be no objection in principle to the jury examining a defendant's state of mind at the time of the alleged offence, or shortly thereafter, when he or she is found later to lack capacity for trial.

Advantage to complainants, witnesses and others affected by the alleged offence

5.84 We are also aware that for some complainants and witnesses, and others affected by offences committed by defendants who lack capacity, the very limited scrutiny of the offence under the current section 4A procedure is itself a cause of distress. This was not raised in terms of a complaint about the lack of a conviction, and the absence of a finding of culpability and censure of the sort that would follow a full trial. Rather, what was raised with us by one particular victim[105] was that the limited examination required of the jury, in the absence of the consideration of any fault element, resulted in a grossly misleading picture of the offence emerging at the section 4A hearing. This individual welcomed the proposal that the jury be required to consider all elements of the offence, so that a more complete picture of the alleged offence would be presented at the hearing.

Conclusion: The Crown to prove all elements of the offence?

5.85 In light of the difficulties widely acknowledged to arise in relation to the current procedures, and following our analysis of the proposal advanced in the IP, **we recommend that:**

(1) **The prosecution be required to establish all elements of the offence charged against a defendant who has been found to lack capacity for trial**[106] (see draft Bill clauses 9 and 38 (magistrates' proceedings)).

(2) **Where the jury are satisfied that the prosecution have established all the elements of the offence beyond reasonable doubt, they will return a finding that the allegation is proved against the defendant** (see draft Bill clauses 9(4) and 38(4) (magistrates' proceedings)).

(3) **Where they are not so satisfied they will acquit the defendant** (see draft Bill clauses 9(5) and 38(5) (magistrates' proceedings)). (This is subject to the question of a special verdict being raised, as discussed below).

[104] [2015] EWCA Crim 2, [2015] 1 WLR 2797 at [20].

[105] Meeting with family members bereaved by homicide committed by unfit defendants, 13 February 2015.

[106] Subject to the judge concluding that it is appropriate to proceed to an alternative finding procedure.

5.86 We have until this point referred to the hearing following a finding of lack of capacity as the "section 4A hearing" or the "determination of facts". In light of the statutory changes that we recommend, and the expanded nature of the enquiry at this stage, we propose to call this reformed hearing an "alternative finding procedure".

Issue: Introducing a special verdict

5.87 It is plain from responses that we have received to CP197 and the IP that we need to clarify the purpose and scope of the special verdict that we proposed in CP197. Several respondents to the IP[107] queried whether the special verdict is synonymous with an insanity verdict in full trial. Or, by implication, whether it extends to situations where the defendant's mental disorder or learning disability at the time of the offence might have had some effect on the defendant's ability to form the requisite intention but not to the degree that it gives rise to a defence of insanity.

Discussion: Introducing a special verdict

The purpose of introducing an insanity verdict

5.88 We consider that the introduction of a special verdict into the alternative finding procedure is necessary to allay public protection concerns which might otherwise arise in relation to defendants who are lacking in capacity but would also be liable to a special verdict of not guilty by reason of insanity at full trial. Sir Brian Leveson P in *Wells and others* raised an example of such a situation:

> If…it was necessary for the Crown to prove all the ingredients of murder, a paranoid and delusional schizophrenic would be able legitimately to plead self defence to murder on the basis that he or she truly believed that he or she was being attacked by an alien even though his or her interaction with his or her victim was, in objective reality, entirely benign. Subject to intervention under the Mental Health Act 1983, he would then be free to do so again.[108]

5.89 Were the special verdict to be available at the alternative finding procedure, the jury would be likely to return a verdict of not guilty by reason of insanity at the alternative finding procedure in respect of the defendant in this example. In relation to self-defence, where it is raised by a person labouring under paranoid delusions at the time of the offence, the Court of Appeal have confirmed in the case of *Oye* (considering *Martin*[109]) that "an insane person cannot set the standards of reasonableness as to the degree of force used by reference to his own insanity".[110] Therefore the jury in Sir Brian Leveson P's example would be

[107] David Hughes (member of the public, formerly of the Law Commission) and Professor Ronnie Mackay.

[108] [2015] EWCA Crim 2, [2015] 1 WLR 2797 at [10]. This concern is repeated later at [39] in the same judgment.

[109] [2001] EWCA Crim 2245, [2003] QB 1, CA.

[110] [2013] EWCA Crim 1725, [2014] 1 WLR 3354 at [47]. Lord Justice Davis in *Oye* confirmed that the second limb of self-defence does include an objective element by reference to reasonableness, even if there may also be a subjective element.

likely to conclude that the defendant was not acting in self-defence. The basis for this would be that, even though he or she may have held, as a result of a paranoid delusion, a genuine belief in the need to defend him- or herself, the defendant's response to that perceived threat was not, judged against reasonable non-delusional standards, proportionate in the circumstances.

The scope of the verdict

5.90 The special verdict that we propose is intended to be synonymous with an insanity verdict for a fit defendant.[111] This would mean that, at a hearing following a finding of lack of capacity, a defendant would only be found not guilty by reason of insanity if the jury concluded that, at the time of the alleged offence, the defendant did not know the nature and quality of the act that he or she did, or that he or she did not know that it was wrong.[112] This condition would only satisfy the requirement for a special verdict if it arose from a "disease of the mind", and the court had heard evidence from two registered medical practitioners, at least one of whom was approved under section 12 of the MHA.[113]

5.91 As a result, the operation of the special verdict that we propose for defendants who lack capacity for trial is a narrow one, as is the defence of insanity at full trial. We have discussed elsewhere the difficulties that the current formulation of the insanity verdict gives rise to at full trial.[114] We remain of the view that there are strong arguments for reforming that defence, but until that occurs, we take the view that it is important for the defence of insanity at full trial, and the special verdict at an alternative finding procedure, to operate in the same way.

5.92 To extend the special verdict for defendants who lack capacity to situations where the defendant's mental state at the time of the offence may have been affected by his or her condition, falling short of insanity, seems to us to be a wholly inappropriate extension of the verdict. It would place in jeopardy restrictive disposals defendants who ought properly to be entitled to an acquittal.

5.93 We do not consider that such an approach could be justified on public interest or public protection grounds, or indeed that it is required for the reasons set out at paragraph 5.66 and following above.

[111] That is a defendant who was insane at the time of the offence but has recovered capacity by the time of trial.

[112] *M'Naghten's Case* (1843) 10 Cl & Fin 200, 8 ER 718.

[113] Criminal Procedure (Insanity and Unfitness to Plead) Act 1991, s 1(1). Section 12 MHA approval designates a registered medical practitioner as having special experience in the diagnosis or treatment of mental disorder. Section 12 MHA approved registered medical practitioners are generally, but not always, psychiatrists.

[114] Criminal Liability: Insanity and Automatism (July 2013) Law Commission Discussion Paper. See also more recently J J Child and G R Sullivan, "When does the Insanity Defence Apply? Some Recent Cases" [2014] 11 *Criminal Law Review* 788.

Is it necessary to have a special verdict, or could sectioning under the civil provision of the Mental Health Act 1983 suffice to protect the public?

5.94 We canvassed in the IP,[115] whether instead of introducing a special verdict, defendants who might otherwise have been liable to receive a special verdict could be adequately dealt with under sections 3 or 7 of the MHA.[116] This possible proposal was raised by respondents to CP197. We considered it appropriate to consult on this option in light of our interest in diverting defendants who lack capacity from the criminal justice system wherever that is possible and appropriate.

5.95 There was a reasonable degree of support for this proposal within the legal community, especially from solicitors.[117] In addition, there is a strong argument that such an approach is preferable because it is non-discriminatory (Professor Jill Peay).

5.96 However, there remain a significant number of consultees who have concerns about allowing civil protections to address potentially dangerous individuals who come to the attention of the courts.[118] There was particular concern from psychiatrists who observed variously:

(1) That public protection concerns would be inadequately addressed by the civil sections of the MHA. The issue of dangerousness "loses significance/relevance in civil sections of the MHA" (Dr Michael Kavuma).

(2) The use of the civil sections "essentially for public protection would contravene the UNCRPD"[119] (Dr Michael Kavuma).

(3) The civil sections should be used where they are required, not purely because of risk (Forensic Psychiatrists SW Yorkshire NHS Foundation Trust).

(4) Arranging a MHA assessment is cumbersome and cannot be relied upon to occur in sufficient time (Royal College of Psychiatrists).

(5) General psychiatrists might "baulk" at being asked to manage the risk presented by a violent offender which they might consider more appropriately addressed by forensic colleagues (Charles de Lacy).

5.97 The CPS summarised the difficulties raised by these responses in its observation that "too many risks would be introduced by reliance on the civil orders alone".

[115] Further Question 19.

[116] See IP paras 5.34 to 5.43 for fuller discussion.

[117] Nigel Barnes, Carolyn Taylor, Law Society.

[118] Justices' Clerks' Society, Dr Michael Kavuma (consultant forensic psychiatrist), Forensic Psychiatrists SW Yorkshire NHS Foundation Trust, Royal College of Psychiatrists, Charles de Lacy, Professor Ronnie Mackay, Faculty of Forensic and Legal Medicine, CPS, Holroyde J.

[119] United Nations Convention on the Rights of Persons with Disabilities.

5.98 On balance, we consider that to remove the court's power to deal with a defendant who is unable to participate, but who would also have been able to avail him- or herself of an insanity verdict at trial, is a significant step. It would leave the court unable to impose a disposal on such a defendant and may present a significant risk to the public. In the absence of greater enthusiasm for such a bold measure, especially from the psychiatric community, there seems no safe basis for taking the proposal further.

Concerns in relation to a two-stage procedure for special verdict cases

5.99 Respondents to CP197, whilst broadly in favour of a special verdict, did not endorse the two-stage process by which we had initially proposed it be considered.[120]

5.100 In acknowledgement of these concerns, we asked in the IP[121] whether the special verdict should be available to the jury at their initial consideration of the facts.

5.101 There was significant enthusiasm, from a wide range of consultees, for a single-stage fact-finding determination.[122] Their support was based on a number of factors:

(1) That juries are capable of following complex routes to verdict (HHJ Sarah Paneth,[123] Centre for Evidence and Criminal Justice Studies).

(2) A two-stage process would be cumbersome and have an adverse effect on all involved (CPS).

(3) A two-stage process might not necessarily achieve the protection for the defendant that was envisaged in CP197 (David Hughes).

5.102 Those who were uneasy about a single-stage determination were those who generally preferred reliance on civil MHA powers in place of a special verdict (Nigel Barnes, Professor Jill Peay (although the latter was more comfortable with a special verdict if it was given the very narrow "insanity" basis which we have proposed above at paragraph 5.90)).

[120] See discussion at IP paras 5.8 to 5.20. Under the two-stage test that we proposed in CP197, the special verdict would not be available when the jury initially considered whether all elements of the offence had been proved against the defendant. If the defendant was acquitted, then the judge would have a discretion whether to order a second hearing. At that second hearing, the jury would determine whether or not the acquittal was by reason of mental disorder existing at the time of the offence.

[121] Further Question 21.

[122] Council of HM Circuit Judges, HM Council of District Judges (Magistrates' Court), Law Society, Justices' Clerks' Society, Dr Eileen Vizard CBE, Royal College of Psychiatrists, Dr Susan O'Rourke, Faculty of Forensic and Legal Medicine, Centre for Evidence and Criminal Justice Studies, CPS, Holroyde J.

[123] Speaking at the round table discussion with judges sitting at Snaresbrook Crown Court, 17 July 2014.

Should there remain a discretion for the judge to order a second stage hearing?

5.103 Concern was raised by the Council of HM Circuit Judges that there may remain some "rare cases" in which a two-stage process would be required. In light of this, we asked in the IP[124] whether judges should retain a discretion to order a second stage process for consideration of the special verdict in cases where exceptional prejudice was likely to arise.

5.104 This question split consultees. A number were in favour of the retention of the discretion to provide sufficient flexibility to address rare instances of prejudice.[125] Others took the view that such a requirement was so unlikely that the added complication was unjustified.[126]

5.105 On one view, retaining the discretion, whilst cumbersome, should not have any adverse effects. The concerns raised by those who rejected the two-stage process for every case would be unlikely to be engaged, since the discretion would be exercised, presumably, on the judge's consideration of the unusual features of the case. This would only be at the request of the defence who perceived some undue prejudice in the normal single-stage hearing.

5.106 However, we remain sceptical that there are likely to be any, or at least sufficient numbers of, instances that justify retaining the procedure. We agree with judicial observations that juries cope well with careful directions about the use that they can make of expert evidence in analysing different issues. Finally, we are also uneasy about the prospect of such a discretion being used more widely than initially envisaged, and there being a danger that acquittals become reopened in cases other than the truly exceptional.

Conclusion: Introducing a special verdict

5.107 In light of this discussion, **we recommend:**

(1) **A special verdict, synonymous with an insanity verdict at full trial, be available to the jury at the alternative finding procedure** (see draft Bill clauses 10 and 39 (magistrates' proceedings)).

(2) **Either party, or the court of its own motion, should be entitled to raise the issue of insanity at the alternative finding procedure** (see draft Bill clauses 10(2) and 39(2) (magistrates' proceedings)).

(3) **A special verdict should only be available where the court has received evidence from two registered medical practitioners, one of whom is duly approved** (see draft Bill clauses 11(3) and 40(2) (magistrates' proceedings)).

[124] Further Question 22.

[125] Council of HM Circuit Judges, Nigel Barnes, Rudi Fortson QC, Faculty of Forensic and Legal Medicine, CPS.

[126] HM Council of District Judges (Magistrates' Courts), HHJ Tim Lamb QC, Law Society, Dr Eileen Vizard CBE, Professor Ronnie Mackay, Centre for Evidence and Criminal Justice Studies, Holroyde J.

(4) Where the issue of insanity is raised, it should be considered by the jury in a single-stage fact-finding process.

Issue: Should partial defences to murder be available at the alternative finding procedure?

5.108 In reviewing the scope and purpose of our proposal to require the Crown to prove all elements of the offence, we have also considered again whether partial defences to murder (diminished responsibility, loss of control and acting in pursuance of a suicide pact) ought to be available to a defendant charged with murder at the alternative finding procedure.

Discussion: Should partial defences to murder be available at the alternative finding procedure?

5.109 In approaching this question we have in mind three particular issues. First, that the partial defences are designed primarily to protect a defendant from the mandatory life sentence for murder where his or her culpability may be reduced by virtue of his or her loss of control/diminished responsibility/suicide pact. The mandatory life sentence would not, of course, be available in procedures following a finding of lack of capacity, because the defendant cannot be convicted of murder.

5.110 Secondly, we focus on the purpose of the alternative finding procedure. The hearing is conducted to ensure that a defendant is not subject to a disposal where he or she is entitled to be acquitted, in full, of the allegation. Where murder is charged, the partial defences do not result in an outright acquittal in relation to the defendant's act of killing, since they result in a conviction for manslaughter. The defendant would be liable to have a disposal imposed upon him or her, whether he or she was found to have done the act of murder or manslaughter by reason of diminished responsibility/loss of control/suicide pact. Successfully establishing a partial defence would not remove the court's powers to impose a disposal.

5.111 Thirdly, once it is established that the defendant did the act of killing, further consideration of the degree of culpability attributable to the defendant (under one of the partial defences), is irrelevant to this procedure (with one caveat, see paragraph 5.112 below). The identification of the correct disposal is not a matter of weighing culpability (as it would be with sentence after trial), but of examining the risk posed by the defendant and what support or treatment is required to prevent further concerning behaviour.

Mandatory restriction order

5.112 The caveat, referred to above, is that under the current law following a finding at the section 4A hearing that the defendant did the act in relation to a charge of murder, if the defendant satisfies the conditions for a hospital order[127] the court is

[127] Under s 37(2) of the MHA, namely that the court is satisfied on the evidence of two RMPs that the accused is suffering from a mental disorder, and that mental disorder is of a nature or degree which makes it appropriate for him or her to be hospitalised for medical treatment and that medical treatment is available to him or her, and that the most suitable way of dealing with him or her is under this section.

required to impose a hospital order with restriction.[128] This mandatory restriction order applies only to cases of murder. Thus, under the current system, if a defendant were able to establish a partial defence to murder, and received a finding that he or she had done the act of voluntary manslaughter at the section 4A hearing, he or she would escape the mandatory restriction order. The court would, however, retain the discretion to impose such a restriction, where satisfied that the defendant posed a risk of serious harm to the public.

Numbers

5.113 Before turning to consider the options in relation to the availability of the partial defences at the alternative finding procedure, it is useful to consider how many defendants this issue is likely to affect. Empirical research suggests that in the last five years there have been on average 98 findings of unfitness per year. Murder is the principal charge in 4.2% of unfitness cases;[129] approximately 4 cases per year. We anticipate that in only a fraction of those cases would there be an evidential basis for a defendant who lacks capacity to rely on one of the partial defences. The defendant, although lacking in capacity, would nonetheless have to be sufficiently able to participate in the procedure to the extent that he or she could give evidence to establish the defence or provide sufficient instructions for evidence to be raised on his or her behalf. We anticipate that, under the current law, in only one or two unfitness cases per year would a partial defence be engaged if available. Even if the numbers of unfit defendants increased significantly, were our recommendations for amending the test to be enacted, we still do not anticipate that more than two or three defendants per year would be affected by this issue.

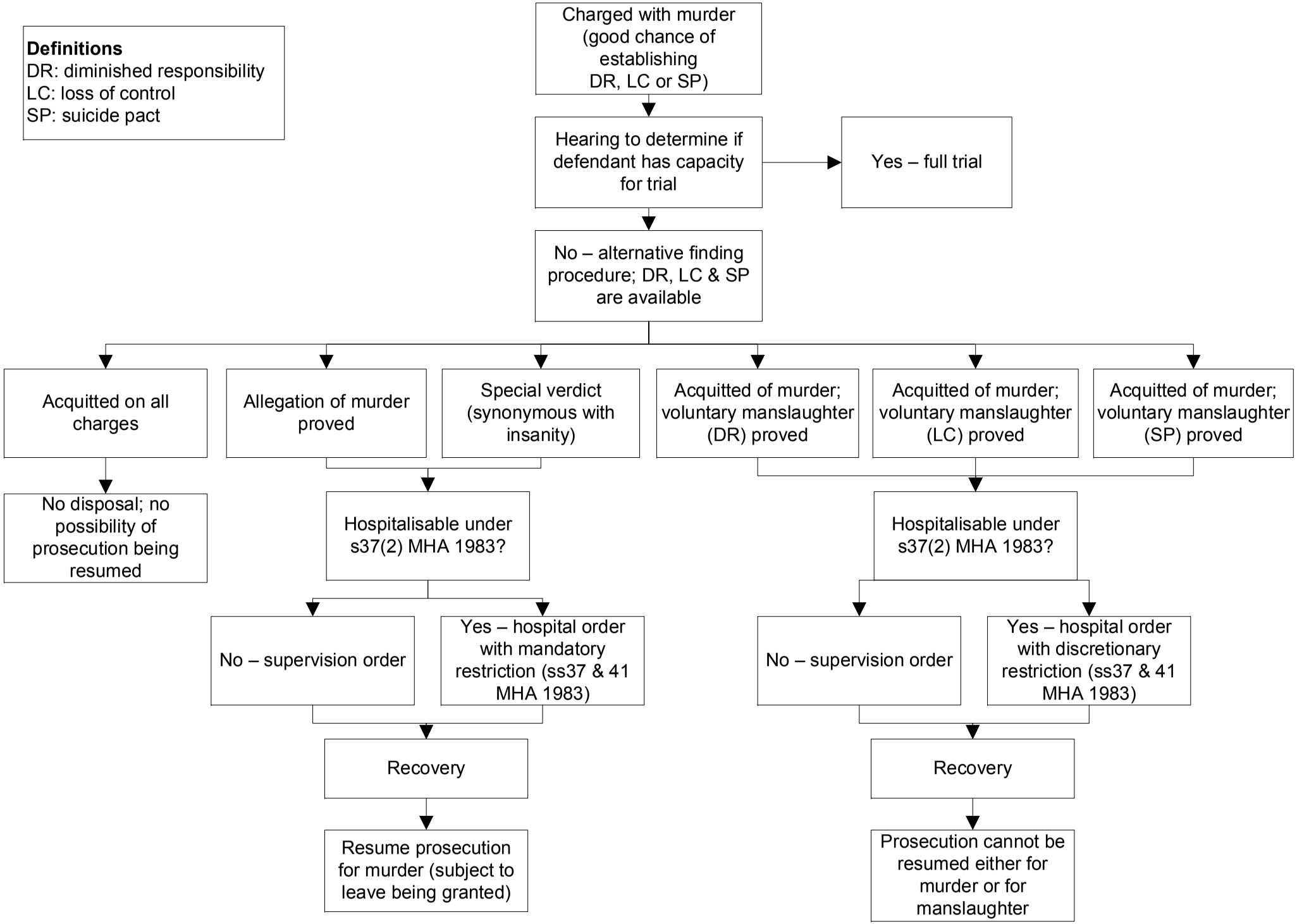
5.114 Thus, although the issues that this policy question engages are of the most serious sort, it is important, we think, to keep in mind that the group affected, even if the numbers increased substantially, would probably be no more than two or three defendants per year.

Examining how partial defences would function at the alternative finding procedure were they available

5.115 In reviewing the position with regards to partial defences, we consider that there are strong arguments for recommending that they should not be available at the alternative finding procedure. We attach below a flowchart of the verdicts available to the jury if partial defences were included, and the disposals which could be imposed.

[128] Under s 5(3) of the CP(I)A. A restriction order has the effect of allowing the criminal justice system to maintain control over the future release of the defendant, and enables conditions to be placed on their release in due course. The defendant who is subject to a live restriction order cannot be discharged from hospital, granted leave of absence or transferred without the consent of the Secretary of State as long as the order is in force. Such orders are made without limit of time. The responsible clinician is required to provide a report on the defendant to the Secretary of State, at least yearly. We discuss the mandatory restriction order in more detail at paras 6.6 to 6.7 and 6.104 to 6.110 below.

[129] R D Mackay, "Unfitness to Plead – Data on Formal Findings from 2002 to 2014", Appendix A available at http://www.lawcom.gov.uk/project/unfitness-to-plead/.


Definitions
DR: diminished responsibility
LC: loss of control
SP: suicide pact
Charged with murder (good chance of establishing DR, LC or SP)
Hearing to determine if defendant has capacity for trial
Yes – full trial
No – alternative finding procedure; DR, LC & SP are available
Acquitted on all charges
Allegation of murder proved
Special verdict (synonymous with insanity)
Acquitted of murder; voluntary manslaughter (DR) proved
Acquitted of murder; voluntary manslaughter (LC) proved
Acquitted of murder; voluntary manslaughter (SP) proved
No disposal; no possibility of prosecution being resumed
Hospitalisable under s37(2) MHA 1983?
Hospitalisable under s37(2) MHA 1983?
No – supervision order
Yes – hospital order with mandatory restriction (ss37 & 41 MHA 1983)
No – supervision order
Yes – hospital order with discretionary restriction (ss37 & 41 MHA 1983)
Recovery
Recovery
Resume prosecution for murder (subject to leave being granted)
Prosecution cannot be resumed either for murder or for manslaughter

5.116 As can be seen in the flowchart above, the inclusion of partial defences would make the route to verdict for the jury potentially very complicated. Jury deliberation would be especially difficult where, as may sometimes be the case, the jury would have to consider two potential partial defences. For example, whether at the time the defendant killed he or she acted in a state of diminished responsibility or of loss of control. The jury may also have to consider at the same time whether there should instead be a special verdict. Direction to the jury is extremely complicated in such cases, and their task in navigating towards unanimous or majority verdicts on any one of those positions can be extremely difficult. The jury would almost certainly have to engage in careful analysis of complex medical evidence if partial defences are engaged.

5.117 However, as we discuss above at paragraph 5.110, this greater burden on the jury will have little practical purpose. Whether the partial defence is established or not will make no difference to the substance of the disposal imposed, save in respect of the mandatory restriction order in cases of murder where the defendant is suitable for hospitalisation[130] which we address below.

5.118 More problematic, we consider, is the restriction on the Crown's powers to resume prosecution on recovery of the defendant. If the partial defences were available and the defendant established his or her partial defence, on recovery the defendant could not be the subject of resumed proceedings for murder (having been acquitted on that allegation). There would be no mechanism for securing a verdict of guilty of voluntary manslaughter; it could not be available in the absence of the prospect of a murder conviction, nor conceptually could it be a stand-alone offence suitable for trial by jury. Nor would involuntary manslaughter be an appropriate charge, since the essence of the partial defences is of intentional killing. In short, retaining partial defences raises significant problems for remission which in turn raise serious issues of public protection.

5.119 These problems must be balanced against the potential disadvantages to the defendant should the partial defences not be available. In addition to the issue of the mandatory restriction order, we have in mind in particular that the defendant would be unable to achieve an acquittal for murder at the alternative finding procedure stage, even though he or she may have a good basis for a partial defence. We acknowledge this loss of opportunity. However, we consider that the defendant who cannot participate effectively cannot truly be said to be disadvantaged in comparison with the defendant who can. The latter defendant, in order to achieve his or her acquittal for murder, has to put him- or herself in jeopardy of conviction for murder, with the life sentence which follows, or enter a plea of guilty to manslaughter. The defendant who cannot participate effectively, by contrast, is not at risk of conviction for murder at the alternative finding procedure. Indeed, if he or she remains unable to participate effectively he or she will never be tried for the allegation. If the defendant does recover and trial proceedings are resumed, he or she will have the opportunity to establish the partial defence then.

[130] Under MHA, s 37(2).

Lifting the mandatory restriction order

5.120 In weighing these factors, we have considered with some care the mandatory restriction order under section 5(3) of the CP(I)A. We come to the conclusion that the amendment to section 5 of the CP(I)A by the Domestic Violence, Crime and Victims Act 2004,[131] to require the defendant to be otherwise suitable for a hospital order before the mandatory restriction can be applied, is liable to result in arbitrary outcomes. Indeed it might be argued that the provision discriminates against those defendants who have a treatable "mental disorder" under the meaning of the MHA. Such a defendant, following a finding that he or she had done the act of murder, would be subject to a mandatory restriction order without limit of time, whether or not he or she represented a risk of serious harm to the public.[132] However, a defendant in an identical position, but who does not suffer a treatable "mental disorder" would receive, at most, a supervision order for a maximum of two years, however significant the risk he or she presented of serious harm to the public.

5.121 Such an approach appears to us to be out of step with that taken in the Equality Act 2010 and article 14 of the United Nations Convention on the Rights of Persons with Disabilities ("UNCRPD"), which places an absolute prohibition on deprivation of liberty on the basis of disability alone.[133]

5.122 As we set out in more detail in Chapter 6 at paragraph 6.107 and following below, we do not consider that this discriminatory position can be justified and we recommend the removal of the mandatory restriction order.

Different considerations for the defence of insanity

5.123 We consider that the position of the special verdict can be readily distinguished from that of the partial defences. The special verdict bears some similarity to the partial defences in that the special verdict also entitles the court to impose one of the disposals. However, the special verdict requires consideration of a different sort. While partial verdicts consider the degree of culpability, the special verdict looks at the wholesale negation of criminal responsibility by virtue of a "disease of the mind". The disposal is engaged to protect the public in those circumstances, such a defendant being otherwise entitled to an acquittal by virtue of the effect of his or her condition. These defendants are not infrequently considered dangerous, and for this reason, we consider that there is a public interest in maintaining that special verdict option, in its very narrow confines. We also note that there is no disadvantage to the defendant who cannot participate effectively in this regard, since the special verdict, not guilty by reason of insanity, is available at full trial in the same way.

[131] Domestic Violence, Crime and Victims Act 2004, s 24.

[132] As required otherwise under s 41 of the MHA.

[133] See the Statement on article 14 of the United Nations Convention on the Rights of Person with Disabilities (Geneva, September 2014), http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15183&LangID=E (last visited 18 November 2015).

Conclusion: Should partial defences to murder be available at the alternative finding procedure?

5.124 In balancing these competing concerns, **we recommend that the partial defences should not be available at the alternative finding procedure** (see draft Bill clause 11(4)).

Issue: The evidential basis for leaving a full defence to the jury

5.125 Some respondents to CP197 expressed uncertainty as to what we meant when we stated in CP197 that there should be a "sufficient evidential basis" for leaving a defence to the jury. This is understandable in light of the difficulties that have arisen in relation to identifying "objective evidence" to found the jury's consideration of self-defence, mistake and accident at the section 4A hearing.[134] In light of this, we asked consultees in the IP[135] whether they would approve leaving to the jury any defence on which there was evidence on which a properly directed jury might reasonably find the defence made out, or the essential element unproven.

Discussion: The evidential basis for leaving a full defence to the jury

5.126 This approach was generally endorsed by the consultees who addressed the question.[136] In essence this proposal was welcomed because it places unfit defendants in the same position as fit defendants. Such a proposal would overturn the requirement, derived from the case of *Antoine*, for there to be objective evidence for a defence to be left to the jury.

Conclusion: The evidential basis for leaving a full defence to the jury

5.127 **We recommend that at an alternative finding procedure, any full defence (or basis for acquittal other than a partial defence) should be left to the jury, where there is evidence on which a properly directed jury might reasonably find the defence made out, or the essential element of the offence unproven** (see draft Bill clauses 11(5) and 40(3) (magistrates' proceedings)).

Issue: Should the jury be able to return a "not proven" verdict?

5.128 It is necessary to consider at this stage the available verdicts at the alternative finding procedure and what their status should be. This is to a large extent governed by consideration of powers to resume prosecution where the defendant recovers. We discuss below in Chapter 9 our recommendations for extending the scope for resumption of proceedings against a recovered defendant (with certain provisos) where there has been a finding adverse to the defendant at the alternative finding procedure.

[134] Following *Antoine* [2001] 1 AC 340, [2000] 2 WLR 703. Discussed at para 5.9 above.

[135] Further Question 20.

[136] Council of HM Circuit Judges, HM Council of District Judges (Magistrates' Courts), HHJ Tim Lamb QC, Law Society, Rudi Fortson QC, Dr Eileen Vizard CBE, Helen Howard (academic), Professor Ronnie Mackay, Faculty of Forensic and Legal Medicine, Centre for Evidence and Criminal Justice Studies, CPS, and (on an exceptional basis) Nigel Barnes.

5.129 The question also arises, however, as to whether there should be wider powers to resume prosecution of recovered defendants where there has been an acquittal or a special verdict at the alternative finding procedure. Two consultees to CP197 raised the question of whether a finding that the defendant had done the act or made the omission is a "holding position" or a final outcome.[137] In a recent publication,[138] Rudi Fortson QC explores this issue with regard to all the potential findings at the current determination of facts hearing. He suggests that if the outcome of a determination of facts is a "holding position" (which he takes to embrace all possible outcomes) then it is necessary to consider whether an acquittal, or qualified acquittal, should rather be framed as a finding of "not proven". This would then not operate as an outright acquittal and would leave the defendant open to prosecution being resumed against him or her on recovery. Fortson acknowledges, however, that there may be circumstances in which an outright acquittal ought to be the verdict at a determination (for example where DNA evidence exonerates the defendant) and so one assumes that this further option would also be available to the jury under his proposal.

Discussion: Should the jury be able to return a "not proven" verdict?

5.130 We think that it is important to consider whether a verdict of "not proven" should be available to a jury at an alternative finding procedure, either in place of, or in addition to an outright acquittal. This proposal has the advantage that it would allow the Crown greater opportunity to proceed against those defendants who subsequently recover sufficiently to be tried. It might also redress any lingering concerns arising out of the perceived greater burden on the prosecution to prove all elements of the offence at the alternative finding procedure.[139] However, we are inclined to agree with Rudi Fortson QC that to introduce a verdict of "not proven" alongside an outright acquittal may be to complicate the hearing unnecessarily. Our concern would be that the jury may find it difficult to distinguish between "not proven" and an outright acquittal, and might be tempted in all but the most obvious cases to find the case "not proven". This raises the prospect of defendants, who on the evidence should have been acquitted outright, being subject to concerns about prosecution being resumed on recovery. The prospect of future proceedings in these cases would also create a concerning degree of uncertainty for witnesses and complainants in what might be a large number of cases.

5.131 We also consider that, under our recommendations, there should be very few cases in which the flexibility of a "not proven" verdict would be welcomed. If adjournment to allow for recovery of capacity is appropriately used, and all efforts are made to facilitate full trial of defendants of borderline capacity, the number of cases where a defendant recovers capacity following an alternative finding procedure should be very small. The numbers of those who might have achieved an acquittal at the alternative finding procedure which was "both erroneous and

[137] Royal College of Psychiatrists, National Offender Management Service ("NOMS").

[138] R Forston QC, "Reforming Unfitness to Plead for Adults in the Crown Court: A practitioner's perspective" in B Livings, A Reed and N Wake (eds), *Mental Condition Defences and the Criminal Justice System: Perspectives from Law and Medicine* (2015) pp 15 to 17.

[139] Referred to at para 5.75 above.

profoundly contrary to public interest" (as Rudi Fortson describes it) should be even fewer. In the circumstances, we agree with Rudi Fortson's final position that rejecting the prospect of a "not proven" verdict is justified in the interests of fairness to the defendant and avoiding unnecessary complexity.

Conclusion: Should the jury be able to return a "not proven" verdict?

5.132 **We** therefore **recommend that the available verdicts, in relation to each charge, in a single-stage alternative finding procedure should be:**

(1) a finding that the allegation is proved against the defendant;

(2) an outright acquittal; or

(3) a qualified acquittal (a "special verdict" synonymous with an insanity verdict in full trial) (see draft Bill clauses 9 and 10, and 38 and 39 (magistrates' proceedings)).

Issue: Representation for the defendant at the alternative finding procedure

5.133 At present, the court has a duty to appoint a representative to put the case for the defendant at the determination of facts hearing.[140] This will not necessarily be the same person who has represented the defendant so far. Rather, the task for the court is to identify a representative who is "the right person for this difficult task".[141] As we observed in CP197, that representative, although he or she will obviously discuss the case with the accused, is not bound to follow the accused's instructions about the way in which the case should be run if the representative does not agree that those instructions are in the accused's best interests.[142] This was a matter of concern raised in the joint response of the Law Reform Committee of the Bar Council and the Criminal Bar Association of England and Wales. They asked at what point the duty owed by the representative to the court to act in the defendant's best interests in putting the case for the defence should override the defendant's autonomy.

5.134 In considering that concern, we also have in mind the duty imposed by the UNCRPD to give effect to the defendant's "rights, will and preferences", insofar as they can be identified, in any measures which restrict the exercise of his or her legal capacity.[143]

5.135 In the IP[144] we took the view that the power of the court to appoint a representative to act in the best interests of the defendant should be retained, even where a defendant who lacks capacity would otherwise not wish to be represented. We also considered that, although that representative should

[140] CP(I)A 1964, s 4A(2)(b).

[141] *Norman* [2008] EWCA Crim 1810, [2009] 1 Cr App R 13 at [34].

[142] CP197 para 6.3. Indeed the different responsibility placed on the advocate is underlined by the fact that he or she is paid out of central funds rather than through the Criminal Defence Service (*Norman* [2008] EWCA Crim 1810, [2009] 1 Cr App R 13 at [34]).

[143] UNCRPD, art 12(4).

[144] IP para 5.62.

respect the "rights, will and preferences" of the defendant where those are identifiable, the representative should continue to be entitled to override the defendant's expressed will and preferences where the representative identifies that to give effect to them would be contrary to the best interests of the defendant. We took the view that this exceptional approach was justifiable on the basis that a defendant who has been found to lack capacity for trial has been removed from the optimal full trial procedure with its fair trial guarantees. We considered that it is legitimate, in those circumstances, for the state to require that person's best interests to be properly represented. This is necessary both to protect his or her position but also to protect the legitimate interests of witnesses and the wider public in the fair and effective administration of justice.

Discussion: Representation for the defendant at the alternative finding procedure

5.136 There was significant support for our proposed approach from respondents.[145] However, two additional issues arise from the observations of consultees:

(1) That, given the challenges of representing a defendant in these circumstances, it would be of assistance if there was a code of practice, or guidance document, drafted by the Law Society and the Bar Council, for representatives acting in these difficult situations (Nigel Barnes). The Council of HM Circuit Judges suggested a number of steps which could be taken where the representative decides to depart from the defendant's instructions, which would be suitable for inclusion in such a guidance document.[146]

(2) Whether there needs to be an amendment to the current duty of the court to appoint a representative to put the case for the defence. In practice, as caselaw confirms,[147] the court does not always formally appoint such a representative and the representative already instructed continues to act without there being specific consideration of their ability to perform the role. Indeed in many cases it would be far preferable for the vulnerable defendant for the case to proceed with the representative currently instructed, with whom he or she will in all likelihood have had a number of meetings.[148] It would be problematic in many cases for a wholly new representative to be introduced, whatever his or her expertise, just before the alternative finding procedure. As Nigel Barnes observed, there should be a presumption that the advocate chosen by the defendant should retain conduct of the case.

[145] Council of HM Circuit Judges, HM Council of District Judges (Magistrates' Court), HHJ Tim Lamb QC, Professor Graeme Yorston, Karina Hepworth, Carolyn Taylor, Law Society.

[146] Such as the representative being obliged to inform the judge that he or she is departing from his or her instructions, a record being made of the defendant's expressed will and preference, and the representative's reasons for that departure.

[147] *O'Donnell* [1996] 1 Cr App R 286, (1996) 29 BMLR 65; *Egan* [1998] 1 Cr App R 121, [1997] Criminal Law Review 225; *McKenzie* [2011] EWCA Crim 1550, [2011] 1 WLR 2807; *B(M)* [2012] EWCA Crim 770, [2013] 1 WLR 499.

[148] As noted by the Centre for Evidence and Criminal Justice Studies in their response to the IP.

Conclusion: Representation for the defendant at the alternative finding procedure

5.137 We agree with the observations of the Bar Council and Criminal Bar Association that representing a defendant who lacks capacity can be a very challenging task. **We** endorse the proposal of Nigel Barnes and **recommend that a code of practice or guidance document should be drafted to assist representatives appointed by the court to put the case for the defendant**.

5.138 **We** also **recommend that the following procedural arrangements should be set out in statutory provisions:**

(1) that in every case the court should be required to appoint a person to put the case for the defendant following a finding of lack of capacity;

(2) in doing so the court should take into account the views of the defendant, in so far as they can be identified. However, an appointment should be made even where the defendant would prefer not to be represented;

(3) where a representative is already instructed for the defendant, the court should appoint that individual, unless the court is satisfied that the advocate will not be competent to deal with the issues arising in the hearing; and

(4) the representative should be required to give effect to the defendant's instructions, in so far as they can be identified, unless he or she concludes that to do so would be contrary to the defendant's legal best interests (see draft Bill clauses 13 and 41 (magistrates' proceedings)).

Issue: Alternative finding procedure alongside full trial of co-defendants

5.139 In CP197 we asked consultees whether a defendant found unfit to plead should be subject to a determination of facts conducted simultaneously with the trial of fit co-defendants.[149]

5.140 As we observed in CP197, the CP(I)A makes no provision for what should occur where an unfit defendant has co-defendants who are facing full trial. The issue was addressed by the Court of Appeal in *B and others*[150] who concluded that the trial of fit defendants alongside a determination of whether an unfit defendant did the acts alleged was permissible. However, as we discuss in detail in CP197,[151] such an approach can cause significant difficulties for both the fit and unfit defendants. This is especially so in cases where "cut-throat" defences are

[149] CP197 Question 7, full discussion of the issue set out at CP197 paras 7.27 to 7.44.

[150] [2008] EWCA Crim 1997, [2009] 1 WLR 1545. This was an exceptional case involving allegations against 10 defendants on a 32-count indictment spanning a period of 40 years.

[151] CP197 paras 7.27 to 7.44.

deployed,[152] where the question of an adverse inference from silence arises or where there may be applications to use bad character evidence. However, there are obvious public policy reasons why it may, in certain circumstances, be appropriate for the two proceedings to be heard together, particularly to avoid the need for a complainant and other witnesses to give evidence twice.

Discussion: Alternative finding procedure alongside full trial of co-defendants

5.141 Some consultees rejected the position in *B and others* and considered that the determination of facts should always occur separately from the trial of any co-defendants.[153] Their concerns focused on the difficulties outlined in CP197,[154] as well as the challenge for the jury in being required to return two different types of finding.

5.142 The greater number of respondents considered that it should continue to be permissible for both proceedings to be held simultaneously.[155] Consultees proposed that the circumstances in which such a power should be available might include:

(1) Where simultaneous proceedings would avoid the need for vulnerable witnesses to give evidence twice (Council of HM Circuit Judges).

(2) Where there is no conflict between the defendant lacking capacity to participate effectively in the trial and the defendant who has capacity (Council of HM Circuit Judges).

(3) Where it would be in the interests of justice for all defendants for their cases to be heard together because the evidence in relation to each is so detailed and heavily interwoven (Bar Council and Criminal Bar Association).

(4) Where the evidence of co-defendants might assist in relation to the issue of the mental state at the time of the offence of the defendant who is unable to participate effectively (Council of HM Circuit Judges).

(5) To avoid delay (HM Council of District Judges (Magistrates' Courts)).

5.143 A number of those consultees in favour of retaining the power to hold simultaneous proceedings considered that such a power should be sparingly

[152] A cut-throat defence is where one defendant seeks to establish his or her own innocence by implicating a co-defendant.

[153] HHJ Tim Lamb QC, Carolyn Taylor, the Law Society, Dr Lorna Duggan, Compass Psycare, the National Steering Group with responsibility for Health Policy on Offenders with Learning Disability.

[154] CP197 paras 7.36 to 7.44

[155] Justices' Clerks' Society, Council of HM Circuit Judges, HM Council of District Judges (Magistrates' Courts), the South Eastern Circuit, CPS, Criminal Bar Association/Bar Council, Professor Ronnie Mackay, Professor Rob Poole, the Edenfield Centre (adult forensic secure service), Dr Eileen Vizard CBE, Just for Kids, Richard Mills (National Autistic Society), Kids Company.

exercised and should not be regarded as the norm.[156] The Bar Council and Criminal Bar Association felt that there may be merit in a rebuttable presumption that the hearings be separate. Others felt that the issue should be, simply, within the discretion of the judge, to consider on a case by case basis.[157] The CPS took the view that the normal rules of joinder and severance[158] should apply, and that in the majority of cases there should be joint proceedings for those who are jointly indicted.

5.144 We agree with the majority view that, despite the difficulties which may arise in such cases, it should continue to be possible for the alternative finding procedure to be conducted simultaneously with the trial of co-defendants. We are particularly persuaded by the fact that this might in some circumstances be the only mechanism to avoid a vulnerable complainant giving evidence twice. We also bear in mind that, under the reforms recommended in this report, the risk of the appearance of unfairness to the different defendants should be reduced, since all elements of the offence will be considered against all defendants.

5.145 We have considered with care whether there should be a rebuttable presumption that the alternative finding procedure for a defendant who lacks the capacity to participate effectively should be conducted separately from the trial of co-defendants. In our view such a presumption is appropriate. In reaching that decision we have borne in mind in particular:

(1) Given the advances in the use of technology to support vulnerable witnesses, there should be fewer cases where separate proceedings would necessarily require a vulnerable complainant to give evidence for a second time. We have in mind, in particular, the early indications of success in the piloting of the use of pre-recorded cross-examination of vulnerable witnesses.[159]

(2) The difficulties for the jury in considering alternative findings in the same proceedings.

(3) The significant adjustments that will have to be made in the alternative finding procedure to allow the defendant to participate to the fullest extent possible, and how such adjustments might affect the position of the co-defendants.

(4) The length of multi-handed proceedings and the effect of them on the defendant who lacks capacity.[160]

[156] The Council of HM Circuit Judges, Just for Kids Law.

[157] Professor Ronnie Mackay, South Eastern Circuit.

[158] The power of the judge to review whether charges and defendants should be tried together or separately, now contained within CrimPR 2015 (SI 2015 No 1490) r 3.21 and 3.22.

[159] Launched to consider the issues surrounding the implementation of s 28 of the Youth Justice and Criminal Evidence Act 1999.

[160] See in particular the observations of Paula Backen in her response to the IP, having assisted numerous vulnerable defendants as an intermediary during lengthy cases.

Conclusion: Alternative finding procedure alongside full trial of co-defendants

5.146 **We** therefore **recommend:**

(1) That there should be a rebuttable statutory presumption that the alternative finding procedure in relation to any defendant should be conducted separately from the trial of any co-defendants.

(2) The starting position should therefore be separate proceedings, unless, on the application of any party, or the court of its own motion, the court determines that it is in the interests of justice for the alternative finding procedure and the trial of co-defendants to proceed together.

(3) In considering whether simultaneous proceedings would be in the interests of justice, the court should take into account how joint proceedings would be likely to affect:

(a) the interests of the defendant who lacks capacity;

(b) the interests of other defendants in the proceedings;

(c) witnesses in the proceedings, and others affected by the offence or offences charged; and

(d) the public interest (see draft Bill clauses 7 and 36 (magistrates' proceedings)).

Issue: Judge-only alternative finding procedures

5.147 In the IP,[161] we invited consultees to consider whether it would be appropriate for determinations of fact to be heard before a judge alone. We raised this possibility on the basis of a number of factors:

(1) Such a process could be less formal, less time-consuming and may lead to fewer delays in concluding the proceedings. This would obviously be advantageous to a defendant lacking capacity.

(2) A judge may be better placed than a jury to analyse the expert evidence adduced and follow the more complex routes to verdict were the single-stage process to be adopted.

(3) Empirical research suggests that in the majority of cases the section 4A hearing is not contested.[162]

[161] Further Question 23.

[162] R D Mackay, B Mitchell and L Howe, "A Continued Upturn in Unfitness to Plead - more disability in relation to the trial under the 1991 Act" [2007] *Criminal Law Review* 530, 538. The duration of the majority of cases examined by Professor Mackay suggested that the section 4A hearing had not been contested.

5.148 We recognised that the removal of the right to a jury determination that this question engaged was potentially controversial and might cause concern. In seeking to weigh the merits of this provisional proposal against those concerns, we identified the following counterbalancing factors:

(1) The alternative finding procedure does not lead to conviction, or penal sanction, although a hospital order, especially with a restriction,[163] is clearly a serious deprivation of liberty.

(2) The imposition of a hospital order is governed by additional stringent conditions set out in section 37 of the MHA.

(3) Under our recommendations, a defendant found to lack capacity, but who subsequently recovers, would be entitled to seek leave for prosecution to be resumed before a jury (or the prosecution may make such an application), under our recommendations in Chapter 9 below.[164]

(4) There are other determinations which may involve the significant deprivation of liberty which are dealt with by judge alone, for example: *Newton* hearings, which address aggravating features having a significant effect on the severity of sentence; bail hearings, especially where intensive supervision and surveillance might be imposed on a young defendant; and the serious matters which can be dealt with by district judge alone in the youth court.[165]

(5) Under the current provisions, a defendant convicted without a jury in the magistrates' court is at risk of a hospital order, and even a restriction order.[166] District judges (magistrates' courts) sitting alone also have the power to impose a hospital order (but not to commit for a restriction order) without convicting the defendant.[167]

5.149 This question garnered starkly contrasting responses. A significant proportion of consultees opposed the provisional proposal.[168] There were also groups within consultee bodies that objected, including a number of members of the Centre for Evidence and Criminal Justice Studies, the Chairman and a minority of the Council of HM Circuit Judges criminal sub-committee and some of the judges at Snaresbrook Crown Court. The proposal was rejected in strong terms by some

[163] MHA, s 41.

[164] There is already statutory provision for the remission of defendants held under a restriction order, under s 5A(4) of the CP(I)A.

[165] We discuss youth court issues in detail in Chapter 7 at para 7.33 and following below.

[166] Magistrates have the power to impose hospital orders on conviction and can commit the defendant to the Crown Court for the imposition of a restriction order: MHA, ss 37(1) and 43.

[167] MHA 1983, s 37(3) and see Chapter 7 below for a fuller discussion of magistrates' powers in relation to hospital treatment.

[168] Nigel Barnes, Law Society, Dr Michael Kavuma, Forensic Psychiatrists SW Yorkshire NHS Foundation Trust, Charles de Lacy, Professor Jill Peay, the Prison Reform Trust.

consultees who described it as "entirely inappropriate"[169] and "extraordinarily controversial".[170]

5.150 The concerns raised variously by those objecting to the proposal include:

(1) This is a further erosion of jury trial on the grounds principally of cost and convenience (minority of the Council of HM Circuit Judges).

(2) The role of the jury as the determiner of facts in non-summary criminal cases is a vital component of the criminal justice system in England and Wales (Law Society, Prison Reform Trust).

(3) A determination of facts cannot be equated to a *Newton* hearing[171] – general verdicts as to whether an offence has been proved are the province of a jury, whilst precise interpretation of the facts has always been a matter for a judge. There is no good basis for creating an exception for determinations of fact for unfit defendants (minority of the Council of HM Circuit Judges, David Hughes).

(4) The unfit defendant will be at a disadvantage to the fit defendant if he or she is denied jury consideration at the determination of facts (minority of the Council of HM Circuit Judges and Mr Justice Holroyde, who considered it an "unjustifiable discrimination").

(5) Denial of jury consideration would be "counterproductive" and may well lead to more defendants refusing to co-operate with report preparation (Nigel Barnes).

(6) The alternative finding procedure "in all but name" leads to a conviction – especially where unfit defendants are subject to ancillary provisions such as notification on the sex offenders' register (Forensic Psychiatrists SW Yorkshire NHS Foundation Trust). A hospital order is a deprivation of liberty (David Hughes).

(7) There may be a conflict of interest if a judge can decide that the defendant is unfit, appoint an advocate to represent the unfit defendant (especially where that counsel is able to override the defendant's preferences) and then make the determination of facts as well. This may be particularly problematic in a terrorism case, or one involving a paranoid defendant (Charles de Lacy).

(8) The jury may have a "less formalistic and more deliberative" role under the reform proposals (Professor Ronnie Mackay).

(9) Removal of jury involvement at this stage might reduce public willingness to accept the findings and undermine the legitimacy of the criminal justice

[169] Nigel Barnes.

[170] A section of the Centre for Evidence and Criminal Justice Studies.

system. The issue of legitimacy should not be underestimated (a section of the Centre for Evidence and Criminal Justice Studies).

(10) Delays in proceedings are more frequently caused by a lack of available courts rather than by juries (a section of the Centre for Evidence and Criminal Justice Studies).

(11) Juries are capable of following expert evidence and complex routes to verdict (a section of the Centre for Evidence and Criminal Justice Studies, HHJ Sarah Paneth,[172] David Hughes).

(12) The fact that many such hearings are uncontested is "irrelevant" (a section of the Centre for Evidence and Criminal Justice Studies, David Hughes, Mr Justice Holroyde).

5.151 There were, however, a number of respondents who considered that the proposal had merits.[173] Arguments advanced in favour of the proposal included:

(1) The move to judge-only unfitness findings seems to have worked well and not garnered a significant number of complaints (the majority of the Council of HM Circuit Judges).

(2) Judges have expertise in dealing with such cases and have the knowledge and experience to make a correct decision (Anonymous (academic and intermediary), CPS).

(3) Judges have to give reasons for their decisions which in this context would be valuable (HHJ Stephen Ashurst,[174] a section of the Centre for Evidence and Criminal Justice Studies).

(4) "Unfitness is a procedural issue and, like other procedural issues, properly in the purview of the judge" (a section of the Centre for Evidence and Criminal Justice Studies).

(5) The objection based upon the apparent loss of jury trial is properly met by the fact that this is not a decision which attributes criminal liability (the majority of the Council of HM Circuit Judges).

[171] *Newton* (1983) 77 Cr App R 13, [1983] Criminal Law Review 198. A Newton hearing is held to resolve factual issues where a defendant pleads guilty but does not accept all of the prosecution's factual allegations.

[172] Speaking at the round table discussion with judges sitting at Snaresbrook Crown Court, 17 July 2014.

[173] The majority of the Council of HM Circuit Judges, HM Council of District Judges (Magistrates' Court), a section of the Centre for Evidence and Criminal Justice Studies, Dr Eileen Vizard CBE, Professor Ronnie Mackay, Dr Linda Monaci and Professor Graeme Yorston.

[174] At the Law Commission symposium on unfitness to plead, School of Law, University of Leeds, 11 June 2014.

(6) The determination of unfitness and the examination of the facts are both conducted by judge alone in Scotland, without difficulty (Professor Ronnie Mackay).

(7) The majority of cases are uncontested cases and do not require the involvement of a jury (Professor Ronnie Mackay).

(8) A judge-only hearing may result in "so much less distress to all parties, particularly victims (who are not infrequently related to the defendant in these cases)" (Faculty of Forensic and Legal Medicine).

(9) Judge-only procedures would be less time consuming (CPS, David Hughes).

(10) A judge could deal more effectively with a determination of facts alongside a full trial for co-defendants (CPS, David Hughes).

5.152 Some felt that the option of a judge-only hearing ought to be available:

(1) to the accused, if he wishes, on the basis that "he may feel that his case would be given more dispassionate consideration" (HHJ Tim Lamb QC); and

(2) in uncontested cases (David Hughes strongly supports this approach. In his view, it is not right to empanel juries where there is no contest between defence and Crown).

Discussion: Judge-only alternative finding procedures

5.153 There simply does not appear to be sufficient support for this controversial proposal. The principled and pragmatic arguments of the objecting consultees make a strong case for retaining the status quo.

5.154 However, there remain, it seems to us, some significant advantages of a judge-only determination. We have in mind in particular, the reasons provided by a judge in reaching his or her finding, and the greater capacity for less formal proceedings that the absence of the jury allows. Therefore, we consider that the proposals advanced by HHJ Tim Lamb QC and David Hughes, that the defendant should have the option to forego a jury procedure, deserve consideration.

5.155 On one view, for a defendant who lacks the capacity to participate effectively in the trial, there is a logical difficulty in introducing into the procedure a further and significant choice. However, if, as seems to be the position, a good proportion of fact-finding hearings are uncontested,[175] this suggests that representatives in a reasonable proportion of cases do in fact feel able to agree evidence, and that they have sufficient, reliable instructions to take the decision not to contest the Crown's case. This suggests that there are cases where the option to forego a

[175] See R D Mackay, B Mitchell and L Howe, "A Continued Upturn in Unfitness to Plead - more disability in relation to the trial under the 1991 Act" [2007] *Criminal Law Review* 530, 537, table 8.

jury procedure might well be welcome.[176] We have in mind not only the position of the defendant, but also that of complainants and witnesses who may prefer not to have to undergo a full jury procedure. In particular, where, as is often the case, they are related or close to the defendant (as the Faculty of Forensic and Legal Medicine note). As an additional protection, we bear in mind that the judge's finding, with reasons, would, we anticipate, be susceptible to judicial review.[177]

5.156 Such a process might be beneficial, for example, in a case where the defendant has a learning disability such that he or she can make decisions with sufficient support but lacks the foundational capacity to follow the proceedings and perhaps to give evidence. Such a defendant might favour a judge-only hearing, finding it less stressful than the experience of appearing before a jury. His or her representative may, where the evidence is not controversial, feel that he or she has sufficient instructions to agree to a judge-only hearing.

5.157 We consider that a judge-only alternative finding procedure would not, however, be workable nor particularly advantageous, where the court determines that the alternative finding procedure should proceed at the same time as the trial of co-defendants (where that is to be trial by jury). We do take the view, however, that the fact that the defendant might otherwise opt for a judge-only alternative finding procedure should be a matter to be considered by the judge in assessing where the interests of justice lie in an application for simultaneous proceedings.

Conclusion: Judge-only alternative finding procedures

5.158 **We** therefore **recommend that:**

(1) **the defendant should be entitled to elect for the alternative finding hearing to be conducted by a judge sitting alone** (see draft Bill clause 12);

(2) **such an election should not be available where the alternative finding procedure is to be conducted at the same time as the trial of co-defendant(s)** (see draft Bill clause 12(2)); **but**

(3) **in an application for simultaneous proceedings, the fact that the defendant might otherwise opt for a judge-only alternative finding procedure should be a matter to be considered by the judge in assessing where the interests of justice lie** (see draft Bill clause 7(4)(a)).

[176] However, the alternative position, of having a presumption of judge-only determinations which the defence have an unfettered right to reject in favour of a jury process, would, it seems to us, inappropriately shift the burden to the defence.

[177] Following a finding of lack of capacity the proceedings would no longer be related to trial on indictment and thus not excluded from consideration of the High Court, under the Senior Courts Act 1981, s 28(2). See *Grant* [2001] EWCA Crim 2611, [2002] QB 1030.

Issue: Procedural considerations for the alternative finding procedure

5.159 Professor Ronnie Mackay, in responding to the IP, was concerned to understand exactly how the single-stage fact-finding process would work. We agree that we need to explain how such a process would work.

Discussion: Procedural considerations for the alternative finding procedure

5.160 In terms of the hearing process itself, in order for the defendant who lacks capacity to enjoy the same advantages as the defendant in a full trial, the alternative finding procedure will be close to a criminal trial in procedural terms.

5.161 First, we envisage that this would, for example, include a right to make a submission of "no case to answer" at the close of the prosecution case. This provision would provide to defendants the protection which is currently available to them as a result of the judge's power to postpone consideration of the issue of unfitness until the start of the defence case.[178] Although, as Master Egan QC observed,[179] this power to postpone the determination of unfitness until the close of the prosecution case is currently rarely if ever exercised, presumably because of practical difficulties.

5.162 The second issue is that under the reform proposals the defendant should be better supported to engage to the fullest extent possible in the proceedings, in contrast with the reality of many such hearings at present. The finding that a defendant is unable to participate effectively in a trial such that he or she cannot fairly be convicted is very different from an assertion that the defendant can and should have no engagement in the process at all. The court should actively consider special measures or other reasonable adjustments for the defendant who lacks capacity at the alternative finding procedure in the same manner that they are provided to vulnerable fit defendants.

5.163 Finally, there should, in addition, remain the right of the defendant to give evidence should his or her abilities allow.

Practical challenges arising

5.164 We appreciate that some consultees were concerned that a reformed procedure for defendants who lack capacity might be almost indistinguishable from a criminal trial. A significant degree of procedural similarity is an inevitability if the defendant who lacks capacity is to enjoy the same opportunities for acquittal as the fit defendant. However, the primary and essential difference remains that around which the whole process is conceived, namely that the defendant is insulated from conviction.

5.165 We do, however, understand the concerns raised by consultees in this regard. We appreciate that some defendants who lack capacity will struggle to cope with the alternative finding procedure (as they do with the current section 4A hearing), or would suffer distress or a deterioration in their condition as a result of those

[178] CP(I) A, s 4(2).

[179] At the Law Commission symposium on unfitness to plead, School of Law, University of Leeds, 11 June 2014.

proceedings. We have considered this issue with care. However, we conclude that ensuring the fairness of the procedure must be our primary concern, even if that may result, in some cases, in a slightly longer hearing than under section 4A. There are a number of measures proposed under our recommendations which should alleviate the unintended negative effects of enhancing the fairness of these proceedings:

(1) Greater assistance available to enhance the defendant's ability to participate effectively in the proceedings on an offence, including in the alternative finding procedure (at paragraph 2.69 above and draft Bill clauses 61 and 63).

(2) The option of electing for a judge-only alternative finding procedure, and the greater flexibility that this may achieve (at paragraph 5.158 above).

(3) The judicial discretion not to hold an alternative finding procedure, where other arrangements can be made to support the defendant and protect the public without the need for a disposal to be imposed by the court (at paragraph 5.61 above).

5.166 We also bear in mind the facility for the judge to proceed with the hearing in the absence of the defendant, where the defendant is certified unfit to attend court or has waived his or her right to be present.[180]

Conclusion: Procedural considerations for the alternative finding procedure

5.167 **We recommend that:**

(1) Although no conviction can result, the alternative finding procedure should be conducted as proceedings to which the strict rules of evidence apply (see draft Bill clauses 14 and 42 (magistrates' proceedings)).

(2) The Criminal Practice Direction on vulnerable defendants (paragraphs 3G.1 to 3G.6)[181] should be amended so that it also applies in the alternative finding procedure to defendants who lack capacity for trial.

[180] Crim PR 2015 (SI 2015 No 1490) r 25.2(1)(b). See also *Jones (Anthony)* [2002] UKHL 5, [2003] 1 AC 1, HL and *Lederman* [2015] EWCA Crim 1308.

[181] CrimPD [2015] 2015 EWCA Crim 1567.

CHAPTER 6
DISPOSALS

INTRODUCTION

6.1 This chapter considers what disposals should be available to the court where an individual has been found to lack capacity, and the allegation has been proved against him or her in an alternative finding procedure, or a special verdict of not guilty by reason of insanity, has been returned by the jury.

6.2 We review, first of all, the current framework of disposals for individuals who have been found to be unfit to plead, and to have "done the act or made the omission" at a hearing under section 4A of the Criminal Procedure (Insanity) Act 1964 ("CP(I)A"). We then consider the difficulties that have been identified with the current system, and make recommendations for reform.

The rationale behind disposals for defendants lacking capacity

6.3 It is important to have in mind at the outset the rationale behind the current disposal framework. Unfit individuals who have been found to have "done the act or made the omission" under the current provisions have not been convicted. The jury have not drawn any conclusions about the culpability of the accused, nor have they scrutinised whether the defendant had the required state of mind or fault at the time of the behaviour that led to criminal proceedings. As a result, these individuals do not receive sentences, since it would be inappropriate to punish them. Instead they are made subject to disposals which are not intended to have a punitive or retributive ("pay-back") element to them. Rather, the disposals are imposed to support the individual to live without engaging in criminal behaviour, and to protect the public, where that is necessary.

6.4 We propose to retain that approach to disposals under our recommended reforms. Of course, if our recommendations in relation to the alternative finding procedure were enacted, the jury, or judge sitting alone, will have considered whether the defendant had the required state of mind or fault at the time of the alleged offence. However, we recommend that this approach be taken in order to give the defendant the same opportunities for acquittal as a defendant with capacity would have in the same position, rather than in order to achieve a conviction. As a result, under our proposed recommendations the court can be more confident that the finding presents a firm and fair basis for imposing disposals. However, the individual still has not been convicted at a trial in which he or she was able to participate effectively. Therefore, punitive disposals remain inappropriate, and the focus, we suggest, should continue to be on support for the individual and protection for the public.

Key recommendations in this chapter:

(Our recommendations are confined to supervision orders, restriction orders and restraining orders. We recommend no changes to the availability of hospital orders and absolute discharges as disposals).[1]

1) Supervision orders to be made the sole responsibility of the local authority, who would have a statutory duty to provide a supervising officer and to make arrangements in accordance with the order.

2) Supervision orders to be enhanced to ensure greater effectiveness by:

a) The addition of a specific supervision requirement in each order.

b) The option for the court to include a constructive requirement that arrangements be made to address the defendant's needs.

c) The option to include a review requirement in the order.

d) The introduction of sanctions for breach, including curfew (with or without electronic monitoring), fine or custodial penalty (for adults only) or a youth rehabilitation order with intensive supervision and surveillance (for youths only).

3) Making discretionary the imposition of a restriction order on an individual who is suitable for hospitalisation and who has had an allegation of murder proved against him or her at the alternative finding procedure.

4) The creation of a power to impose a restraining order where the allegation is proved against the defendant at the alternative finding procedure.

THE CURRENT POSITION

6.5 Where an unfit individual has been found by the jury to have "done the act or made the omission" he or she must be made subject to one of the following disposals:[2]

(1) A hospital order (with or without a restriction order)[3] by which an individual is admitted to and detained in a hospital which is secure.[4] The

[1] The available orders are discussed in para 6.5.

[2] CP(I)A, s 5(2). We discuss the present position more fully in the CP197, paras 7.8 to 7.13.

[3] A restriction order means an order under Mental Health Act 1983 ("MHA"), s 41 limiting the possibility of discharge from hospital. See para 6.6 below.

[4] CP(I)A, s 5(2)(a) and MHA, s 37(2).

making of a hospital order requires evidence from two registered medical practitioners, one of whom must be approved under section 12 of the Mental Health Act 1983 ("MHA").[5] The court needs to be satisfied on the basis of that expert evidence that:

(a) the individual suffers a mental disorder of a nature and degree which makes medical treatment appropriate;

(b) treatment is available; and

(c) in the circumstances, such treatment is the "most suitable method" of disposing of the case.[6]

(2) A supervision order (a community order with or without a treatment requirement).[7] Such orders can be made for a period not exceeding two years. A person subject to a supervision order is required to "keep in touch with" his or her supervising officer in accordance with that officer's instruction[8] and must notify the officer of any change of address. The order may also require a supervised person to submit, during the whole of the given period or a part of it, to treatment under the direction of a registered medical practitioner (a "treatment requirement").[9] The order may also include a residence requirement.[10]

(3) An absolute discharge.[11]

Restriction orders

6.6 A restriction order has the effect of allowing relevant agencies within the criminal justice system to maintain control over the future release of the unfit individual, and enables conditions to be placed on his or her release in due course. A person who is subject to a restriction order cannot be discharged from hospital, granted leave of absence or transferred between hospitals without the consent of the Secretary of State as long as the order is in force.[12]

[5] Section 12 MHA approval designates a registered medical practitioner as having special experience in the diagnosis or treatment of mental disorder. Section 12 MHA approved registered medical practitioners are generally, but not always, psychiatrists.

[6] MHA, s 37(2).

[7] CP(I)A, s 5(2)(b).

[8] CP(I)A, sch 1A para 3(5).

[9] Requirements as to medical treatment can only be imposed on the basis of evidence from two registered medical practitioners, and where the mental condition of the supervised person requires, and may be susceptible to, treatment, but is not such as to warrant the making of a hospital order. A medical treatment requirement cannot impose residential treatment, save with the consent of the supervised person (CP(I)A, sch 1A para 6).

[10] CP(I)A, sch 1A para 8.

[11] CP(I)A, s 5(2)(c).

[12] MHA, s 41.

6.7 A restriction order is mandatory for an unfit person who is found to have done the act in relation to murder,[13] as long as that person satisfies the conditions for hospitalisation under section 37(2) of the MHA. If that individual does not satisfy the conditions for a hospital order, then he or she may only be made subject to a supervision order (with or without treatment) or receive an absolute discharge.

Ancillary orders

6.8 An unfit individual found to have done the act or made the omission may also be liable to the following:

(1) A Sexual Harm Prevention Order ("SHPO") (replacing the Sexual Offence Prevention Order) under section 103A of the Sexual Offences Act 2003 ("SOA 2003").[14] The SHPO allows the court to impose such prohibitions on the individual as are considered necessary to protect the public, or particular members of the public, from sexual harm. Breach of the order is an offence punishable with a custodial term of up to five years' imprisonment (on indictment) or six months' imprisonment (on summary conviction).[15]

(2) A notification order under section 97 of the Sexual Offences Act 2003 (in relation to an individual found to have done the act in relation to an offence specified within schedule 3 to the SOA 2003). Failure to comply with such notification orders is an offence punishable with a custodial term of up to five years imprisonment (on indictment) or six months' imprisonment (on summary conviction).[16]

(3) A violent offender order under section 98 of the Criminal Justice and Immigration Act 2008 (in relation to an adult found to have done the act in relation to a specified offence and who has received a hospital or supervision order).[17] Breach of the order is an offence punishable with a custodial term of up to five years' imprisonment (on indictment) or twelve months' imprisonment (on summary conviction).[18]

(4) An exploitation proceeds order under section 155 of the Coroners and Justice Act 2009 (in relation to a defendant found to have done the act in relation to a "relevant offence" as defined by section 159 of the Act).

[13] CP(I)A, s 5(3).

[14] Sexual Offence Prevention Orders (SOPOs) were imposed under the Sexual Offences Act 2003, s 104. The Anti-Social Behaviour, Crime and Policing Act 2014, s 113 and sch 5 inserted sections 103A to 103K into the Sexual Offences Act 2003, replacing SOPOs with SHPOs as of 8 March 2015 (SI 2015 No 373, art 2).

[15] Sexual Offences Act 2003, s 113(2).

[16] Sexual Offences Act 2003, s 91(2).

[17] Criminal Justice and Immigration Act 2008, s 99.

[18] Criminal Justice and Immigration Act 2008, s 113.

(5) A slavery and trafficking prevention order under section 14 of the Modern Slavery Act 2015,[19] (in relation to a defendant found to have done the act in respect of a slavery or human trafficking offence). Breach of the order is an offence punishable with a custodial term of up to five years' imprisonment (on indictment) or six months' imprisonment (on summary conviction).[20]

Notification requirements

6.9 An unfit individual may also be also liable to the following notification requirements:

(1) An individual found to have done the act of an offence to which schedule 3 to the SOA 2003[21] applies will be a relevant offender subject to notification requirements.[22] These require the individual (or his or her parents if under 18) to notify the police of information (name, date of birth and home address) within a fixed period and to update the police periodically. Failure to notify without reasonable excuse can result in a custodial term of up to five years' imprisonment (on indictment) or six months' imprisonment (on summary conviction).

(2) An individual found to have done the act in relation to an offence to which part 4 of the Counter-Terrorism Act 2008 applies who has been made subject to a hospital order will be subject to notification requirements under part 4 of the Counter-Terrorism Act 2008. Failure to comply without reasonable excuse can result in a custodial term of up to five years' imprisonment (on indictment) or twelve months' imprisonment (on summary conviction).[23]

Multi-Agency Public Protection Arrangements

6.10 Some unfit individuals are subject to Multi-Agency Public Protection Arrangements ("MAPPA"). MAPPA were introduced by section 325 of the Criminal Justice Act 2003 ("CJA 2003"). They are designed to protect the public, including previous victims of crime, from serious harm by sexual and violent offenders. MAPPA require local criminal justice, and other, agencies to work together to assess and manage the risk posed by such individuals.

[19] In force from 31 July 2015: Modern Slavery Act 2015 (Commencement No 1, Saving and Transitional Provisions) Regulations 2015 (SI 2015 No 1476) reg 2(b).

[20] Modern Slavery Act 2015, s 30(3).

[21] Sch 3 covers the majority of sexual offences under the Sexual Offences Act 2003.

[22] Sexual Offences Act 2003, s 80.

[23] Counter-Terrorism Act 2008, s 54.

6.11 Currently an unfit individual will be subject to MAPPA if:

(1) he or she is, as a result of the finding at a section 4A CP(I)A hearing and the subsequent disposal, subject to notification requirements under part 2 of the Sexual Offence Act 2003;[24] or

(2) he or she has been found to have done the act of murder, or a specified violent or sexual offence,[25] and has received either a hospital order or a guardianship order.[26]

The frequency with which the various disposals are imposed

6.12 It is perhaps helpful to have in mind, as we consider the current disposal framework, how frequently the different disposals are imposed. The bar chart below (Chart A) details the frequency of the imposition of different disposals on unfit individuals by the Crown Court across the period 2002 to 2014.

[24] CJA 2003, s 327(2).

[25] As listed in CJA 2003, sch 15. Part 1 lists the specified violent offences, which include manslaughter, false imprisonment, assaults under the Offences Against the Person Act 1861, cruelty and other offences involving violence to children, explosives and firearms offences, arson, offences under the Theft Act 1968 involving violence (eg robbery and aggravated burglary), offences under the Public Order Act 1986 (riot, violent disorder and affray), racially and religiously aggravated assaults and various terrorism and related offences. Part 2 lists specified sexual offences, which include the whole range of sexual offences (from rape and penetrative assaults, sexual or indecent assault to voyeurism and exposure) under the Sexual Offences Act 2003 and earlier legislation, such as the Sexual Offences Act 1956. The list also includes indecent image offences where children are the subject, trafficking and related offences committed with a view to sexual exploitation.

[26] CJA 2003, s 327(4). The DVCVA repealed s 3 of the Criminal Procedure (Insanity and Unfitness to Plead) Act 1999 which provided for guardianship orders as an available disposal for unfit individuals. The CJA 2003 retains a reference to guardianship orders because some orders imposed before the DVCVA came into force may still be live.

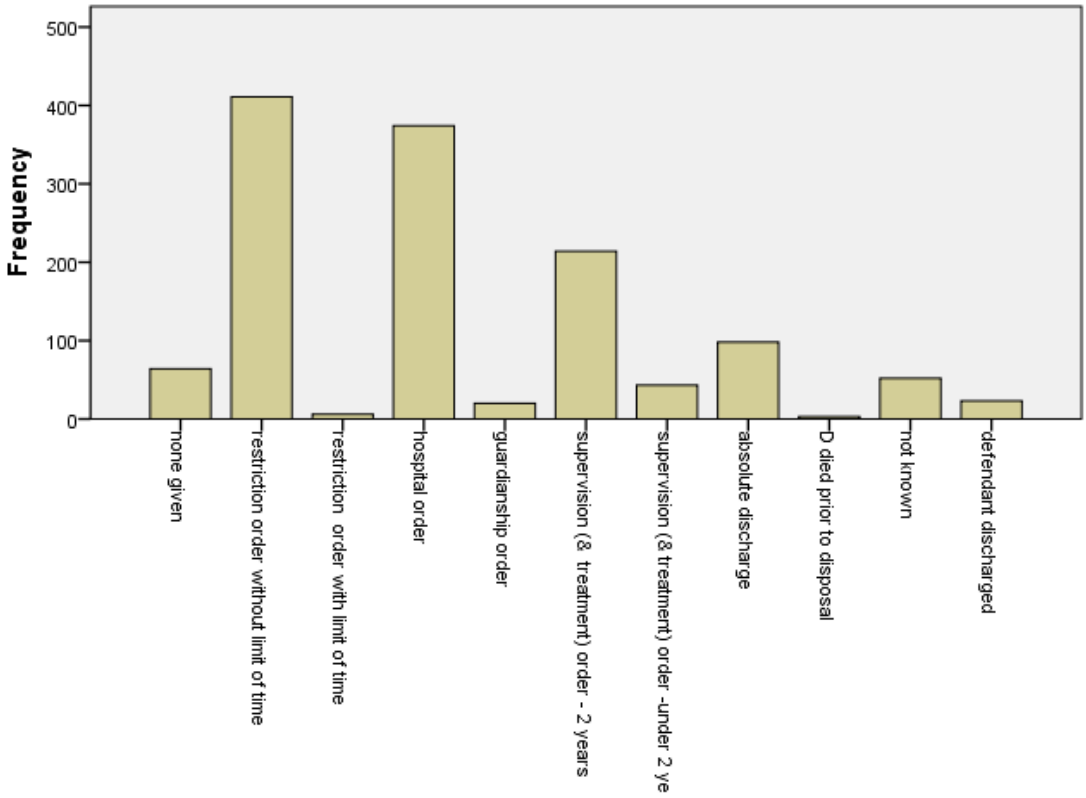


Chart A (Source: Professor R D Mackay, "Unfitness to Plead – Data on Formal Findings from 2002 to 2014", Appendix A).[27]

PROBLEMS WITH THE CURRENT POSITION

6.13 At the time of writing CP197 we were not aware of any particular problems with the disposal regime, which had been the subject of significant amendment under the Criminal Procedure (Insanity and Unfitness to Plead) Act 1991, and the Domestic Violence, Crime and Victims Act 2004 ("DVCVA").[28] As a result we advanced no substantive provisional proposals, nor posed any question, relating directly to disposals in CP197.

6.14 Nonetheless, several respondents to CP197 addressed issues of concern that they had identified in relation to the disposals currently available. The most significant concerns in relation to disposals were raised in respect of magistrates' court and youth court disposals under section 37(3) of the MHA. These are considered separately in Chapter 7 below.

Supervision orders

6.15 In relation to disposal options in the Crown Court, the most substantial concern raised was in relation to supervision orders. There were two particular problems identified.

[27] Available at http://www.lawcom.gov.uk/project/unfitness-to-plead/.

[28] Discussed in CP197, paras 7.8 to 7.13.

Difficulties identifying a supervising officer

6.16 First, a supervision order currently will specify a local social services authority area in which the accused resides, and require the unfit person to be under the supervision of a social worker of that authority. Or, alternatively, the supervision order will specify a local justice area in which that person resides and require them to be under the supervision of an officer of the local probation board appointed for the area.[29] However, the court cannot make a supervision order unless the supervising officer intended to be specified in the order is willing to undertake the supervision.[30]

6.17 There is scope within these provisions for difficulties to arise, therefore, where no officer of the local justice board, or local social services authority, is willing to accept responsibility for supervision of an unfit person.[31]

Lack of power to manage an individual who fails to comply

6.18 Secondly, supervision orders were felt to be insufficiently robust to ensure that appropriate supervision and treatment can be maintained.[32] Some consultees considered that the orders suffered from "a lack of assertive management".[33]

6.19 There is indeed no provision for breach proceedings following a failure by the supervised person to comply with supervision, or medical treatment, imposed as part of a supervision order. However, there is power for the supervised person, or supervising officer, to apply for the supervision order to be revoked "in the interests of the health or welfare of the supervised person", or for the court to revoke the order of its own motion.[34] There is also the power to amend the order, on application of the supervised person or supervising officer, to cancel any requirement of the order, or substitute or add any requirements that would have been available to the court when the order was first imposed.[35] Where there is a treatment requirement, the medical practitioner responsible for treatment can also apply for variation (including extension of the treatment period) or cancellation of the treatment requirement.[36]

[29] CP(I)A, sch 1A para 3.

[30] CP(I)A, sch 1A para 2(2)(a).

[31] An issue raised in the CP197 response of Just for Kids Law (Just for Kids Law provide support, advice and legal representation for young people in difficulty).

[32] Just for Kids Law CP197 response.

[33] For example, Broadmoor Psychiatrists' response to CP197.

[34] CP(I)A, sch 1A para 9.

[35] Although the court cannot extend the order beyond two years from the date of its original imposition. CP(I)A, sch 1A para 11.

[36] CP(I)A, sch 1A, para 12.

6.20 On a literal reading of the statute it would appear that these requirements can be made more intensive; a supervising officer can adjust supervision arrangements should they prove to be insufficient[37] and, likewise, medical treatment requirements can be amended where appropriate. However, there is currently no power by which a supervising officer or medical practitioner can ensure compliance with the order. Thus, for example, there is no power to compel a supervised person to submit to treatment or assessment, nor to sanction a failure to do so.[38]

6.21 Responding to CP197, Just for Kids Law felt that the introduction of an "intensive supervision order", with powers similar to the intensive disposals available in the youth court, might be appropriate. In a similar vein, Broadmoor psychiatrists suggested in their response that the more assertive management powers available under community treatment orders[39] (in particular the power to recall to hospital for assessment) would be beneficial.

The mandatory restriction order

6.22 Prior to the DVCVA, it was mandatory for an individual found to have "done the act or made the omission" in relation to an offence of murder to be made subject to a hospital order with a restriction order. Section 24 of the DVCVA amended section 5 of the CP(I)A so that this mandatory requirement is now only applicable where the individual, found to have "done the act or made the omission" in relation to an offence of murder, suffers from a treatable mental illness making him or her suitable for a hospital order in any event.

6.23 Although this change rightly ensures that only those suitable for hospitalisation can be detained indefinitely in a hospital, it is also liable to result in arbitrary outcomes. In particular, the provision is discriminatory against those who suffer a treatable "mental disorder" under the meaning of the MHA. Such a defendant, on a finding that he or she has "done the act or made the omission" in relation to an offence of murder, would be subject to a mandatory restriction order without limit of time. This would apply whether or not he or she represented a risk of serious harm to the public.[40] A defendant otherwise in an identical position, but who does not suffer a treatable "mental disorder" would receive, at most, a supervision order for a maximum of two years, however significant the risk he or she presented of serious harm to the public. Such an approach appears to us to be out of step with that taken in the Equality Act 2010 and article 14 of the United Nations Convention on the Rights of Persons with Disabilities ("UNCRPD"). This

[37] CP(I)A, sch 1A, para 11.

[38] See Criminal Liability: Insanity and Automatism (July 2013) Law Commission Discussion Paper, paras 4.154 to 4.157, for a fuller discussion of the issue of imposing penal sanctions for breach of such an order.

[39] Under the Mental Health Act 2007.

[40] As required otherwise under MHA, s 41.

latter provision places an absolute prohibition on deprivation of liberty on the basis of disability alone.[41]

Restraining orders

6.24 A restraining order can be made by a court following a conviction for any offence, in order to protect the victim of that offence, or others, from harassment or conduct which causes fear of violence.[42] The court also has the power to make a restraining order against a defendant who has been acquitted of an offence, if it considers it necessary to do so to protect a person from harassment by the defendant.[43]

6.25 The recent appeal of *Chinegwundoh*[44] confirmed that there is, however, no power for the court to make a restraining order in relation to a defendant found to have "done the act or made the omission" in relation to an offence. Neither section 5 nor 5A of the Protection from Harassment Act 1997 is applicable, since the finding arrived at is neither an acquittal nor a conviction. The Court of Appeal described this as a "lacuna in the court's armoury", observing, as the instant case demonstrated, that "persons under a disability can present risks to others of harassment".[45] Mr Justice Openshaw concluded that "perhaps the court should have the power to make such an order but that is a power that can only be provided by Parliament".

ANALYSIS AND DISCUSSION: SUPERVISION ORDERS

Difficulties with supervision arrangements

Issue: Who should the supervising officer be?

6.26 We consider that the difficulties identifying a willing supervising officer are only likely to become more frequent as a result of current resourcing constraints across the criminal justice system and local authorities. In light of concerns raised by respondents to CP197, we asked respondents to the Issues Paper ("IP") whether they considered that the requirement for the supervising officer to be willing to undertake supervision of an unfit individual poses such problems in practice that it needs to be amended.[46]

6.27 Written responses, and observations at the Leeds symposium[47] and in consultation meetings, suggest that there have been difficulties where neither

[41] See the Statement on article 14 of the United Nations Convention on the Rights of Person with Disabilities (Geneva, September 2014), http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15183&LangID=E (last visited 19 November 2015).

[42] Protection from Harassment Act 1997, s 5.

[43] Protection from Harassment Act 1997, s 5A.

[44] [2015] EWCA Crim 109, [2015] 1 WLR 2818.

[45] [2015] EWCA Crim 109, [2015] 1 WLR 2818 at [27].

[46] IP Further Question 25.

[47] On 11 June 2014 the Law Commission held a symposium at the School of Law, University of Leeds. Over 100 experts in the field attended for a day of discussion of the questions considered in the Law Commission's Issues Paper on unfitness to plead.

probation services nor the local authority have been prepared to undertake supervision of the defendant.[48] As a result, in those cases no willing supervising officer could be identified by the court. However, it appears that this problem does not manifest itself in every area. The Council of HM Circuit Judges[49] stated "this is not a problem in practice", a view echoed by the Centre for Evidence and Criminal Justice Studies and academic Professor Ronnie Mackay who was aware of "no empirical evidence to support this".

6.28 Responses to this question in the IP reveal that there is an essential tension in supervision arrangements between the need for there to be an infrastructure in place to oversee any disposal ordered by the court[50] and the importance of an individual supervising officer being able to refuse to undertake supervision if he or she considers it inappropriate for any reason (Dr Michael Kavuma (consultant forensic psychiatrist), Faculty of Forensic and Legal Medicine).

6.29 Consultees also acknowledged that reduced resources threatened the adequacy of supervision arrangements. The Faculty of Forensic and Legal Medicine were concerned that clinicians are being put at risk under the current arrangements, in part because of lack of resources. Whilst the HM Council of District Judges (Magistrates' Courts)[51] suggested that in light of resource constraints in future, a defined minimum level of supervision might be desirable.

6.30 Some consultees proposed that the local authority in which the individual resides be required to accept supervision.[52] Others suggested that the onus should lie with local NHS bodies or Clinical Commissioning Groups.[53]

6.31 As to the individual supervising officer, clinical nurse specialist Charles de Lacy raised the prospect of that role being played by mental health professionals such as specially trained community psychiatric nurses, specialist nurses, or occupational therapists. As he observed, "Health and Social Care in any event are increasingly becoming a unitary system and this change would recognise this reality".

Discussion: Who should the supervising officer be?

6.32 The consultation responses suggest that there is much to recommend a single body having sole supervisory responsibility for individuals on supervision orders, especially as financial constraints become ever more pronounced. The difficulty lies in identifying which body should supervise, especially considering the range of individuals who lack capacity for trial.

[48] Just for Kids Law CP197 response, HHJ Peter Collier QC at the Leeds symposium, HHJ Simon Wilkinson (Snaresbrook Judges round table discussion 17 July 2014), Prison Reform Trust (IP response), HHJ Tim Lamb QC (IP response).

[49] Response submitted by the Criminal Sub-Committee of the Council of HM Circuit Judges.

[50] Stressed by Nigel Barnes, solicitor specialising in criminal law.

[51] Response submitted by the Legal Committee, HM Council of District Judges (Magistrates' Court).

[52] Professor Ronnie Mackay, Forensic Psychiatrists of SW Yorkshire NHS Foundation Trust.

[53] Faculty of Forensic and Legal Medicine.

Probation providers in a supervisory role?

6.33 The discussion prompted by this question[54] has been somewhat superseded by the Transforming Rehabilitation reforms of the Probation Service.[55] The supervision of individuals who lack capacity does not fit easily within the new probation framework. Community Rehabilitation Companies are only contracted to deal with convicted offenders, whilst the National Probation Service retain supervision only of high risk and high profile offenders. The National Offender Management Service ("NOMS"), who are responsible for probation services, acknowledge that no provision is made in the Transforming Rehabilitation arrangements for supervision of individuals under the CP(I)A.[56]

6.34 In any event, we retain concerns about the suitability of probation providers supervising vulnerable individuals who have not been convicted of an offence. Probation services in recent years, and particularly under the proposed reforms, operate on an increasingly coercive basis which is unsuited to individuals who lack capacity.[57] We are also concerned that for many individuals it would be highly inappropriate for them to attend for supervision at a probation provider alongside convicted offenders. This problem is only likely to become more acute now that the group of offenders supervised by the National Probation Service is comprised solely of high risk and high profile offenders.[58] In addition, although practice varies across different areas, probation providers do not generally have the close working arrangements with local clinical and social care teams that may be essential for effective supervision of an individual lacking capacity.

6.35 We bear in mind, of course, that some defendants who lack capacity present a risk of harm to the public. We appreciate that managing in the community individuals who pose a potential risk has traditionally fallen to probation providers. However, under our recommended reforms, individuals likely to fall into this category will be subject to MAPPA, through which multi-disciplinary teams, including the police and probation providers, will risk assess and monitor the individuals (see paragraph 6.79(2) below).

6.36 The position is arguably different, however, in respect of young individuals who lack capacity[59] for whom probation services are provided by youth offending teams ("YOTs"). YOTs are multi-disciplinary teams, which by law must include an

[54] IP Further Question 25.

[55] See Ministry of Justice, *Transforming Rehabilitation: A Strategy for Reform* (May 2013), https://consult.justice.gov.uk/digital-communications/transforming-rehabilitation/results/transforming-rehabilitation-response.pdf (last visited 19 November 2015).

[56] Meeting Community Offender Management Policy leads, NOMS, 6 August 2014.

[57] Meeting with Community Offender Management Policy leads, NOMS, 6 August 2014.

[58] Defined as "offenders who pose the highest risk of serious harm to the public and who have committed the most serious offences". Ministry of Justice, *Transforming Rehabilitation: A Strategy for Reform* (May 2013), p 20. https://consult.justice.gov.uk/digital-communications/transforming-rehabilitation/results/transforming-rehabilitation-response.pdf (last visited 19 November 2015).

[59] We discuss disposal options for young defendants lacking capacity in Chapter 7 at para 7.170 and following below.

individual with social work experience (or in Wales a social worker) and a person nominated by a local Clinical Commissioning group or Local Health Board.[60] As a result, the necessary close links with clinical services are present in many YOT teams, as is a range of experience beyond the more risk management approach of other probation providers. Additionally, YOTs already do some work with individuals who are not offenders.[61]

NHS bodies in a supervisory role?

6.37 There will plainly be a need for treatment requirements to continue to be available as part of supervision orders and this will engage the involvement of NHS bodies in providing treatment and clinical support for many defendants who lack capacity.

6.38 However, for two reasons the NHS does not appear to us to be the obvious organisation to have overall supervision of many defendants who lack capacity:

(1) Not every individual requiring supervision will be suitable for a medical treatment requirement. This may particularly be the case for those with learning disabilities, who represent a significant proportion of supervised individuals.[62] For those individuals, in the absence of a treatment requirement as part of their supervision order, there will be no clinical involvement in their supervision. In those circumstances it would not be appropriate for there to be a medical supervising officer.

(2) A number of consultees have expressed concerns about medical practitioners having duties of notification to the courts and/or oversight of an order which may include coercive or restrictive elements.[63]

Local authorities in a supervisory role?

6.39 For adults who lack capacity, local authorities appear to be the most appropriate body to fulfil the supervisory role. We reach that view for a number of reasons:

(1) Local authorities work closely with NHS bodies and Clinical Commissioning Groups and would be well-placed to co-ordinate the socially supportive and health elements of the order.

(2) Local authorities are in a position to co-ordinate the other constructive aspects of the order.

(3) Other authorities, such as local education providers and Primary Care Trusts, already have duties to co-operate with the local authorities in

[60] Crime and Disorder Act 1998, s 39.

[61] Including helping young people at police stations who have been arrested and helping young people and their families at court. See https://www.gov.uk/youth-offending-team (last visited 19 November 2015).

[62] As noted by consultant forensic psychiatrist Dr Penny Brown (IP response).

[63] Meeting with Armed Forces and Offender Health and Mental Health Legislation lead, Department of Health, 18 September 2014.

other similar areas, such as the provision of support for children in need.[64]

(4) Local authorities already have responsibilities under the current disposal provisions.

(5) Through their safeguarding role, local authorities have expertise in assessing risk and putting in place measures to support safe integration of vulnerable individuals in the community.[65]

(6) Through their engagement in family court proceedings, local authorities have experience of working with court orders.

(7) Many individuals who lack capacity are likely to be known already to their local authority and many of them will already be receiving support and input from their local authority's adult or children's services.

(8) A local authority supervisor offers a greater chance that there will be continuity of care and provision when a defendant comes to the end of an order.

6.40 We have invited the Local Government Association ("LGA")[66] and the Association of Directors of Adult Social Services ("ADASS") to comment on this proposal. Both agreed in principle to social workers having responsibility for supervising individuals in the community. ADASS in particular responded:

> It seems to us that social work professionals have the right skills base and training to fit with the proposal given their experience in complex mental health support, best interests assessment, determination of mental capacity work, participating in Prevent action planning,[67] and complex adult safeguarding work.[68]

6.41 Both the LGA and ADASS however note that further training or guidance would be required for local authority officers acting in such a role, given the relative rarity of the orders. They also stressed that the resourcing of such additional duties would need to be allowed for. We agree that training would be necessary. We address the issue of resourcing in more detail in our Impact Assessment.[69]

[64] Under the Children Act 1989, s 27.

[65] Meeting with the College of Social Work, 19 November 2014.

[66] LGA representative in attendance at government group meeting 21 September 2015 and at further meeting 29 September 2015.

[67] The Government's Prevent strategy aims to reduce the threat to the UK from terrorism. Local Authority Prevent action planning refers to arrangements made by local authorities to exercise their functions with "due regard to the need to prevent people being drawn into terrorism" (as required by the Counter-Terrorism and Security Act 2015, s 26).

[68] Email correspondence with ADASS representative group, 16 October 2015.

[69] Available at http://www.lawcom.gov.uk/project/unfitness-to-plead/.

Conclusion: Who should the supervising officer be?

6.42 We conclude that it is important that the responsibility for supervising an individual on an order should rest with a single agency. Individuals who lack capacity do not fit into neat categorisations. For them there is the real danger, described in detail to us by a number of consultees, that, where responsibility can be avoided, bodies will decline to supervise such individuals.

6.43 For the reasons set out at paragraph 6.39 above, we come to the view that the local authority in which the individual who lacks capacity ordinarily resides should bear the responsibility for supervising that individual in the community, where the court concludes that a supervision order is the most appropriate course to take.

6.44 For adults, the supervising officer appointed by the local authority should, we conclude, be a social worker. For those under 18 we consider it appropriate to leave open the possibility that the supervisor might be selected by the local authority from the YOT, or children's services, whichever appears to be more suitable for the individual in the particular area.

An undue burden on local authorities?

6.45 In reaching that view we have borne in mind that local authorities, like most other bodies, are currently operating under severely straitened financial circumstances. We have considered carefully whether making local authorities solely responsible for these orders is to place an undue burden on them.[70] However, we conclude that it does not, for three reasons. First, because of the very low numbers of these orders, both currently and under our recommended reforms. There are currently 20 supervision orders made per year across England and Wales.[71] Taking our best estimate we anticipate that, under our recommendations, there would be at most 54 supervision orders made per year in the Crown Court. If our reforms were extended to the magistrates' and youth courts, we envisage that 299 supervision orders would be made per year, as a best estimate, in the magistrates' courts, including the youth court.[72] We do not consider 353 orders per year, spread across 152 local authorities with social care responsibilities, to represent an undue burden. Secondly, as referenced above, we anticipate that individuals whose difficulties are so profound as to result in their lacking capacity for trial are likely in any event to be supported in some way by the local authority both during the supervised period and subsequently. Finally, we understand from discussions with the Department for Communities and Local Government[73] that the new duties that we recommend are likely to be assessed as falling under the

[70] We have attempted to investigate how supervision orders with local authority supervisors are currently resourced. As a result of the rarity of those orders it has not been possible for the Department of Communities and Local Government to trace a consistent funding pattern (Email from Local Government Finance, Department for Communities and Local Government, 12 May 2015).

[71] R D Mackay, "Unfitness to Plead – Data on Formal Findings from 2002 to 2014", Appendix A available at http://www.lawcom.gov.uk/project/unfitness-to-plead/.

[72] For full details of how this figure is arrived at see the Impact Assessment, Appendix B available at http://www.lawcom.gov.uk/project/unfitness-to-plead/.

[73] Meeting with Local Government Finance - Revenue Funding Policy Team, 1 October 2015.

"new burdens doctrine". If so, the net additional cost incurred would be assessed and fully funded by central Government. [74]

Individual officer to retain right to refuse to undertake supervision?

6.46 We appreciate the concerns of Dr Kavuma and the Faculty of Forensic and Legal Medicine in relation to the ability to decline supervisory responsibility. These concerns are raised in the context of clinical treatment and support. In that regard, we consider that the current provisions provide sufficient protection for clinicians. The court cannot impose a treatment requirement without evidence from at least two registered medical practitioners that the individual's condition is susceptible to treatment and not such as to require hospitalisation.[75] In addition, such an order cannot be made unless the court is satisfied that arrangements have been made for the treatment intended to be specified in the order.[76] The medical practitioner providing treatment under the order is also entitled to apply for variation or cancellation of the requirement if he or she considers that treatment is no longer suitable, or if he or she is "for any reason unwilling to continue to treat or direct the treatment of the supervised person". We do not recommend the amendment of any of those provisions.

6.47 As to the position with regards to supervising officers appointed by the local authority, we do not consider that the current entitlement for the individual officer to decline to supervise the person[77] can continue under our recommended reforms. Having imposed a duty on local authorities to provide a supervising officer for the order, we do not consider it appropriate for the legislation to include an external barrier which may frustrate the local authority's efforts to comply with that duty. We do, however, include a restriction, similar to that in relation to treatment requirements, that a constructive requirement should not be included within the order unless the supervising officer is "able to make such arrangements as are necessary to give effect to the requirement" (see draft Bill schedule 1 paragraph 4(2)).

6.48 **We** therefore **recommend that:**

(1) The provisions for supervision orders be amended so that the local authority, in the area in which the defendant ordinarily resides, has sole responsibility for supervising the individual who lacks capacity, where the court decides that a supervision order is appropriate.

(2) For an adult, the supervising officer provided by the local authority should be a social worker of the local authority.

[74] For more information on the "new burdens doctrine" see Department for Communities and Local Government, *New burdens doctrine: Guidance for government departments* (June 2011), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/5960/1926282.pdf (last visited 19 November 2015).

[75] CP(I)A, sch 1A para 4(2).

[76] CP(I)A, sch 1A para 2(2)(b).

[77] CP(I)A, sch 1A, para 2(2)(a).

(3) **For an individual under the age of 18, the supervisor should be either a social worker operating within a children's services team, or a person with social work experience (or in Wales a social worker) operating as part of a youth offending team** (see draft Bill schedule 1 paragraph 1).

Enhancing the effectiveness of supervision orders

6.49 Professor Mackay and Dr Brown both observe that there is no formal empirical research to support the notion that there are difficulties ensuring compliance with supervision orders. This is correct. However, it is perhaps unsurprising that the effectiveness of supervision orders has not come to the attention of empirical researchers. Very few orders of this sort are imposed, and there is no official data collection in relation to the outcomes of supervision orders which would identify the need for such consideration.

6.50 Nonetheless, the concerns about the effectiveness of supervision orders, raised by respondents to CP197,[78] have been echoed throughout our consultation processes. We have been left in little doubt from our consultation work that supervision orders are viewed by a significant number of members of the judiciary and forensic clinicians as being ineffective and lacking in "teeth".[79] The underlying concern is ensuring public protection and sufficient support for the supervised person. It is also important that the community disposal available to the court offers a viable and robust alternative to hospitalisation, so that there is no danger of hospitalisation being the preferred option simply because of a lack of suitable alternatives. In addition, one psychiatrist at our Leeds symposium observed that the limited disposal options cause clinicians unease in arriving at a finding of lack of capacity where they fear that hospitalisation will not be appropriate.[80] This is clearly concerning.

6.51 We explore below a range of options to enhance supervision orders. Our emphasis is on enhancing the effectiveness of supervision orders in three separate but interlinked areas:

(1) supporting compliance and engagement;

(2) providing greater protection for the public in the least intrusive way; and

(3) ensuring that individuals who lack capacity make sustained progress away from involvement in the criminal justice system.

6.52 We do not propose to alter the power of the court to impose a residence requirement, a medical treatment requirement or to revoke or amend the order as currently provided for by schedule 1A to the CP(I)A (see draft Bill schedule 1 paragraphs 11 to 15 and paragraphs 24 to 29).

[78] See in particular Just for Kids Law and the Broadmoor Psychiatrists.

[79] Concerns raised, for example, by HHJ David Radford (Snaresbrook judges round table meeting, 17 July 2014), the Centre for Evidence and Criminal Justice Studies (IP response), consultant forensic psychiatrist Dr Tim Rogers (Leeds symposium address), IP response of Graham Wilkinson DJ(MC).

[80] An issue raised by a forensic psychiatrist at the Leeds symposium.

Issue: Enhancing supervision orders by including additional requirements

6.53 It has been notable, from discussion of specific cases with consultees, that the behaviour that brings defendants who lack capacity to the attention of the criminal courts often occurs in periods of crisis, or where support systems in place have broken down for the individual concerned.

6.54 For example, we were given an example of an individual with an autism spectrum condition who was arrested for assault and criminal damage arising out of an incident in a hostel. This occurred when he was in a period of crisis brought on by being moved between three different hostels within a short space of time.

6.55 We are struck by the fact that the ability for an individual to comply with an order is often inextricably bound up with the effectiveness of arrangements made to support that individual.

Discussion: Enhancing supervision orders by including additional requirements

6.56 In light of this, we agree with the observation of Just for Kids Law that an order similar to those available for juveniles would be beneficial. We have in mind an order with a range of different available requirements, which can be tailored to suit the needs of the particular individual, but which can also involve intensive support and supervision.

Constructive requirements

6.57 Currently the supervision order makes little specific provision for constructive support of an unfit individual on the order, save in terms of medical treatment. However, for many individuals who lack capacity, medical treatment is not appropriate. Instead their needs often relate to issues surrounding accommodation, employment or making progress with education or training.

6.58 We had initially considered that the court should have the power to impose a range of constructive requirements. However, after discussion with consultees, it is apparent to us that the court will rarely have sufficient information available at the time of imposing the order to appreciate the full range of constructive assistance and support that might be available or required during the course of the order. It appears to us that the better approach would be for the supervising officer to be required to direct the supervised person to comply with appropriate arrangements to support him or her and to protect against repetition of the problematic conduct.

6.59 We have in mind not only assistance to address the individual's needs in relation to, for example, education, housing, and employment. We also consider, where available, programmes to address or prevent the repetition of harmful behaviours (harmful either to him or her or to the public), such as anger management or alcohol desistance courses. To limit the supervisor and the individual only to options in the contemplation of the court at the time of the disposal being imposed would be unduly to fetter the potential power of the order.

Conclusion: constructive requirements

6.60 **We** therefore **recommend:**

(1) for every supervision order the supervised person be required to attend supervision meetings, rather than simply to "keep in touch" with the supervising officer as currently required (see draft Bill schedule 1 paragraph 9)**; and**

(2) that a constructive support requirement be available to be imposed as part of a supervision order, requiring the supervised person to comply with arrangements made with a view to dealing with his or her needs including education, training, employment and accommodation needs. Such a requirement should be imposed only where the court is satisfied that it is desirable in the interests of:

(a) supporting the supervised person;

(b) preventing any repetition of the conduct that led to the making of the supervision order; or

(c) preventing involvement in conduct which poses a risk of harm to the supervised person or others (see draft Bill schedule 1 paragraph 10).

Restrictive requirements

6.61 In his response to the IP, criminal solicitor Nigel Barnes advocated restrictive arrangements for defendants on supervision orders, particularly restriction on movement and the use of a curfew requirement, either on breach or when the order is first imposed. The Faculty of Forensic and Legal Medicine stated that they would welcome statutory restrictions on the possession of weapons, including an absolute ban on handling firearms. We are also persuaded that there are cases where restrictive requirements would be beneficial, not to punish but in order to protect the public and to support the supervised person in avoiding a repetition of the conduct which brought them to the attention of the police and courts.

6.62 We appreciate that there are various ancillary orders which might be available to the court following a finding against the accused at the alternative finding procedure.[81] One might argue that these make restrictive requirements as part of the supervision order unnecessary. However, we bear in mind first that those ancillary orders do not cover every category of offence. We also note that the breach of those orders is generally a criminal offence for which a substantial term of imprisonment may be available. For some individuals who lack capacity, such draconian ancillary orders will, we consider, be wholly unsuitable, and may result in unnecessary criminalisation of vulnerable individuals. We consider that making restrictive requirements available as part of a supervision order represents a more appropriate approach to managing some individuals who lack capacity, but who may pose a particular risk to the public. Breach of those restrictive

[81] Set out at para 6.8 and following above.

requirements will not amount to a separate criminal offence, but may result in the engagement of a stepped scheme of sanctions.

6.63 Again, the requirements that we have in mind are formulated in a similar fashion to those included within the youth rehabilitation order. However, we also consider it appropriate to include a specific statement that a restrictive requirement should only be imposed if the court is satisfied that the requirement is "necessary" in the interests of supporting the individual.

Conclusion: restrictive requirements

6.64 **We** therefore **recommend that:**

(1) The following restrictive requirements be available to be imposed as part of a supervision order:

(a) A prohibited activity requirement, including the capacity to prohibit the individual's possession, use or carriage of a firearm within the meaning of the Firearms Act 1968 (see draft Bill schedule 1 paragraph 16).

(b) An exclusion requirement, prohibiting the supervised person from attending at a specified place (see draft Bill schedule 1 paragraph 17).

(2) No restrictive requirement should be imposed unless the court is satisfied that it is necessary in the interests of:

(a) supporting the supervised person;

(b) preventing any repetition of the conduct that led to the making of the supervision order; or

(c) preventing involvement in conduct which poses a risk of harm to the supervised person (see draft Bill schedule 1 paragraphs 16(2) and 17(2)).

6.65 We have considered whether a curfew and electronic monitoring should be available as restrictive requirements at the time of the initial imposition of the order. However, we conclude that, given the more substantial curtailment of liberty involved, they would be more appropriate as measures available on breach of the order only, and we address this in more detail at paragraph 6.80 and following below).

Issue: Enhancing supervision orders with powers similar to those attached to Community Treatment Orders

6.66 Some psychiatrist consultees[82] proposed in their response to CP197 that supervision orders be enhanced by powers similar to those available under community treatment orders ("CTOs"). CTOs are civil orders available under

[82] Broadmoor Psychiatrists.

section 17A of the MHA and can be imposed by clinicians when they discharge patients into the community from psychiatric hospital treatment. A patient subject to a CTO can be required to accept clinical monitoring, and can be rapidly recalled to hospital for treatment in certain circumstances. Recall can take place if the clinician takes the view that the patient requires medical treatment in hospital for his or her mental disorder, and there is a risk of harm to the health and safety of the patient or others. A patient can also be recalled if he or she has not made him- or herself available for examination by the clinician when required. The patient can be detained for a maximum of 72 hours following recall, but the CTO does not authorise forcible treatment outside the hospital.[83]

6.67 It is this ability to recall a patient to hospital for assessment and treatment which some consultees felt could enhance supervision orders under section 5 of the CP(I)A. Currently if a person subject to a supervision order with a medical treatment requirement fails to attend hospital to receive, for example, a routine injection of anti-psychotic medication, the clinician has no power to act to ensure that individual receives that treatment or maintains contact with the hospital. Were supervision orders to be enhanced by the power to recall to hospital, the clinician would be able to enforce the person's admission to hospital for treatment to be re-established and/or for further assessment to be conducted.

6.68 The coercive effect of a power of this sort would need to be balanced against its effectiveness in protecting both the person who has been found to lack capacity for trial and the community. Recent research suggests that CTOs may not provide a greater reduction in hospital admissions than other mandatory outpatient care powers (for example, leave of absence from hospital under section 17 of the MHA).[84] However, it does not question the usefulness of a power to recall for assessment or treatment.

6.69 We therefore asked in the IP[85] whether consultees considered that it would be appropriate and effective to expand the power of supervision orders under section 5 of the CP(I)A to include recall of a supervised person to hospital.[86] We asked in the alternative whether consultees could identify any other enhancements of the powers available under supervision orders which would be beneficial.[87]

[83] MHA, s 17E.

[84] T Burns and others, "Community treatment orders for patients with psychosis (OCTET): a randomised controlled trial" (2013) 381 *The Lancet* 1627.

[85] IP Further Question 26.

[86] As available under s 17E to F of the MHA 1983.

[87] IP Further Question 27.

Discussion: Enhancing supervision orders with powers similar to those attached to Community Treatment Orders

6.70 Although there was some support from respondents to the IP for the proposal to add CTO-type powers to supervision orders,[88] consultation responses suggest that there are both principled and pragmatic objections to such a course:

(1) The power of recall would be inappropriate where the person who has been found unfit and to have done the act had not previously been in hospital. It might have the effect of a shortcut admission to hospital using breach proceedings (Carolyn Taylor,[89] Law Society, Dr Penny Brown, Professor Jill Peay[90]).

(2) Many supervision orders are given to those with learning disabilities, who would be unsuitable for hospitalisation (Dr Penny Brown).

(3) It is unclear who would reconsider the order: the Crown Court or the Mental Health Review Tribunal. If the former, would a circuit judge have the requisite expertise to address the issue? (Council of HM Circuit Judges, Dr Penny Brown).

(4) Such a system would be unduly complicated considering the infrequency with which the issue might arise (Council of HM Circuit Judges, Carolyn Taylor).

(5) How would a disagreement between the supervising officer and MHA services be addressed? (HM Council of District Judges (Magistrates' Courts).

(6) The constant threat of recall may not be conducive to an unfit individual "regaining normalcy" (HHJ Tim Lamb QC).

(7) There would be insufficient safeguards for the unfit individual in such a system (Carolyn Taylor).

(8) CTOs have not been found to be effective in reducing readmission (Dr Michael Kavuma).

(9) The power of recall has very little effect in any event because beds are not readily available (Faculty of Forensic and Legal Medicine).

(10) Treatment in hospital should not be confused with punishment issues (Centre for Evidence and Criminal Justice Studies).

[88] Dr Eileen Vizard CBE (consultant child and adolescent psychiatrist), Holroyde J, Charles de Lacy (for defendants previously detained in hospital), Dr Susan O'Rourke (clinical psychologist), Professor Graeme Yorston (academic, consultant forensic psychiatrist and neuropsychiatrist).

[89] Carolyn Taylor is a solicitor specialising in criminal and mental health law.

[90] Professor Jill Peay is an academic.

Conclusion: Enhancing supervision orders with powers similar to those attached to Community Treatment Orders

6.71 We find persuasive these objections raised by consultees to the proposal to add powers akin to a CTO to the supervision order. We do not therefore pursue that option further.

Issue: Risk assessment, monitoring and review

6.72 Rejecting a medical approach to enhancing the effectiveness of supervision orders, we turn then to more general concerns raised by judicial consultees. In particular, we consider the concern that there is no way for the court to ensure that the order is being adhered to. Some consultees felt that court oversight of individuals subject to supervision orders would be helpful. HM Council of District Judges (Magistrates' Courts) suggested that a positive duty might be placed on the supervising officers to notify the court of any concerns. Other consultees focus on the possibility of giving the court power to review the progress of the person on the order (Just for Kids Law and Prison Reform Trust).

6.73 One consultee group suggested that individuals who lack capacity and are found to have "done the act or made the omission" in respect of an offence should be made subject to the provisions of MAPPA[91] (Forensic Psychiatrists of SW Yorkshire NHS Foundation Trust).

Discussion: Risk assessment, monitoring and review

A power for the court to review a supervision order

6.74 The court has the power to revoke or amend an order on application by the supervisor or the supervised person.[92] However, it has no power to require reports on the individual's compliance to be prepared for the court or to review his of her progress on the order.

6.75 We consider that a review function, including the power for the judge who imposed the order to require reports from the supervising officer, and any registered medical practitioner directing treatment as a requirement under the order, would be beneficial. We consider that such a function would be worthwhile in order to:

(1) encourage the individual's compliance with the order;

(2) enable the court to have ongoing oversight and input into the individual's disposal;

(3) enhance public protection by enabling swifter identification of cases where the order has broken down;

[91] The Criminal Justice Act 2003 provides for Multi-Agency Public Protection Arrangements ("MAPPA") across England and Wales, as discussed at para 6.10 above. For further information see: National MAPPA Team, NOMS Offender Management and Public Protection Group, *MAPPA Guidance 2012: Version 4* (2012), https://www.justice.gov.uk/downloads/offenders/mappa/mappa-guidance-2012-part1.pdf (last visited 19 November 2015).

[92] CP(I)A, sch 1A, part 3.

(4) provide a regular mechanism by which the suitability of the order can be assessed, so that amendments can be made to the requirements to enhance progress and tailor support for an individual who lacks capacity; and

(5) increase public confidence in the robustness and effectiveness of the order.

6.76 Such a review function would be an optional element of an order, included where the court considers it appropriate. We consider that there should be flexibility in the review process, to allow for variation in the intervals of review, and to allow review on paper where that is more appropriate.

Extending MAPPA to individuals subject to supervision orders

6.77 We agree with the Forensic Psychiatrists of SW Yorkshire NHS Foundation Trust that MAPPA is capable of being of considerable assistance in relation to the supervision of individuals who lack capacity. There are individuals subject to supervision orders who represent a risk to the public for whom monitoring would be appropriate. Whilst we are firmly of the view that local authorities are best placed to supervise individuals on these orders, we appreciate that they do not have expertise in risk assessment in a criminal context, nor have close working relations with the police and criminal courts. However, specialist risk assessment and multi-disciplinary working across the agencies of the criminal justice system lie at the heart of MAPPA. An individual subject to MAPPA is risk-assessed at the outset and then subject to a level of multi-agency monitoring of an intensity appropriate to the risk posed, bringing together the expertise and oversight of the police, probation providers, local authorities and NHS bodies.

6.78 At present, of those individuals given a supervision order following a section 4A hearing, only those who are subject to notification on the "sex offenders' register" are also subject to MAPPA.[93] There also remains provision for MAPPA oversight of individuals who received a guardianship order (when they were available)[94] in respect of a finding that he or she did the act of a specified sexual or violent offence at a section 4A hearing. We take the view that such oversight and specialist risk assessment would be beneficial for all individuals for whom supervision in the community is the most appropriate outcome but who, by virtue of the offence proved against them, represent an ongoing risk to the public. We therefore consider it appropriate to recommend extending eligibility for MAPPA to all individuals who receive a supervision order following the proof against them (or returning of a special verdict) at an alternative finding procedure in respect of a specified sexual or violent offence.[95]

[93] There is an ongoing review of MAPPA eligibility commissioned by the Responsible Authority National Steering Group. It is due to report to Ministers (Ministry of Justice and Home Office) by the end of March 2016.

[94] The DVCVA repealed s 3 of the Criminal Procedure (Insanity and Unfitness to Plead) Act 1991 which provided for guardianship orders as an available disposal for unfit individuals.

[95] As listed in CJA 2003, sch 15. See para 6.11 above for further details of the offences which appear in this schedule.

Conclusion: Risk assessment, monitoring and review

6.79 **We** therefore **make two recommendations in relation to the incorporation of risk assessment, monitoring and review in order to enhance the effectiveness of supervision orders:**

(1) The court imposing a supervision order should have the power to include a requirement:

(a) providing for periodic review of the order, with flexibility to vary the intervals of such reviews;

(b) requiring the attendance of the individual at a review hearing;

(c) requiring reports by the supervising officer and any registered medical practitioner directing treatment under the order; and

(d) allowing for subsequent reviews to be conducted without oral hearing where appropriate (see draft Bill schedule 1 paragraphs 21 and 22).

(2) Section 327(4) of the Criminal Justice Act 2003 should be amended so that where a specified violent or sexual offence (listed in schedule 15 of the Criminal Justice Act 2003) has been proved against an individual at the alternative finding procedure (or a special verdict has been returned in that regard), an individual made subject to a supervision order in relation to that offence should also be made subject to MAPPA for the period of the order (see draft Bill clause 67).

Issue: Sanction for breach of a supervision order

6.80 In many cases we consider that a review function will, in itself, have a beneficial effect on compliance and progress. However, a number of consultees have observed that, for more difficult cases, the absence of a breach function is capable of undermining the effectiveness of a review function and of the order in general.[96] Several consultees have observed, especially at the symposium and at consultation discussions, that just because an individual is unable to participate in a trial, does not necessarily mean that it is inappropriate for them to be punished if they wilfully breach an order of the court. Nor is lack of capacity for trial the same thing as being unsuited to, or unable to cope with, punishment, including imprisonment.[97] Conversely, others argue that a punitive or coercive response to a defendant who lacks capacity is inappropriate and fundamentally at odds with the fact that the individual has not been convicted of an offence.

[96] Dr Tim Rogers (symposium), HHJ David Radford (Snaresbrook judges meeting, 17 July 2014), discussion at Northumbria meeting of the Centre for Evidence and Criminal Justice (IP response).

[97] For example, observation of consultant forensic psychiatrist Dr Andrew Bickle at the symposium and in his IP response.

Discussion: Sanction for breach of a supervision order

6.81 We view this as one of the most difficult issues addressed by this project. This question goes to the heart of the tension between fair treatment of some of the most vulnerable defendants in the criminal justice system and the need to provide effective measures to protect the public from individuals who may be amongst the most dangerous dealt with by the criminal courts.

6.82 We consider that introduction of sanction for breach of an order raises three distinct challenges:

(1) Ensuring that an individual who lacks capacity is able to understand the requirements of the order and facilitated to comply.

(2) Establishing with safety that an individual who lacks capacity has indeed wilfully breached an order, and that the defendant is able to participate effectively in the breach proceedings.

(3) Reconciling a punitive approach to an individual who lacks capacity and who has not been convicted of an offence.

6.83 We do, however, consider that supervision orders without sanction for breach are more problematic because:

(1) individuals who may pose a significant risk of harm, but who are not suitable for hospitalisation, may wilfully breach their supervision orders. Without a sanction for breach, such individuals would be beyond the reach of the courts; and

(2) an order without any mechanism to ensure compliance is liable to undermine public confidence in the court system and the authority of the courts.

Capacity to comply with an order

6.84 As we have discussed above, we recommend a supervision order which can be tailored to the specific needs of the individual and his or her ability to comply with and make progress under supervision. The review function is in part designed to allow for difficulties engaging with the order, and issues of its appropriateness, to be considered and reviewed in the presence of the defendant and those with responsibility for supervising and treating the defendant under the order. In short, it should not be the case that a defendant is in danger of breach proceedings arising out of a lack of understanding of the order or an inability to comply with it. We also have in mind that there should be a reasonable excuse defence incorporated into the breach provisions. Thus an individual whose difficulties prevent his or her compliance with the order is protected from a breach finding in any event.

Capacity for breach proceedings

6.85 Although all individuals subject to supervision orders will have been found to lack capacity for the original proceedings on the offence, they will not necessarily lack capacity for breach proceedings. There will inevitably be some individuals who

lack capacity for any judicial determination and in their cases moving to a finding of breach would not be appropriate. However, there will be other individuals who, although they lacked capacity for trial, are capable of understanding and participating effectively in more straightforward breach proceedings. For example, the issue on breach may be an allegation that the individual has repeatedly failed to attend for appointments without a good reason, or has failed to keep the supervisor informed of where he or she is living.

6.86 We therefore consider that it is appropriate to include in the statutory provisions scope for the defendant, or the court of its own motion, to raise the question of lack of capacity for the contemplated breach proceedings. We consider that the test of capacity for trial should be adapted for breach proceedings. If an individual is found to lack capacity for the breach proceedings in question then the court should be unable to pursue, or pursue further, the breach proceedings.

Could a punitive approach to defendants who lack capacity be appropriate?

6.87 We take the clear view that a punitive response, such as custody, could never be appropriate at the initial disposal stage. This is fundamentally because the alternative finding procedure does not result in a conviction; the court having concluded that the defendant's difficulties mean that he or she could not have a fair trial. However, we do consider that, under our recommendations, the court has greater justification for imposing and enforcing the supervision order. This arises because the jury have found all elements of the offence proved against the defendant who lacks capacity, within the limitations of the alternative finding procedure.

6.88 We consider, especially following this more robust alternative finding procedure, that a punitive approach to an individual who lacks capacity may be appropriate where he or she has wilfully, that is intentionally rather than accidentally, breached an order which he or she was capable of understanding. Coercion in that regard would be a response to the individual's wilful refusal to comply with an order of the court, where that is established, rather than to his or her behaviour at the time of the alleged offence.

6.89 Undeniably there will be some individuals who lack capacity, whose difficulties are so profound that it would be inappropriate and unfair to impose a sanction for breach of any aspect of the order. However, we also appreciate that there will be some individuals who lack capacity for trial who can, nonetheless, comply with straightforward and tailored requirements to attend supervision or for a court review hearing, and could participate effectively in straightforward breach proceedings. For those individuals we consider that it is appropriate for there to be a sanction available for a breach of a supervision order (we include below at paragraph 6.96 and following some examples of situations in which we consider sanction to be appropriate)

6.90 We do, however, take the view that there should be no necessity to impose a sanction even where breach of the order is established. The court should be entitled to make no order, or to revoke or vary the terms of the existing order to encourage future compliance, if that is more appropriate.

What sanctions should be available?

Hospitalisation

6.91 We turn then to consider what the sanction should be. The Centre for Evidence and Criminal Justice Studies advanced the suggestion that hospitalisation be considered as a potential outcome for breach. Whilst there is a certain intuitive attractiveness to this proposal, for many of the reasons raised by those who objected to the addition of CTO powers,[98] we do not consider that hospitalisation is an appropriate form of sanction. In particular, we are concerned that it would be undesirable for a defendant lacking in capacity to view hospital as a coercive threat rather than a source of therapeutic support and treatment. Additionally, hospitalisation in such circumstances may be in breach of article 5 of the European Convention on Human Rights ("ECHR") (right to liberty and security of the person).

Curfew (with or without electronic monitoring)

6.92 As we discussed above, we consider that curfew orders (especially where electronic monitoring is used) involve a significant curtailment of liberty. They represent a punitive response to breach, but they also offer the capacity for other supportive arrangements to continue unaffected. As such we consider curfew (with or without tagging) to be a highly suitable option as sanction for breach.

Custodial sanction

6.93 We approach this potential sanction with reluctance on the basis that some vulnerable individuals who lack capacity will be wholly unsuitable for a custodial sanction, even if they wilfully and repeatedly breach the order. In those cases a custodial term would be inappropriate. However, we do not consider that this should lead us to reject custody entirely as an option on breach. As Dr Bickle observed,[99] a defendant who lacks capacity for trial may not be unsuitable for a custodial setting, and there may be those whose repeated breaches raise significant issues of public protection.

6.94 Given the range of defendants who may lack capacity for trial, and the serious nature of the allegations which may be dealt with by way of a supervision order, we consider that a custodial sanction should be included within the range of sanction options for adults. The maximum term should be set to reflect sentence for contempt of court,[100] since that is the basis of the breach proceedings. Thus the maximum in the Crown Court would be two years' custody and in the magistrates' court six months' custody.

6.95 However, we consider that the following restrictions should be imposed on the use of custodial sanction:

(1) That custodial sanction should not be available for youths. For youths a youth rehabilitation order with intensive supervision and surveillance

[98] Set out at para 6.70 above.

[99] IP response of Dr Andrew Bickle.

[100] Contempt of Court Act 1981, s 14(1).

should be available instead (we discuss this in more detail in Chapter 7 below at paragraph 7.195).

(2) That custodial sanction should only be available where the defendant has been warned at a hearing to consider an earlier breach that such an order may be imposed in future breach proceedings.

6.96 We think it is helpful to provide worked examples to illustrate the sorts of cases where we consider that a custodial sanction may be appropriate and necessary:

Example 12 The supervised person (D, personality disorder, severe depression), is a former solicitor, charged with using a false instrument and fraud. The alleged offending arises out of a case that he was previously involved in. As a result of his work on the case, D has the delusional belief that he is entitled to a charge on a particular residential property in satisfaction of a supposed debt. The residential property in question is currently resided in by a family with good title. In order to obtain possession D has fraudulently obtained a writ of possession in respect of the property and has engaged bailiffs to execute the writ, causing substantial distress to the occupying family.

Under our recommendations, D is found to lack the capacity for trial and the allegations are proved against D at the alternative finding procedure. He receives a reformed supervision order, initially including (in addition to the general supervision requirement) a residence requirement, a review requirement and a requirement to receive medical treatment.

D fails to attend supervision appointments or engage with his medical treatment. Police have made the supervising officer aware that D has also been attending the disputed property daily, challenging the occupants on sight. The supervising officer serves notice that the defendant has failed to comply with the order. The court lists the case for review and breach. The defendant attends the hearing with legal representation.

D disputes the alleged failure to comply. The court declines to hear formal breach proceedings, but reviews and amends the order to include a restrictive requirement prohibiting the defendant from attending the disputed address or making contact, direct or indirect, with the occupying family.

D continues to breach the order, including attending repeatedly at the disputed address. The supervising officer serves a further notice that D has failed to comply with the order, including breaching the new restrictive requirement.

The case is listed for breach. There is no dispute that D understands that he is not to approach the property, he simply disputes the legal foundation for the judgment. The breach is established. The Court amends the order a second time, this time to impose a curfew requirement, with electronic monitoring, requiring the defendant to be at his home address between 9 am and 12 noon on Fridays. This will enable the supervising officer and the responsible registered medical

practitioner ("RMP") to attend D's address to provide supervision and treatment. The court formally warns D that future breach may result in custodial sanction.

D further breaches the order. The occupying family are increasingly concerned for their safety and have been subjected to a campaign of abuse from D. The supervising officer serves a third notice of breach and the case is listed for review and breach to be heard. D attends and is represented. The court finds the breach proved. The court considers that all previous amendments to the order have failed to ensure compliance and that there are no further available measures which could be employed. The court is satisfied that D understands the order and that it is appropriate. The court hears from the responsible RMP that D is fit to receive a custodial sanction. The court concludes that it has no option but to impose a four month custodial term on D as sanction for breach.

Example 13 The supervised person (A, significant learning disability, no mental disorder) is charged with outraging public decency. He is alleged to have exposed himself and masturbated in the street outside a primary school whilst children were leaving for the day.

Under our recommended structure, A is found to be unable to participate effectively in criminal proceedings. The jury finds the allegation proved against A at the alternative finding procedure. A receives a supervision order, which includes, in addition to a residence requirement and the usual supervision, a prohibited activity requirement prohibiting A from being in the vicinity of the school in question at any time. There is also a constructive requirement for the supervising officer to make arrangements to support A and to address his needs. A review requirement is also included.

Initially reviews proceed satisfactorily. The supervising officer reports good compliance with the supervision and that A is attending sexual relationship and boundary setting training as part of a learning disability group. But subsequently the supervising officer becomes aware from police that A has been seen standing around outside two other local primary schools at the close of the school day. A breach notice is served on A, who attends the hearing represented. The court does not proceed to breach, but reviews the order, to impose a curfew on the defendant so that he must remain at his address between 2.30 and 4.30pm on week days. The judge ensures that A understands the order, and the new requirement.

A second breach notice is served on A when it is reported to the police that he has been seen standing outside primary schools at the close of the school day (having this time exposed himself to parents waiting outside the school). The Crown Prosecution Service conclude it is not in the public interest to prosecute since the defendant remains lacking in capacity for trial, and A is already subject to the likely disposal should an alternative finding procedure ensue. The

court proceeds with breach proceedings in response to this second breach notice. A is represented and is able to engage with proceedings to the extent required at the breach hearing, namely establishing that he was present outside the school at the time of his curfew (established with CCTV/bodycam footage from a police officer stationed at a local school). The court imposes an electronic monitoring requirement and warns A formally, and in clear terms, that subsequent breach may result in a custodial sanction.

A continues to breach the order in the same fashion. The police consider that his behaviour is becoming increasingly disturbing. A third breach notice is served. A admits the breach of the curfew requirement. The supervising officer informs the court that he considers that further work in the community will be unlikely to prevent a repetition of the concerning behaviour. The court imposes four months' in custody.

Conclusion: Sanction for breach of a supervision order

6.97 **We** therefore **recommend that:**

(1) **Provisions addressing a supervised person's failure to comply with a supervision order should be introduced** (see draft Bill schedule 1 part 6).

(2) **Breach should only be established where the court is satisfied that the supervised person has wilfully and without reasonable excuse failed to comply with one or more of the requirements of the order** (see draft Bill schedule 1 paragraph 30(2)).

(3) **The breach hearing should not proceed where the supervised person is found to lack capacity for that hearing** (see draft Bill schedule 1 paragraphs 31 to 33).

(4) **On breach being established, the Crown Court should have the following powers:**

(a) **To make no order.**

(b) **To amend or revoke the existing order.**

(c) **To require an adult to pay a fine up to a maximum of £10,000.**

(d) **To make a curfew order (with or without electronic tagging).**

(e) **Subject to prior warning, to revoke the supervision order and impose on an adult individual a custodial term not exceeding two years' imprisonment, or the maximum term that would have been available for the offence for which the supervision was imposed, whichever is the lesser.**

(f) **Subject to prior warning, and where the original offence was imprisonable, to revoke the supervision order and to impose**

on a youth a youth rehabilitation order with intensive supervision and surveillance (see draft Bill schedule 1 paragraph 34).

Issue: Should the maximum length of the order be extended beyond two years?

6.98 In our discussion paper on insanity, we suggested that we would consider whether the length of the supervision order requires extension beyond two years.[101] Written consultation responses have not identified a particular need to extend the length of the supervision order, but we have not asked that question directly.[102]

Discussion and conclusion: Should the maximum length of the order be extended beyond two years?

6.99 Nonetheless, we consider that there is value in extending the maximum length of the order for the following reasons:

(1) It is notable that the majority of orders are made for the maximum term. This is unusual when compared with the use of maximum sentences on conviction and suggests that the courts would welcome a higher maximum term.

(2) A two year order is out of step with other community orders which typically run for three years.[103]

(3) Where supportive requirements may be included within a supervision order, we consider that a longer maximum term may be appropriate to allow more established support to be provided to the supervised individual and more lasting protection of the public to be achieved.

(4) This approach has received support when raised at conferences, and in discussions with stakeholders.[104]

(5) An extension to a three year maximum would be in keeping with the three year maximum term for supervision and treatment orders for unfit individuals in Scotland and Northern Ireland.[105]

[101] Criminal Liability: Insanity and Automatism (July 2013) Law Commission Discussion Paper, para 4.151.

[102] In the IP at Further Question 27 we did, however, ask whether consultees could identify "any other enhancements of the powers available under supervision orders which would be beneficial".

[103] A Community Order (CJA 2003, s 177), a Youth Rehabilitation Order and a Youth Rehabilitation Order with Intensive Supervision and Surveillance (both under Criminal Justice and Immigration Act 2008, s 1) are all orders with a maximum three year duration.

[104] For example, discussed with Treasury Counsel, 29 January 2015.

[105] See Criminal Procedure (Scotland) Act 1995, s 57(2)(d) and sch 4, para 1(1)(a) and Mental Health (Northern Ireland) Order 1986 (SI 1986 No 595 (NI 4)), art 50A(2) and sch 2A, para 1(1)(a) (as amended by Supervision and Treatment Orders (Maximum Period) Order (Northern Ireland) 2011 (SI 2011 No 115)).

6.100 **We** therefore **recommend that the maximum length of the supervision order be extended from two years to three years** (see draft Bill schedule 1 paragraph 1(1)).

ANALYSIS AND DISCUSSION: CONDITIONAL DISCHARGES

Issue: Should a conditional discharge be available to the court?

6.101 Conditional discharges operate so that the defendant experiences no penalty for the offence, as long as he or she does not commit a further offence within the discharge period (up to three years). If the defendant is convicted of a further offence committed within the discharge period, the defendant is then liable for re-sentence for the initial offence for which he or she received a conditional discharge (as well as being sentenced for the new offence).

Discussion: Should a conditional discharge be available to the court?

6.102 The proposal to add a conditional discharge[106] to the range of disposals available is initially attractive. However, there are logical difficulties in making use of such an order in this context. The purpose of a conditional discharge is to allow re-sentence for the original matter if a subsequent offence is found to have been committed. Even if an individual who previously lacked capacity were to recover, so that he or she could be tried for a new offence, on that subsequent conviction there could be no re-sentence for the original matter since the defendant would never have been convicted of the earlier offence. Where the defendant lacks capacity for the subsequent proceedings, and receives an adverse finding at the subsequent alternative finding procedure, the full range of disposals is available to the court in any event and would not be enhanced by the power to impose a further disposal relating to the original matter.

Conclusion: Should a conditional discharge be available to the court?

6.103 Working through the process in this way, we do not see any advantage in extending the range of disposals to include a conditional discharge.

ANALYSIS AND DISCUSSION: THE MANDATORY RESTRICTION ORDER

Issue: Lifting the mandatory restriction order in cases of murder

6.104 As we set out at paragraph 6.7 above, a restriction order is mandatory for a person who is found to have done the act in relation to murder,[107] as long as that person satisfies the conditions for hospitalisation under section 37(2) of the MHA. The concern with that provision, as amended by the DVCVA, is that it is liable to result in arbitrary and discriminatory outcomes, since the mandatory restriction is only applicable to those who suffer a treatable mental disorder.

[106] Raised at the Northumbria meeting of the Centre for Evidence and Criminal Justice Studies, Newcastle (9 July 2014).

[107] CP(I)A, s 5(3).

Example 14 A defendant, V, has paranoid schizophrenia and is charged with the murder of her partner whom she stabbed during a domestic altercation. Under the current statutory provisions, she is determined to be unfit to plead, and is found to have done the act of murder at the section 4A CP(I)A hearing. The clinicians report that V's condition is susceptible to treatment and that she is suitable for a hospital order under section 37 MHA. Under section 5(3) of the CP(I)A the judge must and does impose a hospital order with a restriction.

6.105 However, a defendant who faces a murder allegation but has a condition which is not susceptible to, or suitable for, hospital treatment would not be considered suitable for a hospital order. In those circumstances, the mandatory restriction order would not be engaged. The defendant would at most receive a supervision order, with or without a treatment requirement, as a disposal.

Example 15 A defendant, W, has an antisocial personality disorder and is charged with the murder of a stranger whom he assaulted outside a pub. Under the current statutory provisions, he is determined to be unfit to plead, and is found to have done the act of murder at the section 4A CP(I)A hearing. The clinicians report that W's condition does not require treatment in a hospital setting and he is therefore not suitable for a hospital order. The judge imposes a two year supervision order.

6.106 The contrast between the disposals imposed upon defendants V and W is stark. V faces substantial and potentially indefinite deprivation of his liberty, whilst W will be supervised in the community for up to two years under the current disposal arrangements. There is no apparent justification for this difference in outcome on the basis that there is a greater need to protect the public from "serious harm"[108] in the case of V than there is in the case of W. Indeed, arguably the management difficulties presented by W's condition might appear to raise greater public protection concerns than the case of V. V receives the mandatory restriction order, instead of the supervision order, simply by virtue of the nature of his mental disorder.

Discussion: Lifting the mandatory restriction order in cases of murder

6.107 Where an allegation of murder has been proved against a defendant at an alternative finding procedure, we do not consider the gulf between the hospital order with mandatory restriction, which would have to be imposed upon a defendant with a treatable mental disorder, and the supervision order, which would be the only available substantive disposal for a defendant whose condition is not treatable, to be justifiable in the circumstances. As we discussed at paragraph 6.23 above, such an approach appears to us to be out of step with that taken in the Equality Act 2010 and article 14 of the United Nations Convention on the Rights of Persons with Disabilities ("UNCRPD"). Indeed the latter provision

[108] As would be required were a restriction order being contemplated under MHA, s 41.

places an absolute prohibition on deprivation of liberty on the basis of disability alone.[109]

6.108 There is another respect in which the mandatory restriction order in murder cases has a discriminatory effect on defendants who lack capacity. This arises in cases where the defendant, if being tried in the usual way, would raise one of the partial defences to murder (being diminished responsibility, loss of control or suicide pact) and seek a manslaughter verdict instead. For the reasons set out at paragraph 0 and following in Chapter 5 above, making partial defences available in the alternative finding procedure is problematic and we do not recommend this course. Removing the mandatory restriction order for cases of murder means that defendants who lack capacity, who would otherwise seek a manslaughter verdict, are not subject to a mandatory restriction order as a result of the offence of murder being proved against them.

6.109 We consider that lifting the mandatory restriction poses no threat to public safety or public confidence in the criminal justice system. The court will retain the discretion to impose a restriction order where satisfied that such an order is necessary to protect the public from serious harm. The nature of the triggering offence will continue to be relevant and is specifically required to be taken into account by the court in considering whether to impose a restriction order.[110]

Conclusion: Lifting the mandatory restriction order in cases of murder

6.110 **We** therefore **recommend removing the mandatory requirement[111] that a restriction order be imposed on a defendant who is otherwise suitable for hospitalisation under section 37(2) of the Mental Health Act 1983 and against whom there has been an adverse finding at the section 4A hearing in relation to an offence the sentence for which is fixed by law** (see draft Bill clause 57).

ANALYSIS AND DISCUSSION: RESTRAINING ORDERS

Issue: Restraining order to be available following a finding that the allegation is proved against a defendant at the alternative finding procedure

6.111 As set out above at paragraphs 6.24 and 6.25 above, there is a gap in the current law in relation to restraining orders for individuals who lack capacity. The case of *Chinegwundoh*[112] confirmed that the court has no power to make a restraining order in relation to a defendant found to have "done the act or made the omission" in relation to an offence. [113]

[109] See the Statement on article 14 of the United Nations Convention on the Rights of Person with Disabilities (Geneva, September 2014), http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15183&LangID=E (last accessed 19 November 2015).

[110] MHA, s 41(1).

[111] Currently contained within CP(I)A, s 5(3).

[112] [2015] EWCA Crim 109, [2015] 1 WLR 2818.

[113] See also N Wortley, "Unfitness to plead and restraining orders: 'a lacuna in the court's armoury'" (2015) 79(2) *Journal of Criminal Law* 87.

Discussion: Restraining order to be available following a finding that the allegation is proved against a defendant at the alternative finding procedure

6.112 We agree with Mr Justice Openshaw that this is a "lacuna in the court's armoury"[114] which it would be appropriate to address. It is anomalous that a defendant who is acquitted at the alternative finding procedure could be made subject to a restraining order[115] but a defendant against whom the allegation is proved could not be subject to such an order.[116] As Mr Justice Openshaw observed, and has been echoed in our consultation work, such an order may be very useful in relation to a defendant who lacks capacity,[117] as the case of *Chinegwundoh* demonstrates.[118]

Conclusion: Restraining order to be available following a finding that the allegation is proved against a defendant at the alternative finding procedure

6.113 **We** therefore **recommend that a restraining order be available to the court where a defendant has had an allegation proved against him or her at the alternative finding procedure** (see draft Bill clause 66).

[114] [2015] EWCA Crim 109, [2015] 1 WLR 2818 at [27].

[115] Protection from Harassment Act 1997, s 5A.

[116] It should be noted that a restraining order under s 5A of the Protection from Harassment Act 1997 is available where a special verdict has been returned, *AJR* [2013] EWCA Crim 591, [2013] 2 Cr App R 12.

[117] The usefulness of a restraining order for a defendant who lacks capacity was raised in the Snaresbrook Judges' meeting date (17 July 2014).

[118] In *Chinegwundoh* the unfit defendant had subjected the legitimate occupiers of a property to which he felt he was entitled to the "frightening ordeal of their homes being invaded and their personal belongings being thrown outside of the property" forcing the occupiers to resort to expensive emergency applications to the High Court [2015] EWCA Crim 109, [2015] 1 WLR 2818 at [20].

CHAPTER 7
EFFECTIVE PARTICIPATION IN THE MAGISTRATES' AND YOUTH COURTS

INTRODUCTION

7.1 This chapter looks at the approach taken in the magistrates' courts, including the youth court,[1] where a defendant has difficulty participating effectively in the proceedings. The current unfitness to plead framework that we have been considering in the earlier chapters of this report does not apply in the summary courts.[2] As we explore in this chapter, the parties and the court have a different, and much more limited, legal framework for addressing participation difficulties when they arise in the magistrates' courts. Critically, the disposal options are also extremely limited where participation issues have been identified, and in many cases no suitable arrangements are available to support the defendant and protect the public.

7.2 We look in detail in this chapter at how the current arrangements for addressing participation difficulties operate in the summary courts, and identify the problems which arise as a result. We conclude that the legal framework for addressing participation difficulties in the summary courts is in urgent need of reform; a view endorsed overwhelmingly by our consultees. We turn then to considering what reform, if any, is required. There was significant support from respondents to our Consultation Paper ("CP197") for our initial proposal that provisions for addressing participation issues in the summary courts should be brought into line, as far as possible, with those in the Crown Court. In our Issues Paper ("IP") we sought to refine how that might be achieved. In this chapter we analyse responses to those refined proposals and set out our recommendations for the introduction of a statutory scheme to address effective participation issues in the magistrates' courts.

[1] Unless we specify otherwise, we use the term "magistrates' courts" to include both the adult magistrates' court and the youth court. Where we intend to refer only to the adult magistrates' court we will use the phrase "adult magistrates' court".

[2] By "summary courts" or "summary jurisdiction" we mean the adult magistrates' and youth courts together.

Key recommendations in this chapter:

1) A statutory framework for determining whether a defendant lacks the capacity to participate effectively in a trial should be introduced in the magistrates' (including youth) courts.

2) The same tests of capacity to participate effectively in a trial, and capacity to plead guilty, should be applied in the magistrates' courts as in the Crown Court.

3) The determination of lack of capacity, and any subsequent procedures, should be conducted by a district judge sitting alone.

4) Following a finding of lack of capacity, the same procedures should follow in the magistrates' courts as in the Crown Court, including there being an available discretion to divert the defendant from the criminal justice system.

5) A special determination of not guilty by reason of insanity should be available, where appropriate, at the alternative finding procedure.

THE CURRENT POSITION[3]

No formal unfitness to plead procedure

7.3 There is no specific procedure by which a person's unfitness to plead may be determined in the magistrates' court. Sections 4 and 4A of the Criminal Procedure (Insanity) Act 1964 ("CP(I)A"), which set out how those issues are dealt with in the Crown Court, have no application in the adult magistrates' or youth courts.

Provision for mentally disordered defendants charged with imprisonable offences

7.4 There are, however, two powers in the summary courts for dealing with mentally disordered defendants who are charged with imprisonable offences:

(1) Section 37(3) of the Mental Health Act 1983 ("MHA") provides that the court can make a hospital order (or a guardianship order in respect of a defendant aged 16 or over),[4] without convicting the defendant if satisfied that the defendant "did the act or made the omission charged". Such

[3] Discussed in CP197, paras 8.3 to 8.13.

[4] Guardianship orders are only available to those over 16 years. Under a guardianship order, the individual is placed under the responsibility of a local authority or a person approved by the local authority. The guardian has the power to take decisions on behalf of the individual where those decisions are in that person's best interests. These decisions can include where the individual lives, and putting in place requirements to attend treatment, work or education.

orders can only be made if the requirements of section 37(2) of the MHA are satisfied. Namely that the defendant suffers from a "mental disorder" which makes treatment in hospital, or supervision under a guardianship order, appropriate, and that such an order would be the most suitable method of disposing of the case. The court cannot make a hospital or guardianship order without the evidence of two registered medical practitioners, one of whom must be approved under section 12 of the MHA.[5] Where a hospital order is made, the magistrates have no power to impose a restriction order under section 41 of the MHA.[6] Nor do the magistrates have the power to commit the defendant to the Crown Court for a restriction order to be considered where they proceed under section 37(3) of the MHA.[7]

(2) Section 11(1) of the Powers of Criminal Courts (Sentencing) Act 2000 ("PCCSA") gives the court the ancillary power to adjourn for medical reports to be prepared in relation to a defendant who is being tried for an imprisonable summary offence. Again, the court must be satisfied that the defendant "did the act or made the omission".

Procedure to be adopted where section 37(3) of the Mental Health Act 1983 is contemplated

7.5 Unlike the unfitness provisions in the Crown Court,[8] there is no statutory procedure for deciding whether the defendant "did the act or made the omission" where an order under section 37(3) of the MHA is contemplated. Several reported cases have sought to establish how the court should proceed.[9] This caselaw suggests that where the possibility of a section 37(3) MHA disposal is indicated at the beginning of the trial, then the court can embark directly on a fact-finding exercise from the outset. It appears that the finding can be made on the basis of admissions or on the calling of evidence.[10] Where the issue is not apparent until after the trial has been embarked upon, then the court may switch to the fact-finding process during the course of the trial.

5 Section 12 MHA approval designates a registered medical practitioner as having special experience in the diagnosis or treatment of mental disorder. Section 12 MHA approved registered medical practitioners are generally, but not always, psychiatrists.

6 A restriction order has the effect of allowing relevant agencies within the criminal justice system to maintain control over the future release of the unfit individual from hospital, and enables conditions to be placed on his or her release in due course. A person who is subject to a restriction order cannot be discharged from hospital, granted leave of absence or transferred between hospitals without the consent of the Secretary of State as long as the order is in force.

7 In contrast to the magistrates' power to commit for a restriction order to be imposed where the court is considering imposing a hospital order on conviction under MHA, s 43.

8 Where the procedure for the finding of fact is governed by CP(I)A, s 4A.

9 *R (P) v Barking Youth Court* [2002] EWHC 734 (Admin), [2002] 2 Cr App R 19; *Lincoln (Kesteven) Justices* [1983] 1 WLR 335, [1983] 1 All ER 901; *R (Singh) v Stratford Magistrates' Court* [2007] EWHC 1582 (Admin), [2007] 1 WLR 3119; and *Blouet v Bath and Wansdyke Magistrates' Court* [2009] EWHC 759 (Admin), [2009] MHLR 71.

10 *R (Singh) v Stratford Magistrates' Court* [2007] EWHC 1582 (Admin), [2007] 1 WLR 3119, [35]; *Lincoln (Kesteven) Justices* [1983] 1 WLR 335, [1983] 1 All ER 901.

Either way offences sent to the Crown Court

7.6 Alternatively, where an adult defendant who has participation difficulties faces a charge that is triable either way,[11] it is open to the magistrates' court to decline jurisdiction, or the adult defendant to elect (or choose) Crown Court trial. In this way an adult defendant can be sent for trial to the Crown Court, where fitness to plead issues can be considered.[12] By contrast, and particularly following the case of *Derby Youth Court*,[13] the circumstances in which a youth with significant participation difficulties might be sent to the Crown Court for trial are very much more restricted.[14]

Application to stay the proceedings as an abuse of process

7.7 As in any other criminal court, the defendant in the magistrates' court has the right to participate effectively in the trial, guaranteed under article 6 of the European Convention of Human Rights ("ECHR").[15] This is more frequently argued in relation to young defendants, but it is a right enjoyed by adults as well. Where special measures cannot adequately address participation concerns, the only other available remedy for a defendant who is unable to participate effectively is to apply to stay proceedings as an abuse of process.[16] The power of the justices to stay a prosecution on this basis is very sparingly exercised,[17] and will only be employed in "exceptional circumstances".[18] This is particularly so in the youth court, where it would only be in exceptional cases that a stay would be granted before evidence is heard.[19]

[11] This means that the offence is of sufficient seriousness that it can be tried in the magistrates' court or in the Crown Court.

[12] Under s 51 of the Crime and Disorder Act 1998, which now covers the sending for trial to the Crown Court of both either-way and indictable-only offences.

[13] *R(P) v Derby Youth Court* [2015] EWHC 573 (Admin), (2015) 179 JP 139 in which it was held that it would not be appropriate to send a child or young person who was "unfit to plead" to the Crown Court for trial under the Crime and Disorder Act 1998, s 51A(3)(b). The court concluded that s 51A(3) could not apply since, on account of his unfitness, the defendant would not be "found guilty" of the qualifying offences with which he was charged. We anticipate that this reasoning would also exclude sending a child or young person for trial under section 51A(3)(d) which includes the same requirement for a defendant to be "found guilty".

[14] Confined now, we consider, following *R(P) v Derby Youth Court* [2015] EWHC 573 (Admin), (2015) 179 JP 139 to cases of homicide, certain firearms offences, cases where notice is served in a serious or complex fraud and where a juvenile is jointly charged with an adult (Crime and Disorder Act 1998, s 51A(3)).

[15] *SC v United Kingdom* (2005) 40 EHRR 10 (App No 60958/00), [29]. Discussed more fully at para 3.20 above.

[16] Such an application invites the court to stay the proceedings on the basis that it will be impossible, as a result of the defendant's participatory difficulties, for him or her to have a fair trial (Connelly v DPP [1964] AC 1254, [1964] 2 WLR 1145 and DPP v Humphrys [1977] AC 1, [1976] 2 WLR 857).

[17] *Horseferry Road Magistrates' Court ex parte Bennett* [1994] 1 AC 42, [1993] 3 WLR 90.

[18] *R (Ebrahim) v Feltham Magistrates' Court* [2001] EWHC Admin 130, [2001] 1 WLR 1293 at 17, *Attorney General's Reference (No 1 of 1990)* [1992] QB 630, [1992] 3 WLR 9 at 643.

[19] *R(TP)* v *West London Youth Court* [2005] EWHC 2583 (Admin), [2006] 1 WLR 1219. Discussed further below at para 7.41.

The approach to be taken on application to stay proceedings in the magistrates' court

7.8 In *DPP v P*, Lady Justice Smith considered how the court should proceed where the defence wish to apply for a stay of proceedings on the basis that the defendant is unable to participate effectively. The case involved a child, but we consider that it is applicable to adults with participation difficulties in the magistrates' court as well. Lady Justice Smith considered that where effective participation is raised as the issue on an abuse of process application, it would be appropriate for the court to embark on the trial process. The court would then hear medical evidence as part of the evidence in the case, rather than on free-standing application.[20] Keeping a careful eye on the defendant's understanding and ability to engage in the proceedings, the court should halt the proceedings at any stage if it concludes that the defendant is not participating effectively in the trial. The court would then have a discretion to proceed with a fact-finding hearing (under section 37(3) of the MHA) or to stay the proceedings as an abuse of process, but only if "no useful purpose at all could be served by finding the facts",[21] and subject to the principles outlined above at 7.7.

PROBLEMS WITH THE CURRENT POSITION: MAGISTRATES' COURTS[22]

7.9 Mr Justice Wright in the case of *R(P) v Barking Youth Court* declared that the above provisions created a "complete statutory framework" for the consideration of all the issues arising in cases concerning defendants who "are or may be mentally ill or suffering from severe mental impairment".[23] However, during the course of our consultation work in relation to unfitness to plead, members of the judiciary, legal representatives, legal advisers, clinicians and academics have raised significant problems with the current system.

7.10 At the time of drafting CP197, although we had anecdotal evidence that there were problems with the absence of an unfitness to plead framework in the magistrates' court, there was limited published material indicating whether practitioners believed that reform was needed in the summary jurisdiction. As a result, in CP197 we raised tentative concerns about the likely difficulties being encountered in practice.[24] The responses that we received, in addition to reflecting upon our provisional questions, resoundingly confirmed those concerns and raised a significant number of other difficulties.

7.11 In this section we set out all the difficulties identified to date, both in CP197 and as raised by consultees in response to the IP and elsewhere.

[20] *DPP v P* [2007] EWHC 946 (Admin), [2008] 1 WLR 1005 at [53].

[21] *DPP v P* [2007] EWHC 946 (Admin), [2008] 1 WLR 1005 at [56]. See also *R (P) v West London Youth Court and another* [2005] EWHC 2583 (Admin), [2006] 1 WLR 1219 at [18].

[22] Discussed more fully in CP197, paras 8.14 to 8.21. Responses are set out in more detail in Unfitness to Plead: Analysis of Responses (April 2013), paras 1.467 to 1.527, http://www.lawcom.gov.uk/wp-content/uploads/2015/06/cp197_unfitness_to_plead_analysis-of-responses.pdf.

[23] *R (P) v Barking Youth Court* [2002] EWHC 734 (Admin), [2002] 2 Cr App R 19 at [10].

[24] CP197 paras 8.36 to 8.37.

Election by unfit defendants

7.12 This situation arises where a case is triable either in the magistrates' court or in the Crown Court, but the magistrates consider that their powers of sentencing are sufficient for the case to be dealt with in the magistrates' court. In that circumstance, a defendant has the right to choose for the case to be heard at the Crown Court before a judge and jury.[25] This is a highly significant decision, not only because of the importance of the right to trial by jury, but also because if trial in the Crown Court is chosen, that court's sentencing powers will be greater than those available if the case is heard in the magistrates' court. A defendant who may be unable to participate effectively in the proceedings is still required to make that decision him- or herself. However, he or she may lack the capacity to appreciate what is being asked, or what the repercussions of such a decision may be.[26]

No statutory test or procedure to consider unfitness to plead

7.13 The most fundamental deficiency of the current summary system is that there is no statutory procedure to consider a defendant's unfitness to plead or capacity for effective participation. Although psychiatrists and psychologists not infrequently report that a defendant in the summary courts, particularly in the youth court, is "unfit to plead",[27] this concept has no formal application in the summary courts.

7.14 Where participation issues arise, in the absence of any other provision, section 37(3) of the MHA is turned to as a mechanism to protect a defendant from conviction. However, the focus of section 37(3) of the MHA is not on unfitness to plead or participation in trial, but on whether the defendant has a "mental disorder"[28] and on his or her suitability for a particular disposal, namely a hospital or guardianship order.

7.15 Inevitably, as a result of its focus on disposal, section 37(3) of the MHA provides no test for identifying when a defendant in the magistrates' court should be shielded from conviction by virtue of his or her participatory difficulties. As we discuss below, having a mental disorder within the meaning of section 1 of the MHA, particularly one which is susceptible to treatment, is not always an effective identifier of those who are unable to participate effectively in trial.

7.16 Consultees to CP197 have said that this absence of unfitness procedures with suitable disposals has the inevitable result that representatives tend to focus on outcome not capacity (National Bench Chairmen's Forum). This results in trials proceeding in order to secure a suitable disposal, where there is evidence that

[25] Crime and Disorder Act 1998, s 50A(3).

[26] This problem was acknowledged by Wright J in *R (P) v Barking Youth Court* [2002] EWHC 734 (Admin), [2002] 2 Cr App R 19 at [10].

[27] See for example the medical evidence referred to in the case of *R (on the application of P) v Derby Youth Court* [2015] EWHC 573 (Admin), (2015) 179 JP 139.

[28] Within the meaning of the MHA, s 1.

the defendant may be unfit or lacking in capacity (Council of HM Circuit Judges[29]).

Narrow focus of the statutory procedure on defendants having a "mental disorder"[30]

7.17 The narrow focus of section 37(3) of the MHA on defendants who have a "mental disorder" as defined by section 1 of the MHA, significantly limits the availability of the provision in any event. For example, section 37(3) has no application to defendants with a learning disability, unless that disability is associated with "abnormally aggressive or seriously irresponsible conduct".[31] Section 37(3) also has no application to, nor offers any protection from conviction for, defendants whose difficulties may arise as a result of communication impairment or some other difficulty falling outside the statutory definition of "mental disorder". This is particularly concerning given the disproportionately high rate of communication impairment and learning disability amongst those who offend, particularly young offenders.[32]

7.18 This narrow focus causes magistrates' courts significant difficulties, as we demonstrate in the following example:

> **Example 16** An adult defendant, A (learning disability), is charged with harassment of a young female neighbour.
>
> The defence obtain expert reports. His full IQ is assessed by a psychologist to be 65, placing him in the lowest percentile of the general population.[33] A psychiatrist reports, reviewing the psychological assessment, that the defendant would be unfit to plead applying the *Pritchard* test. The psychiatrist also confirms that A does not suffer a mental disorder within the meaning of section 1 of the MHA, and A's condition is not susceptible to treatment. A does, however, require substantial support in the community.
>
> In light of the expert evidence, the defence make representations to the prosecution inviting them to discontinue the matter. The matter is reviewed but the prosecution consider that they should not discontinue, taking into account the nature of the offence, the vulnerability of the complainant and the likelihood of recurrence. However, the section 37(3) MHA procedure cannot be fruitfully engaged because neither a hospital order nor a guardianship order is appropriate, since the defendant does not suffer a "mental disorder".
>
> The only alternative is for the defence to apply to stay the proceedings as an abuse of process. The resulting stay provides no remedy for the complainant, nor is the court able to impose a disposal

[29] Response submitted by the Criminal Sub-Committee of the Council of HM Circuit Judges.

[30] As defined by MHA, s 1.

[31] MHA, s 1(2A).

[32] Discussed in detail at para 7.34 and following below.

[33] D Wechsler, *Wechsler Adult Intelligence Scale* (4th ed 2008).

that can support the defendant in the community and prevent the repetition of such behaviour.

7.19 We have received a number of anecdotal reports of difficulties encountered in the magistrates' courts with cases where the defendant is unable to participate effectively but does not suffer a "mental disorder" as defined.[34] In some cases, the court proceeds to a finding of fact, and then addresses the fact that neither disposal under section 37(3) of the MHA can be imposed. We were informed of one such case where the bench proceeded to a finding that the defendant did the act alleged and then made no order. However, the case was reviewed by the senior justices' clerk at the court who relisted the case for the finding to be vacated and application for stay to be made.[35] Anecdotal reports suggest that these cases are characterised by significant delays, repeated adjournments and relistings for legal argument.

No statutory procedure for considering unfitness to plead issues for defendants charged with non-imprisonable summary offences

7.20 Section 37(3) of the MHA and section 11 of the PCCSA only apply to imprisonable summary offences. There is no statutory procedure at all for dealing with a defendant who is unable to participate effectively in the proceedings, but who is charged with a non-imprisonable offence, such as "using threatening or abusive words or behaviour".[36] The only way in which such a defendant can enjoy any protection from conviction in proceedings in which he or she may be unable to participate is to seek a stay.

Uncertainty surrounding the procedure for deciding whether a defendant "did the act or made the omission"

7.21 Even in circumstances where section 37(3) of the MHA might be applicable, there are difficulties in using the provision. Despite the guidance provided in case law as set out at paragraph 7.5 above,[37] comments made to us during work on the project suggest that there remains uncertainty about the procedures to be adopted. In their response to CP197, the National Bench Chairmen's Forum observed that "the current procedure is vague and can obstruct case management".

Uncertainty and lack of assistance for the defendant

7.22 Where proceeding under section 37(3) of the MHA is a prospect, trial may be embarked upon with neither the court nor the defendant (or his or her representative) knowing with certainty on what basis the enquiry into the facts is proceeding; whether the issue is guilt or the commission of the act or making of

[34] See in particular the concerning examples provided by the Crown Prosecution Service in its response to CP197.

[35] Email from solicitor Peter Bartlett, 1 June 2015.

[36] Contrary to the Public Order Act 1986, s 5.

[37] *R (P) v Barking Youth Court* [2002] EWHC 734 (Admin), [2002] 2 Cr App R 19; *Lincoln (Kesteven) Justices* [1983] 1 WLR 335, [1983] 1 All ER 901; *R (Singh) v Stratford Magistrates' Court* [2007] EWHC 1582 (Admin), [2007] 1 WLR 3119; and *Blouet v Bath and Wansdyke Magistrates' Court* [2009] EWHC 759 (Admin), [2009] MHLR 71.

the omission.[38] This is liable to cause anxiety and uncertainty for the defendant. Section 37(3) of the MHA does not focus on participation issues, and adjournment for reports to be prepared may not occur until after the finding of fact.[39] Inevitably this means that there is also a greater chance that the defendant has to undergo the process without his or her participation needs having been clearly identified and addressed.

No statutory provision for the defendant to be represented

7.23 In the Crown Court there is statutory provision for a defendant to be represented where the Court proceeds to a finding of fact under section 4A.[40] Significantly, however, there is no similar requirement for a defendant in the magistrates' court to be represented where the court proceeds under section 37(3) of the MHA.

Evidential issues in the finding of fact

7.24 It is not clear what the relevance of the mental element of an offence will be on the finding of fact in the summary courts. It is also unclear whether the case of *Antoine*[41] applies so that a strict division between the external and fault elements of the offence is required. Additionally, there is uncertainty as to what extent defences can be pleaded on behalf of the defendant in a section 37(3) fact-finding hearing. Are self-defence, mistake and accident available where there is objective evidence to support that position, as in the Crown Court following *Antoine*?[42]

7.25 We consider that this lack of clarity on how the finding of fact should be arrived at is significantly concerning. Although a restriction order is not available under section 37(3) of the MHA, nonetheless, a finding of fact may result in indefinite hospitalisation. In terms of engaging opportunity for acquittal, the defendant in relation to whom the court proceeds under section 37(3) of the MHA may be significantly disadvantaged in comparison with a defendant facing full trial in the magistrates' court.

Powers of disposal are too limited

7.26 In contrast to the position in the Crown Court, there is no power in the summary jurisdiction to impose a supervision order[43] or an absolute discharge. Even for those defendants who do have a "mental disorder",[44] disposal options are limited

[38] This difficulty has been raised by A Turner, "Capacity to stand trial, especially in the youth court" (2008) 172 *Justice of the Peace* 364.

[39] As provided for by PCCSA, s 11.

[40] CP(I)A, s 4A(2).

[41] *Antoine* [2001] 1 AC 340, [2000] 2 WLR 703. Discussed more fully in Chapter 5, para 5.9 and following above.

[42] *Antoine* [2001] 1 AC 340, [2000] 2 WLR 703. Discussed more fully in Chapter 5, para 5.14 and following above.

[43] CP(I)A, s 5(2) and sch 1A: supervision orders are available for any defendant found to be unfit and have done the act (there is no age restriction or mental disorder requirement). They can include requirements for medical treatment or residence and can be overseen by a social worker or a provider of probation services.

[44] As defined by MHA, s 1.

under section 37(3) of the MHA to the imposition of a hospital order or a guardianship order.

7.27 As set out at paragraph 7.4(1) above, hospital orders can only be imposed in cases where the defendant has a treatable "mental disorder" which justifies in-patient care. Guardianship orders are only available to those over 16 years old and, as with hospital orders, only to those suffering from a "mental disorder" (section 37 of the MHA).

7.28 The effect of the limitations of section 37(3) of the MHA is perhaps best illustrated by the Ministry of Justice's most recent statistics. Between 2010 and 2014 no disposals were recorded to have been imposed on defendants under section 37(3) of the MHA, either in the adult magistrates' court or the youth court.[45]

The power to stay is an exceptional remedy[46]

7.29 The alternative power to stay proceedings where a defendant is incapable of participating effectively is rarely used and a stay will be granted on the basis of capacity issues only in "exceptional circumstances".[47] We discuss the particular issues arising in respect of children and young people in more detail below at paragraph 7.46 and following.

A stay does not attract a suitable disposal to address the behaviour of concern[48]

7.30 Inevitably, no disposal can attach to a stay of proceedings. As a result, where a stay is imposed, the court has no power to impose a disposal to address the concerning behaviour which brought the defendant to the attention of the courts. This was a particular area of concern for the Crown Prosecution Service ("CPS"), in its response to CP197.

The arbitrary identification of unfitness/effective participation concerns

7.31 Perhaps because of the limited provision for addressing such issues in the summary jurisdiction, it is unclear what will trigger an enquiry into a defendant's mental state or his or her capacity for effective participation. As we observed in CP197,[49] whether or not a defendant who may have fitness to plead issues will be the subject of a formal assessment is arbitrary. This problem is exacerbated by the significant proportion of defendants who are unrepresented in the lower courts.[50] Even where a defendant is represented, identification of participation difficulties can still be an issue. Most summary proceedings are of a simpler

[45] Source: Justice Statistics Analytical Services, Ministry of Justice, 2015.

[46] Discussed in CP197, para 8.34.

[47] *R (Ebrahim) v Feltham Magistrates' Court* [2001] EWHC Admin 130, [2001] 1 WLR 1293 at 17, *Attorney General's Reference (No 1 of 1990)* [1992] QB 630, [1992] 3 WLR 9 at 643.

[48] CP197, para 8.34.

[49] CP197, para 8.15.

[50] See Legal Services Commission, K Souza and V Kemp, *Study of defendants in Magistrates' Courts* (2009) p 8 which provides insight into barriers to representation in the magistrates' courts.

nature and, under recent efficiency initiatives in the summary jurisdiction, there is a focus on delivering "swift" justice.[51] This means that there is less opportunity for a defendant's representatives to gain an understanding of, and raise as an issue, a defendant's unfitness to plead or lack of capacity for effective participation.

Organisation of the assessment of the accused

7.32 Where the defendant is unrepresented, it is unclear how arrangements for assessment under section 11 of the PCCSA should be made. Anecdotally, it is understood that in practice the court will step in to instruct an expert and obtain the necessary reports, but this system is far from ideal. It seems that the lack of statutory framework for addressing such issues causes significant case management difficulties for the courts in such cases.[52]

PROBLEMS WITH THE CURRENT POSITION: YOUTH COURTS[53]

7.33 The difficulties set out above apply in the youth court as much as in the magistrates' court. Indeed, arguably, despite the special nature of youth proceedings, the problems observed in the adult magistrates' courts are heightened for youths.

Greater prevalence of effective participation issues

7.34 A significant number of consultees emphasised that there is a much greater prevalence of effective participation issues in the youth court.[54] This arises as a result of two interlinking factors.

Natural developmental immaturity

7.35 Clinical advances in our understanding of the brains of children and adolescents reveal that the natural physical development of the brain continues throughout childhood and adolescence, and may not be fully mature until the individual reaches their early twenties.[55] Increasingly, research findings confirm that juveniles aged under 16 demonstrate inadequate functional and decision-making

[51] See Ministry of Justice, *Swift and Sure Justice: The Government's Plans for Reform of the Criminal Justice System*, (Cm 8388, 2012), [81]. For criticism see also J McEwan, "Vulnerable Defendants and the Fairness of Trials" [2013] 2 *Criminal Law Review* 100, 101. See also the Ministry of Justice's Transforming Summary Justice 2015 initiative: Ministry of Justice, *Transforming the CJS: A Strategy and Action Plan to Reform the Criminal Justice System* (June 2013) , pp 16 to 17, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/209659/transforming-cjs-2013.pdf (last visited 25 November 2015) and Sir Brian Leveson P's, *Review of Efficiency in Criminal Proceedings* (January 2015) https://www.judiciary.gov.uk/wp-content/uploads/2015/01/review-of-efficiency-in-criminal-proceedings-20151.pdf (last visited 25 November 2015).

[52] This issue was raised by the National Bench Chairmen's Forum.

[53] Discussed in CP197, paras 8.38 to 8.68.

[54] Including the CPS, Dr Eileen Vizard CBE (consultant child and adolescent psychiatrist), the National Bench Chairmen's Forum, HM Council of District Judges (Magistrates' Courts) (response submitted by the Legal Committee), and the Association of Panel Members.

[55] B J Casey, S Getz and A Galvan, "The adolescent brain" (2008) 28 *Developmental Review* 62. E Cauffman and L Steinberg, "Emerging findings from research on adolescent development and juvenile justice" (2012) 7(4) *Victims and Offenders* 428.

abilities that are capable of compromising their capacity for effective participation in criminal proceedings. Indeed, research in the US revealed that adolescents aged 11 to 13 were three times as likely as young adults (aged 18 to 24) to be "seriously impaired" on legal abilities and adolescents aged 14 to 15 were twice as likely to be impaired.[56]

7.36 Although generally much developmental maturation has taken place by the age of 14 years, there is a considerable degree of individual variation. The completion of physical, intellectual, emotional and social development, all of which may impact on a young defendant's capacity to participate, does not conform to clear-cut age bands.[57]

7.37 Youths of below average IQ are more likely to have their capacity for proceedings compromised by developmental immaturity. Thus, given the prevalence of learning disability and low IQ amongst the young people who offend, the likelihood of impairment of capacity for criminal proceedings is magnified still further.[58]

7.38 Additionally, child development does not occur in a vacuum. The child's experience of parenting, their learning environment and experience of childhood abuse or other trauma are critical factors.[59] The troubled early life experiences of many young defendants further exacerbate this difficulty.[60]

[56] T Grisso and others, "Juveniles' competence to stand trial: A comparison of adolescents' and adults' capacities as trial defendants" (2003) 27(4) *Law and Human Behaviour* 333. This was the first large-scale study of age differences in competence to stand trial, assessing 1,400 individuals aged 11 to 24 across four different centres in the US. See also S P Sarkar, "In the twilight zone: adolescent capacity in the criminal justice arena" (2011) 17 *Advances in Psychiatric Treatment* 5 for a discussion of UK/US comparisons.

[57] See Royal College of Psychiatrists, *Child Defendants* (Occasional paper OP56, March 2006), ch 6: "Developmental psychology and child development" for a helpful discussion of the research and practical implications. See also E Farmer, "The Age of Criminal Responsibility: Developmental Science and Human Rights Perspectives" (2011) 6(2) *Journal of Children's Services* 86.

[58] T Grisso and others, "Juveniles' competence to stand trial: A comparison of adolescents' and adults' capacities as trial defendants" (2003) 27(4) *Law and Human Behaviour* 333. Also F Lexcen, T Grisso and L Steinberg, "Juvenile Competence to Stand Trial" (2004) 24(2) *Children's Legal Rights Journal* 2.

[59] See Royal College of Psychiatrists, Child Defendants (Occasional paper OP56, March 2006), p 30 and following.

[60] Acknowledged in *R(D) v Camberwell Green Youth Court* [2005] UKHL 4, [2005] 1 WLR 393, [56].

Greater prevalence of psychiatric disorders and learning disabilities or difficulties

7.39 The incidence of mental health difficulties amongst the young people who offend is high.[61] Research suggests that, in comparison to the general and adult population, young offenders exhibit much higher rates of:

(1) learning disability;[62]

(2) post-traumatic stress disorder;[63]

(3) attention deficit hyperactivity disorder (ADHD);[64] and

(4) other psychiatric disorders, notably conduct disorder.[65]

Stays remain an exceptional remedy

7.40 Despite the prevalence of effective participation issues as a result of natural developmental immaturity, and the prevalence of psychiatric conditions and learning disability amongst defendants in the youth courts, staying proceedings as an abuse of process remains a discretionary and exceptional remedy even in the youth court.[66]

[61] For an overview of the clinical evidence base see E Vizard, "How do we know if young defendants are developmentally fit to plead to criminal charges: the evidence base" (a report to the Michael Sieff Foundation Young Defendants Conference in London, April 2009), http://www.michaelsieff-foundation.org.uk/content/Report%204%20-%20Eileen%20Vizard's%20presentation.pdf (last visited 25 November 2015). See also N Hughes and others, *Nobody made the connection: the prevalence of neurodisabillity in young people who offend* (Office of the Children's Commissioner, October 2012), https://www.childrenscommissioner.gov.uk/sites/default/files/publications/Nobody%20made%20the%20connection.pdf (last visited 25 November 2015).

[62] N Loucks, *No one knows: Offenders with learning difficulties and learning disabilities: The prevalence and associated needs of offenders with learning difficulties and learning disabilites* (2007). There is a substantial history of research into the role of learning disability in offending behaviour by children, see for example D J West and D P Farrington, *Who becomes Delinquent?* (1973); DJ West and DP Farrington, *The Delinquent Way of Life* (1977); M Rutter, H Giller and A Hagell, *Antisocial Behaviour by Young People* (1998).

[63] H Steiner, I G Garcia and Z Mathews, "Post traumatic stress disorder in incarcerated juvenile delinquents" (1997) 36(3) *Journal of the American Academy of Child Psychology and Psychiatry* 357.

[64] A E Kazdin, "Adolescent development, mental disorders and decision making of delinquent youths" in T Grisso and R G Shwartz (eds), *Youth on Trial: A Developmental Perspective on Juvenile Justice* (2000) pp 33 to 65.

[65] See Royal College of Psychiatrists, *Child Defendants* (Occasional paper OP56, March 2006), p 50 and following for a detailed discussion of psychiatric conditions experienced by young defendants. Also The Independent Parliamentarians' Inquiry into the Operation and Effectiveness of the Youth Court (June 2014), ch 3 "The profile of children who offend", http://www.ncb.org.uk/media/1148432/independent_parliamentarians__inquiry_into_the_operation_and_effectiveness_of_the_youth_court.pdf (last visited 25 November 2015). And N Hughes and others, *Nobody Made the Connection: The Prevalence of Neurodisability in Young People Who Offend* (Office of the Children's Commissioner, October 2012), http://www.childrenscommissioner.gov.uk/sites/default/files/publications/Nobody%20made%20the%20connection.pdf (last visited 25 November 2015).

[66] See *Crown Prosecution Service v P* [2007] EWHC 946 (Admin), [2008] 1 WLR 1005.

7.41 Lord Justice Scott Baker confirmed this high threshold for staying proceedings against children and young people in the case of *West London Youth Court* where he stated that "neither youth nor limited intellectual capacity necessarily leads to a breach of article 6".[67] His reasoning was based on the consideration that a youth court is a "specialist tribunal" designed to accommodate the participation difficulties of young defendants, as contemplated by the European Court in *SC*:

> when the decision is taken to deal with a child, such as the applicant, who risks not being able to participate effectively because of his young age and limited intellectual capacity, by way of criminal proceedings rather than some other form of disposal directed primarily at determining the child's best interests and those of the community, it is essential that he be tried in a specialist tribunal which is able to give full consideration to and make proper allowance for the handicaps under which he labours, and adapt its procedure accordingly.[68]

Lack of existing psychiatric diagnosis

7.42 Many young defendants whose capacity for trial may be in issue will not, in contrast to adult defendants, have had prior contact with mental health services, and will have no pre-existing diagnosis to assist representatives and the court (Association of Panel Members[69]). Accessing Child and Adolescent Mental Health Services ("CAMHS") as a new referral can result in lengthy delays.

Shortage of facilities for young people

7.43 Owing to the shortage of psychiatric facilities for children and young people, even where the clinical criteria are met for hospitalisation under section 37(3) of the MHA, it is not always possible to secure a placement to admit a young person.[70] The CPS provided us with an example of a case where this led to the absolute discharge of a young defendant who had been assessed as requiring hospital treatment under section 37(3) of the MHA, but for whom no bed could be made available. The public protection implications of such outcomes are obvious.

Seriousness of cases heard in the youth court

7.44 The problematic absence of an unfitness to plead framework in the youth court is more marked than in the adult magistrates' court because of the seriousness of offences which are tried in the youth court.[71] This is particularly so because of the

[67] *R(TP) v West London Youth Court* [2005] EWHC 2583 (Admin), [2006] 1 WLR 1219 at [27].

[68] *SC v United Kingdom* (2005) 40 EHRR 10 (App No 60958/00) at [35].

[69] The Association of Panel Members is the professional association for community volunteers who sit on Youth Offending Team panels which administer referral orders for young offenders.

[70] House of Commons Health Committee, *Children's and adolescents' mental health and CAMHS*: *Third Report of Session 2014–15* (November 2014).

[71] This point was raised by the CPS and the National Bench Chairmen's Forum.

limited scope for children and young people charged with more serious offences to engage the unfitness to plead framework available in the Crown Court.[72]

7.45 We endorse the view of the Carlile Inquiry[73] that there should be a presumption that, in all but the most exceptional cases, young defendants will be tried in the youth court. Indeed, where the defendant has the sort of vulnerabilities which may lead to him or her being unfit to plead, the Crown Court is an even less appropriate place for that young person to be tried. Nonetheless, as the Association of Panel Members and Kids Company[74] observed in their responses to CP197, the absence of unfitness to plead procedures in the youth court is arguably discriminatory in respect of young defendants facing serious charges.

Disposal inadequacy more marked

7.46 Given the prevalence of effective participation issues amongst very young defendants, the limitations on disposals under section 37(3) of the MHA are even more problematic. For defendants aged under 16, the only disposal available under section 37(3) of the MHA is a hospital order. The CPS observe that these limited disposals are rarely suitable to address the disorders commonly diagnosed in the youth court, nor do they tackle the young person's offending behaviour.

7.47 As a result, the CPS inform us that a full trial or plea is often proceeded with, even where a young defendant may have significant participation difficulties, in order to secure a suitable disposal that is only available on conviction. Just for Kids Law[75] raised in their response to CP197 the additional concern that pleas of guilty in such circumstances in the youth court may subsequently be relied upon as evidence of prior fitness to plead in later proceedings in the Crown Court.

Lack of disposal options leading to rise in stays and discontinuances

7.48 In a youth court trial where the defendant has substantial effective participation or capacity issues, but a hospital order is not appropriate, proceedings are often stayed, or discontinued by the prosecution, with the result that much-needed support and treatment is not received. In response to CP197, the CPS observes that stays are more frequently imposed in the youth court than in the adult magistrates' courts, often in relation to serious allegations. It notes that this has the result that some young people effectively become immune from prosecution by the youth court, raising significant public protection concerns.

[72] As we discuss at para 7.6 above, an adult facing an either way charge in the magistrates' court is entitled to elect Crown Court trial, and engage unfitness to plead procedures in the Crown Court. However, following the case of *R(P) v Derby Youth Court* [2015] EWHC 573 (Admin), (2015) 179 JP 139 the availability of Crown Court unfitness to plead procedures for youths charged with comparable offences is much more limited.

[73] The Independent Parliamentarians' Inquiry into the Operation and Effectiveness of the Youth Court (June 2014), http://www.ncb.org.uk/media/1148432/independent_parliamentarians__inquiry_into_the_operation_and_effectiveness_of_the_youth_court.pdf (last visited 25 November 2015).

[74] Kids Company was a charity that provided therapeutic, emotional and practical support, including legal assistance, to vulnerable children and young people.

[75] Just for Kids Law provide support, advice and legal representation for young people in difficulty.

Stays an inadequate and ultimately costly response to youth offending

7.49 The imposition of a stay means both that there is no intervention to tackle problematic behaviour and that mental health difficulties or learning disabilities go unaddressed, which raises the risk of deterioration in the young person's condition and further offending behaviour.

7.50 The following example illustrates the impossible situation that the youth court finds itself in in such cases, where the difficulties identified at paragraphs 7.46 to 7.51 arise:

> **Example 17** A defendant, P (autism spectrum condition and a learning disability), is alleged to have raped a young woman, R, who also has similar difficulties and whom he met at a day care centre which they both attend.
>
> P's full IQ is assessed by a psychologist to be 65, placing him in the lowest percentile of the general population.[76] P's condition is not suitable for in-patient treatment meaning that, although he requires substantial support in the community, he does not require hospitalisation. Two psychiatrists conclude that P is unfit to plead according to the *Pritchard* test, an intermediary being unable to overcome P's inability to follow the course of proceedings and to give evidence in his own defence.
>
> If P is an adult, his case would be sent to the Crown Court for trial. In the Crown Court it is highly likely that P would be found to be unfit to plead and would be most likely to receive a supervision order as a disposal under section 5 of the CP(I)A.
>
> If P is 15, neither of the disposals under section 37(3) of the MHA are available, since he is not suitable for hospitalisation and is not old enough for a guardianship order. Given P's likely unfitness to plead, following *Derby Youth Court*, his case would not be sent to the Crown Court under section 51A(3)(b) or (3)(d) of the Crime and Disorder Act 1998.
>
> The youth court has only two options. The magistrates can allow an abuse of process application and stay the proceedings. However, this achieves no resolution for R, no provision made to prevent recurrence and no protection for the public.
>
> Alternatively, the magistrates can proceed with trial and sentence, if P is convicted. However, such an outcome is highly undesirable and is liable to be appealed on the basis that the conviction is unsafe since P was unable to participate effectively in the proceedings.

Public protection and public confidence in the criminal justice system fundamentally undermined

7.51 The situation in Example 17 above is very similar to that encountered by the bench in *Derby Youth Court*. In overturning the decision of the magistrates, who sent the defendant to the Crown Court rather than staying the proceedings

[76] D Wechsler, *Wechsler Adult Intelligence Scale* (4th ed 2008).

against him for a second time, Lord Justice Davis concluded his judgment commenting: "The matter must get back before the magistrates as quickly as possible because someone has got to keep an eye on this young man."[77] The young man in question had been described earlier in the judgment as "something of a menace" in relation to whom "something needs to be done".[78] However, the reality of the current procedures in the youth court is that there is no mechanism for "something to be done" for such vulnerable but problematic young defendants. The public protection implications of such an inadequate system are significant, as the CPS have stressed,[79] as is the likelihood for the confidence of victims and communities in the criminal justice system to be significantly undermined.

ANALYSIS AND DISCUSSION

Issue: The need for reform to introduce participation procedures in the magistrates' courts

7.52 As we have set out in detail above, respondents to CP197[80] and to the IP provided a wealth of examples of the inadequacy of the current provisions for addressing participation difficulties in the magistrates' courts. There was overwhelming support for the proposal that there be reform of the current provisions and the introduction of a statutory structure for addressing participation issues in both the adult magistrates' and the youth court. The only respondent not generally in favour of reform in the summary jurisdiction was HHJ Tim Lamb QC, although his observation raised concerns about the appropriateness for the summary jurisdiction of the proposals advanced in CP197, rather than endorsing the current arrangements.[81]

Discussion: The need for reform to introduce participation procedures in the magistrates' courts

7.53 The resounding response of our consultees makes plain that reform in this area is urgently required, both in the magistrates' courts and in youth court. The enthusiasm from our consultees for the introduction of procedures in the summary jurisdiction which offer comparable protections to those available for defendants in the Crown Court was overwhelming. In our view, the problems identified above, which arise from the lack of a comprehensive statutory scheme, should not be allowed to persist.

More far-reaching reforms

7.54 However, some of our respondents have suggested that more fundamental reforms of the youth justice system are appropriate. Calls for wider reform focus

[77] [2015] EWHC 573 (Admin), (2015) 179 JP 139 at [17].

[78] [2015] EWHC 573 (Admin), (2015) 179 JP 139 at [11].

[79] See the CPS response to CP197 in which it provides a number of examples where the provisions failed to provide adequate response to the allegations of serious offending by young defendants with participation problems.

[80] See IP paras 8.40 to 8.58 for fuller discussion of the CP197 responses.

[81] HHJ Tim Lamb QC answered "No" to CP197 Question 8, commenting that the test and procedures proposed in CP197 were "far too complicated and time consuming for summary proceedings".

in particular on the low age of criminal responsibility in England and Wales, set at 10 years,[82] and, to a lesser degree, the abolition of the rebuttable presumption of doli incapax.[83] Both of these issues, seen in sharper focus by virtue of the growing body of research about the significant effects of developmental immaturity, undeniably have a substantial bearing on the prevalence of "unfitness" and effective participation issues in the youth court. We remain of the view, expressed in CP197 and the IP, that there may be sound policy reasons for looking afresh at the age of criminal responsibility, and acknowledge the increasingly loud calls for such a review by clinicians and academics.[84] Whilst the issues that prompt such concerns remain in the forefront of our minds when considering the question of how the procedure in the youth court should be reformed, more fundamental reform of the youth justice system is beyond the scope of this project.

Conclusion: The need for reform to introduce participation procedures in the magistrates' courts

7.55 **We recommend that a statutory framework for determining a defendant's capacity to participate effectively, comparable to that which we recommend for the Crown Court, should be created in the summary jurisdiction** (see draft Bill part 2).

Issue: Applying effective participation proceedings to all criminal offences, including non-imprisonable offences

7.56 At present, the section 37(3) MHA procedure only applies to imprisonable offences. In the IP[85] we reasoned that there was no basis for limiting the scope of effective participation procedures in the same way when article 6 ECHR rights extend to all criminal charges. We also noted that the current lack of any provision to address the difficulties of mentally disordered defendants in the magistrates' courts was causing case management difficulties.

[82] See for example CP197 responses of Nicola Padfield (academic) and Dr Eileen Vizard CBE. See also observations of Professor Heather Keating (academic), email 1 March 2015.

[83] Until it was abolished by s 34 of the Crime and Disorder Act 1998, there was a rebuttable presumption that a child aged between 10 and 14 is incapable of committing a criminal offence (ie is *doli incapax*, literally "incapable of evil"). This imposed an obligation on the Crown, when prosecuting such a child, to prove that the child knew that what they were doing was seriously wrong rather than merely mischievous. It was unclear for a time whether the positive defence of *doli incapax* nevertheless remained (ie whereby it would be a defence to prove that the child did not know the act was seriously wrong): *Crown Prosecution Service v P* [2007] EWHC 946 (Admin), [2008] 1 WLR 1005. However, in 2009 the House of Lords confirmed that both the rebuttable presumption and the defence had been abolished (*JTB* [2009] UKHL 20, [2009] 1 AC 1310). We address this issue in more detail in CP197, at paras 8.55 to 8.57. Children under 10 were, and remain, irrebuttably presumed to be *doli incapax* by virtue of the age of criminal responsibility being set at 10 years.

[84] See Centre for Social Justice, *Rules of Engagement: Changing the Heart of Youth Justice* (2012). See also Independent Parliamentarians' Enquiry into the Operation and Effectiveness of the Youth Court (June 2014), ch 4, http://www.ncb.org.uk/media/1148432/independent_parliamentarians__inquiry_into_the_operation_and_effectiveness_of_the_youth_court.pdf (last visited 25 November 2015).

[85] IP paras 8.78 to 8.83.

Discussion: Applying effective participation proceedings to all criminal offences, including non-imprisonable offences

7.57 Respondents to the IP expressed unanimous support for the application of an effective participation framework to all criminal offences, including non-imprisonable offences.[86]

7.58 Despite our consultees' enthusiasm, we have to bear in mind the greater number of defendants who will be included in such procedures if we extend provision to all criminal offences. The majority of defendants are tried in the magistrates' courts, and the majority of those are dealt with for non-imprisonable offences (although a significant proportion of these are summary-only motoring offences).[87]

7.59 However, we do not consider that the inclusion of non-imprisonable offences will produce an unmanageable number of findings that a defendant lacks the capacity to participate effectively.[88] One significant reason for this assessment is that, as we discuss in more detail below, we propose that the test should take into account the nature of the particular proceedings in which the defendant will be required to participate. The determination of the defendant's capacity will therefore involve consideration of the more accessible nature of summary proceedings and the less complex nature of many summary prosecutions. We envisage that a defendant's condition or impairment would have to be extremely severe before he or she was unable to participate effectively in most summary proceedings. This was a view shared, in particular, by the Justices' Clerks' Society and the CPS.

Conclusion: Applying effective participation proceedings to all criminal offences, including non-imprisonable offences

7.60 **We recommend that the statutory framework for determining a defendant's capacity to participate effectively in the summary jurisdiction should be applicable to all criminal offences** (see draft Bill clause 30(1)).

[86] Magistrates' Association, Council of HM Circuit Judges, HM Council of District Judges (Magistrates' Courts), Holroyde J, Carolyn Taylor (solicitor specialising in criminal and mental health law), Nigel Barnes (solicitor specialising in criminal law), Law Society, Justices' Clerks' Society, Dr Eileen Vizard CBE, Dr Linda Monaci (consultant clinical neuropsychologist), Professor Ronnie Mackay (academic), Professor Jill Peay (academic), Centre for Evidence and Criminal Justice Studies, Laura Hoyano (academic), the CPS and the Prison Reform Trust.

[87] In 2014 there were 832,443 defendants proceeded against at the magistrates' courts (86,949 of those being subsequently tried at the Crown Court). 551,000 of those prosecuted in the magistrates' courts were proceeded against for summary only motor offences. Ministry of Justice, *Criminal Justice Statistics 2014 England and Wales: Ministry of Justice Statistics bulletin* (21 May 2015), p 8.

[88] We set out in our Impact Assessment (Appendix B available at http://www.lawcom.gov.uk/project/unfitness-to-plead/) our estimation that approximately 800 defendant are likely to be found to lack capacity for trial per year in the summary jurisdiction under our recommended reforms.

Issue: The same test for effective participation in the Crown Court and the magistrates' courts

7.61 We consider now whether the same test for effective participation should apply in the magistrates' and youth courts as in the Crown Court. Consultees to CP197 expressed almost unanimous support for the introduction of the same test, and the application of the same principles, in all courts. We discuss the formulation of the test for Crown Court proceedings in detail in Chapter 3.

7.62 In the IP, we explored this issue again, against the background of the test we were then proposing, namely a test of effective participation explicitly incorporating decision-making capacity. In particular, we invited consultees to consider whether applying that test in the context of the particular proceedings,[89] would allow sufficient effect to be given to the accessible and more straightforward nature of summary proceedings.[90]

7.63 Responses resoundingly supported the introduction of the same test in all courts, and the majority of respondents considered that the more accessible nature of summary proceedings would be suitably addressed by a test applied in the context of the particular proceedings.[91]

Discussion: The same test for effective participation in the Crown Court and the magistrates' courts

Adjustment of the test for young defendants?

7.64 In the IP[92] we invited consultees to consider whether there should be any adjustment of the new legal test for application to young defendants.

7.65 This question garnered a range of responses. Some consultees were unreservedly of the view that the same unadjusted test should apply to youths as to adults.[93]

7.66 Karina Hepworth[94] took the view that the test that we proposed should be suitable, but will need to be considered in the context of the young person being assessed and taking into account their very different needs and presentations, their chronological age and development. Professor Jill Peay took a similar position in her response.

[89] What we mean by "in the context of the particular proceedings" is discussed in detail in Chapter 3 paras 3.36 to 3.53.

[90] IP Further Question 38.

[91] Magistrates' Association, HM Council of District Judges (Magistrates' Courts), Carolyn Taylor, Nigel Barnes, Law Society, Dr Eileen Vizard CBE, Royal College of Psychiatrists Adolescent Forensic Psychiatry Special Interest Group, Professor Ronnie Mackay, Professor Jill Peay, the CPS and the Prison Reform Trust.

[92] IP Further Question 45.

[93] Council of HM Circuit Judges, HM Council of District Judges (Magistrates' Courts), Holroyde J, Nigel Barnes (subject to screening and training as proposed), Law Society, Royal College of Psychiatrists Adolescent Forensic Psychiatry Special Interest Group, Professor Ronnie Mackay, Centre for Evidence and Criminal Justice Studies.

[94] Karina Hepworth is a specialist learning disability nurse who works with children and young people as part of a Youth Offending Team.

7.67 Some consultees proposed minor amendment of the test:

(1) Removal of reference to the right to challenge jurors which would be irrelevant in the youth court (Magistrates' Association). As set out above at paragraphs 3.87 to 3.90, we propose to remove this requirement in any event.

(2) Addition of "the capability to understand the implications of pleading/being found guilty and likely consequence" (Magistrates' Association). This is, we consider, addressed by our recommendation that the test includes as a relevant ability "an ability to understand the trial process and the consequences of being convicted" at paragraphs 3.85 to 3.86 above (see draft Bill clauses 3(4)(c) and 32(4)(c) (magistrates' courts)).

7.68 Of those not in favour of the same test, Dr Penny Brown (consultant forensic psychiatrist) was concerned at the incorporation of an MCA capacity-based test on the basis that the MCA test is not applicable to those under 16 years, and does not consider developmental age or immaturity. She was concerned that there is a risk of conflating developmental immaturity with mental health problems.

7.69 The Faculty of Forensic and Legal Medicine called for an "entirely separate examination of the needs of children". The Youth Justice Board were "strongly" supportive of the extension of unfitness to plead procedures to the youth court. However, they believed that the test should be adjusted to take into account natural developmental immaturity and should be "distinct" from the adult test, just as youth court procedures and sentencing are also "distinct" from adult procedures. Laura Hoyano rejected the same test on the basis of her dissatisfaction with the proposed test for all purposes.

7.70 As we set out in the IP,[95] we entirely agree that developmental immaturity is highly significant to the question of whether a young defendant will be able to participate effectively at trial. We would expect a clinician assessing a young defendant to have this issue at the forefront of his or her mind, and indeed to assess a young defendant in an entirely different manner to the assessment which would be conducted of an adult defendant. It is for this reason, in part, that we are particularly concerned that the expert instructed should be "competent to advise" on the defendant's particular condition.[96] We have in mind the critical importance, where the defendant is a child or a young person, of assessments of this sort being conducted by adolescent and child practitioners, rather than by those who work predominantly with adults.

7.71 We therefore agree in principle with the observations made by the Faculty of Forensic and Legal Medicine, Dr Penny Brown and the Youth Justice Board about the very different nature of the difficulties faced by young defendants. However, our view diverges in relation to whether that different examination should be reflected in a different test. We consider that it should not, for the following reasons.

[95] IP para 8.124 and following.

[96] Paras 4.66 to 4.67 above.

7.72 First, the test is framed as a statement, in effect, of what effective participation consists of, and what abilities it requires. We consider that it sets out what we would expect a defendant of any age to be able to do to in terms of engagement with the process, in order to have a fair trial. How demanding that participation will be will vary according to the context of the proceedings themselves, and so plainly the very different procedures in the youth court and the challenges faced by children and young people will be reflected in the application of the test.

7.73 Secondly, and critically, the formulation of effective participation on which we draw most closely for our capacity test was set out in the case of *SC*,[97] involving a child who was 11 years old at the time of his trial. *SC* refined the concept of effective participation which had been developed (from the case of *Stanford*)[98] in relation to two other children, T and V, who were also 11 years old at the time of their trial.[99] Rather than the test that we propose being adapted to fit children and young people, the formulation of effective participation which lies at the heart of the test is one developed with specific consideration of the challenges faced by them. In effect, the test of effective participation for children would under our recommendation be extended to incorporate vulnerable adults, rather than the reverse.

7.74 We do not propose to insert into the legal test reference to mental disorder, learning disability or other conditions by which an adult's ability to participate may come to be impaired. Similarly, we consider that it would not be logical or appropriate to insert into the test a reference to developmental immaturity. How a defendant may come to be unable to participate effectively is not a matter of particular relevance to the court. However, of course all those features should be squarely within the contemplation of the expert in assessing whether the defendant has those participatory abilities, and indeed in seeking to support or treat them. For these reasons, we endorse the importance of clinicians considering developmental immaturity when assessing young defendants, and in tailoring their assessments to the young defendant. We do not, however, consider that incorporation of a reference to developmental immaturity into the legal test would be of assistance. We anticipate that the importance of considering developmental immaturity would be a feature of guidance prepared for clinicians applying the test. (We recommend that such guidance or a code of conduct should be prepared to accompany the new test in Chapter 3 paragraphs 3.158 to 3.162).

[97] *SC v United Kingdom* (2005) 40 EHRR 10 (App No 60958/00).

[98] *Stanford v United Kingdom* App No 16757/90 at [26], a case relating to an adult defendant.

[99] T and V, in *T v United Kingdom* App No 24724/94 and *V v United Kingdom* App No 24888/94, reported as a joint decision in (2000) 30 EHRR 121. In that case the court observed at [86]: "It is essential that a child charged with an offence is dealt with in a manner which takes full account of his age, level of maturity and intellectual and emotional capacities, and that steps are taken to promote his ability to understand and participate in the proceedings".

7.75 In light of the initial concerns of the Youth Justice Board, we put this approach to a meeting of the Youth Justice Board's Youth Court Issues Group[100] who approved the position that we propose above.

A test of capacity to plead guilty

7.76 In the Crown Court we have recommended the introduction of a test of capacity to plead guilty. What we have recommended is that, immediately following a finding of lack of capacity for trial, a defendant should be entitled to apply to the court for a determination that he or she, nonetheless, has capacity to plead guilty to the allegation. We discuss the basis for that recommendation and how such a test would operate in detail in Chapter 3 at paragraphs 3.138 to 3.157 above.

7.77 For all the reasons that we favour the introduction of such a test in the Crown Court, we also consider that this additional test would be appropriate for inclusion in the magistrates' courts. The preservation of a defendant's autonomy wherever possible, and achieving a resolution to the criminal charge without recourse to alternative procedures, is to be welcomed wherever it can be safely achieved. We take the view that the safeguards built into the test will be sufficient to ensure that the appropriate protections are in place.

Conclusion: The same test for effective participation in the Crown Court and the magistrates' courts

7.78 **Save where it is necessary to make procedural adaptations, we recommend that the same statutory test for capacity to participate effectively in a trial, and capacity to plead guilty, should apply in all courts: Crown, adult magistrates' and youth courts** (see draft Bill clauses 3, 6, 32, and 35).

Issue: Should we maintain the same evidential requirement in the summary courts as in the Crown Court?

7.79 In consideration of the shorter timescales for trial in the magistrates' courts, and the time taken in the Crown Court for parties to obtain the evidence currently required,[101] in the IP we asked consultees whether they favoured maintaining the same evidential requirement in the summary courts as in the Crown Court.[102]

7.80 There was unanimous support for introducing the same evidential requirement for effective participation in the magistrates' and youth courts as in the Crown

[100] This group brings together representatives from the Youth Justice Board, Ministry of Justice, HM Probation, Association of Chief Police Officers, the Magistrates' Association. Her Majesty's Courts and Tribunals Service, the Judicial College, The Law Society, the Sentencing Council, the National Bench Chairmen's Forum and the CPS to discuss issues of particular relevance to the youth court.

[101] Currently reports from two registered medical practitioners, one s 12 MHA approved, CP(I)A, s 4(6).

[102] IP Further Question 40.

Court.[103] However, as with responses to the question of the evidential requirement in the Crown Court, consultees raised the question of the number of experts that should be required. We engage in that discussion above at Chapter 4 paragraphs 4.28 to 4.43. The recommendation that we make at paragraph 4.67 is that a lack of capacity determination in the Crown Court would require evidence from two experts. One of the experts being a registered medical practitioner approved under section 12 of the MHA, the other a registered medical practitioner, a registered psychologist or another expert with a qualification approved by the Department of Health.[104]

7.81 There was also some support in the IP responses for psychiatric nurses and other forensic mental health professionals playing a greater role in capacity assessment in the summary jurisdiction.[105]

Discussion: Should we maintain the same evidential requirement in the summary courts as in the Crown Court?

7.82 Our view is that there is no logical basis for introducing different requirements for expert evidence in the different jurisdictions. We are, of course, mindful that the obtaining of two expert reports, as is required in the Crown Court, is a lengthy process and one which does not sit easily within the usual timescales for summary procedures. However, in line with our consultees, we take the view that the removal of a defendant from the full trial procedure is a significant curtailment of his or her rights and legal autonomy. This should not be undertaken without robust expert evidence, wherever the case is to be heard.

7.83 However, we agree with Professor Grubin (Professor of Forensic Psychiatry) that psychiatric nurses, and other forensic mental health practitioners, may contribute substantially to the identification of capacity issues in the magistrates' court. We have in mind, in particular, psychiatric nurses and others of similar qualification who operate as part of liaison and diversion teams in the magistrates' courts. By providing an initial assessment of defendants in relation to whom participation concerns have been raised, they will in many cases be able to distinguish those defendants whose difficulties can be addressed by trial adjustment and those defendants who require full psychiatric or psychological assessment. We anticipate, given the focus on progress at each hearing, and the speedy resolution of summary allegations, that initial screening of this sort will be of substantial assistance in providing efficient and effective capacity procedures in the magistrates' courts. NHS England has recently redrafted the service specification for its Liaison and Diversion pilot scheme to increase the focus on

[103] Council of HM Circuit Judges, HM Council of District Judges (Magistrates' Courts), Holroyde J (in principle but notes the resource implications), Carolyn Taylor, Law Society, Justices' Clerks' Society, Dr Eileen Vizard CBE, Dr Penny Brown (but concerns about impact on resources), Professor Ronnie Mackay, Centre for Evidence and Criminal Justice Studies, Laura Hoyano, the CPS and the Prison Reform Trust.

[104] See para 4.44 and following in Chapter 4 above for discussion of the qualification requirements for experts.

[105] IP response of Professor Don Grubin.

participation and communication issues in its assessments.[106] As will be plain from Chapter 4 above, we strongly support the extension of NHS England's Liaison and Diversion pilot scheme, and the Criminal Justice Liaison Services in Wales.

Conclusion: Should we maintain the same evidential requirement in the summary courts as in the Crown Court?

7.84 **We recommend that the same evidential requirement for a finding that a defendant lacks capacity for trial should apply in the adult magistrates' and youth courts as in the Crown Court** (see draft Bill clause 31).

Issue: Should determinations of a defendant's capacity to participate effectively be reserved to district judges?

7.85 In the IP[107] we asked consultees to consider whether determinations in summary courts of a defendant's capacity to participate effectively, and subsequent alternative finding procedures, should be reserved to district judges, or whether lay magistrates should be able to conduct such hearings.

7.86 Responses were fairly evenly divided between the two options. There was marginally more support for lay magistrates being entitled to conduct such hearings, drawn from across the consultee groups.[108] Those in support of lay magistrate determinations made a number of observations:

(1) Magistrates have experience in similar matters, and consistently demonstrate the skills required for these cases, especially considering the support that they receive from legal advisers (National Bench Chairmen's Forum, Justices' Clerks' Society, CPS).

(2) Reserving such matters to district judges would present listing difficulties which would in turn cause delays in proceedings, potentially impacting upon vulnerable persons (National Bench Chairmen's Forum, Justices' Clerks' Society).

(3) There is a growing tendency for cases to be reserved to professional judges, producing a two-tiered summary justice system which is of concern (Justices' Clerks' Society).

7.87 Those who favoured such hearings being reserved to district judges[109] raised various factors in support of their position:

[106] NHS England, *Liaison and Diversion Standard Service Specification 2015* (version 8C, September 2015) (in draft).

[107] IP Further Question 33. We discuss the issues in detail at IP paras 8.62 to 8.68.

[108] The Magistrates' Association, the National Bench Chairmen's Forum, Carolyn Taylor, Law Society, Justices' Clerks' Society, Royal College of Psychiatrists Adolescent Forensic Psychiatry Special Interest Group, Professor Ronnie Mackay, CPS and the Prison Reform Trust.

[109] Dr Eileen Vizard CBE, HM Council of District Judges (Magistrates' Courts) on balance, Centre for Evidence and Criminal Justice Studies, Holroyde J, Nigel Barnes, Laura Hoyano.

(1) The skill set necessary for assessing the ability to participate effectively, particularly of juveniles, is not present in the magistracy or their legal advisers (Dr Eileen Vizard CBE).

(2) A number of respondents suggested not only that hearings be reserved to district judges, but that those judges should receive special training to conduct those hearings (Dr Eileen Vizard CBE, Centre for Evidence and Criminal Justice Studies, Nigel Barnes).

(3) There is already a precedent for reserving matters to specialist district judges in the ticketing of district judges to conduct "serious sexual offence" cases (HM Council of District Judges (Magistrates' Courts)).

(4) Reserving such hearings to district judges would accelerate the process, in comparison to using lay benches (Centre for Evidence and Criminal Justice Studies, Mr Justice Holroyde).[110]

(5) Reserving cases to district judges would provide greater continuity without delay, in comparison with relying on lay benches (Mr Justice Holroyde).

(6) Listing difficulties for courts without resident district judges could be addressed by a pool of deputy district judges who could be assigned to deal with these cases when they arise (HM Council of District Judges (Magistrates' Courts)).

(7) District judges would promote consistency in decisions (Centre for Evidence and Criminal Justice Studies, Nigel Barnes).

(8) District judges could promote consistency of approach to defendants who cannot participate effectively but who are repeatedly charged (Nigel Barnes).

(9) Reserving to district judges is likely to result in fewer appeals (Centre for Evidence and Criminal Justice Studies).

(10) The cost of training lay benches to be able to conduct such hearings, given the number of lay magistrates, "would be a very expensive project and, given the infrequency of such issues, probably not one which would justify the expense" (HM Council of Circuit Judges).

7.88 HM Council of Circuit Judges rejected both options, and took the view that since these issues are equally complex in summary cases and Crown Court cases, that it is most appropriate for them to be dealt with in Crown Court. Although they conceded that if effective participation issues are to be deliberated upon in the magistrates' court, then district judges would be best placed to conduct these hearings.

[110] Writing in his personal capacity, but his comments endorsed by the Lord Chief Justice, Lord Thomas.

Discussion: Should determinations of a defendant's capacity to participate effectively be reserved to district judges?

7.89 There were strong arguments from respondents on both sides of the debate. As we set out in the IP,[111] we consider that a lay bench trained to deal with such hearings, supported by a legal adviser with appropriate training, would be competent to deal with such hearings, and the careful weighing of medical evidence that they require. We are also conscious of the concerns raised by the Justices' Clerks' Society about the creation of a two-tier summary justice system.

7.90 However, on balance, we consider that it is preferable to reserve cases to district judges where it has been identified that the defendant's ability to participate effectively is in doubt, in view of the issues raised at paragraph 7.87 above. We consider in particular:

(1) Continuity and expedition is most likely to be achieved by reserving cases to an identified district judge. We have in mind the lengthy delays often occasioned when a case needs to be listed before the same lay bench on several occasions. We consider that reserving such cases to district judges is most likely to result in continuity without sacrificing smooth case progression.

(2) The cost of training lay justices, by virtue of their much greater numbers, would be difficult to justify, considering the relative infrequency with which such issues arise. (It being acknowledged by almost all consultees that whichever tribunal conducts these hearings in the summary courts will need specialist training).

(3) The Judicial College consider that training for district judges (magistrates' courts) in the new procedures could be accommodated within yearly compulsory updating training and would not incur additional expense.[112]

(4) Greater decision-making consistency is likely to be achieved by reserving matters to district judges.

7.91 Given the evidential requirement, there will inevitably be the need for cases to be adjourned, facilitating their relisting before an appropriate district judge (magistrates' court). We appreciate that this will require careful listing, especially in courts where a district judge does not sit regularly.

Conclusion: Should determinations of a defendant's capacity to participate effectively be reserved to district judges?

7.92 **We recommend that:**

(1) Cases where an issue as to the capacity of the defendant to participate effectively in a summary trial has been raised should be reserved to district judges for determination and subsequent procedures (see draft Bill clauses 30(7) to (8)).

[111] IP para 8.66.

[112] Law Commission meeting with the Judicial College 15 April 2015.

(2) District judges should receive specific training on the reformed test and the procedures to address issues of effective participation in the summary courts.

Issue: How should the defendant's decision to elect Crown Court trial be approached where doubts are raised as to his or her capacity to participate effectively?

7.93 We asked consultees[113] to consider what process should be adopted in cases where an adult defendant, whose capacity to participate effectively in proceedings is in doubt, has the choice of electing Crown Court trial. This situation only arises where an adult defendant faces an either way offence,[114] and the magistrates' court has accepted jurisdiction to try the case. We invited consultees to consider whether, in those circumstances, the issue of the defendant's ability to participate effectively should be resolved in the magistrates' court, and any determination of facts remain in that jurisdiction.[115] We asked consultees whether, alternatively, it would be preferable for all such cases to be sent to the Crown Court for consideration of the defendant's ability to participate effectively in the proceedings, with any subsequent determination of facts being heard in the Crown Court before a jury.[116]

7.94 Of those respondents who addressed these questions, there was strong support for the defendant's capacity to participate effectively being considered in the magistrates' court, and subsequent proceedings being retained in the magistrates' court.[117] Those who favoured this approach did so for a number of reasons:

(1) That "many defendants (both with and without disabilities) have a fear of the Crown Court" and so cases should not automatically be sent to the Crown Court (Law Society).

(2) A change of court and structure of the proceedings can be "extremely intimidating for an unwell defendant" (Law Society).

(3) Retaining such cases in the magistrates' court is "evidently the fairest and most efficient way of dealing with such cases" (Justices' Clerks' Society).

(4) It would be "simpler" for the magistrates to determine capacity in these circumstances (CPS).

[113] IP Further Questions 34 and 35.

[114] An either way offence is an offence which is triable either in the magistrates' court or in the Crown Court.

[115] IP Further Question 34.

[116] IP Further Question 35.

[117] Magistrates' Association, Council of HM District Judges (magistrates' courts), National Bench Chairmen's Forum, Nigel Barnes, Law Society, Justices' Clerks' Society, Professor Ronnie Mackay, Professor Jill Peay, the CPS, Centre for Evidence and Criminal Justice Studies.

(5) The alternative would lead to an "unmanageable" workload for the Crown Court (HM Council of District Judges (Magistrates' Courts), Nigel Barnes).

(6) The "slower, more costly and more intimidating" hearing in the Crown Court is not justified if the magistrates' court has no reservations as to its competence (Justices' Clerks' Society).

(7) If the magistrates' court retained a concern about complexity arising out of the determination of the defendant's ability to participate effectively, they would be entitled to decline jurisdiction on the basis that "complex questions of fact or difficult questions of law" arose.[118]

7.95 Professor Jill Peay expressed support for retaining such cases in the magistrates' court, but only if section 36 of the MHA (the power to remand a defendant in hospital for treatment) were extended to the magistrates' court and section 35 of the MHA (the power to remand a defendant in hospital for a report on his or her mental condition) were extended to be applicable prior to conviction in the magistrates' court.[119]

7.96 The Council of HM Circuit Judges, Mr Justice Holroyde and Dr Eileen Vizard CBE were the only three respondents that preferred such cases to be sent to the Crown Court for determination of unfitness. However, Mr Justice Holroyde recognised that both alternatives had advantages and disadvantages.

7.97 Those who preferred the sending of such cases to the Crown Court focussed on the following:

(1) As we noted in the IP, retaining capacity proceedings in the magistrates' courts denies the defendant whose capacity is in doubt the right to have a jury determine the facts in his or her case. The Council of HM Circuit Judges felt that this was best addressed by sending all such cases to the Crown Court.

(2) To retain such cases in the magistrates' court for financial reasons would be "inappropriate" (Council of HM Circuit Judges).

(3) That "…if a person may lack the capacity to elect trial by jury, one should not assume that if he or she had capacity they would consent to trial in the magistrates' court" (Council of HM Circuit Judges).

Discussion: How should the defendant's decision to elect Crown Court trial be approached where doubts are raised as to his or her capacity to participate effectively?

7.98 As Mr Justice Holroyde noted, both options have their drawbacks. We are particularly aware of the denial of the defendant's right to choose a jury determination should the summary process be preferred. However, on balance and in line with the majority of consultees, we favour such cases being retained

[118] CrimPD 2015 [2015] EWCA Crim 1567, 9A.2.

[119] The Faculty of Forensic and Legal Medicine also echoed concerns in relation to the operation of MHA, ss 35 and 36. We address this issue at para 7.101 and following below.

by the magistrates' court, considering that the more accessible, and less intimidating, nature of summary proceedings provides a more desirable forum for dealing with vulnerable defendants. We bear in mind also that if such defendants were sent automatically to the Crown Court it would be possible for the court to impose a hospital order with restriction,[120] whereas we do not recommend that the magistrates' court be entitled to impose a restriction order.[121] We recommend that it should remain open to the magistrates to commit to the Crown Court for a restriction order to be imposed where appropriate. However, this additional hurdle is of some significance and adds some weight to the argument that it is not desirable to commit to the Crown Court automatically defendants who might not have chosen to engage with that immediate risk of indefinite hospitalisation.

7.99 In addition, although not a determinative factor, we also bear in mind the financial and listing burden which sending all such cases to the Crown Court would create. Of course, if there is any concern that the assessment of the defendant's capacity will be unusually complex, the magistrates' court can decline jurisdiction in any event, and send the matter to the Crown Court for determination, as discussed at paragraph 7.94(7) above.

Conclusion: How should the defendant's decision to elect Crown Court trial be approached where doubts are raised as to his or her capacity to participate effectively?

7.100 **We** therefore **recommend that:**

(1) Where an adult defendant has the right to elect jury trial, on an either way charge for which the magistrates' court has accepted jurisdiction, if an issue arises as to his or her capacity to participate effectively in the proceedings, the case should be retained in the magistrates' court for determination of that issue.

(2) If the defendant is found to be able to participate effectively in the proceedings, or the issue is abandoned by the party who raised it, then the mode of trial procedure should continue in the usual way.

(3) If the defendant is found to lack the capacity to participate effectively in the proceedings, all further hearings in relation to that case should be retained in the magistrates' court (see draft Bill clause 29, in particular clause 29(5)).

Issue: Extension of the application of sections 35 and 36 of the Mental Health Act 1983 in the magistrates' courts

7.101 Section 35 of the MHA provides for the remand of a defendant to hospital for a report on his or her mental condition to be prepared. A section 35 MHA remand is

[120] Available currently under CP(I)A, s 5(2)(a) and under our recommendations within draft Bill clause 57(2).

[121] See para 7.160 below. Subject to the defendant satisfying the criteria in MHA 1983, ss 37 and 41.

limited to 28 days, with the right of further remand for periods of 28 days up to 12 weeks in total.[122]

7.102 Section 35 of the MHA is applicable to any defendant awaiting trial, or sentence, in the Crown Court for an offence punishable with imprisonment (save for a defendant awaiting sentence for murder). However, unless the defendant consents, section 35 of the MHA is only applicable in the summary courts to defendants in respect of imprisonable offences following conviction, or a finding by the Court that the defendant "did the act or made the omission" under section 37(3) of the MHA.[123]

7.103 Section 36 of the MHA provides for the remand of an accused to hospital for treatment. It is applicable to any individual in custody awaiting trial in the Crown Court for an imprisonable offence (other than an offence of murder).[124] Section 36 of the MHA has the same time limitation as section 35.[125] Section 36 of the MHA, however, is not currently applicable in the magistrates' court.

7.104 As we have indicated above, Professor Jill Peay raised in her response to the IP the need for the applicability of sections 35 and 36 of the MHA in the summary jurisdiction to be extended, were capacity procedures to be introduced in that jurisdiction.[126] The Faculty of Forensic and Legal Medicine in their IP response also note the difference in applicability of section 35 of the MHA between the Crown Court and magistrates' courts.

Discussion: Extension of the application of sections 35 and 36 of the Mental Health Act 1983 in the magistrates' courts

7.105 If our recommendation for the extension of capacity procedures to the summary courts were to be adopted, we consider that it would be necessary, as Professor Peay notes, for sections 35 and 36 of the MHA to be extended for imprisonable offences, to mirror the applicability of those sections in the Crown Court. Such provisions are essential to provide the court with the mechanisms to achieve expert assessment and treatment for defendants, where necessary and indicated by the required medical evidence. However, we anticipate that such provisions would rarely need to be engaged in the summary jurisdiction. We discuss the rationale behind extension of sections 35 and 36 of the MHA in more detail in Chapter 4, paragraphs 4.98 to 4.123 above.

Conclusion: Extension of the application of sections 35 and 36 of the Mental Health Act 1983 in the magistrates' courts

7.106 **In relation to section 35 of the Mental Health Act 1983 we** therefore **recommend:**

[122] MHA, s 35(7).

[123] MHA, s 35(2)(b).

[124] MHA, s 36(2).

[125] MHA, s 36(6).

[126] See para 7.95 above.

(1) Section 35 of the MHA should be extended to be applicable prior to conviction or an alternative finding procedure, to all defendants charged with imprisonable matters without the need for the defendant's consent.

(2) Section 35 of the MHA should be applicable to all defendants charged with imprisonable matters following a conviction or alternative finding in relation to an imprisonable offence (see draft Bill clause 64).

7.107 **In relation to section 36 of the Mental Health Act 1983 we recommend that:**

(1) Section 36 of the MHA be applicable to defendants in the magistrates' courts who are remanded in custody in relation to imprisonable matters prior to conviction or an alternative finding procedure.

(2) That the maximum duration of a section 36 remand in the magistrates' court should be six months (see draft Bill clause 65).

Issue: Screening young defendants for participation difficulties

7.108 In light of the prevalence of participation difficulties amongst young defendants, as discussed at paragraphs 7.34 to 7.39 above, and the lack of diagnosis in many cases, we arrived at the provisional view in the IP that there should be mandatory screening for defendants aged under 14 years, to assess whether they have capacity issues.[127] We therefore asked in the IP[128] whether consultees would consider screening for mental health issues for all defendants under 14 to be appropriate. We noted the critical importance of identifying and assisting these young defendants at an early stage, so that support can be provided to them generally, and particularly in engaging with proceedings. Young people convicted between the ages of 10 to 13 are likely to become the most persistent offenders, with longer and more prolific careers.[129] Quite apart from the moral obligation to respond to their vulnerability, intervening at an early stage to assist these younger defendants presents a cost saving in the long term.

7.109 Of the nineteen respondents who addressed this question, sixteen were in favour of mandatory screening for defendants under the age of 14 in some form.[130] There was significant acknowledgement of what one consultee described as the "greater prevalence of psychiatric disorders and learning disabilities, as well as natural developmental immaturity"[131] others focused on the social and

[127] See fuller discussion at IP paras 8.115 to 8.119.

[128] IP Further Question 44.

[129] See for example D Farrington, S Lambert and D J West, "Criminal Careers of Two Generations of Family Members in the Cambridge Study in Delinquent Development" (1998) 7 *Studies on Crime and Crime Prevention* 85.

[130] Magistrates' Association, Council of HM Circuit Judges, HM Council of District Judges (Magistrates' Courts), Carolyn Taylor, Nigel Barnes, Justices' Clerks' Society, Dr Eileen Vizard CBE, Royal College of Psychiatrists, Karina Hepworth, Professor Ronnie Mackay, Faculty of Forensic and Legal Medicine, Centre for Evidence and Criminal Justice Studies, Laura Hoyano, Youth Justice Board, CPS and Prison Reform Trust. See also support for this proposal from Professor Heather Keating, email 1 March 2015.

[131] Centre for Evidence and Criminal Justice Studies.

educational disadvantage, and emotional difficulties, experienced by many young defendants.[132]

Discussion: Screening young defendants for participation difficulties

What should the screen address?

7.110 A number of consultees stressed that the screening should address not only mental health but learning disabilities.[133] The importance of assessing natural developmental immaturity was also stressed, as was the need for assessment of the general competence of those under 14 to defend themselves.[134]

7.111 We agree, and consider that the screening process should address the defendant's capacity to participate effectively in trial generally, encompassing issues which may arise as a result of mental health difficulties, learning disability, developmental disorders and developmental immaturity.

Difficulties in imposing an arbitrary age threshold

7.112 Reservations were expressed with regard to the proposal being limited to those "under 14", on the basis that:

(1) Introducing any age threshold is liable to result in arbitrary outcomes. Both Mr Justice Holroyde (dissenting from the proposal) and the CPS suggested that this might cause difficulties where a group of young defendants are jointly charged with an offence but only some are mandatorily screened.

(2) Mr Justice Holroyde also considered that an age threshold might cause difficulties in terms of the timing of the trial in relation to a defendant's 14th birthday.

(3) Developmental immaturity and mental disorder do not conform to neat age bands. There is no clinical reason to impose a threshold at the age of 14.[135]

7.113 Several consultees considered, in light of these issues, that screening should be mandatory for all those under 18.[136]

7.114 We understand the concerns raised about the risk of arbitrary outcomes in imposing a cut-off at 14. However, we bear in mind that a mandatory requirement for screening of all under 14 year olds would not prevent discretionary screening of others close to that boundary age. Liaison and diversion schemes, now available in many magistrates' courts, can receive referrals from various actors in

[132] Prison Reform Trust.

[133] See for example the response of Karina Hepworth.

[134] See for example the response of Laura Hoyano.

[135] The Royal College of Psychiatrists, Dr Eileen Vizard CBE, the Prison Reform Trust and the Youth Justice Board.

[136] The Royal College of Psychiatrists: Adolescent Forensic Psychiatry Special Interest Group, the Prison Reform Trust and the Youth Justice Board.

the criminal process, including the magistrate(s), the prosecutor, the defence representative or the defendant him- or herself. Many youth offending teams ("YOTs") also have specialist clinical support which can assist as well.

7.115 Our initial motivation in imposing the cut-off was in part pragmatic. Whilst cost and capacity should not override principle, we have to consider whether a law reform recommendation is proportionate in all the circumstances. At that stage we were not persuaded that a mandatory screen for all those under 18 was proportionate. We considered that, whilst not resolving to any age bandings, there is evidence to support the suggestion that very young defendants represent the group most likely to become persistent offenders and in general present a greater risk of participation difficulties than older juvenile defendants.[137]

7.116 However, the concerns raised above about arbitrary thresholds, and the evidence from consultees, many of them experts in the field of child and adolescent psychiatry and psychology, have persuaded us that we should reconsider this view and investigate whether there should be screening for all defendants under 18 appearing in the youth court for the first time.

Screening particular groups of young defendants?

7.117 Several consultees felt that to screen all young defendants under 14 would be disproportionate, but took varying stances as to who should be screened:

(1) Mandatory screening would be required only for those who are "within the Care system"[138] (National Bench Chairmen's Forum).

(2) To screen all would be disproportionate because it is not yet known what proportion of the population are suffering from such ailments (National Bench Chairmen's Forum).

(3) Screening of some under 14 would be appropriate but should not be mandatory because "some issues affecting under 14 year olds are social in nature, rather than medical" (the Law Society).

7.118 We acknowledge that there are some groups at higher risk than others (such as children in the care of local authorities). However, we consider that there is substantial clinical evidence to suggest that many more young defendants, from all backgrounds and experiences, are likely to have participation difficulties than adults. There is also ample evidence, borne out by concerns raised by some of our consultees (for example, Carolyn Taylor) that identifying such difficulties amongst young defendants can be challenging for a doctor or a nurse, let alone a representative or judge. We remain of the view that, for these reasons, screening for young defendants in relation to capacity issues, at least those under 14, should be mandatory where that person appears in the youth court for the first time.

[137] T Grisso and others, "Juveniles' competence to stand trial. A comparison of adolescents' and adults' capacities as trial defendants" (2000) in T Grisso and R G Shwartz (eds), *Youth on Trial: A Developmental Perspective on Juvenile Justice* (2000) pp 139 to 171.

[138] That is those children and young people who are under the care of the local authority.

Labelling concerns

7.119 Several consultees counselled care in how the screening should be framed, the Royal College of Psychiatrists Adolescent Forensic Psychiatry Special Interest Group recommended that the term "screening" is used, rather than "mental health screening". They felt that this more appropriately reflected the broad nature of the assessment that would be required for consideration of issues of effective participation. The HM Council of District Judges (Magistrates' Courts) in a similar vein noted that the suggestion of a mental health assessment to a young defendant and his or her parents might provoke a hostile reaction.

7.120 We entirely agree, and consider that such screening should reference its purpose (to assess ability to participate effectively) rather than to seek to identify a cause (such as mental disorder, learning disability and natural developmental immaturity). This is in keeping with our rejection of a diagnostic threshold.[139]

Reservations regarding the robustness of screening

7.121 Several consultees, whilst supportive of the proposal, raised concerns about the expertise of the professional responsible for conducting the screening, and the reliability of such a process within the constraints of the criminal justice system. The Royal College of Psychiatrists Adolescent Forensic Psychiatry Special Interest Group considered that a consultant child psychiatrist or psychologist should conduct such screening. The Faculty of Forensic and Legal Medicine were also in favour of screening, but not if it was "in isolation by non-medically qualified staff". Carolyn Taylor was concerned that an assessment made in a police station might be ineffective in identifying effective participation difficulties. She was concerned that the professional may not have the defendant's full medical history, be aware of significant features of the case, or have sufficient time for a full assessment.

7.122 We acknowledge that a screening system for young defendants could not hope to have a perfect identification rate, and would have to work within the constraints of the system. Given the resource pressures on the system it would not be possible to have a consultant psychiatrist or a psychologist conduct this screening. Rather, what we have in mind is a trained forensic mental health practitioner with a youth specialism, most likely a liaison and diversion practitioner at court, should the existing pilots for that scheme be successful, or a clinical specialist member of a YOT.

Screening tools

7.123 There is a range of available screening tools, focussing on different conditions, such as the widely used Learning Disability Screening Questionnaire,[140] or the RAADS-14 test for autistic spectrum disorder.[141] From discussions with clinical

[139] See discussion of a diagnostic threshold at paras 3.127 to 3.128 above.

[140] K McKenzie and D Paxton, "Promoting access to services: the development of a new screening tool" (2006) 9(6) *Learning Disability Practice* 17.

[141] J M Eriksson, L M Andersen and S Bejerot, "RAADS-14 Screen: validity of a screening tool for Autism Spectrum Disorder in an adult psychiatric population" (2013) 4 *Molecular Autism* 49.

consultees, it is clear to us that the appropriate tool to use will be a matter of judgement for the assessing clinician considering the presentation of the particular individual. However, there are sufficient approved tools to enable a forensic mental health practitioner to provide the court with an initial assessment of a young defendant's capacity for effective participation, and to enable referral on for further expert assessment or support where that is indicated. Were defence representatives to retain concerns, a full assessment by an expert could be pursued, but the screening exercise would, we hope, serve as a proportionate measure to identify many young people who would otherwise move through the process with their difficulties unaddressed.

Does a mandatory screen run counter to the presumption of fitness?

7.124 Mr Justice Holroyde objected to mandatory screening in part because, in his view, such an approach undermines the presumption of fitness (or capacity) and challenges our overarching interest in ensuring that the normal trial process is adopted in all cases other than a small minority.

7.125 We acknowledge that mandatory screening raises a question as to the participatory ability of all those defendants within the mandated group. However, we do not consider that that necessarily undermines the presumption. We conceive of a defendant's capacity to participate in criminal proceedings on a sliding scale, where the purpose of screening is not only to identify those who may be unable to participate effectively, but also to identify those who require reasonable adjustment, or special measures, in order to be able to participate effectively. The criminal justice system already acknowledges that those under 18 may find participation difficult. Witnesses under 18, for example, are automatically eligible for special measures.[142] This approach is borne out by the clinical evidence relating to natural developmental immaturity,[143] those difficulties being exacerbated by the prevalence of psychiatric disorders and learning disabilities and difficulties amongst young people who offend.[144]

7.126 The Council of HM Circuit Judges suggested that this issue is linked to the issue of the age of criminal responsibility. In a sense it is, in that to call into question the very youngest defendants' ability to participate in trial may cause one to question their presence in court at all. However, we consider that this issue is distinct from the issue of the age of criminal responsibility in a significant way. In respect of this screening proposal, we are looking not at whether a defendant ought to be considered responsible for his or her acts, but rather whether he or she can fairly engage in the normal criminal process of assessing his or her culpable involvement in those acts. Nonetheless, as we set out above at paragraph 7.54, we believe that there may be strong policy reasons for looking again at the age of criminal responsibility, but it is beyond the scope of this project.

[142] Youth Justice and Criminal Evidence Act 1999, s 16.

[143] See paras 8.25 to 8.28 in the IP and paras 7.35 and following above.

[144] See para 8.29 in the IP.

Resourcing

7.127 Resourcing concerns were raised, both by some in favour (Justices' Clerks' Society) and some against (Mr Justice Holroyde, the National Bench Chairmen's Forum, and the Law Society). Inevitably a mandatory screening process would require additional resources, but we consider that the expenditure would be made manageable as a result of the following factors:

(1) If liaison and diversion services are extended across the jurisdiction as planned,[145] then suitable practitioners would be on hand to assess without undue delay or separate instruction. The costs would be the marginal increase in their assessment workload.[146] (Alternatively, separately from liaison and diversion schemes, many YOTs supporting young defendants at court currently have specialist nurses and other mental health and learning disability practitioners seconded to them or have the support of local child and adolescent psychiatrists and/or psychologists).

(2) Empirical research suggests that engagement is a significant factor in ongoing co-operation and compliance.[147] Ensuring that young defendants are enabled to engage effectively in trial, and achieve an appropriate sentence or disposal, promises savings in the mid to longer term.

(3) Where an undiagnosed mental or developmental disorder, or an undiagnosed learning disability, is a significant factor in offending, early identification of such difficulties, and we would hope subsequent treatment or support, presents a significant potential cost-saving in cutting short what might become a significant criminal career.

7.128 It is difficult to identify accurately how many young defendants would require screening were the recommendation to focus on young people appearing in the youth court for the first time, and how much that screening would cost. Working from youth justice statistics, we calculate that in 2013-14, approximately 7,382 defendants aged between 10 and 17 years appeared for the first time in the youth

[145] NHS England is currently trialling liaison and diversion schemes at 25 courts across the country. This will be reviewed in late 2015, with a view to rolling out services across all court centres by 2017.

[146] It is already proposed that the Liaison and Diversion pilot scheme specification be extended to require providers to alert key decision makers in criminal justice agencies to any presenting factors that may require reasonable adjustments to be made to case management processes so that individuals may understand and be able to effectively engage in criminal justice proceedings. See NHS England, *Liaison and Diversion Standard Service Specification 2015* (version 8C, September 2015) (in draft).

[147] Empirical research suggests that people are more willing to comply with rules set by legal authorities if they understand the processes and believe that those authorities act in ways that are procedurally just. See T R Tyler, *Why people obey the law?* (1990) and N Aye-Maung, *Young People, Victimisation and the Police: British Crime Survey Findings on Experiences and Attitudes of 12 to 15 year olds* (Home Office Research Study No 140, 1995).

court. Of those approximately 1,108 were under 14 years of age.[148] Many of those young people will already have been assessed by forensic mental health practitioners as part of liaison and diversion work occurring in police stations. Were screening to be conducted at court by liaison and diversion practitioners operating under the current liaison and diversion pilot scheme, NHS England estimate the broad cost to be £100 for each individual screened. This is based on a two-hour assessment with a Band 7 practitioner (typically a community psychiatric nurse), resulting in a short written report.[149]

Conclusion: Screening young defendants for participation difficulties

7.129 Given the prevalence of participation difficulties and communication disorders experienced by children and young people, and the advantages of early identification discussed above, we consider in principle that there should be mandatory screening for participation issues for all those defendants under the age of 18 who appear in the courts for the first time, and where no similar screening has already been undertaken.[150]

7.130 We are not in a position to make a firm recommendation about how this principle should be put into practice. Whether, in terms of resources, it is realistic to make the recommendation for all those under the age of 18 appearing in court for the first time (approximately 7,382 per year) or whether the recommendation will have to be limited to those under the age of 14 years (approximately 1,108) depends to a considerable degree on whether NHS England's Liaison and Diversion Pilot Scheme is rolled out for the whole of England following the Government's review of the scheme. If this were to occur, then we consider that there would be appropriate clinicians available in all youth courts to conduct such screening, and a recommendation for a mandatory screen for all defendants under 18 could be made. In the absence of a guarantee of such provision, **we** consider that it is more appropriate to **recommend that all defendants under 14 years of age, appearing in the youth court for the first time, must be screened for participation difficulties, unless the defendant has already been assessed prior to attending court.**

7.131 We anticipate that it would be possible for the Criminal Procedure Rules, or Criminal Practice Direction, to be amended to require the magistrate(s) to refer a

[148] Youth Justice Board/Ministry of Justice, *Youth Justice Statistics 2013-14: England and Wales*, (January 2015). In 2013-14, 5,463 young defendants received convictions as first time entrants into the Criminal Justice system. 30% of those, approximately 1,639 defendants were aged between 10 and 14 years. Approximately half of those 1,639 were under 14 years. There are no figures for the number of defendants who appear for the first time in the youth court but are acquitted. However, on the basis that 45,891 young people were proceeded against in 2013-14 and of those 33,902 were sentenced, we assume a conviction rate of 74%. Therefore we estimate the following for defendants appearing for the first time in the youth court in 2013-14: all aged 10 to 17 = 7,382, 10 to 14 years = 2,215, 10 to 13 years = 1,108.

[149] Costs include overheads and the assessment time only. Depending on the nature of the case and the individual's presentation, follow-up contacts may be required. Travelling time and waiting time (for example, in court) are not taken into account.

[150] Professor Heather Keating has raised concerns that this should be subject to concerns being raised as to deterioration in the child or young person's condition since the earlier assessment (email 1 March 2015).

young defendant, who has not previously been assessed and who is appearing in court for the first time, to liaison and diversion or youth offending services at court for assessment.

Issue: Discretion to divert the defendant out of the criminal justice system following a finding of lack of capacity in the summary courts

7.132 This issue was raised in CP197[151] and, although few respondents addressed it in their responses, those who did were in favour of the court having discretion to divert defendants found to be unfit to plead, where appropriate, out of the criminal justice system. In the IP,[152] we repeated the question, this time incorporating a number of factors that the court would be required to take into account in exercising such a discretion. These factors included the seriousness of the offence, the risk of future offending, the impact on complainants, and the availability of facilities to support the defendant outside the criminal justice system.

Discussion: Discretion to divert the defendant out of the criminal justice system following a finding of lack of capacity in the summary courts

7.133 12 of the 14 respondents who addressed this question favoured there being such a discretion.[153] As expected, support for this position was founded primarily on a desire to divert defendants who are unable to participate effectively out of the criminal justice system where appropriate, in addition to favouring the same test throughout both the summary and Crown courts.

7.134 Mr Justice Holroyde and Laura Hoyano rejected the proposal. Mr Justice Holroyde repeated in relation to the summary jurisdiction the concerns he raised in respect of the introduction of such a discretion in the Crown Court. We discuss those issues at paragraphs 5.53 and 5.54 above. Laura Hoyano's objection to the discretionary fact-finding procedure was rooted in her opposition to the fact-finding hearing itself, and not the question of whether or not it should in fact be discretionary. She takes the view that a defendant who has been found to lack capacity to engage in trial proceedings is equally unlikely to be able to engage in the fact-finding proceedings, and thus it will not be a just determination.

7.135 As we have made clear throughout this report, our view is that every effort should be made to divert defendants out of the criminal justice system where that is appropriate. We discuss the merits of a discretion to divert defendants from the courts in more detail in relation to the Crown Court at paragraphs 5.43 to 5.61 above. In our view such a discretion will be a particularly appropriate option in the summary jurisdiction where many cases will be of lower severity such that advancing to the alternative finding procedure will not be proportionate or necessary.

[151] CP197 Question 9.

[152] IP Further Question 41.

[153] The Magistrates' Association, Council of HM Circuit Judges, HM Council of District Judges (Magistrates' Court), Law Society, Justices' Clerks' Society, Dr Eileen Vizard CBE, Professor Ronnie Mackay, Professor Jill Peay, Centre for Evidence and Criminal Justice Studies, CPS, and Prison Reform Trust.

7.136 Indeed, we consider the facility to divert a defendant from the court following a finding of lack of capacity will be even more important in respect of a child or young person appearing in the youth court. Where a disposal or ancillary order is required to protect the public, support the individual defendant or to prevent recurrence of the concerning behaviour then plainly diversion out of the criminal justice system will not be appropriate. However, where such a disposal is not required, and where no other public interest is served in advancing to the alternative finding procedure, we take the view that careful consideration should be given to diverting a child or young person out of the criminal justice system at that stage.

7.137 We take the view, for reasons discussed in more detail at Chapter 5 above, that the district judge should apply an interests of justice test when considering whether to make such an order, taking into account a number of factors, including:

(1) the seriousness of the offence or offences charged;

(2) the effect of such an order on those affected by the offence or offences charged;

(3) the arrangements made to reduce the risk (if any) that the defendant would commit an offence in future;

(4) the arrangements made to support the defendant in the community; and

(5) the views of the defendant or prosecutor as regards the making of such an order.

7.138 We also consider that such a determination by the court should not prevent the prosecution (or the defendant) making an application for leave to resume the prosecution, should recovery be achieved, for the reasons set out at paragraphs 9.43 to 9.45 below.

Conclusion: Discretion to divert the defendant out of the criminal justice system following a finding of lack of capacity in the summary courts

7.139 **We** therefore **recommend that:**

(1) The district judge in the adult magistrates' or youth court should have the discretion to decline to proceed with the alternative finding procedure (see draft Bill clause 50).

(2) The judge should apply an interests of justice test, with specified factors to be taken into account, in considering whether to exercise this discretion (see draft Bill clauses 50(2) and (4)).

(3) Exercise of the discretion not to proceed should not act as a bar to resumption of proceedings on recovery, subject to successful application by the prosecution or the defendant (see draft Bill clauses 51 and 52).

Issue: The procedure to be adopted where a defendant has been found to lack capacity for effective participation in trial

7.140 The overwhelming weight of responses to the questions asked in CP197 relating to the extension of unfitness to plead procedures in the magistrates' and youth courts endorsed the introduction of like procedures in all courts. That position continued to be reflected in responses to the IP on issues relating to the conduct of the determination of facts in the summary courts.

7.141 In the IP[154] we asked consultees whether they consider that, in reaching its determination on the facts, the tribunal in the summary courts should be able to reach a special determination of qualified acquittal as a result of mental disorder existing at the time of the offence, as we then proposed for the Crown Court.

Discussion: The procedure to be adopted where a defendant has been found to lack capacity for effective participation in trial

The special determination

7.142 Responses to this question were divided, with eight of thirteen favouring the availability of a special determination.[155] The majority of respondents in support cited a desire for extending the same procedures throughout the magistrates' and the Crown Court. Carolyn Taylor and the Law Society commented that they often deal with cases where the offence has been committed as a direct result of a mental disorder, and therefore this determination presents a fair adjustment to the law.

7.143 Those who objected to the availability of a special determination in the summary courts[156] did so on the basis of concerns relating to the operation of the special verdict in full trial in the Crown Court. Uncertainty as to the scope of the proposed special determination was a particular concern. In respect of the Crown Court, the reasoning behind our recommendation to introduce the special verdict in the alternative finding procedure, its scope and the issues raised by respondents to the IP are discussed in detail in Chapter 5 paragraphs 5.87 to 5.107 above. The arguments raised in respect of the Crown Court special verdict apply equally, we consider, to the magistrates' court special determination.

7.144 We consider that where the prosecution will be required to establish all elements of the offence at the alternative finding procedure, as we propose for the Crown Court, the special determination is necessary. The special determination is designed to ensure that the court has the capacity to put in place disposals to protect the public where an individual's mental state at the time of the offence is so compromised by his or her condition that he or she cannot be held responsible for his or her actions. The special determination of not guilty by reason of insanity that we propose for the magistrates' courts would have the same very limited

[154] IP Further Question 42.

[155] Magistrates' Association, Council of HM Circuit Judges, HM Council of District Judges (Magistrates' Court), Holroyde J, Carolyn Taylor, Law Society, Dr Eileen Vizard CBE and CPS.

[156] Nigel Barnes, Professor Ronnie Mackay, Professor Jill Peay, Faculty of Forensic and Legal Medicine.

scope as the special verdict of not guilty by reason of insanity which we recommend be available at the alternative finding procedure in the Crown Court. In summary, the district judge would only arrive at a special determination if satisfied that, at the time of the alleged offence, the defendant did not know the nature and quality of the act that he or she did, or he or she did not know that it was legally wrong.[157]

7.145 We have considered whether this approach conflicts with the current availability of the insanity defence in summary trial in the magistrates' court. At present, a defendant in the magistrates' court can raise the issue of insanity which, if established, would prevent him or her from being convicted and, in contrast to the Crown Court, could not result in the defendant being made subject to a disposal. However, where insanity is raised, the defendant is not automatically entitled to pursue that defence. The court, having heard the views of the parties, would be entitled to make a finding of fact under section 37(3) of the MHA instead and impose a hospital order or a guardianship order where that would be appropriate.[158]

7.146 We do not consider, therefore, that, in the magistrates' courts, the defendant who lacks capacity, but who was legally insane at the time of the offence, is likely to find him- or herself in a worse position under our recommendations than under the current arrangements. The defendant in relation to whom, if he or she had capacity, the court would be disinclined to proceed to a section 37(3) MHA determination and disposal, would be likely, if found to lack capacity for trial, either to be diverted out of the criminal justice system following the finding of lack of capacity, or made subject to an absolute discharge following the alternative finding procedure. In conclusion, we consider it appropriate and necessary to include a special determination of not guilty by reason of insanity as one of the available findings in the procedure following a finding of lack of capacity, what we refer to as the "alternative finding procedure".

Complexity issues

7.147 Although we agree with those respondents who favour the introduction of like procedures in all courts, we have also considered with care whether the more complex alternative finding procedure, including a special determination, is appropriate for the summary jurisdiction. A finding of fact, of the sort involved in arriving at a section 37(3) MHA determination, has apparent attractions in terms of simplicity. However, we consider that it has the potential to significantly disadvantage the defendant who lacks capacity in comparison with a defendant in full trial. A procedure for a defendant lacking in capacity which required the court to be satisfied only that the defendant has "done the act or made the omission", for example, has all the drawbacks identified in relation to the current section 4A hearing. We discuss this in detail at Chapter 5 paragraphs 5.28 to 5.36. We are also not persuaded that such a finding is necessarily simpler to arrive at, where division of the external and fault elements of the offence is

[157] *M'Naghten's Case* (1843) 10 CL & Fin 200, 8 ER 718.

[158] *R (on the application of Singh) v Stratford Magistrates' Court* [2007] EWHC 1582 (Admin), [2007] 1 WLR 3119.

required, as well as consideration of whether any defence may be engaged, and the evidence required to raise such an issue.

7.148 Since indefinite hospitalisation may be the disposal imposed following a finding adverse to the defendant,[159] we consider that the protections offered by the alternative finding procedure model that we recommend for the Crown Court are suitable and necessary, whichever jurisdiction the defendant may find him- or herself in. Those cases in the magistrates' courts which do not justify such scrutiny should, we consider, be the subject of diversion following the finding of lack of capacity, as recommended at paragraph 7.139 above.

Representation

7.149 We see no basis for a defendant who lacks capacity in the Crown Court to be represented in an alternative finding procedure, but a defendant in a similar position in the magistrates' courts not to enjoy the same guarantee of competent representation. We consider that the same provision for representation should be available in both jurisdictions. Representation for a defendant who lacks capacity in the Crown Court is discussed in more detail at Chapter 5 paragraphs 5.133 to 5.137.

Conclusion: The procedure to be adopted where a defendant has been found to lack capacity for effective participation in trial

7.150 **We** therefore **recommend:**

(1) There should be an alternative finding procedure before the district judge seized of the case, but otherwise in the manner recommended for the Crown Court.

(2) The available outcomes at the alternative finding procedure in the magistrates' and youth courts would therefore be:

(a) a finding that the allegation is proved against the defendant;

(b) an outright acquittal; or

(c) a special determination that the defendant is not guilty by reason of insanity (see draft Bill clauses 38 to 40).

(3) In every case the court should be required to appoint a person to put the case for the defendant where an alternative finding procedure is held, (in accordance with the recommendations made for the Crown Court) (see draft Bill clause 41).

[159] By finding "adverse to the defendant" we mean a finding that the allegation is proved against the defendant, or a special determination of not guilty by reason of insanity.

DISPOSAL OPTIONS IN THE ADULT MAGISTRATES' COURT

Issue: What should the available disposals be where an allegation is proved against an adult defendant, or a special determination is arrived at, in relation to a non-imprisonable offence in the magistrates' court?

7.151 We consider that procedures to identify those who lack the capacity to participate effectively in trial should apply to all offences. However, we took the provisional view in the IP that the disposals available in relation to non-imprisonable offences ought not to include measures that significantly restrict freedom.

7.152 In view of this, we asked consultees in the IP[160] whether they supported limiting the available disposals in relation to non-imprisonable offences to a supervision order[161] and an absolute discharge.

Discussion: What should the available disposals be where an allegation is proved against an adult defendant, or a special determination is arrived at, in relation to a non-imprisonable offence in the magistrates' court?

7.153 The majority of respondents favoured limiting the disposals for non-imprisonable matters in this way.[162] However, several other disposal options were raised by respondents:

Conditional discharges

7.154 Carolyn Taylor and Nigel Barnes both proposed the availability of conditional discharges. We have considered this option in relation to the Crown Court in Chapter 6 at paragraphs 6.101 to 6.103. For the reasons outlined there, we do not consider that a conditional discharge would be a useful addition to the available disposals.

Hospital orders

7.155 The Faculty of Forensic and Legal Medicine and Professor Graeme Yorston (academic, consultant forensic psychiatrist and neuropsychiatrist) both considered that hospital orders should be available disposals for non-imprisonable matters, since they are therapeutic, and non-punitive. While we see some attraction in this argument, we are concerned that the availability of such a measure for defendants facing non-imprisonable allegations who lack capacity would place that defendant in a very different position from the defendant in ordinary criminal proceedings. The former would be at risk of indeterminate hospitalisation, the latter would face only a fine. Even though hospital orders are therapeutic in approach, and would only be imposed where treatment as an in-patient is appropriate, we consider that the potential deprivation of liberty is too significant a response for non-imprisonable matters. Just as we must bear in

[160] IP Further Question 37.

[161] We discuss our recommendations for reform to the supervision order in Chapter 6 at para 6.15 and following.

[162] Magistrates' Association, Council of HM Circuit Judges, HM Council of District Judges (Magistrates' Court), Holroyde J, Law Society, Dr Eileen Vizard CBE, Professor Ronnie Mackay, Centre for Evidence and Criminal Justice Studies, Laura Hoyano, CPS and Prison Reform Trust.

mind the importance of deterring malingerers, we also have to bear in mind that we do not want to deter those who lack capacity from engaging the protection of removal from the trial process. In appropriate circumstances, there remains the option for an individual who presents a risk to the public to be admitted to hospital under the civil sections of the MHA.[163]

Conclusion: What should the available disposals be where an allegation is proved against an adult defendant, or a special determination is arrived at, in relation to a non-imprisonable offence in the magistrates' court?

7.156 **We recommend that where an allegation is proved against a defendant, or a special determination is arrived at, in relation to a non-imprisonable offence, the available disposals in adult magistrates' courts should be:**

(1) a supervision order (with or without medical treatment); and

(2) an absolute discharge (see draft Bill clause 57(4) and following).

Issue: What should the available disposals be where an allegation is proved against an adult defendant, or a special determination is arrived at, in relation to an imprisonable offence in the magistrates' court?

7.157 Building on the strong support in the responses to CP197 for an equalisation of the framework in the Crown Court and the magistrates' courts, we asked consultees in the IP[164] whether they were in agreement that the following disposals should be available where an allegation is proved against a defendant, or a special determination is arrived at, in relation to an imprisonable offence in the magistrates':

(1) a hospital order (without restriction);

(2) a supervision order (with or without medical treatment); and

(3) an absolute discharge.

7.158 17 of the 19 respondents who addressed this issue agreed that the above three disposals were suitable to be imposed in the adult magistrates' court. Support for the proposition was again focused on a desire for the disposals to reflect those available in the Crown Court (with the exception of the restriction order).

7.159 Laura Hoyano objected on the basis of her more fundamental concerns about the fairness of the proposed procedures, and out of concern that lay magistrates are not a suitable tribunal to address issues of unfitness to plead. Professor Jill Peay, whilst not objecting in terms to the suggested disposals being available, favoured the imposition of such disposals only where "necessary" (to use the wording of section 3 of the MHA rather than where the disposal has been identified as the "most suitable option" (the wording of section 37(3) of the MHA)).

[163] MHA 1983, s 2 (admission for assessment) and s 3 (admission for treatment).

[164] IP Further Question 47.

Discussion: What should the available disposals be where an allegation is proved against an adult defendant, or a special determination is arrived at, in relation to an imprisonable offence in the magistrates' court?

A power to impose a restriction order?

7.160 While responses to CP197 suggested strong support for equalising procedures between the Crown Court, and the youth and magistrates' courts, we raised in the IP[165] whether the imposition of a restriction order[166] should nonetheless remain solely within the Crown Court's powers. We asked consultees whether the summary courts should instead have the power to commit a defendant to the Crown Court for a restriction order to be imposed in suitable cases, in line with their powers on sentence.[167]

7.161 Responses were generally in favour of the current position, with ten consultees agreeing,[168] and three disagreeing with the proposal. Those who responded positively offered various observations, including:

(1) The risk assessment involved in the imposition of a restriction order is not something that the magistracy regularly carry out, and the procedures for review and release are not known to them either. Together, these would require unjustifiable expense in terms of training (Council of HM Circuit Judges).

(2) The power for a summary court to impose a restriction order would not currently be in keeping with the general sentencing and disposals available to the summary courts (CPS).

7.162 We agree with those observations and the view of the majority of consultees. We doubt that the existing power to commit a defendant to the Crown Court for the imposition of a restriction order will be much used, but consider it important that such an option is available where required.

[165] IP Further Question 46.

[166] A restriction order has the effect of allowing relevant agencies within the criminal justice system to maintain control over the future release from hospital of the individual, and enables conditions to be placed on his or her release in due course. A person who is subject to a restriction order cannot be discharged from hospital, granted leave of absence or transferred between hospitals without the consent of the Secretary of State as long as the order is in force.

[167] The magistrates' courts currently have the power to commit a defendant to the Crown Court for a restriction order to be imposed following conviction, under MHA 1983, ss 43 and 44. No power to commit for a restriction order to be imposed attaches to a hospital order made under MHA 1983, s 37(3).

[168] HM Council of District Judges (Magistrates' Court), Holroyde J, Law Society, Justices' Clerks' Society, Dr Eileen Vizard CBE, Professor Ronnie Mackay, Nigel Barnes, Professor Graeme Yorston, Professor Jill Peay, Faculty of Forensic and Legal Medicine, Centre for Evidence and Criminal Justice Studies, CPS and Prison Reform Trust.

Conclusion: What should the available disposals be where an allegation is proved against an adult defendant, or a special determination is arrived at, in relation to an imprisonable offence in the magistrates' court?

7.163 **We recommend that where an allegation is proved against a defendant, or a special determination is arrived at, in relation to an imprisonable offence, the available disposals in adult magistrates' courts should be:**

(1) a hospital order (without restriction);

(2) a supervision order (with or without medical treatment); and

(3) an absolute discharge (see draft Bill clause 57(4) and following).

7.164 **We** also **recommend that, where the district judge considers that a restriction order should be imposed, he or she should have the power to commit the defendant to the Crown Court for a restriction order to be imposed** (see draft Bill schedule 2 paragraph 16).

Issue: Sanction for breach of a supervision order in the adult magistrates' court?

7.165 We address above in Chapter 6, at paragraph 6.80 and following, the finely balanced issues surrounding the appropriateness of imposing sanctions for breach of a supervision order. We conclude there that in many cases it will not be appropriate to pursue breach proceedings in respect of a supervised person, because his or her participatory difficulties are so profound that he or she will be unable to participate effectively in straightforward breach proceedings. For that reason we include within the draft Bill provisions for raising of lack of capacity for breach proceedings, and the procedure to adopted in such situations (see draft Bill schedule 1 paragraph 30). However, we also acknowledge that there will be some offenders, who lack capacity for trial, who can, nonetheless, comply with simple and tailored requirements as part of a supervision order, and could participate effectively in straightforward breach proceedings.

7.166 For those individuals, we consider that it is appropriate for there to be sanctions available where a breach of a supervision order has been proved. We recommend a stepped approach to breach, as set out in Chapter 6 paragraph 6.91 and following. Under our recommendations it would be open to the Crown Court to make no order, to amend or to revoke the order. Alternatively, the court would be able to add a curfew order (with or without electronic monitoring). A fine would also be available and, in exceptional cases and subject to prior warning, the court would be able to impose a custodial term of up to two years' imprisonment, or the maximum term available for the offence, whichever is the lesser.

Discussion: Sanction for breach of a supervision order in the adult magistrates' court?

7.167 We have considered with care what sanctions should be available for breach of a supervision order imposed in the adult magistrates' court. We are satisfied that the stepped approach that we recommend for the Crown Court is appropriate for

the adult magistrates' court, including the addition of a curfew requirement (with or without electronic tagging) and the imposition of a fine.

7.168 However, the question of whether a custodial term should be available in the magistrates' courts where the determination related to an imprisonable offence is a finely balanced one. We bear in mind that any defendant may wilfully fail to comply with a supervision order, regardless of the seriousness of the original offence alleged. However, we consider that custodial sanction should only be considered in truly exceptional cases and as a last resort in cases of appropriate seriousness. For these reasons we take the view that it is appropriate to reserve this exceptional power to judges in the Crown Court.

Conclusion: Sanction for breach of a supervision order in the adult magistrates' court?

7.169 **We** therefore **recommend that the magistrates' courts' powers to sanction adult defendants in respect of breach of a supervision order should mirror those available in the Crown Court, save that a custodial sanction should not be available in the summary jurisdiction** (see draft Bill schedule 1 paragraph 34(4)).

DISPOSAL OPTIONS IN THE YOUTH COURT

Issue: Different disposal options for children and young people?

7.170 We consider now whether there should be additional disposal options tailored specifically for children and young people in respect of whom there has been an adverse finding at the alternative finding procedure.

Discussion: Different disposal options for children and young people?

Referral orders

7.171 The National Bench Chairmen's Forum proposed that referral orders be available as a disposal option for young defendants on the basis that they are "flexible and adapted to the individual". Whilst initially attractive, we consider that there are two difficulties with such a disposal. First, referral orders require an admission of guilt. The alternative procedures that we recommend do not arrive at a conviction and there would be concerns around a defendant volunteering such an admission if he or she lacked the capacity to participate effectively and the capacity to enter a guilty plea.

7.172 The second difficulty arises from the fundamental aim of the restorative justice process, which is to achieve a meaningful engagement between all affected parties. The referral order would only be imposed where the court considered it appropriate. However, a defendant who has been found to lack the capacity to participate effectively in his or her proceedings may not be any better placed to participate effectively in the restorative justice proceedings.

Engagement of the Family Court

7.173 In their response to the IP, the Youth Justice Board proposed that there should be a "youth supervision order" under a new family court power. We understand that the Youth Justice Board had in mind that this new order would be modelled

on the existing supervision order available, as an alternative to a care order, under section 35 of the Children Act 1989. This order requires the supervisor to "advise, assist and befriend" the supervised child and take such steps as are reasonably necessary to give effect to the order. There is no statutory definition, however, of what "advise, assist and befriend" in fact requires. Such a supervision order currently lasts for one year, and relates only to those under 17.

7.174 We have considered with care whether an adapted section 35 supervision order, or some other form of oversight by the family courts, would be appropriate for young defendants in relation to whom there has been an adverse finding at the alternative finding procedure. We have also taken soundings from academics and members of the judiciary who have experience in both family and criminal courts.[169]

7.175 We have concluded that an adapted section 35 order does not offer a more suitable disposal for children and young people than our recommendation for an amended supervision order. In arriving at that position we have taken into account in particular the following factors:

(1) Unlike the adult court, the youth court already has a statutory duty to consider the welfare of the child (section 44 of the Children and Young Persons Act 1933) (Naomi Redhouse DJ(MC)[170]).

(2) Transfer to the family court is liable to lead to further delay and the disruption of judicial continuity (HHJ Richardson QC, Naomi Redhouse DJ(MC)).

(3) Family court proceedings do not provide ongoing review of cases, as is available in magistrates' and youth courts[171] (Naomi Redhouse DJ(MC)).

(4) Reliance on the family courts would be inappropriate in many cases. The threshold criterion for the imposition of a supervision order under the Children Act 1989 is that the harm suffered, or likely to be suffered, is attributable to inadequate care having been provided to the child by their parents or guardians, or an inability by those with parental responsibility to assert parental control.[172] Although for some defendants who lack capacity the behaviour which brought him or her to the attention of the courts will be attributable, in part at least, to such failures, this will not always be the case.

(5) Where an order is contemplated under the Children Act 1989 the paramount consideration is the child's welfare. An order cannot be made

[169] In particular, HHJ Richardson QC, Naomi Redhouse DJ(MC) and Professor Heather Keating.

[170] Commenting in her personal capacity, here and throughout.

[171] The review facility works well, for example, with Drug Rehabilitation Requirements. The Criminal Justice and Immigration Act 2008 introduced a review function for certain Youth Rehabilitation Orders, although the provisions are not yet enacted.

[172] Children Act 1989, s 31(2). See also Wall J in *Re DH (A minor: child abuse)* [1994] 1 FLR 679, [1994] 2 FCR 3 at 702.

unless it is better in welfare terms than making no order. This may lead to tensions if, in capacity procedures, what is required is a mechanism which, not only addresses the child's welfare concerns, but is also able to protect the public (Professor Heather Keating).

(6) It is not clear that a section 35 supervision order offers a better, or significantly different, model to the reformed supervision order which we recommend at paragraph 6.60 above. In particular, section 35 orders require the engagement of a "responsible person", usually one or both parents. Thus the extent to which a supervision order may be effective depends on the consent and co-operation of that responsible person. Additionally, there is no direct mechanism for enforcing the order where there are compliance difficulties. The only mechanism available is for the supervisor to return to court for variation or discharge of the order (Professor Heather Keating, HHJ Richardson QC).[173] HHJ Richardson QC observed that supervision orders are viewed as "a rather vague mechanism for very limited oversight by a local authority" appropriate where an order with "a very light touch" is required.

(7) Public confidence, so important where issues of lack of capacity for trial arise, is more likely to be fostered by orders made in the criminal courts, with ongoing judicial oversight in a public forum, than in closed family proceedings where the focus is purely on welfare (HHJ Richardson QC).

7.176 We have investigated whether, instead of a section 35 supervision order, the youth court should be able to make an order under section 37 of the Children Act 1989, requiring the local authority to "undertake an investigation of the child's circumstances". At present the family court could only make such an order if "a question arises with respect to the welfare of the child" and it "appears to the court that it may be appropriate for a care or supervision order to be made" in respect of the child. Where such an order is made, and where, following investigation, the local authority do not propose to apply for a care or supervision order, the local authority is required to inform the court of the reasons for the decision. They must also inform of any service or assistance they have provided to the family and any other action that they propose to take in relation to the child.[174]

7.177 This proposal was supported by Professor Keating, if "seen through the lens of welfare", and by Naomi Redhouse DJ(MC), who felt that there may be a role for a section 37 of the Children Act 1989 report. HHJ Richardson QC also viewed such an order as potentially "useful", especially where there is a wider family context where further investigation might be beneficial. However, he was concerned that this may lead to duplication of the work of the local authority which, in such a

[173] Professor Heather Keating also notes that the Children Act 1989, s 90 abolished the use of care orders in criminal proceedings ensuring that the only route into care could be through civil proceedings. She observes that to mingle the work of the civil and criminal courts in respect of young defendants who lack capacity runs the risk of diluting this important distinction between civil child protection proceedings and the criminal courts.

[174] Children Act 1989, s 37(3).

case, would be likely to be providing input into the creation of a supervision order under the capacity procedures in any event.

7.178 Whilst we note this support for a section 37 order, we agree with HHJ Richardson's reservations about duplication. We are conscious that, like the criminal justice system, the local authorities have dwindling resources. We anticipate that, in cases where the court might consider making a section 37 order, the likely disposal imposed will be a supervision order. This is liable to engage the local authority in any event, and to involve ongoing scrutiny by the court of the support provided to the defendant by the local authority. We also doubt whether, in many capacity cases, the district judge will have sufficient information to be satisfied that a supervision or care order "may be appropriate". Finally, the Youth Justice Board have also raised the pre-existing duty on a local authority, where requested by a criminal court proceeding against a child, to make investigations and provide information to the court in relation to the "home surroundings, school record, health and character" of such a defendant under section 9 of the Children and Young Persons Act 1969.[175]

7.179 On careful analysis, we are not persuaded that supervision by the family court, or a section 35 or 37 order under the Children Act 1989, would be beneficial for a young defendant who receives an adverse finding at an alternative finding procedure. We have discussed this position with the Youth Justice Board who acknowledge the force of our concerns in relation to engaging family proceedings and endorse the approach that we have arrived at.[176]

Supervising officers

7.180 As will have been apparent from the discussion of supervision orders in Chapter 6, we recommend for adults that local authority social workers should be responsible for supervising defendants on supervision orders made in capacity proceedings. In line with many of our consultees, we did not consider that probation providers, whose supervision work is focused on convicted offenders, would be the most suitable to supervise unconvicted defendants who lack capacity. In principle we consider that the same arguments apply to the supervision of young defendants. This approach was endorsed by the IP response of the Youth Justice Board and others.[177]

7.181 However, we consider that it is important to explore whether members of the YOT might be better suited to supervising some young defendants who lack capacity than adult probation providers are for adult defendants who lack capacity. This is an issue which has been raised in several different forums during the course of our consultation process. The distinguishing feature of the YOT, in contrast to

[175] Children and Young Persons Act 1969, s 9. For parliamentary debate about the relative scope of the Children Act 1989, s 37 and the Children and Young Persons Act 1969, s 9 see http://www.theyworkforyou.com/pbc/2012-13/Crime_and_Courts_Bill/06-0_2013-01-29a.6.0?s=%22section+9%22+%22Children+and+Young+Persons+Act+1969%22#g6.7 (last visited 25 November 2015).

[176] Meeting with the Youth Justice Board, 15 June 2015.

[177] Including the responses to CP197 of the Prison Reform Trust and Just for Kids Law.

adult probation providers, is its statutory multi-disciplinary structure and its wider duties beyond the supervision of convicted offenders.

7.182 As Naomi Redhouse DJ(MC) observed,[178] YOTs often have strong links with CAMHS and may have forensic mental health and learning disability practitioners within the team. Indeed, we have ourselves had the benefit of speaking to specialist mental health and learning disability nurses seconded to a YOT team.[179] YOT teams also already play a significant role in many areas in diversion and prevention work, including with young people who are not formally engaged with the criminal justice system.

7.183 Naomi Redhouse DJ(MC) also voiced a concern about the low level of engagement of local authority social workers with youth court proceedings in some areas, even where the defendant is in the care of the local authority. She is not alone in identifying this as an area of concern.

7.184 We discussed the question of supervising officers with the Youth Court Issues Group.[180] At that meeting, the group felt that whilst it was generally undesirable for the YOTs to manage such disposals, YOT support and oversight at some level could be important for risk purposes. Lucy Dawes of the Youth Justice Board suggested a hybrid disposal with joint supervision. Such a disposal could be managed by children's services, supported by the YOT. Overarching strategic responsibility could sit jointly with the Director of Children's Services and the Chair of the YOT management board, overseen by the local authority Chief Executive.

7.185 We agree with the assessment that, in principle, supervision of an unconvicted defendant should not be conducted by a probation officer (or member of staff of a probation provider) trained to supervise convicted offenders, whether as part of a YOT or working with adults. Conversely, we also appreciate that in some cases, the supervision of a young defendant lacking capacity may require risk management skills more likely to be situated within a YOT than a children's services team. We are, however, uneasy about the likely effectiveness of jointly managed supervision, especially in difficult cases where limited resources are already stretched.

7.186 We consider that there are a number of mechanisms by which a local authority supervisor can be supported in relation to risk management, and other aspects of the order. First, where an adverse finding is made in relation to a specified offence, MAPPA oversight will assist in supporting a social worker supervisor where risk management is an issue.[181] Secondly, as the Youth Justice Board observe, supervision provided by children's services teams should be supported

[178] Comments on Unfitness to Plead Policy Paper, 28 January 2015.

[179] Visit to Kirklees YOT, 15 July 2014.

[180] This group brings together representatives from the Youth Justice Board, Ministry of Justice, HM Probation, Association of Chief Police Officers, the Magistrates' Association. Her Majesty's Courts and Tribunals Service, the Judicial College, The Law Society, the Sentencing Council, the National Bench Chairmen's Forum and the CPS to discuss issues of particular relevance to the youth court.

[181] See full discussion of this recommendation at Chapter 6 paras 6.77 to 6.79.

by the co-operation and support of other mainstream and specialist services. We have in mind, in particular, the duty on other authorities, such as local health services and local housing authorities, to co-operate with a local social services authority in providing services to "children in need" and their families.[182] There is an additional statutory duty on a local authority's relevant partners, including YOTs and health and education service providers, to co-operate in improving the well-being of children in the authority's area.[183]

7.187 However, in other cases, more direct input from the YOT may be more appropriate. In those circumstances, we do not consider that it would be appropriate for the supervisor to be a probation officer (or an officer of a probation services provider) working in the YOT for the reasons set out above at paragraph 7.180 and following. We do consider, however, that it should be open to the court to specify that the supervisor should be a person with social work experience (or, in Wales, a social worker) operating as part of the YOT team. This would retain the social work expertise of the supervisor, but enable risk management support to be accessible through the YOT. The ultimate responsibility for the supervisor, whether part of children's services or the YOT, would rest with the local authority.

A youth specific supervision order

7.188 In view of the specific welfare needs of young people, it is important to consider whether it would be beneficial to have a supervision order that has aspects tailored specifically to young people. In the IP we invited consultees to consider whether the non-penal requirements of the youth rehabilitation order should be available as part of a youth supervision order.[184]

7.189 The vast majority of respondents favoured the introduction of such requirements.[185] However, there were two particular issues raised, in addition to the question of who should supervise, which we consider to be helpful and important:

(1) The Prison Reform Trust and Just for Kids Law also proposed that there be regular reports by supervising officers to the court (in their vision the criminal court) and opportunity for the defendant to report his or her own progress on the order, with the court retaining the power to amend the order where necessary.

(2) Nigel Barnes and the Justices' Clerks' Society raised concerns that there was a danger that to import such requirements would give the impression that a sentence of the court had been imposed.

[182] Children Act 1989, s 27.

[183] Children Act 2004, s 10.

[184] IP Further Question 48.

[185] Magistrates' Association, Holroyde J, Nigel Barnes, Dr Eileen Vizard CBE, Royal College of Psychiatrists Adolescent Forensic Psychiatry Special Interest Group, Professor Ronnie Mackay, Faculty of Forensic and Legal Medicine, Centre for Evidence and Criminal Justice Studies, CPS and the Prison Reform Trust agreed with the proposal.

7.190 In fact, as we discuss at Chapter 6 paragraph 6.53 and following, the amended supervision order that we recommend for adults is modelled to a significant extent on the youth rehabilitation order. In particular, the requirement to provide constructive support, which is available under our proposed order, includes making arrangements to address the education, training, employment and accommodation needs of the supervised person. There are also additional available requirements for the local authority to specify where the individual should reside, subject to consideration of the home circumstances of the individual, and to impose restriction on certain activities and movements. In short, as with the legal tests for capacity, the adult provisions are, by design, modelled on youth provisions. As a result, we do not recommend that the supervision order be specifically adapted further for young defendants.

7.191 To address the specific concerns raised at paragraph 7.189 above, first, our recommendation that the supervision order have an optional review function,[186] will introduce the sort of report and review mechanism that the Prison Reform Trust and Just for Kids Law have in mind. Secondly, we do not consider that the resulting supervision order will give the impression of a sentence being imposed, as Nigel Barnes and the Justices' Clerks' Society feared. In the first instance, the supervision order that we recommend does not include punitive elements, such as work requirements or attendance centre requirements. In addition, we consider that the more coercive elements, such as a curfew and electronic monitoring requirements should not be available to be imposed as part of the initial order, but only where there has been a finding of breach (see draft Bill schedule 1 paragraphs 18(2) and 19(2)). Finally, we recommend that none of the constructive or restrictive elements of the order should be imposed save where the court is satisfied that such a requirement is necessary in the interests of supporting the individual, preventing repetition of the conduct which led to the making of the supervision order, or preventing the individual's involvement in future conduct which poses a risk of harm to themselves or others (see for example draft Bill schedule 1 paragraph 19(3)).

Sanction for breach of a supervision order

7.192 In approaching the question of whether sanction is appropriate for breach of an order in the youth court, we have in the forefront of our minds the double vulnerability of defendants who are both young and also lack the capacity to participate effectively in trial. We have looked carefully at whether it is appropriate at all to hold breach proceedings (however straightforward they may be) and to impose sanctions in respect of such defendants. However, we come to the conclusion, that such provisions are required.

7.193 We arrive at that position particularly in contemplation of the review function which we propose the court should have. We consider this an essential element of the order, both in terms of ensuring that the order is appropriately tailored to protect the public and support the defendant, but also to enable the court to monitor progress. In addition, it will allow the young person's engagement with the order to be encouraged and commended. However, a review requirement

[186] We discuss this at para 6.72 and following above.

without any sanction for non-compliance, or indeed for failure to attend, would appear unworkable and run the risk of undermining the authority of the court.

7.194 As we have acknowledged above, there will be some defendants, especially young defendants, for whom breach proceedings will never be appropriate. In this regard we have included in the draft Bill provision for raising a lack of capacity to participate effectively in any breach proceedings brought (draft Bill schedule 1 paragraph 31 and following). But for those who can engage in straightforward proceedings of this sort, we come to the conclusion that breach proceedings, and sanction for breach, are necessary. Although, given the tailored nature of the order, and the review process, such proceedings should be rare and reserved for cases of significant and persistent failure to comply.

7.195 Where breach is established we consider that the stepped approach that we recommend for adults who breach supervision orders imposed in the magistrates' courts is also appropriate for defendants dealt with in the youth court. Thus the court would be entitled to take no action, amend or revoke the order. We also take the view that imposition of a curfew order (with or without electronic monitoring) is an appropriate restrictive requirement, but that a fine would not be appropriate. The more difficult question is that, in consideration of the more serious cases which may be dealt with by the youth court, whether a more punitive sanction should also be available. We conclude, given the double vulnerability of these defendants, that a custodial sanction is not appropriate. However, we consider that in truly exceptional and serious cases of persistent and wilful failure, a youth rehabilitation order with intensive supervision and surveillance[187] should be available as a sanction (following appropriate warning). This would enable an "extended activity requirement" to be imposed as a punitive element where that was considered necessary. We have purposely selected this more robust formulation of the youth rehabilitation order to signal the exceptional nature of this sanction, and to dissuade district judges from imposing such an order save in extreme cases where breach has been persistent.

The power to impose a restriction order in the youth court

7.196 We have recommended in relation to adult defendants that the magistrates' courts' powers in relation to restriction orders should be limited to committing a defendant to the Crown Court for such an order to be imposed.[188] However, two consultees suggested that the power to impose a restriction order might, however, be appropriate for youth courts, on the basis that they have the power to impose lengthier custodial terms and deal with more serious offences.[189] The Justices' Clerks' Society in particular stressed the desirability of avoiding the need for young people to appear in the Crown Court for such an order to be imposed.

7.197 We strongly agree in principle with the position taken by the Carlile Inquiry into the effectiveness of the youth court, in its recommendation that there be a clear presumption that all child defendants are dealt with in the youth court, and that

[187] Criminal Justice and Immigration Act 2008, s 1(3)(a) and sch 1 para 3.

[188] Para 7.167 and following above.

[189] The Justices' Clerks' Society and the Magistrates' Association.

any residue of youth cases heard in the Crown Court should be "exceptional only".[190] However, we do consider that the imposition of a restriction order is so significant a deprivation of liberty that, even considering the seriousness of some cases before the youth court, it falls into the exceptional category of matters which should be reserved to the Crown Court. In arriving at that conclusion we bear in mind that the committal would only occur at the disposal stage, and the earlier consideration of the defendant's ability to participate effectively, and the alternative finding procedure, would be dealt with in the youth court.

7.198 Under section 43 of the MHA the power of a magistrates' court to commit a young offender to the Crown Court for a restriction order to be imposed is limited to those offenders who have reached the age of 14. We see no reason to extend the power to commit for a restriction order to be imposed to young defendants under the age of 14.

Conclusion: Different disposal options for children and young people?

7.199 **We** therefore **recommend that where at the alternative finding procedure an allegation is proved against a child or young person, or a special determination is arrived at, the available disposals in youth court should be:**

(1) a hospital order (without restriction), but only where the adverse finding relates to an imprisonable offence;

(2) a supervision order (with or without medical treatment); and

(3) an absolute discharge (see draft Bill clause 57).

7.200 **We** also **recommend that, in the youth court, where the district judge considers that a restriction order should be imposed, he or she should have the power to commit the defendant to the Crown Court for a restriction order to be imposed, but only where the defendant is aged 14 or over** (see draft Bill schedule 2 paragraph 16).

7.201 **Sanction for breach of a supervision order should be restricted to:**

(1) amendment of the supervision order to add a curfew requirement (see draft Bill schedule 1 paragraph 18) **with or without an electronic monitoring requirement** (see draft Bill schedule 1 paragraph 19)**; or**

(2) the revocation of the supervision order and imposition of a youth rehabilitation order with intensive supervision and surveillance (see draft Bill schedule 1 paragraph 34).

[190] The Independent Parliamentarians' Inquiry into the Operation and Effectiveness of the Youth Court (June 2014), http://www.ncb.org.uk/media/1148432/independent_parliamentarians__inquiry_into_the_operation_and_effectiveness_of_the_youth_court.pdf (last visited 25 November 2015).

Issue: Mandatory training for legal practitioners and members of the judiciary engaged in youth cases?

7.202 The issue of training for legal practitioners and members of the judiciary who are engaged in cases involving youths has been consistently raised by consultees throughout this project. There is currently no requirement for legal representatives in youth cases to have specialist training on issues relevant to trying youths.[191] We have in mind, in particular, awareness training addressing participation and communication issues arising from learning disability, mental health difficulties, developmental immaturity and developmental disorders. Yet, such conditions are frequently experienced by young defendants[192] and advocates, particularly defence representatives, play a vital role in identifying young defendants who may have capacity issues. A number of consultees have raised concerns that participation and wider communication issues are inadequately identified amongst young defendants.[193]

7.203 Similarly, there is no mandatory requirement for members of the judiciary presiding over youth cases to have awareness training of this sort. District judges sitting in the youth court are required to undergo specific training for that role and have two days of youth court training annually. However, there is currently no strict requirement for district judges in youth courts to have undergone awareness training of the sort described above. There is no mandatory training at all on these issues for judges or recorders sitting in the Crown Court dealing with cases involving young defendants.

7.204 We considered the question of mandatory training on youth participation difficulties in the Issues Paper, at paragraph 8.112 and following. In the IP,[194] we asked consultees whether they supported the introduction of mandatory specialist training on issues relevant to trying youths for all legal practitioners and members of the judiciary engaged in cases involving young defendants. There was overwhelming support for this proposal, with 16 respondents out of 17 who addressed this question favouring the idea.[195]

[191] Although the CPS provides training on youth court procedure to its specialist youth advocates who deal with youth court trials and other more complex youth prosecution work.

[192] As we have discussed at para 7.34 and following above.

[193] For example Dr Eileen Vizard CBE and the Prison Reform Trust.

[194] IP Further Question 43.

[195] Magistrates' Association, Council of HM Circuit Judges, HM Council of District Judges (Magistrates' Court), National Bench Chairmen's Forum, Nigel Barnes, Law Society, Justices' Clerks' Society, Dr Eileen Vizard CBE, Royal College of Psychiatrists, Professor Ronnie Mackay, Centre for Evidence and Criminal Justice Studies, Laura Hoyano, Youth Justice Board, CPS, Just for Kids Law and Prison Reform Trust.

7.205 Those in support of such a proposal acknowledged the prevalence of mental disorders, developmental disorders and learning disabilities amongst the juvenile offending population.[196] The Youth Justice Board also identified that there is an appetite among court professionals for specialist training on issues relevant to young defendants. This was based on their work in 2013 with HMCTS and the Communication Trust to facilitate workshops for over 300 professionals on the speech and language and communication needs of children and young people in the youth justice system. The Youth Justice Board have offered to coordinate with colleagues in Government to define and implement mandatory specialist training for legal practitioners and the judiciary.

7.206 Mr Justice Holroyde considered training to be "desirable" but did not support a mandatory requirement. His concerns were:

(1) A mandatory requirement might interfere with freedom of choice.

(2) There may be serious delays, particularly in the Crown Court, if cases involving youths could only be listed before "ticketed" judges.

Discussion: Mandatory training for legal practitioners and members of the judiciary engaged in youth cases?

7.207 Calls for such training have been raised consistently in recent years.[197] Most recently, since we published the Issues Paper, there have been further calls for training in this area. We note the firm recommendation in the Carlile Inquiry Final Report[198] for mandatory training of this sort for legal practitioners. The report also recommends that training for district judges in the youth court be "augmented" by training on the "needs of child defendants (including mental health issues, speech, language and communication needs, welfare issues and child development)" and "effective participation" including "how to manage learning and communication difficulties, mental health problems and vulnerability, and fitness to plead)". The Bar Standards Board ("BSB"), with the Institute of Legal Executives Professional Standards body ("ILEXPS"), are now conducting a Youth Court Advocacy Review to establish the skills and knowledge required to work effectively and competently in the Youth Justice System.

7.208 In relation to legal practitioners, we appreciate that the introduction of mandatory training before an advocate can engage in youth work is to introduce a further burden at a time of uncertainty and resource scarcity. However, with the work of the BSB and ILEXPS, we are hopeful that the scope of the required training will be effectively identified and the wider use of online resources will facilitate such training.

[196] The Royal College of Psychiatrists, Centre for Evidence and Criminal Justice Studies.

[197] See J Jacobson and J Talbot, *Vulnerable Defendants in the Criminal Courts: a review of provision for adults and children* (Prison Reform Trust, 2009); and Centre for Social Justice, *Rules of Engagement: Changing the Heart of Youth Justice* (2012), 16.

[198] Independent Parliamentarians' Inquiry into the Operation and Effectiveness of the Youth Court (June 2014) p 37, http://www.ncb.org.uk/media/1148432/independent_parliamentarians__inquiry_into_the_operation_and_effectiveness_of_the_youth_court.pdf (last visited 25 November 2015).

7.209 In relation to members of the judiciary, we understand from the Judicial College that a mandatory module on communication and participation difficulties (particularly arising from learning disability, mental health difficulties and developmental disorders) for young defendants can be added without difficulty to the yearly training that youth court district judges are required to attend.

7.210 A mandatory system of such training for those sitting in the Crown Court was less favourably received by the Judicial College. Their survey of resident judges rejected separate "ticketing" for youth cases on the basis that this would result in listing difficulties and delays. We proposed to the Judicial College an alternative, that youth ticketing might be incorporated into serious sexual offence ticketing for judges. We consider that there is likely to be significant overlap between the skills and awareness required for addressing issues of vulnerability raised in both serious sexual offences and cases involving young defendants. The Judicial College considered this to be a good idea, but they were concerned that this may not be practical since the serious sexual offence mandatory training is already a very full programme. The Judicial College are, however, in the process of compiling what will be an online resource addressing procedural issues in dealing with youths which, it is anticipated, will also address communication and participation issues arising in respect of young defendants.

7.211 We of course recognise the listing difficulties that can be presented by a mandatory training requirement, as noted by Mr Justice Holroyde, and the burden that additional training will place on legal practitioners. However, in light of the weight of consultee support for mandatory training for legal practitioners and members of the judiciary dealing with young defendants, and the increasing calls from other areas for similar measures, we consider it appropriate to make this recommendation. In respect of the Crown Court, we conclude that, although logistically demanding, the joint ticketing of judges to preside over cases of serious sexual offences and cases involving young defendants is likely to be the most efficient method of introducing such a requirement. We appreciate that there are cost implications of such a recommendation. However, we consider that the benefits of ensuring that as many young people as possible are enabled to have a full trial with which they are able to engage meaningfully far outweigh the expense of such training and accreditation, and will in time, repay the investment.

Conclusion: Mandatory training for legal practitioners and members of the judiciary engaged in youth cases?

7.212 **We** therefore **recommend that there should be mandatory specialist training on issues relevant to trying youths (particularly awareness training in relation to participation and communication issues arising out of learning disability, mental health difficulties, developmental immaturity and developmental disorders) for all legal practitioners and members of the judiciary engaged in cases involving young defendants in any criminal court.**

7.213 We address provisions for appeals and the resumption of the prosecution on recovery in the magistrates' courts and the Crown Court, in Chapters 8 and 9 below.

CHAPTER 8
APPEALS FROM THE CROWN AND MAGISTRATES' COURTS

INTRODUCTION

8.1 This chapter addresses issues arising in respect of appeals in capacity cases. Currently, an individual determined to be unfit to plead, who has also been found to have "done the act or made the omission" in respect of an offence, may appeal (with leave[1]) to the Court of Appeal against either or both of those findings.[2] He or she may also appeal against any disposal imposed as a result of those findings.[3]

8.2 We consider in this chapter, firstly, the exercise of those rights of appeal by a person found to be unfit, or – under our recommendations – found to lack capacity for trial. Secondly, we consider the powers of the Court of Appeal where an appeal is allowed in respect of the finding that the unfit individual "did the act or made the omission" at the section 4A hearing, but where the finding of unfitness is not overturned.

8.3 Finally, we also consider what rights of appeal there should be from capacity proceedings in the magistrates' courts.

Key recommendations in this chapter:

1) The rights of appeal of an individual who lacks capacity for trial should be exercisable by the representative appointed by the court to put the defendant's case at the alternative finding procedure.

2) The Court of Appeal, where it quashes a finding arising from the alternative finding procedure, should have the power to order a rehearing of the alternative finding procedure in respect of that offence.

3) In respect of capacity procedures in the magistrates' courts (including the youth court), there should be a right of appeal against a finding of lack of capacity, an adverse finding at the alternative finding procedure, or in respect of any disposal imposed. Those rights of appeal should function in a manner similar to rights of appeal created by section 108 of the Magistrates' Court Act 1980.

[1] The individual must obtain leave form the Court of Appeal, or the trial judge must grant a certificate that the case is fit for appeal: Criminal Appeal Act 1968, s 15(2).

[2] Criminal Appeal Act 1968, s 15(1).

[3] Criminal Appeal Act 1968, ss 16A and 16B.

THE CURRENT POSITION

8.4 An unfit individual can seek leave to appeal to the Court of Appeal against a finding that he or she was unfit to plead and/or against a finding in a section 4A hearing that he or she did the act or made the omission.[4] An unfit person can also, with leave, appeal against any hospital or supervision order imposed by virtue of section 5 of the CP(I)A.[5]

8.5 The right of appeal vested in the unfit person can be exercised by that individual alone.[6] There is no power for anyone to exercise that right on his or her behalf.

8.6 Where leave is granted and an appeal is allowed in relation to a finding that the individual was unfit to plead, the appellant can be remitted to the Crown Court to be tried for the offence for which he or she was originally charged.[7] Where an appeal is allowed in respect of a disposal alone, the Court may vary the original order or substitute for it any other disposal which could have been ordered following the determination of facts hearing.[8] However, the situation is very different where an individual's appeal against a finding of fact at the section 4A hearing is allowed, and the Court quash[9] the finding of fact, but the finding of unfitness to plead remains unaffected. In those circumstances the Court of Appeal has no power to order that the section 4A hearing be reheard. The Court of Appeal can only enter an acquittal.[10]

8.7 The defendant can also seek judicial review in relation to decisions made by the judge at the section 4A hearing.[11] This is because the section 4A hearing is not included within "matters relating to trial on indictment",[12] since trial on indictment is suspended by virtue of the determination of unfitness to plead.[13]

PROBLEMS WITH THE CURRENT POSITION

A barrier to appealing for the unfit individual

8.8 Master Venne, who was at that time the Registrar of Criminal Appeals, responding to our Consultation Paper ("CP197"),[14] made a valuable suggestion in

4 Criminal Appeal Act 1968, s 15. The unfit individual must obtain leave, or the trial judge must have granted a certificate that the case is fit for appeal.

5 Criminal Appeal Act 1968, ss 16 and 16A.

6 Criminal Appeal Act 1968, s 15.

7 Criminal Appeal Act 1968, s 16(3).

8 Criminal Appeal Act 1968, s 16B.

9 Or overturn the finding.

10 Criminal Appeal Act 1968, s 16(4).

11 The defendant can also appeal by way of case stated, under the Senior Courts Act 1981, s 28(1). This is an automatic right of appeal to the High Court, which requires the judge to "state a case" (set out his or her reasons for reaching the decision) for the High Court to adjudicate on.

12 "Matters relating to trial on indictment" are not judicially reviewable under the Senior Courts Act 1981, s 29(3).

13 CP(I)A, s 4A(2).

14 Unfitness to Plead (2010), Law Commission Consultation Paper No 197.

relation to the exercising of the unfit individual's right to appeal. He recommended that consideration be given to whether any attendant rights of appeal need to be created and, if so, by whom such rights may be exercised. Given the possibility that a ground of appeal might arise, even where the person continues to lack the capacity to participate effectively in the proceedings, we are concerned that he or she should be able to exercise that right of appeal, through an advocate if necessary.

No power of the Court of Appeal to order a rehearing under section 4A

8.9 The inability of the Court of Appeal to remit a case for rehearing under section 4A where the appeal is allowed in relation to a finding that the defendant "did the act or made the omission", but not in relation to the finding of unfitness, has caused difficulties and raises significant public protection issues. In the case of *McKenzie*,[15] the appeal was allowed in relation to the findings at the section 4A hearing on the basis of drafting errors in relation to the indictment. The Court of Appeal were obliged to enter an acquittal on each count on the indictment, even though the evidence before the jury at the section 4A hearing clearly established that the defendant had done the act of a number of indecent assaults. It is clear that significant public protection concerns may arise as a result.

8.10 In the case of *Norman,* Lord Justice Thomas (as he then was), in referring to this limitation of the Court of Appeal's powers, observed:

> Although in this case the public interest is protected, there could well be cases where it would not be and serious public concern could arise where this court considered a verdict unsafe and was compelled to enter an acquittal, but nothing further could be done. We would hope that Parliament might give consideration to this lacuna in the statutory provisions and consider granting this court power to order a re-trial of the issue as to whether the defendant did the act with which he is charged.[16]

8.11 Lord Thomas has continued to express his concerns in relation to this issue. Most recently, in giving judgment in the case of *B* when President of the Queen's Bench Division, he observed that it was "high time that Parliament remedied this most unfortunate error in the law".[17]

ANALYSIS AND DISCUSSION

Issue: Rights of appeal vested in the defendant who lacks capacity to be exercisable by the legal representative appointed to put the case for the defence.

8.12 Unlike in the civil context, there is no court-appointed litigation friend to act in criminal proceedings in the best interests of a person who lacks the capacity to participate effectively in trial. There is, as a result, no individual to give formal

[15] [2011] EWCA Crim 1550, [2011] 1 WLR 2807.

[16] [2008] EWCA Crim 1810, [2009] 1 Cr App R 13, at [34].

[17] [2012] EWCA Crim 1799, [2012] MHLR 310, at [19].

consent, on behalf of such a person, for the lodging of an appeal, where legal representatives advise that there are grounds which are properly arguable. We consider that this situation is liable to lead to injustice, if the defendant's ability to participate is so impaired that it prevents the lodging of an appropriate application for appeal.

8.13 In our Issues Paper ("IP")[18] we took the provisional view that, in those circumstances, legal representatives should be able to exercise the unfit individual's right to appeal. In doing so, the representative should be required to take instructions from the individual insofar as that is possible, and can be facilitated. He or she should then reflect in his or her decision the unfit defendant's identifiable will and preferences, but only insofar as they are congruent with the protection of the unfit defendant's best legal interests in pursuing proper grounds of appeal. We invited consultees to consider this provisional proposal.[19]

Discussion: Rights of appeal vested in the defendant who lacks capacity to be exercisable by the legal representative appointed to put the case for the defence.

8.14 There was a significant degree of support for the proposal to allow the unfit defendant's legal representatives to exercise his or her right of appeal, where his or her ability to participate effectively is so compromised as to prevent the lodging of an application for leave to appeal.[20]

8.15 This response was not, however, unanimous. HHJ Tim Lamb QC was concerned that this proposal might result in legal representatives competing with each other for the right to instruct themselves, in effect, in a vulnerable unfit person's appeal. The Justices' Clerks' Society, meanwhile, were concerned that this might conflict with the professional obligations of the representative.

8.16 In relation to HHJ Tim Lamb QC's concerns, we consider that it is possible to avoid any such competition by restricting the power to exercise the defendant's rights of appeal to the representative appointed by the court following the determination of lack of capacity (see draft Bill paragraph 13(1)(b)).

8.17 This recommendation limits the defendant to exercising his or her rights of appeal through the incumbent representative. To alleviate the effects of this restriction in appropriate cases, we recommend that the Court of Appeal should have the power to revoke any previous appointment and appoint a new representative to put the case on appeal, taking into account the views of the defendant so far as they can be identified (see draft Bill clause 13(7)). This introduces some flexibility, and allows consideration of the defendant's views, although it reintroduces the danger of competition over a vulnerable defendant at a later stage instead.

[18] Published in May 2014, accessible at http://www.lawcom.gov.uk/project/unfitness-to-plead/.

[19] IP Further Question 32.

[20] Council of HM Circuit Judges (response submitted by the Criminal Sub-Committee), Holroyde J, Carolyn Taylor (solicitor specialising in criminal and mental health law), the Law Society, Charles de Lacy (clinical nurse specialist), Professor Ronnie Mackay (academic), and the Crown Prosecution Service ("CPS").

However, we consider that such flexibility is important, both to give effect to the appellant's wishes, and to address any logistical difficulties which may arise. Further, the worst effects of any such competition are alleviated by the ultimate decision on appointment resting with the Court of Appeal.

8.18 We also note the concerns of the Justices' Clerks Society. As stated in the IP,[21] we anticipate that the creation of such a power might necessitate amendment of the codes of conduct for solicitors and barristers[22] to entitle them to engage in litigation in this way.

Conclusion: Rights of appeal vested in the defendant who lacks capacity to be exercisable by the legal representative appointed to put the case for the defence.

8.19 **We** therefore **recommend that the rights of appeal vested in the individual who lacks capacity for trial should be exercisable by the legal representative appointed by the court to put the case for the defence** (see draft Bill clause 13(1)(b)).

Issue: The Court of Appeal to have the power to remit a case for a rehearing of the alternative finding procedure

8.20 We provisionally proposed in CP197[23] that where a finding at the section 4A hearing has been quashed by the Court of Appeal, but there has been no successful appeal in relation to the section 4 finding of unfitness, the Court of Appeal should have the power, in appropriate circumstances, to order a rehearing under section 4A.

Discussion: The Court of Appeal to have the power to remit a case for a rehearing of the alternative finding procedure

8.21 This provisional proposal was approved, or not objected to, by all of the 11 consultees who addressed it. There was a strong feeling that this lacuna requires urgent attention.[24]

8.22 We consider that there are significant public protection concerns which may arise if there continues to be no power for the Court of Appeal to order a rehearing of the fact-finding procedure in these circumstances. We consider this issue to be of the particular importance because of the serious nature of offences in relation to which an individual may be found to lack capacity. Additionally, determinations of fact, or alternative finding procedures under our recommendations, will continue to be unusual and challenging, because of the defendant's participation difficulties and the relative inexperience of advocates and judges in conducting such hearings. As a result, the scope for irregularities to occur during a fact-

[21] IP para 7.47.

[22] See for example The Bar Standards Board, *Handbook 2nd Edition* (August 2015), rC9.2.a.

[23] CP197 Provisional Proposal 14.

[24] For example, from the Council of HM Circuit Judges, Nicola Padfield (academic), Professor Mackay, Dr Lorna Duggan (consultant forensic psychiatrist specialising in developmental disabilities), and Master Venne.

finding hearing, which might provide grounds for allowing an appeal, is magnified in comparison to a normal criminal trial.

8.23 The powers of the Court of Appeal in respect of an unfit appellant contrast starkly with the Court's powers in respect of a convicted appellant. Where a fit appellant appeals successfully against a conviction, the Court of Appeal has the power to order a retrial of the offence,[25] or to enter an acquittal. We can see no good reason why such a power ought not to exist in respect of defendants who lack capacity. This issue has continued to be a cause of concern to the Court of Appeal,[26] and we agree with the observations of Lord Thomas in *Norman,*[27] and repeated in *B*,[28] that this is an issue which requires urgent consideration by Parliament.

Conclusion: The Court of Appeal to have the power to remit a case for a rehearing of the alternative finding procedure

8.24 **We** therefore **recommend that, where a finding arising from the alternative finding procedure has been quashed on appeal, but the finding that the appellant lacked the capacity for trial remains, the Court of Appeal should have the power to remit the case back to the Crown Court for a rehearing of the alternative finding procedure** (see draft Bill clause 28).

Issue and Discussion: Right of appeal for individuals found to lack capacity for proceedings in the magistrates' and youth courts

8.25 Under section 108 of the Magistrates' Courts Act 1980, a defendant convicted in the magistrates' court has a right to appeal to the Crown Court against conviction, sentence, or both.[29] There is no requirement for the defendant to obtain leave to appeal, or for the trial judge to grant a certificate that the case is fit for appeal.

8.26 In the IP[30] we asked consultees whether a new right of appeal should be created from any determination or disposal arrived at under the proposed reformed procedures for addressing effective participation concerns in the magistrates' and youth courts. We provisionally proposed that the right of appeal from such determinations should mirror the right to appeal against conviction and/or sentence under section 108 of the Magistrates' Court Act 1980.

[25] Criminal Appeal Act 1968, s 7.

[26] See *McKenzie* [2011] EWCA Crim 1550, [2011] 1 WLR 2807; *Norman* [2008] EWCA Crim 1810, [2009] 1 Cr App R 13 at [34]; and *B* [2012] EWCA Crim 1799, [2012] MHLR 310 at [19].

[27] [2008] EWCA Crim 1810, [2009] 1 Cr App R 13 at [34(iv)].

[28] [2012] EWCA Crim 1799, [2012] MHLR 310 at [19].

[29] But if the defendant pleaded guilty to the offence, he or she may only appeal against sentence. The appellant must serve a notice of appeal in accordance with the Criminal Procedure Rules 2015, r 34.2.

[30] IP Further Question 50.

8.27 All ten respondents to this question were in favour of this right of appeal being created.[31]

Conclusion: Right of appeal for individuals found to lack capacity for proceedings in the magistrates' and youth courts

8.28 **We recommend that an individual who lacks capacity should have rights of appeal from the magistrates' court to the Crown Court which mirror the rights of appeal against sentence and conviction under section 108 of the Magistrates' Courts Act 1980. The individual who lacks capacity should have such rights of appeal in relation to:**

(1) A finding that he or she lacked the capacity to participate effectively in trial.

(2) A finding that he or she lacked the capacity to plead guilty.

(3) A finding that an offence is proved against him or her in the alternative finding procedure.

(4) A special determination that the individual is not guilty by reason of insanity.

(5) Any disposal imposed (see draft Bill schedule 2 paragraph 13).

[31] Magistrates' Association, Council of HM Circuit Judges, Holroyde J, Nigel Barnes (solicitor specialising in criminal law), the Law Society, Dr Eileen Vizard CBE (consultant child and adolescent psychiatrist), Professor Ronnie Mackay, Laura Hoyano (academic), the CPS, and the Prison Reform Trust.

CHAPTER 9
RESUMING THE PROSECUTION

INTRODUCTION

9.1 This chapter considers what should occur when an individual who has previously been found to lack capacity for trial gains or recovers that capacity after a disposal has been imposed. Under the current provisions, there is limited scope for the prosecution to resume trial proceedings against a person determined to be unfit to plead. There is, however, no similar power for a recovered individual to require that the prosecution against him or her should be resumed. We consider in this chapter in detail how resumption currently operates, and what reform, if any, is required in this area, addressing in particular:

(1) The scope of the prosecution's power to resume trial proceedings against an individual previously found to lack capacity for trial.

(2) What procedure should apply when prosecution is resumed against an individual who previously lacked capacity for trial, but where that individual is subsequently determined again to lack capacity for trial.

(3) Whether there should be a power for an individual who previously lacked capacity for trial to request that the prosecution be resumed against him or her.

(4) What provision should be made for resumption of proceedings where the capacity issues arose in the magistrates' courts.

Key recommendations in this chapter:

1) The prosecution should have the right to apply for permission to resume prosecution in relation to an individual, previously found to lack capacity, who has since recovered that capacity. This entitlement should apply in the Crown Court and in the magistrates' courts.

2) However, the prosecution's entitlement to apply for permission to resume proceedings should be limited to cases where:

a) a specified violent or sexual offence has been proved against the individual at the alternative finding procedure (or featured in the indictment when the court declined to proceed to the alternative finding procedure); or

b) a special verdict was returned in respect of an allegation of murder.

3) The prosecution's application for permission to resume proceedings should only be granted where:

a) the court is satisfied that the prosecution has reasonable grounds to believe that the defendant now has capacity for trial; and

b) the court determines that it is in the interests of justice for prosecution to be resumed.

4) An individual who has gained capacity should have a similar power to apply for an order that prosecution be resumed against him or her, in both the Crown Court and the magistrates' courts.

5) The individual's right to apply for prosecution to be resumed should not be limited to cases where he or she was charged with, or had proved against him or her, a specified offence.

6) Where an individual against whom prosecution is resumed is again found to lack capacity for trial, there should be no requirement to hold a second alternative finding procedure, unless that is in the interests of justice.

THE CURRENT POSITION

Remission for trial following recovery of fitness

The power of the prosecution where a previously unfit individual becomes fit to plead

9.2 This power only applies where an unfit individual is subject to a current hospital order with a restriction order, imposed under section 5(2)(a) of the Criminal Procedure (Insanity) Act 1964 ("CP(I)A"). Where, in consultation with the responsible clinician, the Secretary of State is satisfied that such a person can now properly be tried,[1] he or she can remit the person (send them back) to court or prison for trial. The CP(I)A states that on arrival at the court, or the prison, the hospital order and restriction order come to an end.[2] However, the statute gives no indication as to what, procedurally, should happen once the individual appears at court and how the prosecution is to be recommenced. Nor indeed does the statute make clear what has happened to the indictment following an individual being found unfit to plead, save that the "trial shall not proceed or further proceed".[3]

9.3 What occurs in practice when an individual subject to a restriction order is considered to have become fit to plead is governed by guidance agreed between the Crown Prosecution Service ("CPS"), the National Offender Management Service ("NOMS") and HM Courts and Tribunal Service ("HMCTS").[4] This guidance concludes that the determination that the individual was unfit to plead "merely suspends a prosecution until the defendant is able to enter a plea and stand his trial". We consider that this analysis must be correct. With the exception

1 CP(I)A, s 5A(4). We set out the position in respect of remission in our Consultation Paper ("CP197"), paras 7.14 to 7.26 and 7.45 to 7.59. The "responsible clinician" is the practitioner with overall responsibility for the patient's case: see Appendix A to CP197.

2 CP(I)A, s 5A(4).

3 CP(I)A, s 4A(2).

4 NOMS, CPS and HMCTS, *Resuming a prosecution when a patient becomes fit to plead* (2013), https://www.justice.gov.uk/downloads/offenders/mentally-disordered-offenders/resuming-guidance-prosecution-fit-to-plead.pdf (last visited 19 November 2015).

of an acquittal at the section 4A hearing, which operates "as if on the count in question the trial had proceeded to a conclusion", the other counts on the indictment remain live. None of the other mechanisms by which counts are disposed of have been engaged in such a situation: namely acquittal, conviction or quashing. Nor has there been a stay, or the matter ordered to lie on file. The determination of unfitness merely suspends the trial proceedings on those counts.

9.4 Although by convention the return of a recovered individual to court for trial to be resumed is referred to as "remission" there are in fact two separate functions involved.[5] The first is the Secretary of State's power to remit or send the individual back to court, or prison on remand, for the prosecution to be resumed.[6] In order to exercise this power, where appropriate, the Mental Health Casework Section ("MHCS") of the Ministry of Justice keeps the individual's fitness to plead under review and obtains the responsible clinician's opinion on a yearly basis.[7] The MHCS notify the prosecution, generally the CPS, when the responsible clinician has determined that a restricted individual is now fit to plead.

9.5 The second function is the decision whether prosecution should, in the particular case, be resumed. This decision is solely a matter for the prosecutor, in most cases the CPS. They receive information from the MHCS, and review the case in accordance with the Code for Crown Prosecutors[8] and the principles set out in the guidance document. They consider in particular such issues as the current availability of evidence, the views of witnesses and those affected by the offence, the effect of prosecution on the health of the individual, and likely sentence on conviction.[9] They then communicate their decision to the MHCS.

9.6 The decision on remission remains that of the Secretary of State but where the CPS intends to resume prosecution, remission "will be the norm".[10] Where the prosecution does not intend to resume prosecution it remains possible for the Secretary of State to remit the individual for trial in any event. At that point the prosecution would be obliged either to proceed with the resumption of the prosecution or to offer no evidence on the charges. However, we understand that the MHCS are not aware of any case in which the Secretary of State has exercised the power to remit despite a CPS decision not to resume the

[5] In CP197 and the Issues Paper we referred to the remission for trial of the defendant by the Secretary of State and the resumption of the prosecution under the single conventional term of "remission".

[6] CP(I)A, s 5A(4).

[7] Medical reports are provided to the Secretary of State in relation to a patient subject to a restriction order under the Mental Health Act 1983, s 41(6).

[8] CPS, *The Code for Crown Prosecutors* (January 2013), http://www.cps.gov.uk/publications/docs/code_2013_accessible_english.pdf (last visited 20 August 2015).

[9] NOMS, CPS and HMCTS, *Resuming a prosecution when a patient becomes fit to plead* (2013), para 3, https://www.justice.gov.uk/downloads/offenders/mentally-disordered-offenders/resuming-guidance-prosecution-fit-to-plead.pdf (last visited 20 August 2015).

[10] NOMS, CPS and HMCTS, *Resuming a prosecution when a patient becomes fit to plead* (2013), para 7, https://www.justice.gov.uk/downloads/offenders/mentally-disordered-offenders/resuming-guidance-prosecution-fit-to-plead.pdf (last visited 14 August 2015).

prosecution. It should be noted that the Secretary of State can lift the restriction order, or conditionally discharge the patient, without the need for remission to the court for trial.[11]

9.7 The recent case of *S*[12] confirms that there is no other express power which provides for a recovered, but previously unfit, individual not subject to a restriction order to be sent back to court for full trial.[13] Nor do we know of any case in which such an individual has been remitted for trial following recovery of fitness.

9.8 Remission of recovered individuals is rare. The total number of cases remitted for trial per year in the last five years across England and Wales is as follows:

	2010	2011	2012	2013	2014
Total number of remitted cases (per year)	5 or fewer[14]	5 or fewer	10	5 or fewer	9

Source: Mental Health Casework Section, MoJ.

No defence power to seek remission

9.9 There is, conversely, no power for an individual previously found unfit to plead, but who has subsequently recovered fitness, to request that prosecution of him or her for the outstanding matters should be resumed, as demonstrated in the case of *S*.[15]

Procedures following remission

9.10 The restriction order ceases to have effect once the remitted individual arrives at court (or at the prison) for trial.[16] If the prosecution is resumed the court will proceed to make arrangements for the trial of the individual (now a defendant again) on those counts on the indictment on which the defendant was found to have "done the act or made the omission". The court will then consider whether to remand the defendant to hospital (for further reports or for treatment)[17] or

[11] Mental Health Act 1983, s 42.

[12] [2014] EWCA Crim 2648.

[13] [2014] EWCA Crim 2648 at [9].

[14] Where the number of cases is 5 or fewer, for data protection reasons the Ministry of Justice are unable to release the exact figure.

[15] [2014] EWCA Crim 2648 at [9].

[16] CP(I)A, s 5A(4).

[17] Mental Health Act 1983, ss 35 and 36.

whether to remand him or her in custody or on bail. Custody time limits[18] do not apply.[19]

9.11 Where an individual is remitted to the Crown Court for trial, the judge has no power to reverse the decision to remit, where, for example, on closer assessment, or by virtue of undergoing the trial process, the remitted defendant is considered again to be unfit to plead. In such a situation, where a second determination of unfitness to plead is arrived at, the court cannot rely on the original finding at the section 4A hearing, and is required to go through the section 4A hearing for a second time.[20]

PROBLEMS WITH THE CURRENT POSITION

Problems with the apparent limitation of resumption to restriction order cases

9.12 There is uncertainty as to whether the prosecution have a broader power to resume the prosecution of an unfit individual who has recovered than that associated with the Secretary of State's power to remit for trial an individual subject to a restriction order. In practice resumption of prosecution seems to be limited to such cases, as we have said above at paragraph 9.7. However, as we discuss below at paragraph 9.18, some respondents to CP197, including the CPS, considered that the prosecution have a wider power than that referred to in the CP(I)A.

9.13 Secondly, this conventional limitation of the power for the prosecution to resume proceedings to restriction order cases is inconsistent with the logic of the unfitness to plead procedures. If the determination of unfitness to plead simply suspends trial proceedings and if section 4A findings of fact, along with any subsequent disposal, are indeed a "holding position" rather than a final outcome[21] then limiting resumption of prosecution to restriction order cases seems illogical. Although a restriction order is imposed as a disposal in nearly a third of all unfitness cases where the individual is found to have done the act,[22] many individuals found to have done the act of a serious offence, although presenting a risk of serious harm to the public, will not be suitable for hospitalisation, and thus a restriction order will not be available.

[18] The Prosecution of Offences (Custody Time Limits) Regulations 1987 (SI 1987 No 299) specify the maximum time for which a defendant may be remanded in custody by the Crown Court prior to trial before he or she is entitled to be released on bail. Currently the maximum period is 112 days unless an extension for the period is granted.

[19] Prosecution of Offences (Custody Time Limits) Regulations 1987. See discussion in NOMS, CPS and HMCTS, *Resuming a prosecution when a patient becomes fit to plead* (2013) at para 14, https://www.justice.gov.uk/downloads/offenders/mentally-disordered-offenders/resuming-guidance-prosecution-fit-to-plead.pdf (last visited 22 December 2015).

[20] *R (Julie Ferris) v DPP* [2004] EWHC 1221 (Admin), [2004] All ER (D) 102.

[21] As argued in the CP197 responses of NOMS and the Royal College of Psychiatrists.

[22] R D Mackay, "Unfitness to plead – Data on Formal Findings from 2002 to 2014", Appendix A available at http://www.lawcom.gov.uk/project/unfitness-to-plead/. Between 2002 and 2014, restriction orders were imposed as the disposal in 31.9 % of cases where the defendant was found to have "done the act or made the omission".

9.14 Thirdly, this apparent limitation on resumption is liable to result in significant feelings of injustice amongst complainants and those affected by the alleged offending, where a previously unfit individual recovers fitness but, because he or she is not subject to a restriction order, the prosecution cannot be resumed.

The problematic position of recovered defendants

9.15 Conversely, the fact that recovered unfit individuals cannot request remission for trial, or resumption of the prosecution, so that they can clear their name, is arguably also capable of causing significant injustice. This is especially problematic given that the section 4A hearing is currently limited to a consideration of the conduct element of the offence alone.[23]

Procedural difficulties on resumption

9.16 In addition, the inflexibility of the procedures in the Crown Court following remission for trial has been shown to cause problems. This is especially the case where the judgement of the responsible clinician that fitness has been recovered is not supported by subsequent expert evidence, or where the remitted defendant's fitness deteriorates as a result of the trial.[24] The requirement for the Court to repeat the section 4A fact-finding hearing, where the defendant's continuing unfitness to plead is confirmed, is also liable to cause unnecessary expense and delay, and to have an adverse impact on witnesses.

ANALYSIS AND DISCUSSION

Issue: Should the Crown's power to resume proceedings against a recovered individual be extended beyond those who are subject to a hospital order with restriction?

The approach taken in CP197[25]

9.17 We did not advance specific proposals in CP197 in relation to clarifying the power of the prosecution to resume prosecution against[26] a recovered individual. We noted that, in qualitative research in Scotland,[27] psychiatrists raised concerns about the potential distress caused to unfit individuals arising out of the prospect that they may face a full trial on recovery. In addition, we also considered that there was a question over the effectiveness of remission where the likely sentence might, in any event, be in similar terms to the disposal imposed under the unfitness procedure.

[23] Observations of participants at the meeting of the Law Commission working group on unfitness to plead, 14 December 2009.

[24] See *R (Julie Ferris) v DPP* [2004] EWHC 1221 (Admin), [2004] All ER (D) 102. See also anecdotal evidence of HHJ Jeremy Roberts QC concerning the case of *Sureda*, which is the subject of a case study in Appendix B to CP197.

[25] CP197 paras 7.14 to 7.21.

[26] In CP197 and the IP we used the term "remit" and "remission" in the conventional sense, covering both the Secretary of State's power to remit a patient for trial and the prosecution's power to resume proceedings. We prefer in this chapter to refer to resumption of the prosecution as a more accurate description of the process.

[27] C Connolly, "Unfitness to Plead and Examination of the Facts Proceedings: A Report Prepared for the Law Commission of England and Wales" (March 2010).

CP197 responses[28]

9.18 Respondents to CP197 confirmed the need to clarify the scope of the prosecution's power to resume prosecution against unfit individuals who have recovered, in particular whether it should be extended beyond those subject to a hospital order with restriction. Several respondents to CP197 considered that the prosecution has an inherent power to resume prosecution of any unfit individual who recovers fitness to plead, despite there being no express power to this effect.[29]

9.19 The question of whether a finding of inability to participate effectively should be a "holding position" rather than the final outcome was raised by several consultees.[30] Professor Grubin (Professor of Forensic Psychiatry) and the Royal College of Psychiatrists both proposed that the court consider at the time of the unfitness procedures whether the public interest required resumption of the prosecution, should fitness be regained.

9.20 Several consultees observed that the fairer focus for unrestricted patients would be on ensuring that fitness is regained and trial is achieved in the first instance, rather than resumption of proceedings after the unfitness procedure has been completed, and a disposal imposed. Their concern lay in the undesirable position of an unfit individual, having already been through one court process, having the prospect of a full trial hanging over him or her during recovery.[31]

The approach in the IP and responses

9.21 In the IP[32] we argued that to limit the prosecution's powers to resume proceedings by virtue of the nature of the disposal imposed was not necessarily logical. We considered that there will be cases where, although a serious offence was charged, the unfit individual's particular condition did not warrant hospitalisation. There may be a strong public interest in resuming prosecution against some individuals on recovery following disposal who had not been the subject of restriction orders. We asked consultees whether the power of the prosecution to remit or resume prosecution against an unfit individual who has recovered following disposal should be statutorily extended to all those found unfit and to have done the act or made the omission.[33]

[28] The responses are discussed more fully in Unfitness to Plead: Analysis of Responses (2013), paras 1.232 to 1.263. Available at http://www.lawcom.gov.uk/wp-content/uploads/2015/06/cp197_unfitness_to_plead_analysis-of-responses.pdf.

[29] Including NOMS, Professor Ronnie Mackay (academic), and the CPS.

[30] Including NOMS and the Royal College of Psychiatrists.

[31] NOMS and the Royal College of Psychiatrists.

[32] Paras 7.28 to 7.29.

[33] IP Further Question 28.

9.22 There was significant support from consultees for the proposal, in principle, to extend remission powers of the prosecution beyond those who receive a hospital order with restriction order.[34]

Restriction to certain types of offences

9.23 However, many of those who agreed in principle raised significant issues for consideration. Most prominent was an acknowledgement of the uncertainty for witnesses and unfit individuals if the power to resume prosecution following disposal was extended to all cases where a positive finding of fact was achieved. A number of respondents, whilst agreeing that restriction by reference to the disposal imposed was not logical, suggested that the power be restricted to serious or exceptional cases, and that cases involving more minor charges should be excluded from the power to remit.

9.24 Consultees variously proposed that the power could be limited to:

(1) cases where the alleged offence involved "serious risk to life or limb" (such as arson, serious interpersonal violence and serious sexual offences) (Faculty of Forensic and Legal Medicine);

(2) specified offences (per dangerous offender provisions) (Nigel Barnes);

(3) specified serious offences, subject to modification by statutory instrument (Rudi Fortson QC); or

(4) resumption criteria set out by way of guidelines (Rudi Fortson QC, although his preferred option was (3)).

A ruling by the judge to exclude remission in the future?

9.25 We anticipated the concern surrounding the uncertainty that broadening resumption powers would give rise to. We therefore proposed in the IP that at the conclusion of the proceedings, the judge should have the power to rule that resumption was (or was not) in the public interest, should the unfit individual regain capacity.[35] We proposed that the judge take into account various factors, including the seriousness of the offence, the impact on any identified complainant, the views of any complainants, and the likelihood of the unfit individual recovering within a reasonable period.

[34] Council of HM Circuit Judges (response submitted by the Criminal Sub-Committee), HM Council of District Judges (Magistrates' Courts) (response submitted by the Legal committee), HHJ Tim Lamb QC, Holroyde J, Nigel Barnes (solicitor specialising in criminal law), Law Society, Rudi Fortson QC, Dr Eileen Vizard CBE (consultant child and adolescent psychiatrist), Charles de Lacy (clinical nurse specialist), Professor Ronnie Mackay, the Faculty of Forensic and Legal Medicine, Professor Graeme Yorston (academic, consultant forensic psychiatrist and neuropsychiatrist), and CPS. Only Carolyn Taylor (solicitor specialising in criminal and mental health law) and Professor Jill Peay (academic) disagreed entirely with the proposal.

[35] IP Further Question 29.

9.26 Although there was some support for this proposal,[36] it was not universally welcomed. In particular, members of the judiciary did not support the proposal. The Council of HM Circuit Judges felt that to require the judge to make a binding ruling at the close of the original proceedings may be unfair since the decision as to whether the case should be remitted "may depend on the factual situation at the time the remission is being considered and a ruling at an earlier stage may be premature." Mr Justice Holroyde[37] echoed this concern, adding that some later unforeseen act (such as subsequent similar offending, as envisaged in IP paragraph 7.30)[38] may be relevant. In addition, Mr Justice Holroyde felt that, if in reality the unfit individual will never be fit to be tried, then such a ruling would be unnecessary.

Resumption of prosecution only with leave of the court?

9.27 The Council of HM Circuit Judges raised the alternative proposal that there should be no remission without leave of the court, with the judge having power to rule that remission is not in the interests of justice, having regard to, amongst other factors, the lapse of time. The CPS, which rejected the proposal of a ruling at the time of the original proceedings, also proposed, if judicial oversight were required, a statutory obligation to apply to a judge for permission to resume proceedings.

A time limit on resumption?

9.28 We invited consultees to consider, in addition, whether there should be a time limit for the resumption of proceedings against unfit individuals who have recovered following disposal.[39] Our provisional position was that such a limit was neither necessary nor appropriate. All respondents who addressed this question agreed with that approach, subject to their other observations on remission.[40] Responses focused on the arbitrary nature of time limits and the different rates at which recovery might be achieved. Several respondents observed that lapse of

[36] HM Council of District Judges (Magistrates' Court), Professor Jill Peay, Nigel Barnes, Law Society, Dr Eileen Vizard CBE, and the Faculty of Forensic and Legal Medicine endorsed such an approach.

[37] Responding to the IP in his personal capacity, but his comments endorsed by the Lord Chief Justice, Lord Thomas.

[38] In the IP at para 7.30 we provided the following example of a situation where defendant might come to the attention of the prosecution other than as a result of being subject to a restriction order, and where a wider power to remit might be appropriate: "For example, this may occur where an individual, previously found to lack capacity in relation to a sexual assault on complainant A, and made the subject of a supervision order on disposal, regains capacity but goes on to commit a further sexual assault against complainant B. We consider that it would be highly undesirable if complainant A were able to be called to give evidence for the prosecution in the trial of the defendant for sexually assaulting complainant B, but the allegation in relation to A could not be considered by the jury."

[39] IP Further Question 30.

[40] HM Council of District Judges (Magistrates' Court), HHJ Tim Lamb QC, Holroyde J, Nigel Barnes, Law Society, Rudi Fortson QC, Justices' Clerks' Society, Dr Eileen Vizard CBE, Royal College of Psychiatrists, Professor Graeme Yorston, Charles de Lacy, Professor Ronnie Mackay, Professor Jill Peay, Faculty of Forensic and Legal Medicine, and the CPS.

time would nonetheless be a factor in the prosecution and court's consideration of whether resumption of the trial would be appropriate.[41]

Practical difficulties

9.29 Charles de Lacy (clinical nurse specialist) and Professor Ronnie Mackay enlarged upon the practical difficulty of identifying those unfit individuals, not subject to restriction orders, who might be suitable for resumption.[42] At present, updated reports in relation to the fitness of previously unfit individuals subject to a restriction order are requested annually by the Ministry of Justice and prepared by the responsible clinician.[43] Charles de Lacy considered that if the power to resume the prosecution were to carry with it a duty for responsible clinicians and/or supervising officers to report to the courts on the condition of the individual, then this would create an unmanageable burden for the criminal justice system and health services.

Discussion: Should the Crown's power to resume proceedings against a recovered individual be extended beyond those who are subject to a hospital order with restriction?

9.30 Addressing this question engages tensions between several different and competing factors:

(1) the public interest, and the interest of complainants and witnesses, in a person being tried whenever he or she is able to participate effectively in a full trial;

(2) the detrimental effect on recovery the threat of resumption of prosecution might have on an unfit individual who is unwell;

(3) the difficulty for either side in marshalling their witnesses and those witnesses recalling events in a resumed prosecution, particularly where significant time has elapsed; and

(4) difficulties for the court in sentencing an individual who has already been subject to a significant disposal, and whether, in many cases, there is much to be gained in terms of sentence from the remission process.

Should the power to resume prosecution be clarified or extended?

9.31 There is clearly a need to clarify the prosecution's powers in relation to resuming prosecution. However, we consider that the arguments in relation to extension of the prosecution's powers beyond those attaching to the current statutory provision for the Secretary of State to remit for trial are finely balanced. If the power to postpone the determination of capacity to enable recovery is fully utilised, there should be very few cases in which a recovery is achieved following the completion of the alternative procedures. We also consider that the cases in which there is a strong argument for the power to be available, and the unfit

[41] Rudi Fortson QC, Justices' Clerks' Society and the CPS.

[42] Raised in the IP at para 7.30.

[43] In accordance with the Mental Health Act 1983, s 41(6).

defendant is not subject to restriction, are likely to be very few. However, we do consider it significant that those few cases might very well include individuals who have been found to have done the act in relation to very serious offences, or may be recidivist offenders of the sort envisaged in the IP at paragraph 7.30,[44] but who were simply not suitable for hospitalisation.

9.32 In addition, we also acknowledge the difficulty of identifying those individuals who have subsequently gained capacity but who are not subject to a restriction order. We consider that the wider power to resume prosecution is only likely to be required where the person comes to the attention of the police or courts again for fresh matters or where he or she is identified as having recovered by virtue of a supervision order or Multi-Agency Public Protection Arrangements.[45]

9.33 We do not think that it is practical to propose that there should be duties imposed on responsible clinicians or supervising officers to report on the recovery of an individual who previously lacked capacity, over and above that currently contained within section 41(6) of the Mental Health Act 1983 ("MHA").[46] However, we do consider that it would assist if the court could include a requirement that any medical reports prepared for the court for review purposes[47] be provided to the prosecutor, where that is considered to be appropriate.[48]

9.34 The difficult question is whether extending the power to resume prosecution to encompass those few cases referred to at paragraph 9.31 above justifies leaving a much larger group of vulnerable individuals in a state of uncertainty. We also have very much in mind the impact of such uncertainty on complainants and witnesses, although we anticipate that some complainants would welcome the prospect of future trial being preserved, even given the uncertainty that that opportunity brings with it.[49]

9.35 On balance, we consider that it is appropriate explicitly to extend the power of the prosecution to resume proceedings beyond live restriction order cases.

A leave requirement

9.36 We are persuaded by the judiciary's objections to a ruling being made by the judge at the close of the initial capacity proceedings, raised at 9.26 above. On balance we consider that the requirement for the court to give leave for resumption at the time of the individual's recovery, as advanced by the Council of HM Circuit Judges, is a more appropriate restriction. We acknowledge that this

[44] See footnote 38 above.

[45] Discussed in detail in Chapter 6 para 6.77 and following above.

[46] MHA 1983, s 41(6) places a duty on responsible clinicians for defendants subject to a hospital order with restriction to report to the Secretary of State at least yearly.

[47] In respect of an individual subject to a supervision order which includes a requirement for treatment (draft Bill sch 1 para 11) or periodic review (draft Bill sch 1 para 21).

[48] See draft Bill sch 1 para 21(1)(f).

[49] We have canvassed our recommendations for reform in this regard with the Policy Officer for Victim Support (meeting 13 January 2015). She felt that the proposals were sensible, and considered that, in particular, victims would welcome the opportunity for their views to be considered.

would not serve to reduce the uncertainty for some individuals who lack capacity. However, we agree with Mr Justice Holroyde that in many cases the person's condition which gives rise to his or her lack of capacity, such as a learning disability or dementia, is not liable to resolve itself in such a way that there is any realistic prospect of resumption in any event. Those individuals will no doubt be advised that they need not concern themselves about the prospect of future resumption.

9.37 We consider that the factors to be taken into account in considering an application for leave to resume prosecution should include: the seriousness of the offence, the impact of the alleged offence on any identified complainant, the views of any complainants and witnesses, the availability and willingness of witnesses to give evidence in a full trial, the lapse of time since the alleged offence and the earlier alternative procedures, the disposal imposed following the finding of fact, and the likely sentence which might be imposed on conviction.

A threshold linked to the seriousness of the offence alleged

9.38 We consider that a threshold based on the seriousness of the offence would also be of assistance in meeting any residual concerns in relation to uncertainty for the individual who lacks capacity. We appreciate that imposing thresholds always raises the prospect of some arbitrary results at the margins. However, we consider that a threshold would be beneficial in ensuring that only those defendants who have had proved against them at the alternative finding procedure an offence of relative seriousness should face the potential prospect of trial on recovery. We would certainly not recommend a power to resume prosecution for summary only matters.[50]

9.39 However, identifying thereafter where the threshold should lie is not straightforward. Setting the threshold at indictable-only offences, or serious specified offences,[51] would fail to catch many offences, particularly either-way sexual offences, which might well result in an individual who had previously lacked capacity coming to the attention of the courts at some later time.[52] As a result, on careful consideration, we conclude that the most appropriate threshold is the requirement that the defendant should have had proved against him or her, at the alternative finding procedure, a specified violent or sexual offence.[53] This is a threshold with which the courts are very familiar. No threshold will produce perfect results and we recognise that a specified offences threshold would exclude serious offences which are not sexual or violent, such as serious

[50] This is in line with the observations of the HM Council of District Judges (Magistrates' Courts). Summary-only crimes are less serious offences which can only be dealt with in magistrates' courts.

[51] Criminal Justice Act 2003, s 224, defines serious specified offences as specified offences (listed in sch 15) which would be punishable in the case of an adult by imprisonment for life or a determinate period of ten years or more, ignoring the provisions of s 224A (which provides for a life sentence for a second offence listed in sch 15B).

[52] In the manner envisaged at IP paragraph 7.30.

[53] As defined by the CJA 2003 s 224 and set out in sch 15 to that Act.

offences of dishonesty. However, research suggests[54] that sexual and violent offences account for the vast majority of offences charged against those found to be unfit to plead, and specified offences are those which raise the most significant issues in terms of public protection.

No time restriction

9.40 We remain of the view, supported now by consultees, that there should be no time limit on the Crown's power to apply for leave to resume prosecution. That said, lapse of time would of course be a factor for the court to take into account when considering an application for leave.

Resumption where a special verdict is returned at the determination of facts?

9.41 We do not consider that the power to apply for leave to resume proceedings should be available in all cases where the jury (or judge) have returned a special verdict at the determination of facts hearing. Two issues lead us to this conclusion. First, in such cases it is highly likely that the jury at any subsequent full trial would return the same verdict, namely not guilty by reason of insanity. Secondly, should that be the outcome, the disposal range available would not differ from that available to the court in the alternative procedures. There would therefore be little, if anything, to be gained in terms of leaving open the prospect of resumption in these rare cases.

9.42 There is one exception to this principle, namely cases where a special verdict is returned in respect of a murder allegation where the defendant, if he or she had capacity, would have raised the partial defence of diminished responsibility. For such defendants, the partial defence of diminished responsibility could not be raised as an issue at the alternative finding procedure under our recommendations. However, if a special verdict were returned, and the defendant recovered capacity, such an outcome might be sought in resumed proceedings by the prosecution as an alternative to an insanity finding.[55] In these cases, it is not inevitable that the jury would again return a special verdict at a resumed prosecution, since they may conclude instead that the defendant acted with diminished responsibility. If the jury did convict of voluntary manslaughter on that basis then the full range of sentences would be available. The CPS confirm that they would favour retaining the option to apply to resume prosecution in those cases, so that the possibility of conviction and sentence on recovery remains available.[56]

Resumption of prosecution where the judge has exercised his or her discretion to decline to proceed with the alternative finding procedure

9.43 In Chapter 5 at paragraphs 5.55 to 5.56 we raised the issue of whether there should be a power for the prosecution to apply to resume proceedings against an individual where the judge has exercised his or her discretion not to hold an

[54] R D Mackay, "Unfitness to Plead – Data on Formal Findings from 2002 to 2014", Appendix A, tables 5 to 7 available at http://www.lawcom.gov.uk/project/unfitness-to-plead/.

[55] CP(I)A, s 6.

alternative finding procedure. In terms of the indictment itself, the individual who is subject to the alternative finding procedure and the defendant who is not are in the same position. Trial proceedings are simply suspended. There is no logical reason why an individual in relation to whom the judge concludes that he or she need not impose a disposal should inevitably be shielded from future prosecution if he or she later achieves capacity. Indeed, to curtail the prosecution's powers in this way would convert the exercise of the judge's discretion into a power to bring a halt to a prosecution. We do not consider that such an encroachment onto the CPS's powers to decide on prosecution could be justified.[57]

9.44 However, in practical terms such an individual is highly unlikely, in any event, to come to the attention of the prosecution on recovery and to meet the threshold for application for leave to resume. The discretion not to hold an alternative finding procedure is likely to be exercised in relation to individuals charged with less serious offences. Additionally, the lack of disposals overseen by the criminal justice system will make it highly unlikely that, bar the commission of fresh offences, the prosecution will become aware of the defendant's recovery so as to enable them to make an application.

9.45 Weighing these considerations carefully, we conclude that, in order to preserve the Crown's powers to decide on prosecution, the prosecution's right to apply for permission to resume trial proceedings against an individual should be extended to include cases where the judge declined to hold an alternative finding procedure. This entitlement would, as above, be restricted to cases where the indictment contained a specified offence, as listed in schedule 15 of the Criminal Justice Act 2003 or where a special verdict was returned in respect of a murder allegation.

Resumption in relation to all live counts

9.46 We have recommended above that resumption should only be available where the individual has had a specified offence proved against him or her at the alternative finding procedure (or received a special verdict in respect of a murder allegation), or where he or she faced an indictment which contained a specified offence and the court did not embark on the alternative finding procedure. However, in many cases an indictment may also contain other charges which are not specified offences. What should the position be with regard to those lesser offences? Should they also be the subject of resumed proceedings?

9.47 We consider that the answer to this question lies in the approach taken to the imposing of disposals. Currently, following a positive finding at the section 4A hearing, disposals are imposed "in respect of the accused"[58] rather than in relation to each offence, as is the case at sentence. Thus, where there is a resumption of the prosecution, unless proceedings are resumed in relation to all live matters, there may be uncertainty at the close of the resumed prosecution, as to whether any lack of capacity disposal should continue unaffected. It would also

[56] Email correspondence with the CPS, 30 October 2015.

[57] See the concerns of Holroyde J at Chapter 5 para 5.46.

[58] CP(I)A, s 5(2).

be undesirable if the prosecution were entitled to choose to apply for leave for prosecution to be resumed in relation to some counts at one time, and then on a later occasion to apply for leave in relation to other allegations on the same indictment.

9.48 We conclude that the most appropriate approach is for all offences in respect of which the jury found the allegation proved against the individual at the alternative finding procedure[59] to be the subject of resumed prosecution, once leave has been granted. This should also include lesser and included alternatives to the counts found proved at the alternative finding procedure. If the prosecution do not wish to proceed on some or any of those linked matters, or is not in a position to do so, then they would be obliged to offer no evidence in respect of those counts. This issue would no doubt be amongst the matters considered by the prosecution in any decision to apply for leave and a point considered by the judge on hearing the application for leave.

Satisfying the court that the individual now has capacity

9.49 It is plainly highly undesirable for all involved in resumption proceedings for it to be discovered at a late stage that the individual does not, in fact, have capacity for trial. Under the current provisions remission can only occur where the Secretary of State is "satisfied after consultation with the responsible clinician that the person can properly be tried".[60] We are concerned that there should be some like requirement for resumption under our reformed procedures.

9.50 Clearly the safest way to ensure that the individual really has achieved capacity before resumption is allowed would be for the prosecution to submit two expert reports to confirm the same, as would have been required in the original determination of lack of capacity. However, we recognise that this may not always be feasible, especially where the individual retains the right to refuse to be assessed. In those circumstances, the individual would be able to frustrate the prosecution's intention to resume trial proceedings.

9.51 Nonetheless, on making an application for leave to resume, it should be incumbent on the prosecution, we consider, to establish that, on the evidence available, they have reasonable grounds to conclude that the defendant has capacity for trial. This evidence might, for example, be a report from the responsible clinician (where the individual is subject to a restriction order), a report from a doctor providing treatment on a supervision order with treatment requirement, or evidence arising out of a subsequent arrest (for example, an assessment by a forensic medical practitioner at the police station, coupled with a police interview). In those circumstances, should the individual, or the court, dispute the position, they would be entitled to obtain (or order, in the case of the court) the preparation of an expert report addressing the individual's capacity.

[59] Or which appeared in the same indictment as the triggering specified offence at the time of the exercise of the judge's discretion not to proceed with the alternative finding procedure.

[60] CP(I)A, s 5A(4).

The Secretary of State's power to remit

9.52 As discussed above at paragraph 9.4 and following, there are at present two decisions made where resumption occurs in respect of a restricted patient. First, the CPS decides whether it proposes to resume the prosecution, and then the Secretary of State decides whether to remit the defendant or not. We consider now whether the Secretary of State's power to remit continues to be necessary and worthwhile under our recommendations.

9.53 Under the current provisions, although the CPS make the decision whether to resume prosecution, the formal resumption of proceedings is triggered by the Secretary of State remitting the defendant to court, or to prison. However, under our reform proposals the formal resumption of the prosecution will be triggered by the judge granting leave. The production at court of an individual who is the subject of a restriction order can be achieved by summons, without the need for formal remission. There is also no basis for an individual to be remitted to a prison under our reform proposals, since the proceedings are not resumed, and the power to remand in custody not activated, until leave has been granted. On this analysis remission by the Secretary of State performs no formal function, nor is it necessary under our reform proposals.

9.54 We have considered with care whether removing this power would be to the disadvantage of the Secretary of State and the Ministry of Justice. We note in particular that remission is not the only mechanism by which the state can put an end a restriction order. As discussed above, the Secretary of State can lift the restriction order under section 42 of the Mental Health Act 1983 without remitting an individual. We have considered whether retaining the Secretary of State's power to remit is a desirable mechanism to prompt the prosecution to apply for leave to resume a prosecution. First, we observe that this is a prompt which, although available under the current arrangements, has not, as far as the MHCS is aware, been used. This is the case even though the MHCS express some concerns at the length of time taken by the CPS to make decisions on resumption in less serious cases.[61] Secondly, we have some doubts as to whether it is appropriate for the Secretary of State to retain a power which has the capacity to force the hands of the CPS in relation to its particular discretion whether to prosecute or not. We note that the Mental Health Casework Section of NOMS, who deal with restriction order cases, have no objection to the removal of the Secretary of State's power to remit, as long as the defendant is entitled to apply for leave for prosecution to be resumed against him or her.[62]

Conclusion: Should the Crown's power to resume proceedings against a recovered individual be extended beyond those who are subject to a hospital order with restriction?

9.55 **We** therefore **recommend:**

(1) That the prosecution be entitled to apply to the Crown Court for leave to resume prosecution in respect of an individual against whom, at an alternative finding procedure, a jury:

[61] Meeting with MHCS 12 May 2015, email from MHCS 14 May 2015.

[62] Government Group meeting held on 21 September 2015.

(a) found proved a specified violent or sexual offence;[63] or

(b) returned a special verdict in respect of an allegation of murder.

(2) That such leave should only be granted if:

(a) the court is satisfied that there are reasonable grounds to believe that the individual would have the capacity to participate effectively in such a trial; and

(b) the court determines that it is in the interests of justice that the individual be tried (see draft Bill clause 15).

(3) In determining whether it is in the interests of justice for the individual to be tried, the court must take into account, amongst any other relevant matters:

(a) the seriousness of the offence(s) alleged;

(b) the impact of the alleged offence(s);

(c) the views of those affected by the alleged offence;

(d) the views of witnesses, and their availability and willingness to give evidence;

(e) the lapse of time since the alleged offence(s) and since any alternative finding procedure;

(f) any order(s) made in respect of the individual following an alternative finding procedure; and

(g) the likely sentence if the individual is convicted (see draft Bill clause 15(5)).

(4) The prosecution should have a similar right to apply for leave to resume prosecution in respect of an individual in relation to whom the judge declined to hold an alternative finding procedure, where the indictment contained a specified violent or sexual offence[64] (see draft Bill clause 23).

(5) The Secretary of State's power to remit a recovered individual to court or prison should not be replicated in the new statutory provisions.

(6) Where leave to resume proceedings is granted following an alternative finding procedure, all offences in respect of which the

[63] As defined by Criminal Justice Act 2003, s 224.

[64] As defined by the Criminal Justice Act 2003, s 224.

jury found the allegation proved against the individual, should be the subject of resumed prosecution (see draft Bill clause 16(3)).

(7) Where leave to resume proceedings is granted where no alternative finding procedure has previously been held, all charges which appeared in the same indictment as the triggering specified offence should be the subject of resumed prosecution (see draft Bill clause 23(2)).

Issue and discussion: Should the prosecution have a power to apply for leave to resume proceedings against a recovered individual in the magistrates' courts?

9.56 We consider now whether the prosecution should enjoy a similar entitlement to apply for leave to resume prosecution against an individual who has achieved capacity following a finding of lack of capacity for trial in the magistrates' courts (including the youth court).

9.57 We anticipate that, were such an entitlement to exist, it would be likely to be very sparingly exercised. In relation to adults this is because the magistrates' court would be unlikely to retain jurisdiction in respect of many cases involving an allegation of a specified violent or sexual offence of sufficient seriousness to warrant resumption of proceedings. (An example of such an offence would be sexual assault contrary to section 3 of the Sexual Offences Act 2003, which encompasses a broad range of criminal behaviour and is a specified offence in part 2 of schedule 15 to the Criminal Justice Act 2003). In relation to youths, such a power may be somewhat more frequently engaged, given that more serious allegations are frequently dealt with in that jurisdiction. That said, we consider that the court would be slow to resume proceedings against a young person in all but the most serious of cases. Although we consider the arguments to be finely balanced, we conclude that, for those few cases where resumption would be appropriate, in the interests of complainants and those affected by the alleged offending, the prosecution should have the right to apply for leave to resume proceedings.

Conclusion: Should the prosecution have a power to apply for leave to resume proceedings against a recovered individual in the magistrates' courts?

9.58 **We** therefore **recommend that the prosecution should have the same entitlement to apply for leave to resume proceedings in the magistrates' courts as in the Crown Court** (see draft Bill clauses 44 and 51).

Issue: Should a recovered individual, previously found to lack capacity for trial, be entitled to apply for an order that prosecution should be resumed against him or her?

The position in CP197 and responses

9.59 In relation to the proposed right of a recovered individual to request remission for trial following recovery, we concluded in CP197 that, were amendments to be made to the section 4A procedure to require consideration of all the elements of the alleged offence, it would be unlikely that a recovered individual would benefit

from a trial at a later stage. We also noted the difficulty for both sides in marshalling the necessary witnesses for such a rehearing. In the circumstances, we did not advance a provisional proposal, but asked consultees whether they felt that unfit individuals, who had been found at the determination of fact to have done the act or made the omission, should be able to request remission for trial.

9.60 A number of respondents to CP197 offered examples of situations where such an issue might arise and where such a power should perhaps exist. Instances included:

(1) Where the unfit individual becomes fit and is able to give instructions leading to fresh evidence relevant to the case (Council of HM Circuit Judges, Bar Council/Criminal Bar Association).

(2) Where an unfit individual is found to have "done the act" of a sexual offence, and wishes to remove his or her name from the sex offenders' register (Council of HM Circuit Judges, Professor Mackay).

(3) Where co-defendants are acquitted or otherwise discharged, and the unfit individual might be considered fit for the resulting simpler trial process (HHJ Tim Lamb QC).

9.61 Respondents agreed that there would be few individuals who would wish to exercise such a right and run the risk of conviction. The Royal College of Psychiatrists in particular noted that the more restrictive test for release or discharge for hospital orders imposed on conviction in comparison to hospital orders imposed following a section 4A hearing might deter previously unfit individuals from applying for leave.[65]

9.62 Some consultees suggested that such a right could exist but should be restricted in light of difficulties locating witnesses and the likely deterioration of their recollection.[66] In their joint response, the Bar Council and Criminal Bar Association suggested consideration of a time limit, or a requirement that there must be reliance upon fresh evidence or information not available at the time of the section 4A hearing. The CPS suggested that the power to request remission should be subject to a finding of fitness with the same evidential requirements as pertain to a section 4 hearing.

The position in the IP and responses

9.63 In the IP, considering the observations made by respondents to CP197, we asked consultees whether, where there has been a finding that an individual had "done the act or made the omission," he or she should be entitled to request remission for trial on recovery, where that is confirmed by the opinions of two experts competent to address the unfit offender's particular condition.[67]

[65] Response to CP197.

[66] HM Council of District Judges (Magistrates' Court), Bar Council/Criminal Bar Association.

[67] See IP paras 7.39 to 7.42 and IP Further Question 31.

9.64 The majority of consultees who addressed this question agreed with this proposal.[68] Only two consultees did not agree (CPS, Mr Justice Holroyde). Both raised concerns about the need to restrict the entitlement of previously unfit individuals to be remitted for trial. Their position is understandable since in the IP we did not explain what "request remission" might involve, and what restrictions we considered might be appropriate.

9.65 Their concerns were:

(1) An unqualified right to remission overlooks the interests of complainants and other witnesses.

(2) An unqualified right to remission might be open to abuse and cause injustice.

(3) There should be a requirement for the unfit **individual** to have acted with due diligence in commencing or pursuing his or her request for leave within a short time of becoming aware of having grounds to believe that he or she could seek remission.

(4) Any section 4A procedure may need to be recorded to guard against the possibility of witnesses no longer being available for a subsequent trial.

Discussion: Should a recovered individual, previously found to lack capacity for trial, be entitled to apply for an order that prosecution should be resumed against him or her?

Is such an entitlement required?

9.66 We consider first of all whether there is a need for this entitlement. Undeniably, if created, this entitlement is likely to be infrequently exercised. Few recovered individuals are likely to wish to put themselves in jeopardy of criminal conviction. This is particularly because disposals following a finding of lack of capacity are generally less restrictive, even under our reforms, than sentences likely to follow any subsequent conviction for the same offences. In addition, where all elements are required to be established by the prosecution at the alternative finding procedure, there should be fewer instances where a recovered individual feels that he or she has failed to engage an opportunity for acquittal at the alternative finding procedure.

9.67 Nonetheless, such an entitlement may be exercised, particularly in the case of an individual against whom a sexual offence has been found proved at an alternative finding procedure and he or she is subject to notification requirements under Part 1 of the Sexual Offenders Act 1997 (in layman's terms, "put on the sex offenders' register"). The recent case of *S*[69] is an example of just such a situation. Mr

[68] Council of HM Circuit Judges, HM Council of District Judges (Magistrates' Court), HHJ Tim Lamb QC, Carolyn Taylor, Nigel Barnes, the Law Society, Charles de Lacy, Professor Ronnie Mackay.

[69] [2014] EWCA Crim 2648.

Justice Openshaw, in refusing the appellant's request to be remitted to the Crown Court for trial, confirmed that the Court of Appeal has no such power.[70]

9.68 We consider that this issue raises an important point of principle, which is engaged:

(1) where an individual has had proved against him or her a criminal offence, whilst he or she lacked the capacity to participate effectively as a result of illness or some condition; and

(2) where that finding, albeit short of conviction, nonetheless subjects him or her to a disposal, an ancillary order which carries criminal sanctions on breach, or other requirements such as notification under the Sexual Offenders Act 1997.

9.69 If he or she later achieves the capacity for trial, and wishes to clear his or her name, it would seem contrary to the principles of fair and equal access to justice to deny such an individual the opportunity at least for the court to consider the merits of resuming the prosecution.[71]

Balancing the rights and interests of defendants, complainants and witnesses

9.70 It is essential, however, that the rights of a recovered individual are balanced against those of complainants and witnesses in such cases. We have very much in mind the concerns raised by respondents to CP197 and the IP, as described at paragraph 9.65. In particular, it is vital that the process is not open to abuse. We are concerned, especially, that an individual ought not to be able to manipulate the process in order deliberately to cause distress to complainants or witnesses. Nor should the individual be able to manufacture advantage, for example by delaying the making of an application until a critical prosecution witness is no longer available.

9.71 For these reasons we consider that there should be no unqualified right to trial, just as under our recommendations the prosecution will also not have an unfettered right to resume prosecution. We take the view that the requirement for an individual to apply for an order that prosecution be resumed will allow the judge considering the application to balance the rights of both prosecution and defence. We have in mind a similar range of factors to those set out in our recommendations at paragraph 9.55(3) above for the court to take into account in considering whether ordering that prosecution should resume is in the interests of justice. In particular, the views of witnesses and complainants, their availability and willingness to give evidence would be critical considerations. Additionally, the court should be required to take into account any delay in making an application for leave and the reasons for it. We consider that such requirements will prevent any abuse of the procedure.

[70] [2014] EWCA Crim 2648 at [9].

[71] We have in mind in particular articles 12 and 13 of the United Nations Convention on the Rights of Persons with Disabilities.

9.72 Inevitably there may be evidential difficulties for the Crown, should an individual achieve an order that prosecution be resumed many years after the initial proceedings. This will, of course, be an issue for the judge to consider when hearing an application for an order, in assessing where the interests of justice lie. In addition, we anticipate that a witness' evidence at the determination of facts may be admissible as hearsay in a subsequent full trial process,[72] or indeed may be recordable at the initial determination of facts.

Establishing that capacity has been achieved

9.73 We turn then to consider what evidence the individual should be required to serve on the court, to establish that he or she has indeed recovered or gained capacity for trial. Our initial inclination was to propose that the person be required to serve two expert reports confirming the same. There can, of course, be no difficulty in terms of co-operating with an assessment where the individual makes the application.

9.74 However, we bear in mind the very significant costs involved in obtaining expert reports. The most up to date costings that we have received suggest a range of fees between £1,800 and £2,691 for a psychiatric or psychological assessment and report.[73] We conclude that requiring an individual to serve two such reports, in circumstances where we anticipate legal aid would not be granted, would act as a virtual bar to any application by an individual. For most individuals who have previously lacked capacity, the cost would be simply unsupportable. We also bear in mind that, for different reasons, we have imposed a lesser requirement for evidence from the prosecution on application for leave to resume.[74] In the circumstances, therefore, we propose to impose a similar requirement that the court be satisfied that there are reasonable grounds for believing that the individual would have capacity for trial, before an order for resumption can be made.

Resumption in relation to all counts

9.75 In relation to prosecution applications, we recommended a seriousness threshold before application for leave can be made, namely that a specified violent or sexual offence should have been found proved against a defendant (or appear on the indictment on which the judge declined to hold an alternative finding procedure). In light of the point of principle identified at paragraph 9.68 above, we conclude that it would not be appropriate for there to be such a restriction on defence applications. The defence should be entitled to apply for an order for resumption in relation to any offence found proved against the defendant at an alternative finding procedure (or included within an indictment in relation to which the judge declined to proceed with the alternative finding procedure).

[72] On a similar basis to transcripts of evidence admitted at a retrial under the Criminal Justice Act 2003, s 131. See also *R, M and L* [2013] EWCA Crim 708, [2014] 1 Cr App R 5.

[73] Legal Aid Agency, *Guidance on the Remuneration of Expert Witnesses* (April 2015), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/420106/expert-witnesses-fees-guidance.pdf (last visited 22 December 2015).

[74] See para 9.55(2)(a) above.

9.76 We do not consider that this would unduly raise the numbers of resumed prosecutions on application by defendants. The judge would, in each application, consider the seriousness of the offences alleged as one of the factors in analysing where the interests of justice lie. It may be that, where the original offence was of a more minor sort, or bore no ancillary orders, the court would conclude that resumption of proceedings is not in the interests of justice. Conversely, were leave to be granted and were the Crown to consider that there is no longer a public interest in pursuing the prosecution, they could then offer no evidence in the resumed proceedings.

9.77 Similarly, we concluded that it was not appropriate for special verdicts to be the subject of an application for permission to resume prosecution by the Crown (save in cases of murder). However, we consider that, as a point of principle, a recovered individual should be entitled to apply for an order that prosecution be resumed in relation to special verdict cases. We consider it to be unlikely that, in weighing the interests of justice, such an application would succeed. Nonetheless, we consider that it is important for that right to apply for such an order to exist.

9.78 Where prosecution applications for leave to resume succeed, we take the view that proceedings should resume in relation to all matters which are contained within the same indictment and which were not the subject of an acquittal at any earlier alternative finding procedure.

Conclusion: Should a recovered individual, previously found to lack capacity for trial, be entitled to apply for an order that prosecution should be resumed against him or her?

9.79 Weighing up the observations made by respondents to both consultation processes, we have come to the conclusion that it is appropriate for there to be a statutory right for an individual who has recovered or gained the capacity for trial to apply for an order that prosecution be resumed against him or her.

9.80 **We** therefore **recommend:**

(1) That a defendant be entitled to apply to the Crown Court for an order that prosecution be resumed against him or her, where that defendant was previously found to lack capacity in the proceedings.

(2) This entitlement should arise in relation to any allegation which was found proved against the defendant at an alternative finding procedure, or in relation to which a special verdict was returned (see draft Bill clause 16).

(3) The entitlement should also arise where the judge declined to hold an alternative finding procedure (see draft Bill clause 24).

(4) That such an order should only be made if:

(a) the court is satisfied that there are reasonable grounds to believe that the individual would have the capacity to participate effectively in such a trial; and

(b) the court determines that it is in the interests of justice that the defendant be tried (see draft Bill clauses 16(4) and (5) and 24(3) and (4)).

(5) In determining whether it is in the interests of justice for the individual to be tried, the court must take into account, amongst any other relevant matters:

(a) the seriousness of the offence(s) alleged;

(b) the impact of the alleged offence(s);

(c) the views of those affected by the alleged offence(s);

(d) the views of witnesses, and their availability and willingness to give evidence;

(e) the lapse of time since the alleged offence(s) and since any alternative finding procedure;

(f) any order(s) made in respect of the defendant following the alternative finding procedure; and

(g) any delay in the defendant's making of the application for leave and the reason for it (see draft Bill clauses 16(5) and 24(4)).

(6) Where an order to resume proceedings is made following an alternative finding procedure, all offences in respect of which the jury found the allegation proved against the individual, or in respect of which a special verdict was returned, should be the subject of resumed prosecution.

(7) Where leave to resume proceedings is granted where no alternative finding procedure has previously been held, all charges which appeared in the indictment when the lack of capacity determination was arrived at should be the subject of resumed prosecution.

Issue and Discussion: Should a recovered individual, previously found to lack capacity for trial in the magistrates' court, be entitled to apply for an order that prosecution should be resumed against him or her in the magistrates' court (including the youth court)?

9.81 We turn now to consider whether an individual should enjoy the same entitlement to apply in the magistrates' courts for summary proceedings to be resumed against him or her.

9.82 We consider that the justifications for extending the right to apply for resumption to the recovered individual him- or herself apply as much in the summary courts as in the Crown Court. We consider that, as a point of principle, an individual against whom an adverse finding is made in the magistrates' court when he lacks capacity for trial should, on achieving that capacity, at the very least, have the right to apply to the court for prosecution to be resumed so that he or she may

clear their name. As we discuss above, we anticipate that this entitlement will be very sparingly exercised.

Conclusion: Should a recovered individual, previously found to lack capacity for trial in the magistrates' court, be entitled to apply for an order that prosecution should be resumed against him or her in the magistrates' court (including the youth court)?

9.83 **We** therefore **recommend that a defendant, found in the magistrates' court to lack capacity for trial, on achieving capacity should have the same entitlement to apply for proceedings to be resumed against him or her as he or she would enjoy in the Crown Court** (see draft Bill clauses 45 and 52).

Issue: Procedural concerns on resumption

CP197 position and responses

9.84 In light of the difficulties with cases where prosecution has been resumed in the Crown Court, set out at paragraph 9.16 above, we proposed two reforms to the current procedure:

(1) Where an unfit individual has been remitted to court for trial and it thereafter becomes clear beyond doubt (and medical evidence confirms) that he or she is still unfit to plead, the court should be able to reverse the decision to remit the case.[75]

(2) In the event of a resumed prosecution in which the defendant is subsequently found to be unfit to plead, there should be no requirement have a further hearing on the issue of whether the accused did the act. This is subject to the proviso that the court considers such a course to be in the interests of justice.[76]

9.85 These proposals found favour with, or were unobjectionable to, all those who responded to them.[77]

Discussion: Procedural concerns on resumption

9.86 We consider that a relapse after prosecution has been resumed should be extremely rare. However, the case of *Ferris*[78] demonstrates that this can occur, and we consider it important for there to be a procedure for such eventualities. In light of the support expressed by consultees for the provisional proposals above, we propose to adopt them in principle. However, in considering how they may be implemented in practice, several issues arise.

[75] CP197 Provisional Proposal 12.

[76] CP197 Provisional Proposal 13.

[77] Including the Justices' Clerks' Society, the Council of HM Circuit Judges, South Eastern Circuit, Professor Ronnie Mackay, Professor Rob Poole (academic and psychiatrist), Dr Lorna Duggan (consultant forensic psychiatrist in developmental disabilities), Dr Eileen Vizard CBE, Victim Support, and Kids Company (a charity that provided therapeutic, emotional and practical support, including legal assistance, to vulnerable children and young people).

[78] [2004] EWHC 1221 (Admin), [2004] All ER (D) 102.

Findings and disposals should not lapse on resumption of the prosecution

9.87 First, there is the question of whether any findings from the alternative finding procedure, and any disposals still live at the time of the resumption of the prosecution against the individual, should lapse once he or she attends court or leave has been granted. Under the current provisions, the restriction order lapses on the individual's first appearance in court.[79] The advantage of allowing the disposals to lapse is that the court is then free to consider bail, remand into custody or remand to hospital afresh, in consideration of the criminal proceedings now resumed. A remand into custody for an individual previously in the community on a supervision order may be rare, but could be appropriate, particularly if he or she faces proceedings for new allegations or where the original charge was of exceptional seriousness, but the person was not previously suitable for a hospital disposal.

9.88 However, the danger of such an approach is that there may be circumstances in which the continuation of the disposals is critical to the defendant maintaining his or her capacity for trial (for example, where the defendant is subject to a particular treatment regime in hospital or particular support in the community by virtue of the supervision order). It may also not be possible, or not without unhelpful disruption, for those arrangements to be replicated outside the scope of the disposals. We have in mind the difficulties of replicating any supervision order features as part of a bail package, or where the lapse of a hospital order may result in the person losing his or her bed in a secure unit.

9.89 Secondly, under our proposed reforms the individual's first appearance in court may not result in the resumption of proceedings, since the application for leave may be adjourned for further enquiries. Finally, in light of our proposals below in relation to cases where the defendant is determined for a second time to lack capacity for trial, it is preferable if the findings and disposals (if live at the time of application) remain in effect until the conclusion of the resumed proceedings.

9.90 However, we do consider it important that the judge should have the power, once he or she has granted leave for resumption of the prosecution, to revoke any extant disposal and remand an individual in custody, if that is appropriate.

Procedure where the defendant is again found to lack capacity for trial

9.91 Although it should extremely rarely arise, it is also necessary to consider what the procedure should be when an individual, in relation to whom prosecution has been resumed, again lacks capacity for trial.

How the issue of lack of capacity is to be determined a second time

9.92 We consider that the same test and evidential requirement should be imposed a second time as were applied the first time the defendant's capacity was in doubt. The resumed prosecution functions in the same way as any other trial process, and a second finding of lack of capacity denies the defendant his or her article 6 rights to fair trial, including to a trial in which he or she can participate effectively,

[79] Or on his return to prison, CP(I)A, s 5A(4).

in the same way as when first raised. There is no logical basis for imposing any different test.

A discretion as to whether a second alternative finding procedure is required

9.93 As discussed above at paragraph 9.16 we are concerned to avoid the court having to undertake a second alternative finding procedure following a second finding of lack of capacity, unless it is in the interests of justice to conduct that hearing afresh.

9.94 We propose this proviso because we consider that there may be circumstances in which it would be unfair for the findings from the original alternative finding procedure to remain valid. We envisage a situation, prior to the defendant being found to lack capacity for a second time, where fresh evidence has been adduced at the resumed trial, or the defendant has provided further instructions to his or her representatives, which raise issues not considered at the original alternative finding procedure. We have in mind, for example, instructions consistent with alibi, or which raise an issue with regard to reasonable belief in consent, which might lead to an acquittal at the second alternative finding procedure. In considering whether the interests of justice require a second determination of facts, the judge would, we anticipate, consider such issues, along with other factors such as the views of witnesses, their availability to give evidence, and the lapse of time since the alleged incident.

Disposals to continue to have effect but discretion to reconsider disposal

9.95 Finally, we consider what should occur where the court propose to dispose of the case without holding a second alternative finding procedure, or where the jury's findings at the second alternative finding procedure are the same as those at the earlier procedure. In those circumstances we consider that the starting point should be that any disposals imposed following the original alternative finding procedure which are still live should continue to have effect. However, the court should retain the power to reconsider disposal, but only to the extent that there remains an unexpired portion of a supervision order, or where a hospital order (with or without restriction) is appropriate.

Conclusion: Procedural concerns on resumption

9.96 In light of this analysis **we recommend, in relation to proceedings where leave has been given, or an order made, for prosecution to be resumed:**

(1) Where prosecution is resumed against an individual who previously lacked capacity, any findings made in the alternative finding procedure, and any live disposal (a hospital order, a restriction order or a supervision order) consequent on such a finding, should remain in effect until the conclusion of the resumed proceedings (see draft Bill clauses 18(1) to (3) and 47(1) to (3)).

(2) Once leave has been granted, or an order made, for the prosecution to be resumed, the judge should have the power to revoke any disposal and remand the defendant in custody, before or after trial (see draft Bill clauses 18(4) and (5) and 47(4) to (5)).

(3) **Where an issue is raised in resumed proceedings as to the capacity of the defendant for trial, the issue should be resolved in accordance with the usual capacity procedures** (see draft Bill clause 20 and following and clause 48 and following).

(4) **Where an individual has been found to lack capacity in the resumed proceedings, he or she should not be subject to a second alternative finding procedure, unless it is in the interests of justice for the procedure to be conducted afresh** (see draft Bill clauses 20(3) and 48(2)).

(5) **Where the finding(s) from the original alternative finding procedure remain in effect, or where the second alternative finding procedure yields the same finding(s) as previously returned, any original extant disposal should remain in effect** (see draft Bill clauses 21(2) and 49(2)).

(6) **The court should have the power to revoke or amend any disposal currently extant (but not to extend a supervision order beyond three years' duration) or to impose a hospital order (with or without a restriction order)** (see draft Bill clauses 21(3) and 49(3)).

CHAPTER 10
RECOMMENDATIONS

CHAPTER 2: FACILITATING FULL TRIAL THROUGH TRIAL ADJUSTMENTS

10.1 We recommend that all members of the judiciary engaged in criminal proceedings in the Crown and magistrates' courts and all legal representatives appearing in such proceedings should be required to receive training:

(1) to assist them in understanding and identifying participation and communication difficulties experienced by vulnerable defendants; and

(2) to raise their awareness of the available mechanisms to adjust proceedings to facilitate the defendant's effective participation.

[paragraph 2.30]

10.2 We recommend, in relation to intermediary assistance for the giving of evidence by a defendant, that section 33BA of the Youth Justice and Criminal Evidence Act 1999 (examination of an accused through an intermediary) be amended so that a defendant would be eligible for a direction for intermediary assistance for the giving of evidence where he or she is:

(1) under 18 years of age; or

(2) his or her ability to participate effectively in the proceedings is likely to be diminished by reason of mental disorder (as defined in section 1(2) of the Mental Health Act 1983), a significant impairment of intelligence and social functioning, or a physical disability or disorder.

10.3 The making of a direction for such assistance should remain subject to the court being satisfied that the making of the order is "necessary in order that the accused receives a fair trial".[1]

10.4 We recommend that a statutory entitlement be created for intermediary assistance to be extended to a defendant during or in connection with the proceedings, other than for the giving of evidence, subject to the following restrictions:

(1) That the court is satisfied that the defendant's ability to participate effectively in the proceedings is likely to be diminished to the extent that granting intermediary assistance is necessary for the defendant to have a fair trial; and

(2) That the defendant is:

(a) under 18 years of age; or

[1] Youth Justice and Criminal Evidence Act 1999, s 33BA(2)(b).

(b) his or her ability to participate effectively in the proceedings is likely to be diminished by reason of mental disorder (as defined in section 1(2) of the Mental Health Act 1983), a significant impairment of intelligence and social functioning, or a physical disability or disorder.

(3) The extent of the intermediary assistance granted should be limited to that which is necessary to ensure that the defendant can have a fair trial.

[paragraphs 2.66 to 2.69]

10.5 We recommend that intermediaries assisting defendants should be required to be registered according to a scheme administered by a suitable body, we anticipate under the authority of the Ministry of Justice. This registration scheme should include, in its implementation, the creation of a code of practice, or guidance manual, for defendant intermediaries. This code of practice should address, amongst other matters, the scope of the intermediary's role in court, the position with regards to disclosures made to the intermediary and guidance for out of court contact with the defendant.

[paragraph 2.84]

10.6 We recommend that:

(1) where there are concerns about the need for an intermediary, or uncertainty surrounding the particular intermediary specialism required; and

(2) where the service is available at court;

the court or defence should consider obtaining an initial independent assessment of the need for a defendant intermediary from a liaison and diversion practitioner at court. Such an approach could be incorporated into the CrimPD at 3F.5.

[paragraph 2.91]

10.7 We recommend that the eligibility criteria for the use of live link for the defendant contained within section 33A(4) and (5) of the Youth Justice and Criminal Evidence Act 1999 be amended so as to provide that a defendant will be eligible for such assistance where he or she is:

(1) under 18 years of age; or

(2) his or her ability to participate effectively in the proceedings as a witness giving oral evidence is likely to be diminished by reason of mental disorder (as defined in section 1(2) of the Mental Health Act 1983), a significant impairment of intelligence and social functioning, or a physical disability or disorder.

[paragraph 2.94]

CHAPTER 3: THE LEGAL TEST

10.8 We recommend that the test for unfitness to plead be reformulated in statute.

[paragraph 3.30]

10.9 We recommend the reformulation of the legal test as an assessment of the defendant's capacity to participate effectively in a trial.

[paragraph 3.35]

10.10 We recommend that the test for capacity to participate effectively in a trial should require the defendant to be able to participate effectively "in the proceedings on the offence or offences charged", and that assessment of the defendant's abilities in that regard should reflect consideration of the actual proceedings.

[paragraph 3.53]

10.11 We recommend that the test of capacity to participate effectively in trial should require the court, in applying the test, to take into account the assistance available to the accused in the proceedings.

[paragraph 3.61]

10.12 We recommend that the test should specify a list of relevant abilities and that the court be entitled to consider "any other ability that appears to the court to be relevant in the particular case".

[paragraph 3.70]

10.13 We recommend that the test should be structured so that the defendant will be considered to lack capacity where his or her relevant abilities are not, taken together, sufficient to enable the accused to participate effectively in the proceedings.

[paragraph 3.75]

10.14 We recommend that the ability to understand the charges should require the defendant to have an understanding of what the charge means, its nature, and also an understanding of the evidence on which the prosecution rely to establish the charge in the particular case.

[paragraph 3.85]

10.15 We recommend that the test include an ability to understand the trial process and the consequences of being convicted.

[paragraph 3.86]

10.16 We recommend that the ability to exercise the defendant's right to challenge a juror should not be a specified factor in the test.

[paragraph 3.90]

10.17 We recommend that the ability to give instructions to a legal representative should be included within the statutory test.

[paragraph 3.101]

10.18 We recommend that the statutory test include the ability to "follow the proceedings in court".

[paragraph 3.103]

10.19 We recommend the inclusion of the ability to give evidence as part of the statutory test.

[paragraph 3.107]

10.20 We recommend that the test should include as relevant abilities: the ability to make a decision about whether to plead guilty or not guilty, the ability to make a decision about whether to give evidence, and (where relevant) the ability to make a decision about whether to elect Crown Court trial.

[paragraph 3.116]

10.21 We recommend that the test should include as a relevant ability the ability of the defendant to make "any other decision that might need to be made by the defendant in connection with the trial".

[paragraph 3.117]

10.22 We recommend that the ability to make decisions should be defined in the test by specific reference to the Mental Capacity Act criteria.

[paragraph 3.121]

10.23 We do not recommend the inclusion of a diagnostic threshold as part of the legal test.

[paragraph 3.128]

10.24 We recommend that the statutory test for capacity to participate effectively in trial should be reformulated to require the defendant's relevant abilities to be sufficient to enable him or her to participate effectively "in the proceedings on the offence or offences charged".

[paragraph 3.136]

10.25 We recommend that the test explicitly exclude from "proceedings on an offence" proceedings under section 6 of the Proceeds of Crime Act 2002.

[paragraph 3.137]

10.26 We recommend the separation of the capacity to plead guilty from the capacity to participate effectively in a trial.

[paragraph 3.154]

10.27 We recommend that the separate test of capacity to plead guilty would be one applied only in cases which satisfy the following requirements:

(1) the defendant has been found to lack the capacity to participate effectively in a trial;

(2) two suitably qualified experts have specifically addressed in oral or written evidence the defendant's capacity to plead guilty notwithstanding the defendant's lack of capacity to participate effectively in a trial; and

(3) the defence apply, immediately following a determination of lack of capacity for trial, for the court to determine whether the defendant has the capacity to plead guilty.

[paragraph 3.155]

10.28 We recommend that the test of capacity to plead guilty should incorporate a requirement that the defendant has sufficient relevant abilities in relation to his or her understanding of the charge, the evidence adduced in relation to it, what it means to plead guilty and the consequences of doing so. The relevant abilities should also include the defendant's ability to give instructions, follow the remainder of the proceedings and to make the decisions required of him or her in connection with the decision to plead guilty.

[paragraph 3.156]

10.29 We recommend that guidance, or a code of practice, for clinicians in applying the tests should be drafted to accompany the statutory tests themselves.

[paragraph 3.162]

CHAPTER 4: ASSESSING THE DEFENDANT

10.30 We recommend that:

(1) There should be a statutory presumption of capacity to participate effectively in trial, for both adult and juvenile defendants.

(2) It should be a duty of the prosecution, defence, and the court, to keep the defendant's ability to participate under review and to raise the issue of lack of capacity promptly where concerns arise.

(3) The court should have the power to order an investigation into the defendant's capacity to participate effectively in the trial and to determine the defendant's capacity to participate effectively in the trial of its own motion.

[paragraph 4.16]

10.31 We recommend that:

(1) Where the defence raise the issue of lack of capacity, they should bear the burden of establishing lack of capacity on a balance of probabilities.

(2) Where the prosecution raise the issue of lack of capacity, they should bear the burden of establishing lack of capacity beyond reasonable doubt.

(3) Where the court determines the issue of capacity of its own motion, the prosecution should bear the burden of establishing lack of capacity on behalf of the court, but the standard of proof should be the balance of probabilities.

(4) The burden and standard of proof in these different situations should be set out in the statute for the avoidance of doubt.

[paragraph 4.24]

10.32 We recommend that the minimum requirement for a determination of the defendant's lack of capacity to participate effectively in the trial should be written or oral evidence from two experts.

[paragraph 4.43]

10.33 We recommend that:

(1) The minimum evidential requirement for a determination of effective participation be two experts competent to advise on the defendant's particular condition.

(2) One of those experts must be a section 12 MHA approved registered medical practitioner.

(3) The other expert, should be either a registered medical practitioner, or a registered psychologist or an individual having a qualification appearing on a list of appropriate disciplines and levels of qualification, approved by the Department of Health.

[paragraph 4.67]

10.34 We recommend that:

(1) The Criminal Practice Direction be amended to require the court or the parties to make use of liaison and diversion services at court (where available) to provide an initial assessment of the defendant (subject to his or her consent), where there are doubts as to his or her capacity, but it is unclear whether a full expert assessment is required.

(2) Where a party has obtained an expert report indicating that the defendant lacks the capacity to participate in the trial, that they should be required to serve that report on the opposing party and the court as soon as reasonably practicable.

(3) Where a party has served on the court and opposing party a first report indicating a lack of capacity for trial, that the normal process should be for the court to order that the second expert be jointly instructed by the defence and prosecution, unless such a course would not be in the interests of justice.

[paragraph 4.80]

10.35 We recommend that:

(1) The need to address the defendant's prospects for recovery, and the likely timeframe for achieving capacity for trial should be addressed by all experts instructed to assess the capacity of the defendant. The code of practice drafted to accompany the legal test should stipulate this as a requirement of every assessment.

(2) Once two expert reports have been prepared, and prior to commencing a hearing to consider the defendant's capacity to participate effectively in trial, there should be a statutory requirement for the court to consider whether it is appropriate to postpone proceedings for the defendant to achieve the capacity to participate effectively.

(3) The proceedings should only be adjourned where it is in the interests of justice, taking into account in particular whether there is a real prospect of the defendant having capacity to participate effectively after a period of adjournment and whether it is reasonable to delay proceedings in the circumstances.

(4) Save in exceptional circumstances, the period between postponement and the beginning of the determination of capacity, alternative finding procedure or full trial should not extend beyond 12 months.

[paragraph 4.97]

10.36 We recommend that section 36 of the Mental Health Act 1983 be amended as follows:

(1) section 36 MHA be extended to apply to defendants remanded in custody for offences for which the penalty is "fixed by law", namely murder, prior to conviction or determination of the facts;

(2) the duration of a section 36 MHA remand be extended to a maximum of 12 months; and

(3) a section 36 MHA remand be reviewed by the Crown Court every 12 weeks.

[paragraph 4.114]

10.37 We recommend that:

(1) A finding that a defendant lacks the capacity to participate effectively in the trial should remain effective in the proceedings unless and until the

contrary is established, the court having received evidence from two suitably qualified experts.

(2) The standard of proof should be the balance of probabilities, the burden resting on the party raising the issue or the prosecution if the issue is raised by the court.

[paragraph 4.133]

CHAPTER 5: THE PROCEDURE FOR THE DEFENDANT WHO LACKS CAPACITY FOR TRIAL IN THE CROWN COURT

10.38 We recommend that:

(1) the judge in the Crown Court have the discretion to decline to proceed with the alternative finding procedure;

(2) the judge should apply an interests of justice test, with specified factors to be taken into account, in considering whether to exercise this discretion; and

(3) exercise of the discretion not to proceed should not act as a bar to resumption of proceedings on recovery, subject to successful application by the prosecution or the defendant.

[paragraph 5.61]

10.39 We recommend that:

(1) The prosecution be required to establish all elements of the offence charged against a defendant who has been found to lack capacity for trial.[2]

(2) Where the jury are satisfied that the prosecution have established all the elements of the offence beyond reasonable doubt, they will return a finding that the allegation is proved against the defendant.

(3) Where they are not so satisfied they will acquit the defendant.

[paragraph 5.85]

10.40 We recommend:

(1) A special verdict, synonymous with an insanity verdict at full trial, be available to the jury at the alternative finding procedure.

(2) Either party, or the court of its own motion, should be entitled to raise the issue of insanity at the alternative finding procedure.

[2] Subject to the judge concluding that it is appropriate to proceed to an alternative finding procedure.

(3) A special verdict should only be available where the court has received evidence from two registered medical practitioners, one of whom is duly approved.

(4) Where the issue of insanity is raised, it should be considered by the jury in a single-stage fact-finding process.

[paragraph 5.107]

10.41 We recommend that the partial defences should not be available at the alternative finding procedure.

[paragraph 5.124]

10.42 We recommend that at an alternative finding procedure, any full defence (or basis for acquittal other than a partial defence) should be left to the jury, where there is evidence on which a properly directed jury might reasonably find the defence made out, or the essential element of the offence unproven.

[paragraph 5.127]

10.43 We recommend that the available verdicts, in relation to each charge, in a single-stage alternative finding procedure should be:

(1) a finding that the allegation is proved against the defendant;

(2) an outright acquittal; or

(3) a qualified acquittal (a "special verdict" synonymous with an insanity verdict in full trial).

[paragraph 5.132]

10.44 We recommend that a code of practice or guidance document should be drafted to assist representatives appointed by the court to put the case for the defendant.

[paragraph 5.137]

10.45 We recommend that the following procedural arrangements should be set out in statutory provisions:

(1) that in every case the court should be required to appoint a person to put the case for the defendant following a finding of lack of capacity;

(2) in doing so the court should take into account the views of the defendant, in so far as they can be identified. However, an appointment should be made even where the defendant would prefer not to be represented;

(3) where a representative is already instructed for the defendant, the court should appoint that individual, unless the court is satisfied that the advocate will not be competent to deal with the issues arising in the hearing; and

(4) the representative should be required to give effect to the defendant's instructions, in so far as they can be identified, unless he or she concludes that to do so would be contrary to the defendant's legal best interests.

[paragraph 5.138]

10.46 We recommend:

(1) That there should be a rebuttable statutory presumption that the alternative finding procedure in relation to any defendant should be conducted separately from the trial of any co-defendants.

(2) The starting position should therefore be separate proceedings, unless, on the application of any party, or the court of its own motion, the court determines that it is in the interests of justice for the alternative finding procedure and the trial of co-defendants to proceed together.

(3) In considering whether simultaneous proceedings would be in the interests of justice, the court should take into account how joint proceedings would be likely to affect:

(a) the interests of the defendant who lacks capacity;

(b) the interests of other defendants in the proceedings;

(c) witnesses in the proceedings, and others affected by the offence or offences charged; and

(d) the public interest.

[paragraph 5.146]

10.47 We recommend that:

(1) the defendant should be entitled to elect for the alternative finding hearing to be conducted by a judge sitting alone;

(2) such an election should not be available where the alternative finding procedure is to be conducted at the same time as the trial of co-defendant(s); but

(3) in an application for simultaneous proceedings, the fact that the defendant might otherwise opt for a judge-only alternative finding procedure should be a matter to be considered by the judge in assessing where the interests of justice lie.

[paragraph 5.158]

10.48 We recommend that:

(1) Although no conviction can result, the alternative finding procedure should be conducted as proceedings to which the strict rules of evidence apply.

(2) The Criminal Practice Direction on vulnerable defendants (paragraphs 3G.1 to 3G.6)[3] should be amended so that it also applies in the alternative finding procedure to defendants who lack capacity for trial.

[paragraph 5.167]

CHAPTER 6: DISPOSALS

10.49 We recommend that:

(1) The provisions for supervision orders be amended so that the local authority, in the area in which the defendant ordinarily resides, has sole responsibility for supervising the individual who lacks capacity, where the court decides that a supervision order is appropriate.

(2) For an adult, the supervising officer provided by the local authority should be a social worker of the local authority.

(3) For an individual under the age of 18, the supervisor should be either a social worker operating within a children's services team, or a person with social work experience (or in Wales a social worker) operating as part of a youth offending team.

[paragraph 6.48]

10.50 We recommend:

(1) for every supervision order the supervised person be required to attend supervision meetings, rather than simply to "keep in touch" with the supervising officer as currently; and

(2) that a constructive support requirement be available to be imposed as part of a supervision order, requiring the supervised person to comply with arrangements made with a view to dealing with his or her needs including education, training, employment and accommodation needs. Such a requirement should be imposed only where the court is satisfied that it is desirable in the interests of:

(a) supporting the supervised person;

(b) preventing any repetition of the conduct that led to the making of the supervision order; or

[3] CrimPD 2015 [2015] EWCA Crim 1567.

(c) preventing involvement in conduct which poses a risk of harm to the supervised person or others.

[paragraph 6.60]

10.51 We recommend that:

(1) The following restrictive requirements be available to be imposed as part of a supervision order:

(a) A prohibited activity requirement, including the capacity to prohibit the individual's possession, use or carriage of a firearm within the meaning of the Firearms Act 1968.

(b) An exclusion requirement, prohibiting the supervised person from attending at a specified place.

(2) No restrictive requirement should be imposed unless the court is satisfied that it is necessary in the interests of:

(a) supporting the supervised person;

(b) preventing any repetition of the conduct that led to the making of the supervision order; or

(c) preventing involvement in conduct which poses a risk of harm to the supervised person.

[paragraph 6.64]

10.52 We make two recommendations in relation to the incorporation of risk assessment, monitoring and review in order to enhance the effectiveness of supervision orders:

(1) The court imposing a supervision order should have the power to include a requirement:

(a) providing for periodic review of the order, with flexibility to vary the intervals of such reviews;

(b) requiring the attendance of the individual at a review hearing;

(c) requiring reports by the supervising officer and any registered medical practitioner directing treatment under the order; and

(d) allowing for subsequent reviews to be conducted without oral hearing where appropriate.

(2) Section 327(4) of the Criminal Justice Act 2003 should be amended so that where a specified violent or sexual offence (listed in schedule 15 of the Criminal Justice Act 2003) has been proved against an individual at the alternative finding procedure (or a special verdict has been returned in that regard), an individual made subject to a supervision order in

relation to that offence should also be made subject to MAPPA for the period of the order.

[paragraph 6.79]

10.53 We recommend that:

(1) Provisions addressing a supervised person's failure to comply with a supervision order should be introduced.

(2) Breach should only be established where the court is satisfied that the supervised person has wilfully and without reasonable excuse failed to comply with one or more of the requirements of the order.

(3) The breach hearing should not proceed where the supervised person is found to lack capacity for that hearing.

(4) On breach being established, the Crown Court should have the following powers:

(a) To make no order.

(b) To amend or revoke the existing order.

(c) To require an adult to pay a fine up to a maximum of £10,000.

(d) To make a curfew order (with or without electronic tagging).

(e) Subject to prior warning, to revoke the supervision order and impose on an adult individual a custodial term not exceeding two years' imprisonment, or the maximum term that would have been available for the offence for which the supervision was imposed, whichever is the lesser.

(f) Subject to prior warning, and where the original offence was imprisonable, to revoke the supervision order and to impose on a youth a youth rehabilitation order with intensive supervision and surveillance.

[paragraph 6.97]

10.54 We recommend that the maximum length of the supervision order be extended from two years to three years.

[paragraph 6.100]

10.55 We recommend removing the mandatory requirement that a restriction order be imposed on a defendant who is otherwise suitable for hospitalisation under section 37(2) of the Mental Health Act 1983 and against whom there has been an adverse finding at the section 4A hearing in relation to an offence the sentence for which is fixed by law.

[paragraph 6.110]

10.56 We recommend that a restraining order be available to the court where a defendant has had an allegation proved against him or her at the alternative finding procedure.

[paragraph 6.113]

CHAPTER 7: EFFECTIVE PARTICIPATION IN THE MAGISTRATES' AND YOUTH COURTS

10.57 We recommend that a statutory framework for determining a defendant's capacity to participate effectively, comparable to that which we recommend for the Crown Court, should be created in the summary jurisdiction.

[paragraph 7.55]

10.58 We recommend that the statutory framework for determining a defendant's capacity to participate effectively in the summary jurisdiction should be applicable to all criminal offences.

[paragraph 7.60]

10.59 Save where it is necessary to make procedural adaptations, we recommend that the same statutory test for capacity to participate effectively in a trial, and capacity to plead guilty, should apply in all courts: Crown, adult magistrates' and youth courts.

[paragraph 7.78]

10.60 We recommend that the same evidential requirement for a finding that a defendant lacks capacity for trial should apply in the adult magistrates' and youth courts as in the Crown Court.

[paragraph 7.84]

10.61 We recommend that:

(1) Cases where an issue as to the capacity of the defendant to participate effectively in a summary trial has been raised should be reserved to district judges for determination and subsequent procedures.

(2) District judges should receive specific training on the reformed test and the procedures to address issues of effective participation in the summary courts.

[paragraph 7.92]

10.62 We recommend that:

(1) Where an adult defendant has the right to elect jury trial, on an either way charge for which the magistrates' court has accepted jurisdiction, if an issue arises as to his or her capacity to participate effectively in the proceedings, the case should be retained in the magistrates' court for determination of that issue.

(2) If the defendant is found to be able to participate effectively in the proceedings, or the issue is abandoned by the party who raised it, then the mode of trial procedure should continue in the usual way.

(3) If the defendant is found to lack the capacity to participate effectively in the proceedings, all further hearings in relation to that case should be retained in the magistrates' court.

[paragraph 7.100]

10.63 In relation to section 35 of the Mental Health Act 1983 we recommend:

(1) Section 35 of the MHA should be extended to be applicable prior to conviction or an alternative finding procedure, to all defendants charged with imprisonable matters without the need for the defendant's consent.

(2) Section 35 of the MHA should be applicable to all defendants charged with imprisonable matters following a conviction or alternative finding in relation to an imprisonable offence.

[paragraph 7.106]

10.64 In relation to section 36 of the Mental Health Act 1983 we recommend that:

(1) Section 36 of the MHA be applicable to defendants in the magistrates' courts who are remanded in custody in relation to imprisonable matters prior to conviction or an alternative finding procedure.

(2) That the maximum duration of a section 36 remand in the magistrates' court should be six months.

[paragraph 7.107]

10.65 We recommend that all defendants under 14 years of age, appearing in the youth court for the first time, must be screened for participation difficulties, unless the defendant has already been assessed prior to attending court.

[paragraph 7.130]

10.66 We recommend that:

(1) The district judge in the magistrates' or youth court should have the discretion to decline to proceed with the alternative finding procedure.

(2) The judge should apply an interests of justice test, with specified factors to be taken into account, in considering whether to exercise this discretion.

(3) Exercise of the discretion not to proceed should not act as a bar to resumption of proceedings on recovery, subject to successful application by the prosecution or the defendant.

[paragraph 7.139]

10.67 We recommend:

(1) There should be an alternative finding procedure before the district judge seized of the case, but otherwise in the manner recommended for the Crown Court.

(2) The available outcomes at the alternative finding procedure in the magistrates' and youth courts would therefore be:

(a) a finding that the allegation is proved against the defendant;

(b) an outright acquittal; or

(c) a special determination that the defendant is not guilty by reason of insanity.

(3) In every case the court should be required to appoint a person to put the case for the defendant where an alternative finding procedure is held, (in accordance with the recommendations made for the Crown Court).

[paragraph 7.150]

10.68 We recommend that where an allegation is proved against a defendant, or a special determination is arrived at, in relation to a non-imprisonable offence, the available disposals in adult magistrates' courts should be:

(1) a supervision order (with or without medical treatment); and

(2) an absolute discharge.

[paragraph 7.156]

10.69 We recommend that where an allegation is proved against a defendant, or a special determination is arrived at, in relation to an imprisonable offence, the available disposals in adult magistrates' courts should be:

(1) a hospital order (without restriction);

(2) a supervision order (with or without medical treatment); and

(3) an absolute discharge.

[paragraph 7.163]

10.70 We recommend that, where the district judge considers that a restriction order should be imposed, he or she should have the power to commit the defendant to the Crown Court for a restriction order to be imposed.

[paragraph 7.164]

10.71 We recommend that the magistrates' courts' powers to sanction adult defendants in respect of breach of a supervision order should mirror those available in the Crown Court, save that a custodial sanction should not be available in the summary jurisdiction.

[paragraph 7.169]

10.72 We recommend that where at the alternative finding procedure an allegation is proved against a child or young person, or a special determination is arrived at, the available disposals in youth court should be:

(1) a hospital order (without restriction), but only where the adverse finding relates to an imprisonable offence;

(2) a supervision order (with or without medical treatment); and

(3) an absolute discharge.

10.73 We recommend that, in the youth court, where the district judge considers that a restriction order should be imposed, he or she should have the power to commit the defendant to the Crown Court for a restriction order to be imposed, but only where the defendant is aged 14 or over.

10.74 Sanction for breach of a supervision order should be restricted to:

(1) amendment of the supervision order to add a curfew requirement with or without an electronic monitoring requirement; or

(2) the revocation of the supervision order and imposition of a youth rehabilitation order with intensive supervision and surveillance.

[paragraphs 7.199 to 7.201]

10.75 We recommend that there should be mandatory specialist training on issues relevant to trying youths (particularly awareness training in relation to participation and communication issues arising out of learning disability, mental health difficulties, developmental immaturity and developmental disorders) for all legal practitioners and members of the judiciary engaged in cases involving young defendants in any criminal court.

[paragraph 7.212]

CHAPTER 8: APPEALS FROM THE CROWN AND MAGISTRATES' COURTS

10.76 We recommend that the rights of appeal vested in the individual who lacks capacity for trial should be exercisable by the legal representative appointed by the court to put the case for the defence.

[paragraph 8.19]

10.77 We recommend that, where a finding arising from the alternative finding procedure has been quashed on appeal, but the finding that the appellant lacked the capacity for trial remains, the Court of Appeal should have the power to remit

the case back to the Crown Court for a rehearing of the alternative finding procedure.

[paragraph 8.24]

10.78 We recommend that an individual who lacks capacity should have rights of appeal from the magistrates' court to the Crown Court which mirror the rights of appeal against sentence and conviction under section 108 of the Magistrates' Courts Act 1980. The individual who lacks capacity should have such rights of appeal in relation to:

(1) A finding that he or she lacked the capacity to participate effectively in trial.

(2) A finding that he or she lacked the capacity to plead guilty.

(3) A finding that an offence is proved against him or her in the alternative finding procedure.

(4) A special determination that the individual is not guilty by reason of insanity.

(5) Any disposal imposed.

[paragraph 8.28]

CHAPTER 9: RESUMING THE PROSECUTION

10.79 We recommend:

(1) That the prosecution be entitled to apply to the Crown Court for leave to resume prosecution in respect of an individual against whom, at an alternative finding procedure, a jury:

(a) found proved a specified violent or sexual offence;[4] or

(b) returned a special verdict in respect of an allegation of murder.

(2) That such leave should only be granted if:

(a) the court is satisfied that there are reasonable grounds to believe that the individual would have the capacity to participate effectively in such a trial; and

(b) the court determines that it is in the interests of justice that the individual be.

(3) In determining whether it is in the interests of justice for the individual to be tried, the court must take into account, amongst any other relevant matters:

[4] As defined by Criminal Justice Act 2003, s 224.

(a) the seriousness of the offence(s) alleged;

(b) the impact of the alleged offence(s);

(c) the views of those affected by the alleged offence;

(d) the views of witnesses, and their availability and willingness to give evidence;

(e) the lapse of time since the alleged offence(s) and since any alternative finding procedure;

(f) any order(s) made in respect of the individual following an alternative finding procedure; and

(g) the likely sentence if the individual is convicted.

(4) The prosecution should have a similar right to apply for leave to resume prosecution in respect of an individual in relation to whom the judge declined to hold an alternative finding procedure, where the indictment contained a specified violent or sexual offence.[5]

(5) The Secretary of State's power to remit a recovered individual to court or prison should not be replicated in the new statutory provisions.

(6) Where leave to resume proceedings is granted following an alternative finding procedure, all offences in respect of which the jury found the allegation proved against the individual, should be the subject of resumed prosecution.

(7) Where leave to resume proceedings is granted where no alternative finding procedure has previously been held, all charges which appeared in the same indictment as the triggering specified offence should be the subject of resumed prosecution.

[paragraph 9.55]

10.80 We recommend that the prosecution should have the same entitlement to apply for leave to resume proceedings in the magistrates' courts as in the Crown Court.

[paragraph 9.58]

10.81 We recommend:

(1) That a defendant be entitled to apply to the Crown Court for an order that prosecution be resumed against him or her, where that defendant was previously found to lack capacity in the proceedings.

[5] As defined by the Criminal Justice Act 2003, s 224.

(2) This entitlement should arise in relation to any allegation which was found proved against the defendant at an alternative finding procedure, or in relation to which a special verdict was returned.

(3) The entitlement should also arise where the judge declined to hold an alternative finding procedure.

(4) That such an order should only be made if:

(a) the court is satisfied that there are reasonable grounds to believe that the individual would have the capacity to participate effectively in such a trial; and

(b) the court determines that it is in the interests of justice that the defendant be tried.

(5) In determining whether it is in the interests of justice for the individual to be tried, the court must take into account, amongst any other relevant matters:

(a) the seriousness of the offence(s) alleged;

(b) the impact of the alleged offence(s);

(c) the views of those affected by the alleged offence(s);

(d) the views of witnesses, and their availability and willingness to give evidence;

(e) the lapse of time since the alleged offence(s) and since any alternative finding procedure;

(f) any order(s) made in respect of the defendant following the alternative finding procedure; and

(g) any delay in the defendant's making of the application for leave and the reason for it.

(6) Where an order to resume proceedings is made following an alternative finding procedure, all offences in respect of which the jury found the allegation proved against the individual, or in respect of which a special verdict was returned, should be the subject of resumed prosecution.

(7) Where leave to resume proceedings is granted where no alternative finding procedure has previously been held, all charges which appeared in the indictment when the lack of capacity determination was arrived at should be the subject of resumed prosecution.

[paragraph 9.80]

10.82 We recommend that a defendant, found in the magistrates' court to lack capacity for trial, on achieving capacity should have the same entitlement to apply for

proceedings to be resumed against him or her as he or she would enjoy in the Crown Court.

[paragraph 9.83]

10.83 We recommend, in relation to proceedings where leave has been given, or an order made, for prosecution to be resumed:

(1) Where prosecution is resumed against an individual who previously lacked capacity, any findings made in the alternative finding procedure, and any live disposal (a hospital order, a restriction order or a supervision order) consequent on such a finding, should remain in effect until the conclusion of the resumed proceedings.

(2) Once leave has been granted, or an order made, for the prosecution to be resumed, the judge should have the power to revoke any disposal and remand the defendant in custody, before or after trial.

(3) Where an issue is raised in resumed proceedings as to the capacity of the defendant for trial, the issue should be resolved in accordance with the usual capacity procedures.

(4) Where an individual has been found to lack capacity in the resumed proceedings, he or she should not be subject to a second alternative finding procedure, unless it is in the interests of justice for the procedure to be conducted afresh.

(5) Where the finding(s) from the original alternative finding procedure remain in effect, or where the second alternative finding procedure yields the same finding(s) as previously returned, any original extant disposal should remain in effect.

(6) The court should have the power to revoke or amend any disposal currently extant (but not to extend a supervision order beyond three years' duration) or to impose a hospital order (with or without a restriction order).

[paragraph 9.96]

(Signed) DAVID BEAN, *Chairman*
NICK HOPKINS
STEPHEN LEWIS
DAVID ORMEROD
NICHOLAS PAINES

ELAINE LORIMER, *Chief Executive*
18 December 2015