Law Commission

Reforming the law

Unfitness to Plead

An Issues Paper

2 May 2014

Law Commission

UNFITNESS TO PLEAD

An Issues Paper

THE LAW COMMISSION

The Law Commission was set up by section 1 of the Law Commissions Act 1965 for the purpose of promoting the reform of the law.

The Law Commissioners are: The Rt Hon Lord Justice Lloyd Jones, *Chairman,* Professor Elizabeth Cooke, David Hertzell, Professor David Ormerod QC and Nicholas Paines QC. The Chief Executive is Elaine Lorimer.

We published a consultation paper on Unfitness to Plead on 27 October 2010, which contained our provisional proposals for comprehensive reform of the law in England and Wales. We received over 50 responses and on 10 April 2013 we published an analysis of those responses.

We are now reviewing our provisional proposals in light of the consultation responses, and taking into account the changes to the criminal justice system since we produced the consultation paper in October 2010. In doing so, we have identified a number of further questions on which invite additional input from stakeholders. The purpose of asking these further questions is to ensure that our final recommendations to government are practical and properly reflect the experience and views of all those who encounter these issues, whether by working within the criminal justice system, or experiencing it as a victim, witness, defendant or general member of the public.

We have set out these further questions in this issues paper. **We invite responses by 25 July 2014**.

Comments may be sent:

On the response form at http://lawcommission.justice.gov.uk/areas/unfitness-to-plead.htm

OR

By email to fitnesstoplead@lawcommission.gsi.gov.uk

OR

By post to Miranda Bevan, Law Commission, 1st Floor, Tower, Post Point 1.54, 52 Queen Anne's Gate, London SW1H 9AG

Tel: 020 3334 2743 / Fax: 020 3334 0201

Information provided to the Law Commission

We may publish or disclose information you provide us in response to this consultation, including personal information. For example, we may publish an extract of your response in Law Commission publications, or publish the response in its entirety. We may also be required to disclose the information, such as in accordance with the Freedom of Information Act 2000.

If you want information that you provide to be treated as confidential please contact us first, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic disclaimer generated by your IT system will not be regarded as binding on the Law Commission.

The Law Commission will process your personal data in accordance with the Data Protection Act 1998.

THE LAW COMMISSION

UNFITNESS TO PLEAD: AN ISSUES PAPER

CONTENTS

	Paragraph	*Page*
PART 1: INTRODUCTION		**1**
PART 2: THE LEGAL TEST		**5**
The current position	2.1	5
The problems identified with the current position	2.4	6
The CP Provisional Proposals and questions asked	2.10	7
Consultation responses to Provisional Proposal 1	2.19	9
Discussion and further questions arising	2.26	11
Consultation responses to Provisional Proposals 3 and 4	2.48	15
Discussion and further questions arising	2.55	17
PART 3: SPECIAL MEASURES		**24**
The current position	3.1	24
Problems with the current position	3.5	24
CP Provisional Proposals in relation to special measures	3.6	25
Consultation responses in relation to special measures	3.9	25
Discussion and further questions arising	3.12	27
PART 4: ASSESSING THE CAPACITY OF THE ACCUSED		**30**
The current position	4.1	30
Problems with the current position	4.4	30
The CP Provisional Proposals	4.5	31

	Paragraph	Page
Consultation responses	4.9	31
Discussion and further questions arising	4.15	34
PART 5: PROCEDURE FOR THE UNFIT ACCUSED		**37**
The current position	5.1	37
Problems with the current position	5.2	37
CP Provisional Proposals	5.7	38
Consultation responses	5.14	41
Discussion and further questions arising	5.21	43
PART 6: DISPOSALS		**55**
The current position	6.1	55
Consultation responses	6.3	55
Discussion and further questioning arising	6.6	56
PART 7: REMISSION AND APPEALS		**60**
The current position	7.1	60
Problems identified with the current position	7.6	60
CP Provisional Proposals and questions	7.10	61
The consultation responses	7.14	62
Discussion and further questions arising	7.24	64
PART 8: UNFITNESS TO PLEAD IN THE MAGISTRATES' AND YOUTH COURTS		**69**
The current position	8.1	69

	Paragraph	*Page*
Problems with the current arrangements: magistrates' courts	8.5	70
Problems with the current arrangements: youth courts	8.23	74
CP questions	8.40	78
Consultees' responses: magistrates' courts	8.43	79
Consultees' responses: youth courts	8.54	81
Discussion and further questions arising	8.59	82
Adjustments to the test and procedure in the youth court	8.111	91
Disposals in the summary jurisdiction	8.127	95
Remissions and appeals	8.139	97
PART 9: SUMMARY OF FURTHER QUESTIONS		**99**

THE LAW COMMISSION

UNFITNESS TO PLEAD: AN ISSUES PAPER

PART 1
INTRODUCTION

1.1 The Law Commission published a consultation paper ("CP") on unfitness to plead in October 2010 in which we asked questions and advanced provisional proposals regarding reform of the test and procedure for unfitness to plead.[1] We received many valuable responses to that consultation. The purpose of this issues paper is to develop the provisional proposals and questions from the CP, and invite responses to further questions we feel need to be addressed in light of the responses to the consultation, prior to formulating final recommendations for reform.

1.2 The reasons for formulating these further questions, and seeking additional input, are:

(1) the significant issues and new areas for consideration raised by the responses to the CP;

(2) the scope for formulating more specific provisional proposals for the magistrates' and youth courts in light of the helpful responses and further information provided by consultees;

(3) the lapse of time since the consultation period which closed in January 2011;[2]

(4) that our provisional proposals for reform must be reviewed in the light of the constraints on the criminal justice system which will arise from budget reductions. The Ministry of Justice faces a drop in budget of approximately a third over a five-year period, from a budget of

[1] Unfitness to Plead (2010) Law Commission Consultation Paper No 197. An analysis of responses document (the "AR") has also been published on our website, along with the full text of the responses. These can be found here: http://lawcommission.justice.gov.uk/areas/unfitness-to-plead.htm.

[2] Following the publication of the CP, further work on this project was delayed by a number of factors. In particular, the Law Commission was asked by the Ministry of Justice ("MoJ") and the Attorney General to expedite two other projects: Hate Crime and Contempt of Court. We also produced a Discussion Paper on the related topic of insanity and automatism, published on 23 July 2013.

approximately £9 billion in 2011-2012 to a projected settlement of £6.2 billion for 2015-16;[3]

(5) that our provisional proposals for reform should take into account the present government's continued commitment to implementing a national model for liaison and diversion services for offenders with mental health problems, one of the key recommendations of the Bradley Report.[4] 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[5] with unfitness to plead or capacity issues.[6]

1.3 Not every question posed or proposal advanced in the CP is considered in this paper. We focus on those which generated conflicting responses, or where the responses raised further significant issues which we need to address.

Structure of the Paper

1.4 The areas that we will focus on in this paper are as follows:

(1) the legal test (Part 2);

(2) special measures (Part 3);

(3) assessing the capacity of the accused (Part 4);

(4) the procedure for the unfit accused (Part 5);

(5) disposals (Part 6);

(6) remission and appeals (Part 7); and

[3] Ministry of Justice, *Annual Report and Accounts 2011-12* (https://www.gov.uk/government/publications/ministry-of-justice-annual-report-and-accounts-2011-12) and HM Treasury, *Spending Round 2013* (https://www.gov.uk/government/publications/spending-round-2013-documents) (last accessed 7 April 2014).

[4] Department of Health, *The Bradley Report: Lord Bradley's Review of People with Mental Health Problems or Learning Disabilities in the Criminal Justice System* (2009), available from: http://webarchive.nationalarchives.gov.uk/20130107105354/http://www.dh.gov.uk/prod_consum_dh/groups/dh_digitalassets/documents/digitalasset/dh_098698.pdf (last accessed 7 April 2014).

[5] The terms "defendant" and "accused" are used in this document interchangeably, as in the case law and literature, to designate an individual who faces criminal charges in the courts. No distinction is intended between the two terms.

[6] See NHS England's *Operating Model for Liaison and Diversion Services across England* (September 2013), available from: http://www.fflm.ac.uk/upload/documents/1382004183.doc (last accessed 8 April 2014) and their *2013/14 NHS Standard Contract for Liaison and Diversion Service*, available from http://www.prp-ccf.org.uk/PRPFiles/Liaison%20and%20Diversion%20Service%20Service%20Specification.pdf (last accessed 8 April 2014).

(7) unfitness to plead in the magistrates' and youth courts (Part 8).

1.5 In relation to each such area we set out, briefly:

(1) the current position;

(2) the problems with the current position;

(3) the CP provisional proposals and/or questions asked;

(4) the consultation responses;

(5) discussion and further questions arising.

Overview of our provisional approach

1.6 Before embarking upon our analysis, we think it useful to give an overview of our provisional approach to issues of unfitness to plead.

1.7 Our analysis in this document is based on the central thesis that the normal criminal process is the optimum outcome where a defendant faces an allegation in our criminal justice system. We consider that this is the best outcome not just for the accused but also for victims, witnesses and society more generally. 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, whilst offering the broadest range of disposals.

1.8 We consider that the courts should only deviate from the usual trial process, and adopt alternative procedures, where doing so is in the best interests of the defendant because they lack capacity to participate effectively in the determination of the allegation(s) they face. We consider that removing an accused from the full criminal process should be undertaken only with great caution, since it denies the accused, witnesses and the wider public the benefit of fair trial guarantees and the chance to see the allegation(s) fully scrutinised.

1.9 As a result, whilst we acknowledge that a very small number of defendants will never have the capacity to participate effectively in the determination of an allegation, 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. Likewise, we consider it imperative that appropriate opportunity be allowed for the defendant to regain or achieve capacity, in particular in considering adjourning proceedings for such a recovery to be achieved.

1.10 We therefore consider that the legal test for capacity should focus on functioning (ie what the defendant is capable of), rather than on status (ie what impairment or illness they may suffer). In addition, since the purpose of the test is to identify whether an accused is capable of participating effectively in the determination of the particular allegation, we consider it logical that such a test should incorporate consideration of the context in which the defendant will be required to function. We think it likely, and appropriate, that a defendant might be found to have

capacity for one matter, for example a fare evasion allegation in the magistrates' court, but lack capacity in respect of another, for example an allegation in the Crown Court of conspiracy to commit robbery.

1.11 We note the overwhelming enthusiasm expressed by consultees for reform to the procedures for addressing capacity issues in the magistrates' and youth courts. We consider that the protections for defendants with effective participation difficulties should be the same whether they are tried in the magistrates' courts or the Crown Court. We are particularly concerned that young defendants should enjoy, at the very least, comparable rights to those afforded to older defendants. Indeed we take the view that their greater vulnerabilities should be met with greater protections, especially in terms of screening to identify more readily those who may have capacity issues.

PART 2
THE LEGAL TEST

THE CURRENT POSITION[1]

2.1 The common law test for fitness to plead remains that set down in the 1836 case of *Pritchard*,[2] namely that the defendant must be:

> Of sufficient intellect to comprehend the course of proceedings in the trial so as to make a proper defence, to know that he may challenge any of you to whom he may object and to comprehend the details of the evidence.[3]

2.2 The mere fact that an accused may not be capable of acting in his or her best interests is not sufficient to warrant a finding of unfitness to plead.[4] Indeed, a defendant whose mental state is "grossly abnormal" and who, although aware of the nature of his actions, is unable to view them in "any sensible sort of manner" would not necessarily be considered to be unfit to plead.[5]

2.3 This test has been reinterpreted by the courts to make it more consistent with the modern trial process. Probably the most widely favoured reformulation 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. The judge directed 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 proceedings; and

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

[1] Discussed more fully in the CP, paras 2.44 to 2.87.

[2] *R v Pritchard* (1836) 7 C & P 303.

[3] *R v Pritchard* (1836) 7 C & P 303, 304.

[4] *R v Robertson* [1968] 3 All ER 557.

[5] *R v Berry* (1978) 66 Cr App R 156.

[6] *M (John)* [2003] EWCA Crim 3452, [2003] All ER (D) 199. See the CP, paras 2.53 to 2.56, for the trial judge's full elaboration of the meaning of these criteria.

[7] This is a good example of an expansion designed to make the test consistent with the trial process, of which giving evidence tends to be an important part.

THE PROBLEMS IDENTIFIED WITH THE CURRENT POSITION[8]

Inconsistent with the modern trial process

2.4 The *Pritchard* test does not adequately address aspects of the modern trial process, such as the giving of evidence by the defendant. Although the modern formulation of the test in *John M* does address this, it does not appear to be consistently employed by clinicians or the courts. 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*, since there is no longer a right to challenge a juror without cause.[9]

Sets the threshold for unfitness too high

2.5 Arguably, the threshold for being found unfit 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*,[10] may be found to be fit to plead.

Disproportionate emphasis on cognitive ability

2.6 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 the decisions required of him or her and to engage in a rational way with the proceedings.[11]

No consideration of decision-making capacity

2.7 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. 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.[12]

2.8 By contrast, in criminal proceedings an accused will be deemed 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 regarding legal proceedings."[13] This gives rise to a significant discrepancy between the test for fitness in criminal proceedings and the test for capacity in

[8] Discussed more fully in the CP, paras 2.60 to 2.106

[9] This right to "peremptory challenge" was abolished by section 118(1) of the Criminal Justice Act 1988.

[10] (1978) 66 Cr App R 156. 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 [158].

[11] See, for example, the cases of *R v Robertson* [1968] 3 All ER 557; *Murray* [2008] EWCA Crim 1792, and *Diamond* [2008] EWCA Crim 923, [2008] All ER (D) 401.

[12] MCA 2005, s3.

[13] *Moyle* [2008] EWCA Crim 3059.

civil proceedings.[14] Whilst this discrepancy is not of itself a problem, it does give rise to 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.

Poor fit with "effective participation" test under article 6 ECHR

2.9 The *Pritchard* criteria do not fully align with the separate test of "effective participation" required by article 6 ECHR,[15] and in particular the requirements set out in *SC v United Kingdom*:

> However, "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.[16]

2.10 This 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; the latter capacity in particular is not adequately encapsulated by the *Pritchard* criteria.

THE CP PROVISIONAL PROPOSALS AND QUESTIONS ASKED

A new test for capacity

2.11 In light of these problems, we proposed in the CP to replace the *Pritchard* test with a new legal test of decision-making capacity:

> *Provisional Proposal 1: The current Pritchard test should be replaced and there should be a new legal test which assesses whether or not the accused has decision-making capacity for trial. This test should take into account all the requirements for meaningful participation in the criminal proceedings.*[17]

2.12 In the formulation of this new test, we drew on the MCA 2005 and suggested that a defendant should be found to lack capacity if he or she is unable:

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

[15] See *Stanford v United Kingdom* App No 16757/90, *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).

[16] *SC v United Kingdom* (2005) 40 EHRR 10 (app no 60958/00), [29].

[17] CP, paras 3.1 to 3.41.

(1) to understand the information relevant to the decisions that he or she will have to make in the course of his or her trial;

(2) to retain that information;

(3) to use or weigh that information as part of the decision-making process; or

(4) to communicate his or her decisions.

2.13 We considered that this new formulation of the test would ensure that all the requirements for meaningful participation were met, and would achieve greater fairness for vulnerable defendants.

A single ("unitary") test

2.14 In the CP we proposed that the court would apply a single test of decision-making capacity at one point in the process to determine whether the defendant has capacity for all purposes in relation to trial:

> *Provisional Proposal 3: The legal test should be a revised single test which assesses the decision-making capacity of the accused by reference to the entire spectrum of trial decisions he or she might be required to make. Under this test an accused would be found to have or to lack decision-making capacity for the criminal proceedings.*[18]

2.15 We referred to this as a "unitary" test.[19] We envisaged, subject to there being no substantial change in the defendant's condition, that this test would be applied only once. We favoured that formulation over what we called a "disaggregated" approach,[20] which would assess the accused's capacity for different stages of the criminal process, including separate consideration of fitness to plead and fitness to stand trial.

2.16 We preferred this "unitary" approach on the basis that it would be simpler and less time-consuming to apply, and that it reflected the underlying rationale of the fitness to plead procedure.

The question of proportionality

2.17 We considered whether the anticipated complexity of the particular proceedings, and the gravity of the likely outcome, should be taken into account in determining the defendant's decision-making capacity, as it is in the civil context. In the CP we rejected this approach on the basis that it might lead to a lack of certainty and inconsistency in decision-making. We also noted the difference between criminal and civil proceedings, especially the different procedures which follow a finding of incapacity and the emphasis on individual responsibility in criminal sentencing. In addition, we identified significant practical difficulties in arriving at an assessment

[18] This issue was discussed at paras 3.60 to 3.82 of the CP.

[19] See CP, para 3.60 for fuller discussion of the "unitary test" or "unitary construct."

[20] See CP, para 3.64 and following for discussion of a "disaggregated" approach.

of the likely complexity and seriousness in any given case before it has occurred.[21]

2.18 We did however feel that some contextualisation of the defendant's capacity would be achieved by the inclusion of special measures into the assessment of the defendant's capacity, as discussed below in Chapter 3.

2.19 However, in recognition of what we understood to be a potential enthusiasm amongst some practitioners and medical experts, for the principle of proportionality, we included an alternative provisional proposal 4 for consultees to consider:

> *Provisional Proposal 4: In determining the defendant's decision-making capacity, it would be incumbent on the judge to take account of the complexity of the particular proceedings and gravity of the outcome. In particular the judge should take account of how important any disability is likely to be in the context of the decision the accused must make in the context of the trial which the accused faces.*[22]

CONSULTATION RESPONSES TO PROVISIONAL PROPOSAL 1

The *Pritchard* test needs replacing

2.20 Almost all consultees agreed that the *Pritchard* test needs replacing. Responses raised various drawbacks of that test, notably that it:

(1) fails to safeguard the effective participation of mentally disordered or otherwise impaired defendants (eg Professor Ian Dennis);

(2) is not properly understood and inconsistently applied (eg HHJ Wendy Joseph QC);

(3) is overly restrictive (eg Nottinghamshire NHS Trust); and

(4) sets the threshold of fitness too low (eg Dr Arlie Loughnan).[23]

2.21 Not all respondents, however, expressed this view without reservation. The Bar Council/Criminal Bar Association ("CBA")[24] response, although it noted that "doing nothing was not an option, suggested that they could not identify cases where the *Pritchard* test had led to injustice.

2.22 Importantly, a number of clinicians (including the majority of consultants at the Edenfield Centre[25]) felt that the *Pritchard* test lends itself to a "sufficient level of interpretation and utility" while the British Psychological Society ("the BPS") felt that the *Pritchard* test already implicitly requires decision-making capacity.

21 More fully discussed at CP, paras 3.83 to 3.101.

22 CP, para 3.101.

23 See the Analysis of Responses ("AR"), paras 1.8 to 1.14, for fuller discussion of responses on this issue.

24 The Bar Council and the Criminal Bar Association submitted a joint response, referred to in this document as "the Bar Council/CBA response."

25 The Edenfield Centre is an adult medium secure forensic mental health unit in Manchester.

What should replace the *Pritchard* test?

2.23 There was less of a consensus amongst consultees as to what should replace the test. A number of issues emerged from the responses on this aspect of Provisional Proposal 1. While there was widespread support for the inclusion of decision-making capacity into the test in some form, the importance of ensuring effective participation was also widely emphasised. It was in how these two features should be contained within a legal test that opinion differed most:

(1) some consultees approved the formulation of Provisional Proposal 1 without further qualification (namely an explicit test of decision-making capacity, implicitly importing effective participation principles);[26]

(2) a greater number of consultees, while approving the incorporation of decision-making capacity, stressed the importance of effective participation principles and/or raised concerns about whether the latter were adequately reflected in the proposed formulation;[27]

(3) a significant number considered that some or all of the current *Pritchard* criteria (as updated in *John M*) should be retained, with the addition of a decision-making capacity limb;[28]

(4) some consultees felt that a move away from the *Pritchard* criteria, as updated, was unnecessary since they implicitly incorporate decision-making capacity in any event;[29]

(5) Professor Richard Bonnie felt that there is an important distinction not addressed by the proposed test between "foundational competence," (an ability to understand the nature and purpose of proceedings and instruct legal advisers) and "decisional competence."

2.24 In short, the central concern raised by consultees in relation to the test proposed in the CP was how a test focused on decision-making capacity might take into account all the requirements necessary for meaningful participation. The consultation responses suggest that this was not clear from the formulation of the test that we advanced in the CP.

2.25 Significantly, concerns were also raised that a test reformulated to encompass decision-making capacity might set the threshold for unfitness too low and render a very much larger number of defendants incapable of being tried.[30]

[26] Dr Lorna Duggan, Kari Carstairs, Dr Eileen Vizard (save observations relating to young defendants), Dr Arlie Loughnan, Dr Keith Rix, Royal College of Psychiatrists ("the RCP"), Kids Company and Compass Psycare.

[27] Council of HM Circuit Judges, the Prison Reform Trust ("the PRT"), Sense, Just for Kids Law ("JFKL"), the National Steering Group for Mentally Disordered Defendants, Nottinghamshire NHS Trust, Mind, HHJ Wendy Joseph QC, the Justices' Clerks Society, and the Centre for Mental Health.

[28] Gillian Harrison (MoJ), Carolyn Taylor, the Law Society, Professor Ronnie Mackay, and Graham Rogers.

[29] Edenfield Centre, the BPS.

[30] Eg Victim Support, the CPS, Helen Howard.

2.26 Finally, several respondents thought that there should be an explicit presumption that a person has capacity to plead and stand trial.[31]

DISCUSSION AND FURTHER QUESTIONS ARISING

2.27 As noted above, many consultation responses suggested that the provisional proposal that we advanced in the CP may not be the most effective reformulation of the test. We acknowledge that, although Provisional Proposal 1 did garner some unqualified support, it was not embraced by any legal practitioners or members of the judiciary. This raises concerns about its practical effectiveness. We recognise the force in the argument that our formulation in the CP may cause uncertainty as to how effective participation is to be incorporated, and that it may fail to capture the necessary capacity for ongoing and meaningful engagement in the criminal trial process.

Combining decision-making capacity and effective participation

2.28 Considering the responses as a whole, there appears to be considerable support from legal and clinical practitioners for a legal test which incorporates both effective participation and decision-making capacity. The central issue seems to be how those two concepts should be combined, and whether this should involve a remodelling or enhancing of the *Pritchard* test, as updated in the case of *John M*,[32] or whether the test should be more closely structured on effective participation elements derived from ECHR case law.

2.29 From the consultation responses we identify several options for combining the two elements of effective participation and decision-making capacity:

(1) a decision-making capacity test, implicitly informed by effective participation (as advanced in Provisional Proposal 1 in the CP);[33]

(2) an effective participation test, framed around the *John M* criteria (set out at paragraph 2.3 above) with an additional decision-making capacity limb (as proposed by Professor Ronnie Mackay). This would largely mirror the position adopted in the Jersey case of *O'Driscoll*,[34] and encompass the foundational and decisional competencies identified by Professor Bonnie;

[31] The CPS, the Law Society, the RCP and Professor Don Grubin.

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

[33] CP, para 3.13.

[34] *Attorney General v O'Driscoll* [2003] JLR 390 at [29], in which the Royal Court of Jersey declined to apply the *Pritchard* test and formulated a new test for fitness to plead, which requires determination of whether the defendant has "capacity to participate effectively in the proceedings," having regard to the ability of the accused to:

a) Understand the nature of 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;

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.

(3) an effective participation test, using the wording of *SC v United Kingdom*,[35] with explicit incorporation of decision-making capacity.

2.30 We recognise, as set out at paragraph 2.27 above, that the CP formulation in option (1) may not represent the most effective formulation of the test.

2.31 The weight of consultation responses suggests that prioritisation of effective participation is most likely to capture the meaningful engagement with which unfitness to plead is centrally concerned. The question is whether effective participation is best captured by formulating a test afresh from European Court of Human Rights ("ECtHR") case law, such as the case of *SC v United Kingdom*,[36] as proposed in option (3), or whether, as proposed in option (2), the updated *Pritchard* criteria, set out in *John M*, are a better starting point. The *Pritchard* criteria have evolved through their application in the criminal courts, and have largely proved workable, save for their exclusion of decision-making capacity. The broad approval for the updated *Pritchard* criteria in *John M*[37] suggests that this may present a better starting point than drafting criteria afresh.

2.32 We therefore invite consultees to consider the following further questions:

2.33 **Further Question 1: Do consultees agree that a reformed legal test for fitness to plead should incorporate a consideration of both decision-making capacity and the capacity for effective participation?**

2.34 **Further Question 2: Do consultees consider that an effective participation test, framed around the *John M* criteria (set out at paragraph 2.3 above), with an additional decision-making capacity limb, represents the most appropriate formulation for such a combined legal test? Or do consultees favour another of the formulations set out at paragraph 2.28 above and, if so, why?**

Maintaining the threshold

2.35 We are mindful of the concerns raised at paragraph 2.25 above, and consider that it is important to ensure that the threshold of unfitness does not fall too low. It is plainly essential that the test captures only those who are genuinely unable to participate effectively in the trial process, and not, for example, malingerers or those who may find a full trial difficult but are nonetheless able to participate effectively, with appropriate support. In light of consultees' observations, we think that there are several qualifications which might assist in maintaining the threshold at an appropriate level, and invite further input into whether consultees consider that any of the following options might be useful:

[35] *SC v United Kingdom* (2005) 40 EHRR 10 (app no 60958/00).

[36] *SC v United Kingdom* (2005) 40 EHRR 10 (app no 60958/00).

[37] As commended for example by the Law Society, the Edenfield Centre, Professor Ronnie Mackay, the Council of HM Circuit Judges and the Bar Council/CBA.

(1) An exhaustive list of decisions for which the defendant requires capacity[38]

2.36 For example, the test could set out that the decisions which the defendant will have to make, at the very least, are: how to plead; whether to give evidence; and in the summary jurisdiction, for offences triable either way ,[39] whether to choose jury trial in the Crown Court. The purpose of demarcating those decisions would be to highlight that sufficient decision-making capacity does not require an ability to engage with the more complex decisions required in a criminal trial.[40] The minute consideration of those complex decisions may be beyond the capacity of many fit defendants.

(2) A statement of the level of capacity required

2.37 Should the new test, for example, explicitly refer to a level of capacity for effective participation which is "satisfactory" or "sufficient"? As observed in the case of *SC*, defendants who are fit to plead may not have perfect comprehension of complex legal proceedings, or be able to follow every detail of the case. What is required of them is a "broad understanding" of the proceedings and their significance, and an ability to understand the "general thrust" of what is said in court.[41] This qualification would reflect the approach in competency assessments in civil proceedings, as referenced by the BPS, that capacity for trial is not a state of perfect engagement and comprehension, but a "good enough" level of participation. The requirement to consider special measures as part of the test, as discussed below, would enable support to be provided to those defendants who have difficulties engaging with the trial process falling short of a lack of sufficient or satisfactory capacity.

(3) A diagnostic threshold, such as the identification of a "mental or physical illness, whether temporary or permanent"

2.38 A qualifying diagnosis has been advanced by some respondents (such as the Royal College of Psychiatrists ("RCP"), Helen Howard and HHJ Wendy Joseph QC) as potentially setting suitable parameters on findings of unfitness/lack of capacity, but is rejected by others who take the view that abilities in relation to trial, rather than diagnosis, should be the focus (BPS, Centre for Mental Health).

2.39 Options (1) and (2) provisionally appear to us to be capable of assisting in maintaining the appropriate threshold. We would be grateful for consultees' views as to whether either or both may be effective.

2.40 We are concerned that option (3) is likely to present significant difficulties in isolating a diagnostic category which captures all potential conditions which might give rise to unfitness, yet is sufficiently specific to have an effect on the threshold.

[38] Proposed by the Council of HM Circuit Judges.

[39] Triable either way offences (often simply called "either-way offences") are offences which can be tried either summarily in the magistrates' court, or with a jury in the Crown Court. In such cases, the defendant is entitled to choose a Crown Court trial (even where the magistrates' court considers its powers of sentence sufficient for it to try the case).

[40] We have in mind, for example, questions relating to the adducing of bad character evidence.

[41] *SC v United Kingdom* (2005) 40 EHRR 10 (app no 60958/00) at [29]. See also comments as to the limitations on the ability of some fit defendants to follow the course of proceedings in *M (John)* [2003] EWCA Crim 3452, [22] and [23].

At this stage we doubt whether imposing a diagnostic threshold is likely to assist in maintaining a suitable threshold, but invite further input from consultees in this regard.

2.41 We therefore ask the following further questions:

2.42 **Further Question 3: Do consultees consider that incorporating an exhaustive list of decisions for which the defendant requires capacity into a reformed legal test for unfitness to plead would assist in maintaining the threshold for unfitness at a suitable level?**

2.43 **Further Question 4: Do consultees consider that a reformed test should explicitly refer to a "satisfactory" or "sufficient" level of capacity for effective participation?**

2.44 **Further Question 5: Do consultees agree that a diagnostic threshold would be unlikely to assist in maintaining the threshold of unfitness at a suitable level?**

Presumptions

2.45 In light of the enthusiasm expressed by some respondents for an explicit presumption of fitness (including the CPS and the Law Society), and the difficulties encountered in the case of *Ghulam*,[42] we also pose the following:

2.46 **Further Question 6: Do consultees think that it would be helpful to have a statutory presumption that all defendants are fit to be tried until the contrary is proved?**

2.47 Consideration of this aspect of the fitness test raises the related issue of how findings of unfitness or lack of capacity should be dealt with where an accused recovers capacity before the section 4A hearing.[43] There is currently no procedure to address this situation, which has been described by the Court of Appeal as "an unsatisfactory lacuna in the law."[44] We consider that it may be helpful to have a presumption that where a defendant is found to lack capacity he or she will not be deemed to have recovered it until such time as the court rules

[42] *R v Ghulam* [2009] EWCA Crim 2285, in which the Court of Appeal considered whether, where a single expert medical report raised concerns about the defendant's fitness to plead, the judge would require two expert medical reports (one of which must be approved under section 12 MHA 1983) in order to find the defendant fit. The Court of Appeal concluded that section 4(6) of the Criminal Procedure (Insanity) Act 1964 ("the CP(I)A") only relates to determinations of "unfitness" and did not lay down any evidential requirement for finding a defendant fit to plead.

[43] As we discuss in the CP at paras 2.22 and from 2.25, a person who is found unfit to plead is not subjected to a trial. Rather he or she undergoes a hearing under section 4A CP(I)A, which is intended to ascertain whether or not he or she committed the conduct element of the offence in question.

[44] *Omara* [2004] EWCA Crim 431, [17]. In the absence of any procedure to reverse the section 4 finding of unfitness, the trial judge had felt compelled to proceed to the determination of the facts under section 4A CP(I)A even though there was evidence from two psychiatrists that the defendant had in fact recovered fitness:

(on the balance of probabilities[45] and on the basis of the required expert evidence) that he or she has regained capacity. We therefore ask the following:

2.48 **Further Question 7: Do consultees agree that a finding that a person lacks capacity shall remain valid unless and until the contrary is established on the basis of the evidence of two suitably qualified experts?**

RESPONSES TO PROVISIONAL PROPOSALS 3 AND 4[46]

2.49 There was substantial support for a "unitary" test, namely a test which considers at one time the defendant's capacity for all purposes in relation to trial.[47] In general terms, support for this approach focused on its simplicity and practicality and the fact that it would be less likely to lead to delay.[48]

2.50 There were, however, a number of respondents who suggested that additional issues need to be considered if a capacity test were to be applied at a single time to the entire spectrum of trial decisions. These issues included:

(1) that there should be more structure in the way experts approach the test, to ensure that assessors do not overlook crucial aspects, such as the capacity to give evidence;

(2) that whilst a decision could be made for the whole of the trial, unfitness/lack of capacity needs to be kept under constant review, so that the issue can be reopened if the defendant suffers a deterioration in capacity (Mind); and

(3) that experts should be required to agree on at least one stated capacity to found a finding of incapacity (Dr Andrew Bickle).

2.51 Those who had more substantial reservations about a solidly unitary test raised the following:

(1) that determining capacity separately at least in terms of plea and trial represents a practical way of drawing a close to some less serious proceedings. A number of clinicians felt that capacity to plead, capacity to stand trial and even capacity to give evidence could usefully be distinguished (eg Charles de Lacy);

(2) that identifying the "whole spectrum of trial decisions" could prove problematic (Council of HM Circuit Judges);

(3) that there should be disaggregation, or separate consideration, of a defendant's decision to appear unrepresented (Professor Richard Bonnie).

45 We do not consider that this determination requires the higher standard of proof beyond reasonable doubt, since the result for the defendant is the reversion of his case to the optimal full trial process.

46 The text of the proposals is set out at para 2.13 and 2.18 above.

47 Discussed more fully in the AR at para 1.89 and following.

48 Eg Council of HM Circuit Judges, the Law Society, Professor Bonnie, the PRT, Professor Poole, Sense, Victim Support.

(4) that a single construct of decision-making capacity devised to cover all defendants might result in defendants with particular impairments not being properly assessed (National Autistic Society); and

(5) that more clarity around the level of decision-making capacity is required (Victim Support).

2.52 There was a degree of confusion in the responses to Provisional Proposal 4 (proportionality),[49] since it was not clear to some respondents that it was offered as an alternative to Provisional Proposal 3 (the unitary test)[50]. Even where our position was engaged with, there were some conflicted responses.

2.53 However, as anticipated, a number of powerful arguments against a proportionality approach were raised, especially by legal practitioners and clinicians.[51]

2.54 In particular, consultees raised practical difficulties as to how a proportional approach, taking into account both the complexity of the proceedings and the gravity of the potential outcome, could function, notably:

(1) the difficulty of assessing the seriousness and complexity of the trial at the outset of the proceedings (Mind);

(2) that such an assessment might embroil the judge in micro-management of the case (Council of HM Circuit Judges);

(3) that assessing complexity and seriousness may trespass on privileged material (HHJ Tim Lamb QC); and

(4) that proportionality might lead to inconsistency in findings and, potentially, injustice (the Centre for Mental Health).

2.55 However, a number of those in favour of a proportionality approach cited the intuitive attractiveness of a capacity decision taken with consideration of all the circumstances of the case.[52] A number of respondents felt that capacity might vary, in particular according to the complexity of the case,[53] and that some trials are plainly more demanding of a defendant than others.[54] It was felt by some that proportionality might permit effective participation for more individuals.

[49] Discussed at paras 2.16 to 2.18 above.

[50] Discussed at paras 2.13 to 2.15 above.

[51] Responses are set out in more detail at AR para 1.89 and following.

[52] Eg Dr Arlie Loughnan, the RCP, and the BPS.

[53] Eg Nicola Padfield.

[54] Eg HHJ Wendy Joseph QC.

DISCUSSION AND FURTHER QUESTIONS ARISING

2.56 Although all issues raised merit consideration, at this stage we seek to canvas opinion in particular on the following issues.

Partial disaggregation: isolating capacity to plead from capacity for trial

2.57 Some consultees suggested that isolating fitness or capacity to plead from fitness or capacity for trial is attractive in terms of allowing an accused to plead guilty in a straightforward case (eg Charles de Lacy). However, we consider that there might be a number of difficulties with this approach, including:

(1) Lasting repercussions of any plea: allowing a substantially impaired defendant to plead guilty when otherwise lacking capacity for trial is troubling given the potential ramifications. We are particularly concerned as to how a psychiatrist, the judge or a representative could be satisfied in any but the simplest case that the accused has properly understood the issues, and the ramifications of a plea.

(2) Issues around sentence: a defendant found to have the capacity to plead but not to stand trial may be unable to deal with unforeseen complications at sentence, in particular *Newton* hearings,[55] challenging prosecution evidence on sentence, confiscation proceedings[56] or other ancillary orders.[57]

(3) Complexity: capacity for trial would require the application of a separate test from capacity to plead which would have to be applied in every case. It is not clear that the number of cases where capacity is identified as an issue, but where the accused has capacity to plead but not for trial, would warrant this extra complication.

(4) Capacity would have to extend through to censure (ie punishment): capacity to plead would also have to include an ability to understand the sentence imposed, and to comply with any requirements of sentence, such as attending supervision, courses and the like.

2.58 On balance, it appears that disaggregation of capacity decisions into capacity to plead and capacity for trial may not be desirable, but we would welcome further input on this issue.

2.59 **Further Question 8: Do consultees agree that disaggregation of capacity to plead and capacity for trial is undesirable?**

[55] In a "*Newton* hearing" a judge (without a jury) hears evidence to resolve a dispute of fact with a substantial bearing on sentence. This takes place after a plea or finding of guilt.

[56] Confiscation proceedings consider the extent to which a defendant has benefited from their criminal conduct, and may require payment by the defendant of a sum representing the value of any financial benefit that he has retained as a result.

[57] These are additional orders which can be made at the time of disposal, such as sexual offences prevention orders under section 104 Sexual Offences Act 2003 (as amended by Part 9 of the Anti-social Behaviour, Crime and Policing Act 2014 [not yet in force]), or restraining orders under section 5A Protection from Harassment Act 1997.

Contextualisation

2.60 We find the practical difficulties raised by those who rejected an approach based explicitly on proportionality to be persuasive. In particular, we consider that adjudicating on the gravity of the outcome of a trial, and isolating the standard by which such a judgment should be made, is highly problematic.

2.61 Nonetheless, we acknowledge the obvious truth of the observations made by a number of consultees that some criminal proceedings will be more demanding of a defendant than others. We also consider it important that the capacity test should not deny an accused the opportunity to enjoy the full trial process, with its fair trial guarantees, if he or she would have sufficient capacity to engage in the particular determination of the allegation that he or she faces. As we outlined in Part 1, we consider it fundamentally important that as many defendants as possible are enabled to engage in full trial, with reasonable adjustments where necessary, not only to afford them their full rights, but in the interest of victims and the public as well.

2.62 With those observations in mind, we consider that the test must be understood as one to be applied in context. To allow judges, where they consider it appropriate, to take into account the nature of the particular proceedings faced, might allow for the incorporation of these aspects of proportionality. Inkeeping with the principles of effective participation, that the accused have a "broad understanding" of proceedings and understand the "general thrust" of the evidence,[58] such contextualisation would not, we think, require a minute analysis of every aspect of the trial, incurring the problems considered at paragraph 2.54 (1) to (3) above. Rather it would allow consideration of broad factors such as the likely mode of trial, the presence of hostile co-defendants, the nature of the prosecution evidence (whether largely incontrovertible or requiring more substantial challenge) and the broad nature of any identifiable defence.

2.63 The isolation of such issues is not, we consider, beyond that which would ordinarily be required of the court in its active case management role under the Criminal Procedure Rules.[59] Nor would the provision of such information to the court or clinicians by defence representatives be beyond that which is required of the defence in a defence statement already required under the Criminal Procedure and Investigations Act 1996. [60]

2.64 The capacity of the defendant to participate effectively in the proceedings must, in any event, be kept under constant review, and were significant and unexpected changes to the course of the trial to occur, the judge would be in a position to review the capacity of the defendant, both having observed the defendant's experience of the trial up to that point, and on the basis of the expert opinion contained within the expert reports already before the court.

2.65 We appreciate that by including the requirement that the test be applied in context on a case by case basis there may be circumstances where the same individual is found to have capacity for effective participation in one trial but not

[58] *SC v United Kingdom* (2005) 40 EHRR 10 (app no 60958/00) at [29].

[59] Criminal Procedure Rules 2013 (SI 2013 No. 1554) Rule 3.2.

[60] Criminal Procedure and Investigations Act 1996, s 5.

another. For example a defendant may be capable of participating in a straightforward theft trial where his or her actions were caught on CCTV, or indeed in a robbery trial where his defence is one of alibi, but may lack capacity for a multi-handed conspiracy trial which involves "cut-throat" defences.[61]

2.66 We do not consider that this is essentially problematic. Indeed, we would consider that this variation in findings under a contextualised test is appropriate, at least if questions of capacity are not about categorising the individual, but rather ensuring that only, and all, those who have capacity for the actual proceedings they face should undergo full trial. Even under the current procedures, there would be cases where a defendant may be found unfit to plead for some trials, but fit to plead for others by virtue of his or her fluctuating condition.

2.67 We therefore invite consultees to consider whether they would approve a test of the defendant's capacity for effective participation "in determination of the allegation(s) faced" rather than "in criminal proceedings" more generally, or whether they think such an approach is undesirable because it may incur difficulties similar to those raised in relation to a more explicit proportionality approach.

2.68 **Further Question 9: Do consultees consider that making the test one of capacity for effective participation "in determination of the allegation(s) faced" would introduce a desirable element of context into the assessment?**

Compliance with the United Nations Convention on the Rights of Persons with Disabilities (the "UNCRPD")

The relevant provisions of the UNCRPD

2.69 The UK ratified the UNCRPD in 2009. It introduces binding obligations on the UK Government and devolved institutions. At its core the UNCRPD seeks to promote, protect and ensure full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their dignity.

2.70 The UNCRPD has effect in the criminal as well as the civil context.[62] Articles 12 and 13 in particular appear to be relevant to issues relating to unfitness to plead, and we consider it important to address their implications for reforming the current procedures, particularly the test for unfitness.

[61] A cut-throat defence is a defence that necessarily implicates a co-defendant. For example in a trial where two or more defendants are charged together, defendant A might be described as "running a cut-throat defence" against defendant B if his defence is that he is not guilty of the charge because B is in fact responsible.

[62] See for example the "Thematic Study by the Office of the United Nations High Commissioner for Human Rights on enhancing awareness and understanding of the Convention on the Rights of Persons with Disabilities (26 January 2009)" para 47.

2.71 Article 12 of the UNCRPD establishes that persons with disabilities have equal recognition before the law and requires states to recognise their enjoyment of legal capacity on an equal basis with others. It specifically requires states to "take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity".[63]

2.72 Article 12(4) sets out that measures which relate to the exercise of legal capacity must provide for "appropriate and effective safeguards" which

> respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person's rights and interests.

2.73 Article 13(1) 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, in order to facilitate their effective role as direct and indirect participants". Article 13(2) requires the promotion of "appropriate training for those working in the field of administration of justice".

Interpretation of those rights

2.74 In its General Comment on the operation of article 12, the Committee on the Rights of Persons with Disabilities is critical of states which deny legal capacity on the basis of "perceived or actual deficits in mental capacity", including where a functional approach, of the sort adopted in the MCA 2005, is used to assess mental capacity.[64] The Committee emphasises that the UNCRPD implies a shift from a 'substitute decision-making paradigm" based on what is believed to be in the "best interests" of the person concerned when objectively viewed, to a "supported decision-making" paradigm, which respects the rights, will and preferences of persons with disabilities,[65] including their right to refuse support.[66]

Domestic consideration of the implications of the UNCRPD

2.75 The implications of the UNCRPD have recently been addressed by Baroness Hale:[67]

[63] UNCRPD Article 12(3).

[64] The Committee on the Rights of Persons with Disabilities, General Comment No1 (2014), Article 12: Equal recognition before the law' released on 11 April 2014, paras 12 and 13.

[65] The Committee on the Rights of Persons with Disabilities, General Comment No1 (2014), Article 12: Equal recognition before the law' released on 11 April 2014, paras 22 to 25.

[66] See as illustration the Committee's criticism of the initial report of Australia, where substitute decision-making continues to be used: Committee on the Rights of persons with Disabilities, "*Concluding observations on the initial report of Australia, adopted by the Committee at its tenth session (2-13 September 2013)*", paras 25 to 30.

[67] *P v Cheshire West and Chester Council and another: P and Q v Surrey County Council* [2014] UKSC 19 at [45].

> In my view, it is axiomatic that people with disabilities, both mental and physical, have the same human rights as the rest of the human race. It may be that those rights have sometimes to be limited or restricted because of their disabilities, but the starting point should be the same as that for everyone else. This flows inexorably from the universal character of human rights, founded on the inherent dignity of all human beings, and is confirmed in the United Nations Convention on the Rights of Persons with Disabilities. Far from disability entitling the state to deny such people human rights: rather it places upon the state (and upon others) the duty to make reasonable accommodation to cater for the special needs of those with disabilities.

2.76 Baroness Hale's observations plainly acknowledge that there will be cases where the rights of individuals must be "limited or restricted because of their disabilities" as well as focussing on the "duty to make reasonable accommodation".

2.77 In the criminal context, there has been scant consideration of the effect of the UNCRPD. Reference was made to the UNCRPD in a Scottish case concerning an indefinite guardianship order imposed on a defendant found unfit to plead in relation to a series of historical sexual allegations.[68] In criticising the indefinite nature of the order, Sheriff Baird made reference to article 12(4) of the UNCRPD and the requirement that any measures relating to the exercise of legal capacity should apply "for the shortest time possible". He did not however address the more fundamental question of whether a fitness to plead procedure based on a functional test of capacity is compatible with articles 12 and 13.

Compatibility of the further proposals for reform of the unfitness to plead procedures with the UNCRPD

2.78 A literal reading of the obligations imposed on states by articles 12 and 13 of the UNCRPD would suggest that both the current unfitness to plead procedures, and our provisional recommendations for reform, might incur criticism from the Committee on the UNCRPD for the functional approach taken to the issue of mental capacity, and the denial of legal capacity as a result.[69]

2.79 As will be clear from the overview of our approach in Part 1, we consider that all efforts should be made to ensure that as many defendants as possible are able to participate effectively in the full trial process, with the provision of necessary and appropriate special measures or other adjustments. Such an approach would, we anticipate, be inkeeping with the obligations imposed by the UNCRPD.

[68] Variation and Renewal of Orders for Guardianship made under the Provisions of the Criminal Procedure (Scotland) Act 1995 - Minute to Vary in respect of J.M.[2011] ScotSC 107, 2011 GWD 27-609, 2012 SLT (Sh Ct) 25 at [72].

[69] See also reference to the awaited Government review of the compatibility of the MCA 2005 with the UNCRPD made by the, House of Lords Select Committee on the Mental Capacity Act 2005 in *The Mental Capacity Act 2005: post-legislative scrutiny, Report of Session 2013-14* at paras 51-53.

2.80 However, we take the view that there will be a small group of defendants who will be unable to participate effectively in trial, whatever the level of support provided to them. We consider that to proceed to full trial for them would breach their article 6 ECHR rights to a fair trial, and might undermine the dignity of the court and the criminal process.

2.81 The Committee is silent on how this apparent conflict between the UNCRPD and article 6 of the ECHR should be resolved. We consider that the prosecution of these individuals falls into the category of rare occasions envisaged by Baroness Hale in which the rights of persons with disabilities can properly be "limited or restricted".[70] Our obligation in the first instance must be to the ECHR which is incorporated into our domestic legislation by the Human Rights Act 1998. As a result, we consider that the functional approach to capacity assessment taken in the proposed reforms, and the restriction of legal capacity which follows a finding of unfitness, are necessary to safeguard those defendants' article 6 ECHR rights. We would, nonetheless, in imposing measures restricting the legal capacity of this small group of individuals seek to provide the "appropriate and effective safeguards" required under article 12(4) of the UNCRPD, including respecting the "rights, will and preferences" of the individual, insofar as that is consistent with our duties under article 6 of the ECHR.

2.82 We take the view that this approach properly reflects our obligations under the UNCRPD and the ECHR.[71] However, we would welcome consultees' observations on this difficult issue. We therefore ask:

2.83 **Further Question 10: Do consultees agree that the United Kingdom's obligations under the UNCRPD and the ECHR can properly be accommodated in the manner outlined in paragraphs 2.80 to 2.82?**

Defendants who are unrepresented in the initial stages

2.84 We acknowledge that as a result of changes to the availability of Legal Aid[72] there are likely to be many more defendants who appear before the courts without representation at the beginning of proceedings. In such cases, we take the provisional view that, where it is apparent that a defendant may lack capacity, for example as a result of screening by Liaison and Diversion Services, by virtue of a previous finding of lack of capacity, a pre-existing diagnosis indicative of potential capacity problems, or where concerns are raised by the judiciary or criminal justice professionals, assistance should be provided to an unrepresented defendant to secure representation.

[70] *P v Cheshire West and Chester Council and another: P and Q v Surrey County Council* [2014] UKSC 19 at [45].

[71] In Northern Ireland, The Equality Commission for Northern Ireland and the Northern Ireland Human Rights Commission have created a body called the are "Independent Mechanism" to promote, protect and monitor the implementation of the UNCRPD. Their report on the compliance of the Mental Capacity (Health, Welfare and Finance) Bill also argues that a substitute decision-making system founded on a functional consideration of capacity might be compatible with the requirements of the UNCRPD. Accessed at: www.equalityni.org/ECNI/media/ECNI/Publications/Delivering%20Equality/UNCRPDmonitoringimplementationFullReport0112.pdf.

[72] Legal Aid, Sentencing, and Punishment of Offenders Act 2012.

2.85 Difficulties in understanding proceedings and presenting one's own case are already criteria to be considered in the interests of justice test for the grant of legal aid.[73] We consider that the provision of legal assistance to such defendants would also properly reflect the "appropriate measures" required by article 12(3) of the UNCRPD to ensure that persons with disabilities are provided with the "support they may require in exercising their legal capacity". We also understand, anecdotally, that the lack of representation in such cases, even at the non-imprisonable level in the magistrates' courts, can cause extremely costly case management difficulties.

Defendants who refuse representation in the initial stages

2.86 Defendants whose capacity is of concern but who prefer to dispense with representation in the initial stages, or refuse to seek such help, present a particularly difficult challenge. On the one hand, consultees clearly expressed their approval of protections for the autonomy and self-determination of the defendant (in relation to Provisional Proposal 2[74]). On the other hand, the protection provided by representation seems to be critical in ensuring that the impaired defendant enjoys sufficient support and assistance in isolating any participation difficulties, and in pursuing a finding of lack of capacity, where appropriate.

2.87 We do not consider that any amendment to the legal test can provide a solution to this problem. Indeed the requirement to respect the defendant's "rights, will and preferences" in Article 12(4) of the UNCRPD would suggest that any effort to curtail that choice prior to a finding of lack of capacity would be contrary to convention obligations. Nonetheless, we do consider that, in a situation where concerns surrounding legal capacity have been identified, the court should ensure that the defendant has been provided sufficient opportunity to consider the benefits of legal representation, with any support that they require to facilitate the making of that decision.

2.88 **Further Question 11: Do consultees agree that the difficulties surrounding unrepresented defendants cannot be addressed by amendment to the legal test itself?**

[73] Ministry of Justice, *Guidance on the Consideration of Defence Representation Order Applications* (2013), 10. Available from: https://www.justice.gov.uk/downloads/legal-aid/eligibility/guidance-consideration-defence-representation-order-applications.pdf (last accessed 7 April 2014).

[74] Which was that "a new decision-making capacity test should not require that any decision the accused makes must be rational or wise."

PART 3
SPECIAL MEASURES

THE CURRENT POSITION[1]

3.1 Special measures to ensure effective participation have developed independently of the criteria for unfitness to plead. Criminal Practice Direction 3G[2] extends to vulnerable defendants[3] special measures previously developed in relation to child defendants.

3.2 There are also statutory provisions, for:

(1) adult defendants to give evidence via live link (section 33A Youth Justice and Criminal Evidence Act 1999 ("YJCEA"), and,

(2) the accused to be examined through an intermediary (section 33BA YJCEA), although this is not yet in force.

3.3 The court has a duty under its inherent powers and under the Criminal Procedure Rules[4] to take any steps necessary to ensure that a defendant has a fair trial. In practice, judges and magistrates use these inherent powers to provide special measures in circumstances where there is no statutory power, for example in granting intermediaries for defendants, including for trial preparation and throughout proceedings.[5]

3.4 Consideration of the assistance that special 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.

PROBLEMS WITH THE CURRENT POSITION[6]

3.5 Special measures have developed outside the context of unfitness to plead and in an ad hoc fashion. When applied in the unfitness context, there are a number of practical difficulties that have been identified, particularly the screening and assessment of vulnerable defendants who might benefit from the support of special measures, and the unequal access to such facilities for vulnerable

1 Discussed more fully in the CP, paras 4.1 to 4.15.

2 Criminal Practice Directions 2013 [2013] EWCA Crim 1631, 3G. Available from: http://www.justice.gov.uk/courts/procedure-rules/criminal/rulesmenu.

3 Defined as "(a) children and young persons under 18 or (b) adults who suffer from a mental disorder within the meaning of the Mental Health Act 1983 or who have any other significant impairment of intelligence and social function." Criminal Practice Directions 2013 [2013] EWCA Crim 1631, 3D.1.

4 Criminal Procedure Rules 2013 (SI 2013 No 1554), Rule 1.1.

5 *C v Sevenoaks Magistrates' Court* [2009] EWHC 3088 (Admin) and *R (AS) v Great Yarmouth Youth Court* [2011] EWHC 2059 (Admin). See also Criminal Practice Directions 2013 [2013] EWCA Crim 1631, 3F.

6 CP, paras 4.10 to 4.15.

defendants and vulnerable prosecution witnesses.[7] In particular, where the question of capacity is being addressed, there is no formalised mechanism to encourage consideration of the assistance afforded by special measures.

CP PROVISIONAL PROPOSALS IN RELATION TO SPECIAL MEASURES

3.6 In the CP we expressed the view that special measures should play a greater role within the overall structure which we envisage for determining a defendant's capacity.[8] This is particularly important in the context of our rejection of a fully "disaggregated" test for assessing capacity.

3.7 We took the provisional view that requiring consideration of the benefits of special measures as part of the assessment of the defendant's capacity to undergo trial has the following advantages:

(1) the courts and legal representatives will have a duty to consider how a defendant's capacity for participation in the trial can be enhanced by the use of special measures;

(2) special measures will be less likely to be overlooked, and this will raise the likelihood of appropriate measures being put in place; and

(3) it will ensure that a defendant is not deemed to be unfit unless all efforts have been made to raise his or her capacity for participation.

3.8 We therefore made the following provisional proposal:

> *Provisional Proposal 5: Decision-making capacity should be assessed with a view to ascertaining whether an accused could undergo a trial or plead guilty with the assistance of special measures and where any other reasonable adjustments have been made.*

CONSULTATION RESPONSES IN RELATION TO SPECIAL MEASURES

3.9 A number of consultees stressed that the ultimate goal is, wherever possible, for the accused to be found fit to plead and to be able to access a full trial (eg Council of HM Circuit Judges, Bar Council/CBA), and felt that a finding of unfitness followed by a trial of the facts should be a last resort (RCP, Victim Support, Professor Grubin, Mind).

3.10 The incorporation of special measures into the legal test received significant support from legal practitioners, clinicians and representative groups. Various observations were made in approving Provisional Proposal 5:

[7] The inequity 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, (2012) "Fair Access to Justice? Support for vulnerable defendants in the criminal courts. A Prison Reform Trust Briefing Paper," available from:http://www.prisonreformtrust.org.uk/Portals/0/Documents/FairAccesstoJustice.pdf (last accessed 7 April 2014).

[8] Discussed more fully in the CP, paras 4.16 to 4.27.

(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).

(3) Provisional Proposal 5 aligns the criminal assessment with that in the Mental Capacity Act 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.

(4) Provisional Proposal 5 aligns the legal test with the approach required in the Criminal Practice Directions.[9]

(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).

(6) the provisional proposal that the criminal law acknowledge the existence of a continuum, encompassing vulnerable defendants whose participation can be secured by special measures and those whose fitness to plead cannot be achieved (advanced in CP Question 1), was generally embraced.

3.11 However, a number of concerns were expressed and refinements to the provisional proposal were suggested, in particular:

(1) the impact of special measures is not straightforward if the test is formulated as one of decision-making capacity, since special measures are more relevant to considerations of capacity for effective participation.[10]

(2) a number of those supportive of Provisional Proposal 5 raised concerns about resources being available to provide appropriate measures. It was suggested that, if incorporated into the legal test, special measures should be made a legal entitlement and provided in equal form to those available to prosecution witnesses (PRT). Others felt that there was a danger that defendants might be "pushed" into a trial on the basis of special measures not subsequently forthcoming (eg Helen Howard).

(3) the securing and funding of special measures should be the responsibility of the court, not the accused. Practitioners had experienced arbitrary decision-making and difficulties in securing funding for appropriate special measures (Just for Kids Law).

(4) special measures are of unproven effectiveness in enhancing effective participation or decision-making capacity (Justices' Clerks Society).

[9] Criminal Practice Directions 2013 [2013] EWCA Crim 1631, 3G.

[10] The Law Society, the Justices' Clerks Society and Dr Lorna Duggan rejected the proposal on the basis of difficulties arising from this distinction.

(5) there is a danger that special measures applications might routinely require consideration of the fitness/capacity of the accused (Bar Council/CBA).

(6) special measures need to "cover all aspects of the trial process and not merely the giving of evidence by an accused" (Council of HM Circuit Judges).

(7) where a defendant has been granted special measures, the defendant's ability to participate should be kept under review, with a procedure for halting the trial if necessary (Just for Kids Law).

DISCUSSION AND FURTHER QUESTIONS ARISING

3.12 In line with our observations in Part 1, we remain of the view that consideration should be given to the use of special measures to facilitate effective participation before the court proceeds to a finding of lack of capacity. We note that the Court of Appeal has recently endorsed that approach.[11] Nonetheless, we consider that a number of the observations made by consultees require further consideration.

The impact of special measures

3.13 We accept the observations of some consultees at paragraph 3.11(1) above that some special measures may be more relevant to aspects of effective participation than decision-making capacity. However, we anticipate that if the focus of the reformed test shifts to effective participation, this concern may fall away. In any event, considering the broad range of impairments giving rise to fitness issues, and the variety of special measures available, special measures may potentially have a bearing not only on any aspect of effective participation but also on decision-making capacity. For example, an intermediary provided for the whole of the proceedings may enhance a defendant's decision-making capacity significantly, in terms of allowing them to receive and understand relevant information, and communicate their decisions.

3.14 The effectiveness of special measures generally has been variously reviewed, although the experience from a defendant perspective has received more limited consideration.[12] It is plainly important, as Just for Kids raise, that the implementation of special measures directions is maintained throughout trial, and that the ongoing ability of the defendant to participate effectively is kept under review. We consider that this duty already falls upon the judge, and other participants in the court process, and is encompassed within the overriding objective to deal with cases justly.[13]

[11] *Walls* [2011] EWCA Crim 443, at [37] to [38].

[12] B Hamlyn, A Phelps, J Turtle, G Sattar, *Are special measures working?*(2004) Home Office Resource Study No 283; J Plotnikoff and R Wolfson, *In their Own Words* (NSPCC 2004); J Plotnikoff and R Wolfson, *The 'Go-Between': evaluation of intermediary pathfinder projects* (2007) (available from http://lexiconlimited.co.uk/wp-content/uploads/2013/01/Intermediaries_study_report.pdf); J Jacobson and J Talbot, *Vulnerable defendants in the criminal courts: a review of provision for adults and children* (Prison Reform Trust 2009).

[13] Criminal Procedure Rules 2013 (SI 2013 No 1554), Rule 1.1.

Availability and resourcing of special measures for vulnerable defendants

3.15 We consider that the concerns raised by consultees regarding the availability and resourcing of special measures merit close consideration. As noted at paragraph 3.5 above, statutory provision for vulnerable defendants to benefit from the provision of special measures does not match that for vulnerable witnesses. At present this disparity is overcome by reliance on the trial judge's inherent discretion to grant measures 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.

3.16 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 supporting witnesses. Intermediaries supporting defendants, therefore, are not operating through a regulated scheme, with approved training and support. Additionally, the Ministry of Justice's prioritisation of their statutory obligation to provide witness intermediaries over any requirements of a defendant, and the increasing demand for such assistance, means that identifying and securing an intermediary to support a defendant is increasingly difficult, and the funding arrangements remain complicated.[14]

3.17 Resource constraints across the Ministry of Justice are more acute now than they were when the CP was drafted in 2010, and case law suggests that intermediary support is not always achieved for defendants, even when the court has ruled on its desirability.[15]

3.18 We recognise that adjustments to this system may be required to ensure that intermediaries can be secured for vulnerable defendants where necessary, and to ensure that defendants are not "pushed into trial"[16] where special measures are not forthcoming.

3.19 We doubt whether statutory amendment to ensure that special measures, including intermediary provision, are available to defendants on the same terms as those for vulnerable witnesses will necessarily secure this. As the Council of HM Circuit Judges confirm, the requirements of vulnerable defendants are different from those of vulnerable witnesses, in particular in relation to the need to participate effectively pre-court and for the whole of the proceedings. For that reason we do not consider that the implementation of the accused's right to be examined through an intermediary (section 33BA YJCEA) will provide a complete solution either.

3.20 Rather, we provisionally consider that what is needed is a statutory entitlement to the support of a registered intermediary for an accused, 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. We consider that such an entitlement is key to addressing the problems

[14] 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.

[15] *R v Cox* [2012] EWCA Crim 549.

[16] A concern raised by Helen Howard in her response.

of securing funding for intermediary support, and accessing the assistance of registered intermediaries. We appreciate that such an entitlement will have resource implications, but take the view that such a provision would impose no greater burden on the courts than is already created by the Equality Act 2010,[17] the United Nations Convention on the Rights of Persons with Disabilities[18] and, in relation to child defendants, the United Nations Convention on the Rights of the Child.[19]

3.21 We therefore invite views on the following further question:

3.22 **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?**

[17] Under the Equality Act 2010, HM Courts and Tribunals Service have a duty to make reasonable adjustments to ensure that there is no discrimination against individuals with the protected characteristic of "disability" in accessing their service. We anticipate that most vulnerable defendants requiring intermediaries, for example, would be considered to have that protected characteristic under the Act, and in accordance with HM Office for Disability's *Equality Act 2010 Guidance: Guidance on matters to be taken into account in determining questions relating to the definition of disability*, available from http://www.equalityhumanrights.com/uploaded_files/EqualityAct/odi_equality_act_guidance_may.pdf (last accessed 7 April 2014). See, for example, p37 in relation to learning disability and ADHD as a "disability."

[18] UNCRPD, article 12(3): "States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity".

[19] Under article 40 (Administration of Juvenile Justice). See Department of Children, Schools and Families, *The United Nations Convention on the Rights of the Child: How legislation underpins implementation in England. Further Information for the Joint Committee on Human Rights* (2010), p161 and following in relation to article 40 protections. Available from: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/296368/uncrc_how_legislation_underpins_implementation_in_england_march_2010.pdf (last accessed 7 April 2014).

PART 4
ASSESSING THE CAPACITY OF THE ACCUSED

THE CURRENT POSITION

4.1 Psychiatrists in England and Wales are not currently required to use a defined psychiatric test for assessing unfitness to plead in criminal proceedings. No such test is required, or in regular usage, either for civil or criminal determinations of capacity.[1] There are numerous psychiatric tests in use in the United States, many of which have been criticised as limited in different ways.[2] One such test has been adapted for use in criminal proceedings in England and Wales,[3] but has not been adopted by clinicians.[4]

4.2 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" (the "evidential requirement").[5] In practice this means that a consensus of psychiatric opinion is required for a finding of unfitness.

4.3 In contrast, the MHA 1983 has been amended so that expert evidence in relation to capacity can be given by a "responsible clinician." This is a designation which encompasses not just medical practitioners, but also, for example, psychologists, nurses and social workers.[6]

PROBLEMS WITH THE CURRENT POSITION

4.4 A number of problems have been identified with the application of the *Pritchard* criteria by medical experts,[7] in particular:

(1) a lack of consistency in the application of the *Pritchard* criteria;

(2) undue reliance on discretion in the assessment;

(3) frequent failure by experts to apply all the *Pritchard* criteria; and

(4) a lack of objectivity in the assessments.

[1] The current position is discussed more fully in the CP, paras 5.1 to 5.13.

[2] TP Rogers et al, "Fitness to plead and competence to stand trial: a systematic review of the constructs and their application" (2008) 19(4) *Journal of Forensic Psychiatric and Psychology* 576.

[3] AA Akinkunmi, "The MacArthur Competence Assessment Tool-Fitness to Plead: a preliminary evaluation of a research instrument for assessing fitness to plead in England and Wales" (2002) 30 *Journal of the American Academy of Psychiatry and the Law* 476.

[4] TP Rogers et al, "Reformulating fitness to plead: a qualitative study" (2009) 20(6) *Journal of Forensic Psychiatry and Psychology* 815, 817.

[5] CP(I)A 1964, ss 4(6) and 8(2).

[6] Explanatory notes to the Mental Health Act 2007, para 48.

[7] Discussed more fully in the CP, paras 5.6 to 5.13. See also TP Rogers et al, "Reformulating fitness to plead: a qualitative study" (2009) 20(6) *Journal of Forensic Psychiatry and Psychology* 815, 817; RD Mackay, *Mental Condition Defences in the Criminal Law* (1995).

THE CP PROVISIONAL PROPOSALS

4.5 Although we acknowledged that some of the concerns raised at paragraph 4.4 might result from the lack of definition in the test itself, we provisionally proposed that a mandatory standardised psychiatric test, to accompany interview of the accused, might address these problems:[8]

> *Provisional Proposal 7: A defined psychiatric test to assess decision-making capacity should be developed and this should accompany the legal test as to decision-making capacity.*

4.6 This proposed standardised assessment would be an accompaniment to, not a replacement of, the legal test. The final judgement as to whether the accused lacked capacity would be the province of the judge, who would be capable, as with other expert evidence, of rejecting the view of the medical experts.

4.7 No standardised model was put forward in the CP, but we endorsed research being conducted into such a formulation.[9]

4.8 We also considered whether the requirements for expert evidence referenced at paragraph 4.2 above should be relaxed. However, we concluded that, in light of the court's power to make a hospital order under the section 4A procedure, the requirement ought not to be lifted. In particular, the loss of liberty involved in a hospital order would engage article 5 of the ECHR, which requires "objective medical expertise" for the lawful detention of a person of "unsound mind."[10] Whilst we acknowledged that not all impairments likely to result in incapacity would necessarily require hospitalisation, we felt that the majority would, and that the evidence required for hospital orders would be more readily available if this restriction were maintained.

CONSULTATION RESPONSES[11]

A standardised test

4.9 A number of consultees thought that the CP was proposing a standardised test to be conducted in the place of, rather than as an addition to, the interview of the individual defendant. Others understood the provisional proposal to be that the psychiatric test would be used in place of, rather than as an accompaniment to, the legal test. As a result, there was some confusion in the responses received.

4.10 In addition, some consultees noted that it is difficult to consider the advantages of a standardised test given that none has yet been finalised and assessed (Bar Council/CBA, Council of HM Circuit Judges, Nottinghamshire NHS Trust). It remains the case that there are as yet no published findings from the research referenced in the CP.

[8] CP, paras 5.14 to 5.42.

[9] Dr Nigel Blackwood, Rebecca Brewer, Professor Jill Peay and Mike Watts are conducting research at the Institute of Psychiatry at King's College London funded by the Nuffield Foundation.

[10] Article 5(1)(e) of the ECHR and *Winterwerp v Netherlands* (1979) 2 EHRR 387 (App No 6301/73) at [39].

[11] Discussed more fully in the AR, paras 1.163 to 1.194.

4.11 There was some support for a standardised test (eg from the Justices' Clerks Society), but this was limited. In particular, it was thought that such a standardised test might raise the confidence of victims and the wider public in the court processes (Victim Support).

4.12 There was greater enthusiasm for the development of a psychiatric test as a useful aid to psychiatric assessment where it was felt appropriate, but not as a prescriptive test (eg RCP, Professor Richard Bonnie, and PRT). Some felt that such a test might enhance the objectivity of assessments (eg Nottinghamshire NHS Trust), but others cautioned that all tests require significant interpretation and that any test developed would be unlikely to be sufficiently reliable, practical or robust (Professor Rob Poole).

4.13 However, the majority of respondents who addressed Provisional Proposal 7 rejected the proposal for a mandatory standardised psychiatric test. The issues raised were:

(1) Greater consistency in the approach taken by experts in reports would be more likely to be achieved by an improvement in the legal formulation of the test and improvement in the instructions provided. Having a standardised test does not necessarily improve assessments (Professor Grubin).

(2) There is no such test under the MCA 2005 nor any compelling basis for distinguishing the expert position in the civil context from that in the criminal context (RCP).

(3) A standardised test would be unlikely to be appropriate for all accused requiring assessment. For example deaf-blind or depressed defendants may not be adequately catered for by the test (Sense, Lorna Duggan, The Edenfield Centre).

(4) Standardised tests run the risk of lending false certainty to their findings - the danger of the "illusion of scientific validity" (Professor Grubin, Broadmoor psychiatrists).

(5) Psychiatrists generally do not use standardised tests, unlike psychologists who are more used to working with such assessments. (RCP).

(6) Standardised tests developed in the United States have all been heavily criticised (Gillian Harrison, Charles de Lacy).

(7) A standardised test may fail to keep pace with scientific advances (the Edenfield Centre). Arguably, any changes in scientific understanding may require change to legislation or result in avenues for appeal (RCP).

(8) A standardised test constructed of comprehension exercises, rather than psychometric or other testing, may be coachable or subject to manipulation by malingerers (Nottinghamshire Healthcare NHS Trust). Alternatively, repeat testings may result in learned responses (Just for Kids Law).

(9) A test reliant upon playing video footage might fail for want of equipment in prisons (RCP).

(10) There may be problems relating to copyright and financial recompense which could impinge on the take-up and cost-effectiveness of a standardised test.

(11) Finally, concerns were raised that a standardised test might result in untrained individuals delivering it (Nottinghamshire Healthcare NHS Trust).

The requirement for two registered medical practitioners, one of whom is section 12 MHA 1983 approved ("the evidential requirement")

4.14 Although some consultees approved the position taken in the CP that the evidential requirement be retained (Mind, Just for Kids Law, National Autistic Society), the majority of consultees disagreed with that stance. The following arguments against retention of the requirement were raised by consultees:

(1) It is out of step with the MHA 1983, under which the evidential requirement has been broadened to "responsible clinician," which embraces other professionals such as psychologists, occupational therapists and social workers (Just for Kids Law).[12]

(2) The opinion of two registered medical practitioners is not relevant in all cases, for example where the question is one of communication difficulty such as deafblindness (Sense), or where the issues concern learning disability and effective participation (Sense, Just for Kids Law, 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, Linda Monaci).

(4) Psychiatrists lack community-based experience, and training in assessing what support is required for defendants to participate effectively in the trial process. This is more squarely within the expertise of psychologists (Graham Rogers).

(5) There are insufficient psychiatrists to cope with the possible increase in demand likely to arise in light of amendments to the test. Widening the range of experts which can be relied upon would alleviate delays caused by this shortage (RCP).

(6) The requirement for "objective medical expertise" under article 5 of the ECHR does not apply to fitness to plead findings, only to the restriction of liberty by virtue of making a hospital order. The evidential requirement could be maintained for the latter, without the need for it to remain for

[12] This point was acknowledged in the CP, paras 5.20 and 5.21.

findings of unfitness/lack of capacity (Nigel Shackleford, National Offender Management Service ("NOMS")).

DISCUSSION AND FURTHER QUESTIONS ARISING

A standardised test

4.15 The wealth of practical and principled objections raised by consultees persuade us that we should not seek to advance further our Provisional Proposal 7, which advocated the introduction of a mandatory standardised psychiatric test.

4.16 However, it is noteworthy that several consultees took the view that there may be benefits in the development of a standardised test, for use where considered relevant or beneficial, as an adjunct to other clinical assessments and interviews. This, it seems to us, may well be correct, but such development lies outside the scope of our current project.

The requirement for two registered medical practitioners, one of whom is section 12 MHA 1983 approved

4.17 The consultation responses provide compelling evidence that expertise other than the purely psychiatric would often be required for assessments incorporating decision-making capacity and effective participation requirements. As a result, retaining the evidential requirement runs the risk of psychiatrists not infrequently being required to "rubber-stamp" other expert opinion. Plainly we would want to avoid such unnecessary costs being incurred.

4.18 In addition, we consider that there is merit in reviewing whether the assessment of fitness to plead does in fact engage the requirement for "objective medical expertise" under article 5 ECHR. 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."[13] We note consultees' observation that, in contrast to the imposition of orders under sections 37 and 41 MHA 1983, 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 section 37 MHA 1983 are satisfied. Those conditions of course require the opinion of two registered medical practitioners.[14]

4.19 In the CP at paragraph 5.34 we provisionally proposed that it would be expedient to retain the evidential requirement because, were a hospital order to be made in due course, the required medical opinion would already be before the court. In the light of reduced resources and raised pressures on the courts and health services, we consider that this expediency requires careful review. In particular, we note that hospital orders are not invariably imposed, and there is evidence that their frequency as a disposal for unfit defendants is decreasing.[15] Indeed,

[13] *Winterwerp v Netherlands* (1979) 2 EHRR 387 (App No 6301/73), [39].

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

[15] R Mackay et al, "A continued upturn in fitness to plead – more disability in relation to the trial under the 1991 Act" [2007] *Criminal Law Review* 530. The frequency of the imposition of hospital orders reduced from 77.4% to 62.9% during the research period 1997-2001.

were effective participation to be a more prominent feature of the test for unfitness, we anticipate that that frequency would fall still further. We also consider it highly likely that, in cases in which the defendant's impairment is likely to require hospital treatment at the conclusion of the proceedings, evidence will in any event have been sought from two registered medical practitioners for the determination of the defendant's capacity, or lack of it, as the most suitable experts to consider that particular impairment.

4.20 Finally, we bear in mind consultees' concerns about the pressure on the limited numbers of psychiatrists to deal with the current caseload in relation to fitness to plead assessments, and the delays which can result. We acknowledged in the CP that the numbers of those whose capacity will need assessment may rise under the proposed changes. However, we envisage firstly, as set out above, that the assessment of the individual will not always be most appropriately conducted by psychiatrists. A psychologist, for example, will often be the appropriate expert. Secondly, we anticipate that many who will fall to be assessed under a reformed test, but would not have required assessment under the *Pritchard* criteria, would have had a report or reports prepared in relation to their particular difficulties in any event, for the purposes of identifying the need for special measures or to isolate appropriate sentencing disposals. Therefore the increase in the need for expert reports to be prepared may not be as significant as first considerations may suggest. Additionally, were the evidential requirement to be lifted, we anticipate that an undue increase in the pressure, on psychiatrists in particular, will be avoided.

4.21 The RCP captured the thrust of the majority of consultation responses in their observation that "the important issue is that the training and experience of the individual expert makes them competent for the task." We agree. In light of all of the above, we are considering whether it might be appropriate to relax the evidential requirement in relation to the determination of capacity. We do not, however, propose to amend the evidential requirement for the making of a hospital order, restriction order,[16] or a treatment requirement as part of a supervision order. We therefore invite consultees' response to the following:

4.22 **Further Question 13: Do consultees agree that in any reformed unfitness test it will be unnecessary for the requirement for two registered medical practitioners, one duly approved under section 12, to remain?**

4.23 Turning to what might replace the evidential requirement, we have already acknowledged in the CP[17] that there are jurisdictions, such as Scotland,[18] in which there is no restriction on the evidence required for a finding of unfitness/lack of capacity. We, however, take the provisional view that a finding of lack of capacity, and the curtailment of the right to full trial which follows, is a significant deprivation of rights which continues to justify a minimum requirement for expert evidence. We consider that what is important is that there is, at the

[16] When the court makes a hospital order in relation to a defendant it can also impose a restriction order, under the MHA 1983 s41. A restriction order prevents a hospitalised defendant being granted leave, transferred or discharged from hospital without the consent of the Secretary of State.

[17] Para 5.28.

[18] Criminal Justice Licensing (Scotland) Act 2010, s 53F.

very least, reliable evidence from two expert witnesses, competent to address the defendant's particular condition. We therefore invite consultees to consider the following question:

4.24 **Further Question 14: 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?**

Defendants who refuse to consent to expert assessment

4.25 Particular challenges to unfitness to plead procedures arise with defendants whose capacity causes concern, but who refuse to consent to expert assessment. We anticipate that the provision of Liaison and Diversion Services will improve the identification of such individuals at an early stage, should the project be extended nationwide as hoped,[19] giving the court greater capacity to raise the issue with the defendant, or his or her representative, when it arises.

4.26 However, we consider that those defendants whose impairment is hidden, or who refuse the invitation for their capacity to be assessed, present an intractable problem for the courts. Until a finding of incapacity is arrived at, the court is unable to interfere, even where it considers a guilty plea to be ambiguous or involuntary, on the basis of a suspected impairment. Any attempt to enforce expert assessment would be contrary to the autonomy of the individual, a principle endorsed by many consultees in responding to CP Provisional Proposal 2. In addition, such an approach would also conflict with the obligations of the UNCRPD to respect the 'rights, will and preferences of the person".[20] Beyond ensuring 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, we are unable to suggest any proposals which can might address this problem. We would, however, welcome the views of consultees on this issue.

4.27 **Further Question 15: Do consultees consider that there is any alternative appropriate mechanism to address the difficulty presented by a defendant whose capacity is in doubt, but who refuses expert assessment?**

[19] See NHS England, *Operating Model for Liaison and Diversion Services across England* (2013) and *2013/14 NHS Standard Contract for Liaison and Diversion Service* (2013).

[20] UNCRPD, article 12(4).

PART 5
PROCEDURE FOR THE UNFIT ACCUSED

THE CURRENT POSITION[1]

5.1 Following a finding by the court that an accused is unfit to plead, the jury is required to consider whether the defendant "did the act or made the omission" charged against him or her, under section 4A CP(I)A. This has been interpreted by the House of Lords in the case of *Antoine*[2] to mean that the prosecution only has to prove the external elements of the offence in question, and should not be concerned with any mental element, namely what the accused thought or believed. *Antoine* confirmed that partial defences to murder, namely diminished responsibility and provocation (now loss of self-control, but we assume that the position is unchanged), cannot be put forward on behalf of the defendant. However, where there is objective evidence, for example from an independent witness, raising the question of the act having been the result of mistake, accident or self-defence, these issues can be considered by the jury.

PROBLEMS WITH THE CURRENT POSITION[3]

Division of conduct and fault elements

5.2 The section 4A hearing, following *Antoine*, requires strict division of the conduct and fault elements of the offence. However, in many common offences this is not easy to achieve. For example, in the case of possession of an offensive weapon,[4] where the weapon is not offensive in and of itself but only by virtue of the defendant's intention to use it to cause injury, what is in the defendant's mind changes what could be a perfectly lawful act into an offence. Proving the act itself, without any regard to the mental state of the defendant, can in such cases result in significantly unfair or arbitrary decision-making. The law has developed in a piecemeal manner as a result, leading to uncertainty and inconsistency.[5]

Defences

5.3 The approach in *Antoine,* which limits the raising of self-defence, accident and mistake to cases where objective evidence of the defence exists, is liable to lead to unfairness. It also arbitrarily disadvantages an unfit defendant in comparison with a fit defendant in the same situation. If we take, for example, two defendants,

[1] Discussed more fully in the CP, para 6.1 and following.

[2] [2000] UKHL 20, [2001] 1 AC 340, overturning *Egan* [1998] 1 Cr App R 121 on this point. In *Egan*, 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: pp 124 and 125.

[3] Discussed more fully in the CP, paras 6.24 to 6.54.

[4] Contrary to section 1 of the Prevention of Crime Act 1953.

[5] See for example the case of *B(M)* [2012] EWCA Crim 770, [2012] 3 All ER 1093, in which the Court of Appeal considered how the conduct and fault elements of the offence of voyeurism should be divided for the purpose of a section 4A hearing. They concluded that in proving that the defendant "did the act or made the omission" the relevant act included the defendant's purpose in observing the private act of another, but his knowledge, that the person observed did not consent, was part of the fault element. (See *Criminal Law Week* 12/18/7 and case comment by R McKay, [2013] *Criminal Law Review* 90 for criticism.)

one fit to plead, the other unfit, who arm themselves and, in using reasonable force to fend off an attack, inflict grievous bodily harm. 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. However, the unfit defendant will be found to have done the act of inflicting grievous bodily harm, unless there is objective evidence (from a bystander for example) that his actions might have been in self-defence.

Secondary participation

5.4 Liability for a criminal offence by virtue of assisting, encouraging, or causing another to commit an offence also presents significant problems for section 4A hearings. This arises because the conduct elements of these offences are seemingly innocuous in many cases. The liability of the secondary party turns frequently on consideration of what was in his or her mind, namely what he or she knew or believed about what the perpetrator of the offence was going to do.

Inchoate offences

5.5 Similarly, inchoate offences, such as attempts to commit a criminal offence, or conspiracy to commit an offence, are also problematic for section 4A hearings. This is because the conduct element of such offences is often not in itself unlawful, but is 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 element 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. For example, a jury examining the external elements of a conspiracy to defraud allegation against an unfit defendant, whose involvement on the evidence amounts to the use of his bank accounts for the movement of funds, may be unable to determine whether the defendant's conduct amounted to unlawful involvement or whether he was an unknowing participant in the fraud.

No protection under article 6 of the ECHR

5.6 We also raised the concern in the CP that the House of Lords has concluded that the section 4A hearing is not criminal in nature and that an unfit accused is not therefore entitled to claim the protections enshrined in article 6 of the ECHR. [6] We do not, however, consider this issue to give rise, on its own, to the need for reform.

CP PROVISIONAL PROPOSALS

An amended section 4A procedure (Provisional Proposals 8 and 9):

5.7 In the CP[7] we considered and rejected a number of different options for reform of the section 4A hearing, the trial of facts, to rectify these problems:

(1) Option 1: do nothing. This was rejected on the basis of the problems outlined above.

[6] *H* [2003] UKHL 1, [2003] 1 WLR 411.

[7] CP, paras 6.55 to 6.162.

(2) Option 2: replace the section 4A hearing with a special hearing which does not lead to conviction but which takes the form of a trial of the facts to the fullest extent possible having regard to the mental condition of the defendant. This was rejected on the basis that this might lead to dangerous offenders being acquitted, to the detriment of public safety, where the mental state of the defendant made it impossible for the prosecution to prove the mental or fault element of the offence.

(3) Option 3: to abolish the section 4A hearing altogether, and try the defendant, with a legal representative appointed to protect the defendant's interests at trial. We rejected this approach on the basis that an accused who is not able to participate effectively ought not to be subject to a trial and a finding of guilt. We considered that protection from conviction for an unfit accused is important and should be retained.

(4) Option 4: the Scottish procedure, which requires the prosecution, on an "examination of the facts", to establish beyond reasonable doubt that the defendant did the act, or made the omission, and, on the balance of probabilities, that there are no grounds for acquitting the accused. Where the court acquits an accused, if it appears to the court that the defendant was "insane" at the time of the act or omission constituting the offence, then the court may state that acquittal is on the grounds of such insanity. We rejected this option on the basis that there is no good reason for lowering the standard of proof in relation to any grounds for acquittal, since this reduces the protection for the unfit accused who may have a good defence to the charges.

5.8 We preferred a fifth option: a fact-finding 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. 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." There would therefore be three potential outcomes of the proposed procedure:

(1) a finding that the accused has done the act or made the omission, and that there are no grounds for acquittal;

(2) an outright acquittal; or

(3) an acquittal which is qualified by reason of mental disorder (a "special verdict").

5.9 This formulation sought to ensure a fair outcome for the defendant, by requiring proof of all the elements of the offence beyond reasonable doubt. Any defence, or partial defence, could therefore be raised on the defendant's behalf, as long as there was sufficient evidential basis for it. This option also recognises the difficulty for the Crown in proving all the elements of the offence against an unfit defendant, and the need to ensure proper protection of the public, which would be achieved by providing for the imposition of appropriate disposals where a special verdict had been arrived at.

5.10 We therefore advanced the following provisional proposal:

> *Provisional Proposal 8: The present section 4A hearing should be replaced with a procedure whereby the prosecution is obliged to prove that the accused did the act or made the omission charged and that there are no grounds for an acquittal.*

5.11 We rejected the possibility that the special verdict should be available to the jury at the same time as their consideration of whether or not they found the defendant to have done the act, or made the omission, there being no basis for an acquittal. We preferred the consideration of the "special verdict" to be at a subsequent hearing, on the basis that this would provide a clearer and simpler route for the jury in their initial verdicts, and that this would avoid any prejudice which might arise from the jury hearing medical evidence relevant to the special verdict in the substantive fact finding hearing.

5.12 We also took the view that the holding of a second hearing following an acquittal should be at the discretion of the judge. This was on the basis that there would be some cases in which such a hearing would be redundant, it being plain that the acquittal was not on the grounds of mental disorder, for example where a case of accident had been advanced. Consequently we proposed as follows:

> *Provisional Proposal 9: If the accused is acquitted provision should be made for a judge to hold a further hearing to determine whether or not the acquittal is because of mental disorder existing at the time of the offence.*
>
> *Provisional Proposal 10: The further hearing should be held at the discretion of the judge on the application of any party or the representative of any party to the proceedings.*
>
> *Provisional Proposal 11: The special verdict should be determined by the jury on such evidence as has been heard or on any further evidence as is called.*

5.13 We acknowledged that concerns might be raised that a two stage hearing is unduly complicated, and therefore invited consultees to make any alternative suggestions that they considered would be more suitable:

> *Question 3: Do consultees agree that we have correctly identified the options for reform in relation to the section 4A hearing? If not, what other options for reform would consultees propose?*
>
> *Question 4: If consultees do not agree that option 5 is the best option for reform, would they agree with any other option?*

CONSULTATION RESPONSES

Expansion of the section 4A hearing to cover all the elements of the offence (Provisional Proposal 8, Questions 3 and 4)

5.14 The provisional proposal to expand the scope of the section 4A hearing to cover all elements of the offence received widespread support across all classes of stakeholder.[8]

5.15 Support focused on:

(1) greater fairness to the accused.[9] There was a strong feeling that an unfit defendant should not be disadvantaged in comparison with a fit defendant;[10] and

(2) that the more extensive procedure would attract article 6 ECHR protections.[11] However not all consultees agreed that such rights would necessarily be engaged.[12]

5.16 Support was not unanimous, however. Compass Psycare favoured Option 3, and Just for Kids Law favoured Option 4. The CPS rejected Provisional Proposal 8 and preferred the current position, arguing that the unfit defendant is not at a disadvantage in comparison to a fit defendant, and that consideration of the mens rea of an unfit defendant is neither necessary nor a helpful task for the jury. They were concerned that our proposed procedure would undermine confidence in the criminal justice system and provide insufficient protection to the victims of crime. In their joint response, the Bar Council/CBA, while considering our proposed approach to be the most appropriate avenue for reform, were unconvinced that it was "needed or desirable."

5.17 Furthermore, amongst those who agreed with Provisional Proposal 8, a number of reservations, or amendments to that provisional proposal, were advanced:

(1) The requirement for a "sufficient evidential basis" before the defendant's advocate can raise a defence[13] is too restrictive. They should be able to advance any reasonable defence (Carolyn Taylor, the Law Society).

(2) The proposed amendment to the section 4A procedure does not address the conflict of interest which may arise as a result of advocates' freedom to act against the instructions of an unfit defendant (Bar Council/CBA).

(3) There remains the danger that any section 4A procedure may be unduly burdensome for an unfit defendant (Nicola Padfield).

[8] Including the Justices' Clerks Society, the Council of HM Circuit Judges, Professor Peay, Dr Loughnan, Professor Mackay, Professor Poole, Lorna Duggan, Just for Kids, PRT, Mind, Kids Company, and the South Eastern Circuit.

[9] The Justices' Clerks Society, HHJ Gilbart QC, Kids Company.

[10] Eg the Council of HM Circuit Judges.

[11] PRT, Kids Company.

[12] Eg Professor Mackay.

[13] CP, para 6.129.

(4) Consideration should be given to making the section 4A procedure discretionary, to allow for the treatment of an unfit defendant with a view to his regaining fitness and subsequent trial (Bar Council/CBA). This echoed the concern of Nottinghamshire NHS Trust that the procedure should not be unduly fast-tracked so that there is insufficient opportunity for unfit defendants to regain capacity.

(5) The distinction between a conviction and a finding that the defendant "did the act or made the omission and there are no grounds for acquittal" may not be very meaningful (Professor Rob Poole).

(6) That public understanding of the section 4A procedure is poor and efforts should be made to educate the public about it, regardless of how it is amended (Victim Support).

The two-stage process (Provisional Proposals 9 to 11)

5.18 Provisional Proposal 9, insofar as it introduced a qualified acquittal or special verdict, was well received,[14] although agreement was not total.[15]

5.19 However, a significant number of consultees who favoured the qualified acquittal rejected the two-stage process envisaged by Provisional Proposal 9.[16] Objections to this aspect of Provisional Proposal 9 focused on the following:

(1) A two stage process is unnecessarily cumbersome.[17]

(2) A two-stage process would also be unduly burdensome for an unfit defendant, and would result in uncertainty for him or her (Mind).

(3) There is no compelling reason why a jury might not consider a special verdict alongside the other verdicts in a single stage process.[18] (HHJ Gilbart QC observed that this is no more demanding of a jury than, for example, cases where diminished responsibility arises.)

(4) That the avoidance of prejudice arising from the jury hearing medical evidence during the section 4A hearing is insufficient reason to justify a second stage. Several judicial respondents observed that juries are capable of putting medical evidence out of their minds where required in serious cases.[19]

(5) That undue prejudice arising from the hearing of medical evidence in a single hearing could be avoided, in the rare cases in which it might arise,

[14] Being supported by the the Justices' Clerks Society, the Council of HM Circuit Judges, HHJ Gilbart QC, Dr Arlie Loughnan, Professor Mackay, Professor Poole, Lorna Duggan, PRT, Mind and Kids Company.

[15] Just for Kids Law, Professor Peay, Compass Psycare.

[16] HHJ Gilbart QC, Gillian Harrison, the Council of HM Circuit Judges, Legal Committee for the Council of District Judges.

[17] HHJ Gilbart QC, the Council of HM Circuit Judges.

[18] HHJ Gilbart QC, the Council of HM Circuit Judges.

[19] Including HHJ Gilbart QC.

by provision within the Indictment Rules[20] for severance of the issue (the Council of HM Circuit Judges).

(6) The second stage represents an unnecessary additional expense (Gillian Harrison).

(7) The second stage could result, in effect, in a discretionary reopening of an acquittal (PRT, Professor Peay).

(8) There is uncertainty as to how the discretion to hold the second stage hearing should be exercised (HHJ Wendy Joseph QC).

5.20 Some consultees objected to Provisional Proposals 9 to 11 on the basis that the creation of a qualified acquittal/special verdict was unnecessary, because:

(1) Admission for treatment under the civil sections of the MHA 1983, notably section 3, is available. Thus, protection of the public could be achieved, where required and appropriate, without recourse to a special verdict (Professor Peay, HHJ Lamb QC); and

(2) It is more appropriate for a psychiatrist to make a judgement concerning the dangerousness of an unfit acquitted defendant, and the potential need for hospitalisation, than a judge (HHJ Lamb QC).

DISCUSSION AND FURTHER QUESTIONS ARISING

5.21 The responses reveal significant enthusiasm across the stakeholder groups for broadening the section 4A hearing to require proof of all elements of the offences charged, and allowing for a finding that the accused has "done the act or made the omission, and that there are no grounds for acquittal." Likewise, there was considerable support for the special verdict of acquittal qualified by reason of mental disorder existing at the time of the offence. However, in light of the comments made by consultees in relation to the proposed changes, we think it appropriate to consider a number of additional questions.

Adjournment to allow for the recovery of fitness

5.22 In our overview in Part 1, we noted that the primary goal must be to enable the defendant to have a full trial, where possible. We also emphasised that in our view it is important to consider adjourning the proceedings to allow the accused to recover capacity, where appropriate.[21] There are already powers to delay the determination of the defendant's fitness,[22] and provision for the defendant to receive treatment in the interim,[23] to allow this to occur.

5.23 We also consider that, where a defendant has been found to lack capacity, it is worth investigating the incorporation of a power to adjourn the factual

[20] Now Rule 14 of the Criminal Procedure Rules 2013 (SI 2013 No 1554).

[21] Paras 1.7 to 1.9 above.

[22] Under section 4(2) CP(I)A .

[23] Under s ection36 MHA 1983, on the agreement of two registered medical practitioners, one of whom must be approved under section12 MHA 1983. Hospitalisation for treatment under this section is limited to a total period of 12 weeks (MHA 1983, s 36(6)).

determination to allow recovery of capacity to occur, where that is possible (as proposed by Nottinghamshire NHS Trust and the Bar Council/CBA). We are mindful of the negative impact that delays can have on all parties to criminal proceedings, but consider that such a power may be desirable in the interests of every accused enjoying the benefits of full trial, where appropriate. Our provisional view is that it would be appropriate to fix a maximum time period for such an adjournment, after which the determination of the facts must proceed. Our current view is that this period should not exceed six months from the finding of lack of capacity.[24] We also consider that this power should only be exercisable where both experts agree that capacity may be recoverable within that period. We therefore ask the following:

5.24 **Further Question 16: Do consultees consider that, following a finding that the defendant lacks capacity, there should be a power to delay the determination of facts procedure for a maximum six month period, on the agreement of two competent experts, to allow the accused to regain capacity and be tried in the usual way?**

5.25 **Further Question 17: Do consultees consider that it would be appropriate to extend the maximum period of a section 36 MHA 1983 remand to hospital for treatment to 24 weeks in these circumstances?**

Building in opportunity for diversion out of the criminal justice system

5.26 We bear in mind that, however the determination of fact process may be reformulated, any fact-finding process with which the accused cannot fully engage has its limitations. In particular we consider that, even reformed as we have proposed, the determination of facts may not attract article 6 ECHR fair trial guarantees.[25] Additionally, we do not discount the adverse effect that any such process might have on a defendant who lacks capacity, whatever arrangements are made to facilitate his or her understanding of the process. We therefore think that it is essential to consider whether there is scope for defendants who are found to be lacking in capacity to be diverted out of the criminal justice system following that finding. In those circumstances, the court would not proceed to the determination of fact nor would any disposal be available through the court.

5.27 Our interest in exploring options for diversion accords with the Government's continued commitment to liaison and diversion schemes for vulnerable and mentally disordered defendants, referred to at paragraph 1.2(5) above. Under this initiative,[26] offenders with complex health needs and other vulnerabilities who come into contact with the youth justice and criminal justice systems will have their needs assessed by liaison and diversion services and, where appropriate, be diverted out of the criminal justice system. Services to which they may be referred, in addition to mental health, learning disability and physical health

[24] Where the accused is hospitalised for treatment under s 36 MHA 1983.

[25] Although in the CP we considered that article 6 ECHR guarantees may apply to a reformed section 4A hearing (CP, paras 6.42 to 6.54), this may not necessarily be the case given the judgment in *H* [2003] UKHL 1, [2003] 1 WLR 411.

[26] See NHS England's *Operating Model for Liaison and Diversion Services across England (September 2013)* and *2013/14 NHS Standard Contract for Liaison and Diversion Service* (fn 6, Part 1 above).

services, include alcohol and substance misuse support, accommodation support, financial need assistance, and other social care services.

5.28 For many defendants, diversion out of the criminal justice system will not be appropriate, particularly where the seriousness of the offence, or the danger represented by the offender, is high. However, for less serious charges, diversion out of the criminal justice system after a determination of incapacity may be desirable. This may be particularly appropriate where a mental disorder, 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 finding that the defendant has done the act or made the omission.

5.29 Whilst this may appear to be a radical proposal, we do not view it as such. For those less serious offences which will not be suitable for a hospital order with restriction,[27] the determination of fact process arguably provides no greater protection for the public than diversion out of the criminal justice system. That hearing makes no finding as to fault or culpability. The determination therefore has no status as a conviction, and nor can a sanction be imposed for breach of any of the requirements of a disposal imposed as a result. Thus, the determination of fact offers no remedy for non-compliance, and therefore no greater power for the prevention of harm to the public. Arguably, the flexibility of support offered by the diversion route promises better outcomes for those who have come to the court's attention for less serious matters, and would arguably provide better long-term protection for victims and members of the public. In addition, the discontinuance mechanism would not preclude prosecution should capacity be recovered. Finally, the accused's arrest and charge for a criminal offence, and the result of the process, would remain as a matter of record on the Police National Computer, for the purposes of any future arrest or prosecution.[28]

5.30 We 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 on the basis that it was not in the public interest. There are also instances where the prosecution have decided to offer no evidence following the finding of unfitness.[29]

5.31 We consider that there would be a range of factors for the judge to take into account in exercising that discretion, including: the seriousness of the offence originally charged, the impact on any identified victim(s), the risk of repetition of the alleged offence should a disposal not be imposed by the courts, whether facilities outside the criminal justice system are available to address the

[27] MHA 1983, s 41.

[28] 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) Chapter 12.

[29] R Mackay [2007] *Criminal Law Review* 530, 538. Of the 252 unfitness to plead cases examined, twelve 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.

impairment of the defendant, where appropriate, and any other factor which the court considers relevant. We take the view, however, that diversion of an accused out of the criminal justice system should not occur where the accused or his or her representative objects to that course. We consider that the accused, or the defence representative, should be entitled to put the Crown to proof of the allegation if they wish. We anticipate that this is only likely to arise where the allegation itself is likely to be reputationally damaging (for instance an alleged sexual offence).

5.32 In light of these issues, we therefore ask the following:

5.33 **Further Question 18: Do consultees consider that the determination of facts procedure for the accused who lacks capacity should be made discretionary following the finding of unfitness, to allow for discontinuance of the proceedings, and diversion out of the criminal justice system into health or related services in appropriate cases?**

Exploring civil powers as an alternative to the "special verdict"

5.34 The majority of consultees approved the creation of a special verdict to meet public protection concerns where an unfit defendant is acquitted at the determination of the facts. However, several consultees advocated the use of civil powers to detain under the MHA 1983 as a potential alternative.[30] Under this alternative proposal the determination of the facts would have only two possible outcomes: (1) a finding that the defendant did the act or made the omission and there are no grounds for an acquittal, or (2) an acquittal. For acquitted defendants who nonetheless present a public protection concern, instead of the court proceeding to decide whether to embark on the second stage consideration of a special verdict, this alternative proposal would involve addressing any public protection concerns by using civil powers.

5.35 We believe that it is important to canvas opinion on the suitability of reliance on civil powers as an alternative to the special verdict procedure for an acquitted defendant.

5.36 Section 3 MHA 1983 creates a civil power for an individual to be admitted to hospital for treatment where:

(1) he or she is suffering from a "mental disorder" of a nature and degree which makes it appropriate for them to receive medical treatment in a hospital;

(2) it is necessary for their health and safety, or for the protection of others, that he or she should receive such treatment;

(3) such treatment cannot be provided unless he or she is detained; and,

(4) appropriate medical treatment is available.

5.37 An application for admission for treatment under this section requires the evidence of two registered medical practitioners, one of whom is approved per

[30] Including Professor Jill Peay and HHJ Tim Lamb QC.

section 12 MHA 1983, and at least one of whom has previous acquaintance with the patient. They may examine the patient separately, but there must be no more than five days between their separate examinations.[31] The application itself may be made by the nearest relative of the patient, or by an approved mental health professional who has seen the patient within the preceding 14 days, and is addressed to the managers of the hospital to which admission is sought.

5.38 There is also a power to make a civil guardianship order, under section 7 MHA 1983, for a patient suffering a mental disorder of a nature or degree which warrants such an order, and where it is necessary in the interests of the welfare of that patient, or for the protection of others, for such an order to be imposed.

5.39 There would be several advantages of using the civil powers under the MHA 1983 to address public protection concerns where an accused who lacked capacity to stand trial has been acquitted at the determination of the facts. These include:

(1) the avoidance of the need for a special verdict hearing and the adverse impact of such a process on an unfit accused;

(2) that a judgement as to whether an unfit accused, who has been acquitted at the section 4A hearing, presents a danger to the public and requires hospitalisation is arrived at by medical professionals rather than a judge (HHJ Tim Lamb QC);

(3) hospitalisation is achieved where that is necessary; and

(4) for the purposes of any future prosecution, the arrest, charge and outcome of the current proceedings would remain a matter of record on the Police National Computer.

5.40 The disadvantages of relying on the civil powers under the MHA 1983 in such situations are:

(1) there is no power for a court to impose a restriction order,[32] and the release of the patient from hospital can be on clinical grounds alone;

(2) an admission for treatment under section 3 MHA 1983 would require clinical support (ie the availability of a bed) whereas, following a finding that the accused has "done the act or made the omission" under section 4A or a special verdict, hospital managers have a duty to admit the patient in accordance with a hospital order made by the court;[33]

(3) following an acquittal, the Crown Court would have no power to order immediate detention of the defendant; there would therefore have to be careful co-ordination of the making of the application for admission; and

[31] MHA 1983, s 12.

[32] MHA 1983, s 41.

[33] CPIA 1964, s 5A(4).

(4) reliance on a civil order might be perceived to create a disparity between, on the one hand, an unfit defendant who is acquitted because of a mental disorder existing at the time of the offence and who is subjected only to a civil order, and on the other hand, a fit defendant with the same condition who is found not guilty by reason of insanity at trial, but who may as a result be subject to a hospital order, including with restriction. However, we consider that the fit defendant is in a fundamentally different position, having had the benefit of a full trial. Therefore the more onerous requirements of a court-imposed hospital order, with restriction, may be justifiable.

5.41 In assessing these factors, we consider that there will be few instances where an unfit accused who is acquitted, or likely to be acquitted, presents a danger to the public such that protection by hospitalisation is required. We also anticipate that an accused who would be suitable for such an order is likely to have attended court from a secure hospital, and be accompanied by a mental health professional. As a result, we anticipate that the making of the application, and the detention of the accused for those purposes, would not represent undue difficulty.

5.42 An alternative mechanism for facilitating the making of an order under section 3 MHA 1983 was proposed by HHJ Tim Lamb QC. He referred to the power in civil proceedings under Civil Procedure Rule 35.15 for an expert to attend the proceedings, or any part of them, as an "assessor," providing advice to the court where appropriate. HHJ Lamb QC proposed that a "psychiatric assessor" might be appointed to assist the court at the section 4A stage and, where an acquittal results, the assessor might be invited to state whether he or she considered an application under section 3 was appropriate. We consider this a viable option for the alternative civil powers route, but note the likely increased expense involved.

5.43 Having regard to these arguments, although we doubt whether this alternative proposal would be satisfactory, we consider that there is merit in exploring the use of civil powers under the MHA 1983 in place of the special verdict procedure. In light of these observations we invite consultees to consider the following:

5.44 **Further Question 19: Do consultees consider that public protection concerns arising in relation to an acquitted, but dangerous, unfit defendant could be adequately met by the use of civil powers under section 3 or 7 MHA 1983?**

Restriction on defences which can be raised

5.45 We explained in the CP[34] that the restrictions imposed in *Antoine*[35] on the consideration of the mental element and the advancing of defences may put a defendant who lacks capacity at a significant disadvantage compared to a fit defendant. In our Provisional Proposal 8 (discussed at paragraph 5.9 above), we sought to address that imbalance and suggested that, under that procedure, the legal representative of the accused should be able to raise any defence for which there is "sufficient evidential basis," but we did not address in detail what we meant by that phrase. The concerns raised by consultees about this evidential burden in raising defences (at paragraph 5.17(1) above) suggest that we need to clarify what we meant by "sufficient evidential basis."[36]

5.46 Establishing what should amount to evidential sufficiency in these circumstances is not straightforward. We do not exclude the possibility of the defendant giving evidence in a determination of the facts, where his or her condition makes that possible. However we anticipate that that would not be appropriate in the majority of cases. In those circumstances, and in situations where the accused is unable to provide instructions of any reliable or intelligible sort, what restriction should there be on the defences that can be explored by defence advocates?

5.47 We consider that some help on this issue is provided by the case law on what has been described as the "invisible burden" on the judge to leave to the jury in a criminal trial any alternative defences beyond, or even in conflict with, those advanced by the defendant.[37] This principle requires that if there is a reasonable possibility on one interpretation of the evidence that the accused may have a defence, even where it has not been expressly raised by either party, it is the judge's duty, after discussion with the advocates, to raise that defence in summing up for the jury's consideration.[38]

5.48 This situation bears some similarities to the potential position in a determination of the facts under our proposed amended section 4A hearing. There may be some evidence on which a properly directed jury might reasonably conclude that the accused may have acted, for example, in lawful self-defence, but the accused has not given evidence, or instructions to his or her representative, in that regard. If we take, for example, a defendant who faces an allegation of causing actual bodily harm. He provides no intelligible instructions, gives no evidence and no witnesses are available to be called on his behalf. If there is evidence that he had wounds on his hands which are consistent with defensive injuries, applying the "invisible burden" case law, it would be appropriate for self-defence to be left to

[34] CP, paras 6.30 to 6.35.

[35] *R v Antoine* [2000] UKHL 20, [2001] 1 AC 340.

[36] CP, para 6.129.

[37] S Doran, "Alternative defences: the 'invisible burden' on the trial judge" [1991] *Criminal Law Review* 878.

[38] See for example the case of *Kachikwu* (1965) 52 Cr App R 538, where the accused denied that he had caused an injury, the subject of an allegation of assault occasioning actual bodily harm. The judge gave no direction in his summing-up as to self-defence, and the subsequent conviction was overturned on appeal. The Court of Appeal observed that, difficult though it is, the judge should "always have in mind possible answers, possible excuses in law which have not been relied upon by defending counsel" (at 543).

the jury, even though this could not necessarily be advanced on behalf of the defendant.

5.49 We therefore ask the following:

5.50 **Further Question 20: Do consultees consider that on a determination of the facts, any defence should be left to the jury, after discussion with the advocates, where there is evidence on which a jury properly directed might reasonably find the defence made out or the essential element of the offence unproven?**

The two-stage process

5.51 There was substantial support from consultees for the provisional proposal relating to the special verdict, but also widespread concern in relation to the two-stage process provisionally proposed in that regard. We acknowledge the force of concerns that a second stage may be cumbersome, having anticipated this problem in our CP,[39] and that the additional hearing may have an adverse effect on a vulnerable accused. We also appreciate the unease of some consultees concerning the fairness of an acquittal being reopened at the discretion of the judge. As a result, we consider that the counter-proposal advanced by HHJ Gilbart QC and the Council of HM Circuit Judges, that the special verdict be available to the jury on their initial consideration of the facts, should be explored further.

5.52 Under this counter-proposal, the jury at the determination of the facts would consider the evidence relating to the alleged facts of the offence, and also any evidence advanced by either party in relation to any mental disorder which might have been suffered by the accused at the time of the alleged offence. The jury would then have three different verdicts open to them:

(1) a finding that the accused has done the act or made the omission, and that there are no grounds for acquittal;

(2) an outright acquittal; or

(3) an acquittal which is qualified by reason of mental disorder (a "special verdict").

5.53 We provisionally proposed the two-stage process because of concerns about prejudice to the accused arising out of the admission of medical evidence at the determination of the facts. However, we are persuaded by the observations of the Council of HM Circuit Judges and HHJ Gilbart QC that, in their experience, juries are capable of following more complex routes to verdict and of putting medical evidence out of their minds where required. We also note, as we observed in the CP,[40] that there are already occasions under the current section 4A procedure where medical evidence is adduced without difficulty in relation to the defendant's mental condition at the time of the alleged offence (as occurred in the case of

[39] CP, para 6.151.

[40] CP, para 6.149 and following.

Sureda).[41] Indeed, under the revised process for determining the facts that we have provisionally proposed, we anticipate that evidence of the accused's mental state would routinely be relevant, whether or not the special verdict were available at the jury's initial consideration of the facts. However we would like to canvass broader input on this issue. We therefore ask:

5.54 **Further Question 21: Do consultees consider that the special verdict should be made available to the jury on their initial consideration of the facts?**

5.55 We do however bear in mind that there may be some "rare cases," as the Council of HM Circuit Judges suggested, in which there would be such significant prejudice to the defendant in a single-stage process that there should remain some mechanism by which consideration of the special verdict can be separated off from the rest of the jury's deliberations (as in Provisional Proposal 9). However, in re-examining the issue, we find it so difficult to identify an example of an occurrence of such significant prejudice, that we do not consider it likely that such a mechanism would be required. Our provisional view, therefore, is that it is not necessary for the judge to retain the discretion to hold a two-stage process for arriving at a special verdict, for the avoidance of exceptional prejudice to the defendant, but we invite further input in that regard. We therefore ask in addition:

5.56 **Further Question 22: Do consultees agree that it is not necessary for the judge to retain the discretion, in cases of exceptional prejudice, to order a second stage process for the consideration of the special verdict, in the manner envisaged in Provisional Proposal 9?**

Judge as tribunal for determination of the facts

5.57 At present the jury determine the issue at the section 4A hearing (the determination of fact).[42] The provisional proposals that we advanced in the CP were formulated on that basis. However, we consider that it is appropriate to explore with consultees whether that remains necessary and appropriate, or whether the determination of facts might better be conducted by a judge sitting alone. We raise this option for consideration on the basis of a number of factors:

(1) such a process would be 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) a judge may be better equipped to deal with a section 4A hearing heard at the same time as the full trial of co-defendants, where that was considered appropriate; and,

[41] The case of *Sureda*, which took place in the Central Criminal Court in 2008 and details of which were provided to us by HHJ Jeremy Roberts QC, is considered in detail at Appendix B to the CP.

[42] CP(I)A, s 4A(2).

(4) empirical research suggests that in the majority of cases the section 4A hearing is not contested.[43]

5.58 We recognise that the removal of the right to jury determination that this provisional proposal engages is potentially controversial and may cause concern. In seeking to weigh the merits of this provisional proposal against those concerns, we identify the following counterbalancing factors:

(1) the determination of facts does not lead to conviction, penal sanction, or any disposal with penal sanctions for breach. However the imposition of a hospital order, especially with a restriction,[44] is a serious deprivation of liberty;[45]

(2) the imposition of a hospital order is governed by additional stringent conditions set out in section 37 MHA 1983;

(3) a defendant found to lack capacity, but who subsequently recovers, would be entitled to seek remission for full trial before a jury, or would be remitted for trial by the prosecution, if the proposed reforms set out in Part 7 below find favour;[46]

(4) there are other determinations which may involve the significant deprivation of liberty which are dealt with by judge alone. We have in mind *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,[47]; and,

(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.[48] District judges sitting alone also have the power to impose a hospital order (but not to commit for a restriction order) without convicting the defendant.[49]

5.59 We consider that this alternative proposal merits further consideration, and we therefore pose the following question:

[43] R Mackay et al, "A continued upturn in fitness to plead – more disability in relation to the trial under the 1991 Act" [2007] *Criminal Law Review* 530, 538: in the majority of cases examined the section 4A hearing did not appear to be contested.

[44] MHA 1983, s 41.

[45] See also the discussion of enhancing supervision and treatment orders by adding a more assertive management power akin to the community treatment order, at paras 6.15 and following beneath.

[46] There is already statutory provision for the remission of defendants held under a restriction order, under s 5A(4) CP(I)A.

[47] We discuss youth court issues in detail in Part 8 below, from para 8.23.

[48] 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: ss 37(1) and 43 MHA 1983.

5.60 **Further Question 23: Do consultees consider that the determination of facts in relation to a defendant found to lack capacity could be dealt with by a judge sitting without a jury?**

Representation of defendants at the determination of facts

5.61 At present, the court is empowered to appoint a representative to put the case for the defence at that hearing.[50] As we observed in the CP, 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 interests.[51] This was a matter of concern raised by the Bar Council/CBA, who 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.

5.62 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.[52] We take 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 consider that, although that representative should 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 take the view that this exceptional approach is justifiable on the basis that in respect of a defendant who lacks capacity, and who has therefore been removed from the optimal full trial procedure with its fair trial guarantees, it is legitimate 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.

5.63 We would, however, welcome consultees' responses in relation to this issue and therefore ask the following question:

49 MHA 1983, s 37(3) and see Part 8 below for a fuller discussion of magistrates' powers in relation to hospital treatment.

50 CP(I)A s4A(2)(b).

51 CP, para 6.3.

52 UNCRPD Article 12(4).

5.64 **Further Question 24: Do consultees agree that a representative, appointed by the court to put the case for the defence, should be entitled to act contrary to the defendant's identified will and preferences, where the representative considers that to do so is necessary in the defendant's best interests?**

PART 6
DISPOSALS

THE CURRENT POSITION

6.1 At present, an unfit defendant found at the section 4A hearing to have "done the act or made the omission" can be subject to the following disposals: a hospital order (with or without a restriction order), a supervision order (with or without a treatment requirement), or an absolute discharge.[1]

6.2 In light of the amendments made to the available disposals by the Criminal Procedure (Insanity and Unfitness to Plead) Act 1991, and by the Domestic Violence, Crime and Victims Act 2004,[2] we advanced no substantive provisional proposals, nor posed any question, relating directly to disposals in the CP. Nonetheless, several respondents addressed issues of concern that they had identified in relation to the disposals currently available.

CONSULTATION RESPONSES

6.3 The most significant concerns in relation to disposals were raised in respect of magistrates' court and youth court disposals. These are addressed separately in Part 8 below.

6.4 In relation to disposal options in the Crown Court, most substantial concern was raised in relation to supervision orders. The problems identified were:

(1) there are difficulties in the identification of the entity responsible for supervision orders (Just for Kids Law); and

(2) supervision orders were felt to be insufficiently robust to ensure that appropriate supervision and treatment can be maintained.[3] Some consultees thought that they "lack assertive management."[4] 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 that the more assertive management power available under community treatment orders[5] (in particular the power to recall to hospital for assessment) would be beneficial.

6.5 There was more generalised concern about the lack of resources for disposals, and the difficulty of finding hospital beds for unfit defendants, and indeed those for whom a hospital order might be appropriate on conviction (the Council of HM Circuit Judges, HHJ Wendy Joseph QC). This was advanced particularly in relation to the prospect that the provisional proposals for the amendment of the

[1] CP(I)A 1964, s 5(2). We discuss the present position more fully in the CP, paras 7.8 to 7.13.

[2] Discussed in the CP, paras 7.8-7.13.

[3] Just for Kids Law.

[4] Eg Broadmoor Psychiatrists.

[5] Under the Mental Health Act 2007.

legal test would be likely to result in more individuals being found to lack capacity for criminal proceedings.

DISCUSSION AND FURTHER QUESTIONS ARISING

Supervision orders: difficulties with supervision arrangements

6.6 Following a finding that the accused has "done the act or made the omission," the making of a supervision order, and any subsequent revocation and amendment, is governed by section 5(2)(b) of the CP(I)A. Such orders can be made for a period not exceeding two years and may 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").

6.7 A supervision order will either 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 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.[6] 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.[7]

6.8 A defendant subject to a supervision order is required to "keep in touch with" the supervising officer in accordance with that officer's instruction and must notify the officer of any change of address.[8]

6.9 Requirements as to medical treatment can only be made part of a supervision order on the basis of evidence from two registered medical practitioners,[9] 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.[10] A medical treatment requirement cannot impose residential treatment, save with the consent of the supervised person.[11]

6.10 There is scope within these provisions for difficulties to arise where a local justice board, or social services authority, declines to accept responsibility for supervision of an unfit defendant (a concern raised by Just for Kids Law).

6.11 We had not previously received, nor were we aware of, evidence of such difficulties, and therefore had not considered this issue in our CP. However, in the current climate of cuts to funding we anticipate that this might become a more frequent problem. The most obvious course to address this would be to consider amending section 5 and Schedule 1A CP(I)A to give the court greater powers to require local services to accept supervision of an unfit person.

[6] Schedule 1A CP(I)A, para 3.

[7] Schedule 1A CP(I)A, para 2(2)(a).

[8] Schedule 1A CP(I)A, para 3(5).

[9] At least one of whom is duly registered under section 12 MHA 1983 (ie a senior psychiatrist).

[10] Schedule 1A CP(I)A, para 4.

[11] Schedule 1A CP(I)A, para 6.

6.12 If this were to occur, this would bring the court's powers with regard to supervision orders in line with those in relation to hospital orders imposed on an unfit defendant. In the latter case, under section 5A(4) CP(I)A, no clinical confirmation of an available bed is required, hospital managers having a duty to admit the defendant on order of the court, if the other elements of the section are satisfied.

6.13 However, such an approach may not be considered justifiable in relation to supervision orders, in contrast to hospital orders where the need for protection of the public may override the concerns of hospital managers. Nor indeed may there be sufficient instances of such problems to justify an amendment to the power to impose supervision orders. We therefore ask the following:

6.14 **Further Question 25: Do consultees consider that the requirement for the supervising officer to be willing to undertake supervision of an unfit accused poses such problems in practice that it needs to be amended?**

Supervision and Treatment Orders: more assertive management powers

6.15 There is 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 do so of its own motion.[12] 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 (although the court cannot extend the order beyond two years from the date of its original imposition).[13] 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.[14]

6.16 The absence of breach proceedings, and of any sanction for failure to comply, is in keeping with the fact that these orders are imposed without a finding of fault on the part of the defendant for the purposes of their treatment and in the interests of public protection. 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[15] and, likewise, medical treatment requirements can be amended where appropriate. Nonetheless, as consultees noted (paragraph 6.4 (2) above), there is currently no more assertive management power available to supervising officers or medical

[12] Schedule 1A CP(I)A, para 9.

[13] Schedule 1A CP(I)A, para 11.

[14] Schedule 1A CP(I)A, para 12.

[15] Schedule 1A CP(I)A, para 11.

practitioners. 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.[16]

6.17 We are particularly interested in gathering more detailed information on the proposal advanced by some consultees (such as the Broadmoor Psychiatrists) for supervision orders to be enhanced by powers similar to those available under community treatment orders ("CTOs"). CTOs are civil orders available under section 17A MHA 1983 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 himself 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.[17]

6.18 It is this ability to recall a patient to hospital for assessment and treatment which could enhance supervision orders for unfit defendants under section 5 CP(I)A. Currently if an unfit accused subject to a supervision order with 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 the accused receives that treatment or maintains contact with the hospital. Were section 5 supervision orders to be enhanced by the power to recall to hospital, the clinician would be able to enforce the accused's admission to hospital for treatment to be re-established and/or for further assessment to be conducted.

6.19 The coercive effect of a power of this sort would need to be balanced against its effectiveness in protecting the unfit person and the community. Recent research suggests that CTOs may not provide a greater reduction in hospital admissions in comparison with other mandatory outpatient care powers (eg section 17 MHA 1983 leave),[18] but does not question the usefulness of a power to recall for assessment or treatment per se.

6.20 We wish to gauge the opinion of consultees, particularly those with experience of using CTOs, as to whether adding a similar power of recall would be a welcome enhancement of supervision order powers under section 5 of the CP(I)A. Equally, we would be interested to know whether any consultee thinks that an alternative power might provide greater protection for the public, without introducing an unacceptably punitive dimension to the disposal.

[16] See the Law Commission Discussion Paper "Criminal Liability: Insanity and Automatism" (2013), paras 4.154 to 4.157, for a fuller discussion of the issue of imposing penal sanctions for breach of such an order. Available from: http://lawcommission.justice.gov.uk/docs/insanity_discussion.pdf.

[17] MHA 1983, s 17E.

[18] T Burns et al, "Community treatment orders for patients with psychosis (OCTET): a randomised controlled trial" (2013) 381 *The Lancet* 1627.

6.21 **Further Question 26: Do consultees consider 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, as available under section 17E-F of the MHA 1983?**

6.22 **Further Question 27: Do consultees consider that there are any other enhancements of the powers available under supervision orders which would be beneficial?**

Resource concerns

6.23 We turn to the valid concerns expressed at paragraph 6.5 above regarding the pressure on hospital places and on mental health resources more generally. We are also acutely aware that resources for hospital treatment are scarce and therefore precious. However, we do not envisage that the proposed reforms will significantly increase the number of defendants requiring hospital orders. We have not proposed any change in the criteria which need to be satisfied for a hospital order to be imposed, and the availability of a hospital order following a section 4A finding, or indeed on conviction, would remain unaltered.

6.24 Many of those who might be considered to lack capacity under the new test, but might not have been found unfit to plead under the *Pritchard* criteria, such as the defendant in *Ferris*,[19] would most likely have been the subject of hospital treatment in any event. Alternatively they may be among the numerous convicted offenders who are transferred from prison to hospital each year.[20] Others still may lack capacity due to the impact of their learning disability or autistic spectrum disorder on their capacity to make decisions, but would not warrant hospital treatment. It may also be the case that if supervision orders are made more robust, they may be more widely used in place of hospital orders for defendants who lack capacity, but who do not represent a threat to public safety as long as they are provided with suitable supervision and support.

[19] *Ferris* [2004] EWHC 1221 (Admin).

[20] Under section 47 MHA 1983.

PART 7
REMISSION AND APPEALS

THE CURRENT POSITION

Remission for trial following recovery of fitness

7.1 If an unfit defendant detained under a hospital order with a live section 41 restriction order in place[1] subsequently becomes fit to plead, the Secretary of State, in consultation with the "responsible clinician," may remit the accused for trial.[2] This means that the defendant is sent back to the court to be prosecuted in the normal way for the original offence.

7.2 Apart from this provision, we are aware of no other express power which provides for an accused who has recovered fitness to be sent back for full trial. Nor do we know of any case in which a defendant not under a hospital order with restriction has been remitted for trial following recovery of fitness.

7.3 Although the unfit accused enjoys a right to appeal against the finding of unfitness and the finding of fact,[3] there is no provision for the accused to request remission back to the court for trial if he or she has regained fitness to plead.

7.4 Where a case is remitted, the Crown Court has no power to reverse the decision to remit a case back for trial where, for example, on closer assessment, or by virtue of undergoing the trial process, the defendant is considered again to be unfit to plead. In addition, where a remitted accused is found still to be unfit to plead, the court cannot rely on the original finding at the section 4A hearing, and is required to go through the same hearing for a second time.

Appeals

7.5 Where an appeal is allowed in relation to a finding of fact under section 4A and that finding is quashed, the Court of Appeal has no power to remit, or send back, the case to the Crown Court for a rehearing of the issue as to whether the defendant did the act or made the omission. The Court of Appeal can only enter an acquittal.[4]

PROBLEMS WITH THE CURRENT POSITION

Remission for trial following recovery of fitness

7.6 There is considerable uncertainty as to whether the Crown has a broader power to remit for trial a recovered accused who was subject to a disposal other than a hospital order with restriction. If a determination of unfitness and a section 4A finding of fact are intended to represent a "holding position" rather than a final

[1] Under the MHA 1983.

[2] CP(I)A, s 5A(4). We set out the position in respect of remission in the CP, 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 the CP.

[3] Criminal Appeal Act 1968, s 15.

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

outcome, as some consultees suggest, then the lack of power to remit an accused who has recovered fitness is a significant flaw in the process and could cause substantial injustice to victim(s).

7.7 Conversely, the fact that recovered defendants cannot request remission for trial so that they can clear their name is arguably also capable of causing significant injustice, especially given that the section 4A hearing is limited to a consideration of the conduct element of the offence alone.[5]

7.8 In addition, the inflexibility of the procedures in the Crown Court following remission for trial has been shown to cause problems, especially where the judgement of the responsible clinician that fitness has been recovered is not supported by subsequent expert evidence, or where the accused's fitness deteriorates as a result of the trial.[6] The requirement for the Court to repeat the section 4A fact-finding hearing, where the accused's continuing unfitness to plead is confirmed, is also liable to cause unnecessary expense and delay, and to have an adverse impact on witnesses.

Appeals

7.9 The inability of the Court of Appeal to remit a case for rehearing under section 4A has also caused difficulties. It is plain that significant public protection concerns may arise as a result.[7]

CP PROVISIONAL PROPOSALS AND QUESTIONS[8]

Remission for trial following recovery of fitness

7.10 We did not advance specific proposals in the CP in relation to clarifying the power of the Crown, exercised by the Secretary of State, to remit recovered defendants for trial where they are not subject to a hospital order with restriction. We noted that, in qualitative research in Scotland, psychiatrists raised concerns about the potential distress caused to unfit defendants arising out of the prospect that they may be remitted for 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.[9]

7.11 In light of the difficulties with cases which are remitted to the Crown Court, however, we proposed the following:

[5] Meeting of the Law Commission working group on unfitness to plead, 14 December 2009.

[6] See *R (Julie Ferris) v DPP* [2004] EWHC 1221 (Admin). 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 the CP.

[7] See *Norman* [2008] EWCA Crim 1810, [2009] 1 Cr App R 13, especially at [34], where the Court of Appeal observed that Parliament ought to give consideration to granting the Court of Appeal power to order a rehearing under section 4A. .

[8] CP, paras 7.14 to 7.26.

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

Provisional Proposal 12: Where the Secretary of State has referred a case back to court pursuant to the accused being detained under a hospital order with a section 41 restriction order and it thereafter becomes clear beyond doubt (and medical evidence confirms) that the accused is still unfit to plead,[10] the court should be able to reverse the decision to remit the case.

Provisional Proposal 13: In the event of a referral back to court by the Secretary of State and where the accused is found to be unfit to plead,[11] there should not be any need to have a further hearing on the issue of whether the accused did the act. This is subject to the proviso that the court considers it to be in the interests of justice.[12]

7.12 In relation to the power of an unfit defendant to request remission for trial following recovery, we concluded 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 accused 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 the following:

Question 6: Are there circumstances in which an accused person who is found to have done the act and in respect of whom there are no grounds for an acquittal should be able to request remission for trial?

Appeals

7.13 To address the lacuna in the Court of Appeal's powers to remit for section 4A hearing, we advanced this additional provisional proposal:

Provisional Proposal 14: In circumstances where a finding under section 4A is quashed and there has been no challenge to a finding in relation to section 4 (that the accused is under a disability) there should be a power for the Court of Appeal in appropriate circumstances to order a re-hearing under section 4A.

THE CONSULTATION RESPONSES[13]

Remission for trial of a recovered accused by the Crown

7.14 Several respondents considered that the Crown has an inherent power to remit for trial any unfit defendant who recovers fitness to plead.[14] They felt that the difficulty arises from the practical problems in identifying those who have regained fitness if they are not subject to a hospital order with restriction.[15] The

[10] Or lacks decision-making capacity under our proposed legal test.

[11] Or lacks decision-making capacity under our proposed legal test.

[12] We assume that this would involve the consent of the representative of the accused.

[13] The responses are discussed more fully in the AR, paras 1.232 to 1.263.

[14] Including Nigel Shackleford, NOMS, Professor Mackay, and the CPS.

[15] Professor Mackay and the CPS.

CPS said that, nonetheless, they would review the proposed prosecution on remission according to the usual evidential and public interest tests.

7.15 The need to clarify whether a finding of unfitness, and that the defendant did the act or made the omission,[16] is a "holding position" rather than the final outcome was advanced by several consultees.[17] Professor Grubin and the RCP both proposed that the court consider at the time of the unfitness procedure whether the public interest required remission for trial should fitness be regained.

7.16 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 remission after the unfitness procedure has been completed and a disposal imposed. Their concern lay in the undesirable position of a defendant, having already been through one court process, having the prospect of remission for trial hanging over him during recovery.[18] In that regard, more frequent use of powers under sections 35, 36 and 38 MHA 1983[19] was advocated by Broadmoor Psychiatrists.

7.17 Otherwise, Provisional Proposals 12 and 13 found favour with, or were unobjectionable to, all those who responded to them.[20]

Power of a recovered defendant to request remission for trial

7.18 In relation to Question 6, and the issue of whether an unfit accused should be able to request remission for trial, a number of respondents offered examples of where such an issue might arise and where such a power should exist. Instances included:

(1) where a defendant becomes fit and is able to give instructions leading to fresh evidence relevant to the case (Council of HM Circuit Judges, Bar Council/CBA);

(2) where a defendant, found on section 4A hearing to have committed an act of a sexual nature, wishes to remove his name from the sex offenders' register (Council of HM Circuit Judges, Professor Mackay);

(3) where co-defendants are acquitted or otherwise discharged, and the defendant might be considered fit for the resulting simpler trial process (HHJ Lamb QC);

(4) Professor Mackay also raised concerns that the formulaic section 4A hearing as currently conducted might result in a less thorough

[16] Under CP(I)A, s 4A.

[17] Including Nigel Shackleford, the Ministry of Justice, and the RCP.

[18] Nigel Shackleford, the Ministry of Justice, and the RCP.

[19] MHA 1983, s 35: Remand to hospital for report on accused's mental condition; MHA 1983, s 36: Remand of accused person to hospital for treatment; MHA 1983, s 38: Interim hospital orders.

[20] Including the Justices' Clerks Society, the Council of HM Circuit Judges, SEC, Professor Ronnie Mackay, Professor Rob Poole, Dr Lorna Duggan, Dr Eileen Vizard, Victim Support, and Kids Company.

investigation of the offence by the police. Any injustice might require remedy through a power exercisable by the defendant.

7.19 Some other respondents felt that, in light of the more restrictive requirements of hospital orders imposed on conviction in comparison to hospital orders imposed following a section 4A finding of fact, few defendants would exercise such a power.[21]

7.20 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.[22] The Bar Council/CBA 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.

7.21 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.

Appeals

7.22 Provisional Proposal 14 was approved or not objected to by all of the 11 consultees who addressed it. There was a strong feeling that the lacuna required urgent attention.[23]

7.23 Master Venne, then the Registrar of Criminal Appeals, suggested that, in relation to the exercising of the defendant's right to appeal, consideration be given to whether any attendant rights of appeal need to be created and if so by whom such rights may be exercised.

DISCUSSION AND FURTHER QUESTIONS ARISING

7.24 The consultation responses make plain that remission for trial is a difficult, albeit narrow, area which needs reform to achieve a coherent process. Provisional Proposals 12 and 13 garnered considerable support, but the responses suggested that the circumstances surrounding such issues need careful consideration.

7.25 Firstly, it is apparent from the responses that consideration of remission cannot sensibly be approached before clarity is achieved on the status of a finding of unfitness/lack of capacity and any subsequent disposal. A number of consultation responses suggest that it would be beneficial if the section 4A determination of the facts were considered to be a last resort, and not embarked upon until all efforts have been made to allow the defendant to regain fitness or capacity, and diversion considered where appropriate.

7.26 We provisionally agree with this approach. We have addressed this issue above at Further Question 16, where we asked about the possibility of a six-month adjournment to permit an accused to regain capacity; and at Further Question 18,

[21] Including RCP.

[22] Council of District Judges, Bar Council/CBA.

[23] Eg from the Council of HM Circuit Judges, Nicola Padfield, Professor Mackay, Dr Duggan, and Master Venne.

which considers whether the section 4A hearing should be made discretionary in order to allow for diversion from the criminal justice system.

7.27 Secondly, the consultation responses make a case for clarifying the Crown's power to remit for trial, albeit with some restrictions on the circumstances in which the power can be exercised (given the detrimental effect such uncertainty might have on defendants who lack capacity).

Remission for trial of the recovered accused by the Crown

7.28 In light of consultees' responses, we consider that there is a good argument for statutorily extending the Crown's power to remit for trial beyond cases where a disposal other than a hospital order with restriction has been imposed. If we take the view that a finding of a lack of capacity and any subsequent determination of the facts is a holding position, it makes little sense if the power to remit is limited to restriction order cases, as appears to some to be the position.

7.29 In addition, not all serious charges which result in the accused being found to lack capacity will end with the imposition of a restriction order, given the range of conditions from which a defendant may suffer. For example, a defendant suffering severe depression or post-traumatic stress disorder may commit a serious offence but not be suitable for hospitalisation (or not with a restriction order), yet may still be capable of recovering sufficiently to regain capacity. We consider that the public interest in achieving full trial where possible, both for defendants themselves, and for the victims and the wider public, makes it important that remission powers are clarified and made available for all such cases.

7.30 We recognise that there will be practical difficulties in identifying defendants who are not subject to restriction orders, but who have recovered sufficiently to make remission for trial appropriate. Nonetheless, we anticipate that there will be cases where such defendants do come to the attention of the authorities. For example, this may occur where a defendant, 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 to be called to give evidence for the prosecution in the trial of the defendant for sexually assaulting complainant B, to establish that the defendant has a propensity to commit offences of the kind with which he is charged,[24] but the allegation in relation to A could not, at the same time, be tried by the jury. [25]

7.31 However we do appreciate that leaving open the prospect of remission in every case would be undesirable, since it would lead to undue uncertainty for victims

[24] Criminal Justice Act 2003, s 103.

and witnesses, and for vulnerable defendants in respect of whom remission may never be appropriate. It is therefore our provisional view that it would be desirable to allow the judge who presides over the section 4A hearing to restrict the power of remission. At the conclusion of the section 4A hearing, the judge would have all the necessary information about the circumstances of the offence and the nature of the impairment to make a judgement about whether remission on recovery might be in the public interest or not.[26] For instance the judge would be aware if the defendant's condition is not capable of reversal, such that remission would never be possible (eg a learning disability or acquired brain injury).

7.32 In determining whether it is in the public interest for remission to be available to the Crown should the defendant regain capacity, we consider that the judge would take into account the following factors: the seriousness of the offence charged; the impact of the alleged offence on any identified victim(s); the views of the victim on the issue of remission; the likelihood of the defendant's recovery within a reasonable period; and any other factor that the court considers relevant.

7.33 We therefore invite further input on the following questions:

7.34 **Further Question 28: Do consultees agree that the power of the Crown to remit a recovered defendant for trial should be statutorily extended to cover all defendants found to have done the act or made the omission?**

7.35 **Further Question 29: Do consultees consider that the power to remit an accused for trial should only be exercisable by the Crown where the judge has ruled, following the section 4A hearing, that it is in the public interest for remission to be available should the defendant regain capacity?**

7.36 We are also considering whether, as raised in consultees' responses, there should be any time limit set on the Crown's power to remit for trial. Our provisional position is that it would not be appropriate or necessary for any such limit to be set. We recognise that the open-ended possibility of remission for trial on recovery is capable of having an adverse effect on the recovery of a defendant who lacks capacity. Nonetheless, we also have in mind the range of offences, including extremely serious offences, which might be suitable for remission, and the position of the victim in such cases. Any time limit imposed would necessarily be an arbitrary one, considering the range of potential impairments involved and the different recovery time periods that they might require. Furthermore, we anticipate that judges will leave remission open only in more serious cases, in view of the factors we set out at paragraph 7.32 above.

[25] We appreciate that in some such cases the Crown might be entitled to rely upon the finding of fact under section 4A CP(I)A as bad character evidence, but that this will not always be the case. We have in mind where the recovered defendant's instructions on the earlier allegation now call into question that finding, or where detail of the manner of the commission of the offence is required in evidence. Additionally, even were live evidence from complainant A not required, the original complainant might well consider it arbitrary and unfair that the assault against B could be tried by the jury, but A's own allegation could not be.

[26] Of course, as with all prosecutions, in the event of recovery the decision to remit for trial will have to pass the dual test of evidential sufficiency and public interest contained in the Code for Crown Prosecutors.

7.37 Therefore, we take the provisional view that a time limit on the Crown's power of remission would not be appropriate or necessary.

7.38 **Further Question 30: Do consultees agree that the Crown's power to remit defendants for trial upon their recovery should not be limited in time?**

Power of a recovered defendant to request remission for trial

7.39 We provisionally agree with those consultees who observe that were this power to exist, it would be unlikely to be exercised in many cases. Disposals following a finding of unfitness are generally less restrictive than those likely to follow any subsequent conviction.

7.40 Nonetheless, we are persuaded that this area requires further consideration. We acknowledge that the position of a defendant who has recovered capacity is arguably not adequately dealt with.[27] We anticipate that few defendants who have recovered would wish to run the risk of conviction in order to clear their name, or to lift any continuing disposals. However, we acknowledge that such situations may arise, particularly in the case of previously unfit defendants against whom a finding has been made that they "did the act or made the omission" in relation to a sexual offence 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").

7.41 We recognise that a remission for trial in these circumstances might entail witnesses being required to give evidence a second time. We balance this against the desirability for all, including the victims and witnesses, of the final resolution of the allegation by way of the full trial process. We also consider that there may be circumstances where a witness's evidence at the determination of facts may be admissible as hearsay in a subsequent full trial process.[28]

7.42 We provisionally consider that the power to request remission for trial should only be exercisable where there is evidence from two experts, competent to address the defendant's particular condition, that he or she has recovered sufficiently to have capacity for criminal proceedings. For the same reasons as we set out at paragraph 7.36 above, we do not consider that an additional fixed time limit would be appropriate. However, we would welcome any further observations from consultees in this regard, and so ask the following:

7.43 **Further Question 31: Do consultees agree that where there has been a finding that a defendant had "done the act or made the omission," he or she should be entitled to request remission for trial on regaining capacity, where recovery is confirmed by the opinions of two experts competent to address the defendant's particular condition?**

[27] A defendant who remains unfit is adequately protected by the rights to appeal a finding under sections 4 or 4A CP(I)A or both, and the imposition of a hospital order or supervision order.

[28] On a similar basis to transcripts of evidence admitted at a retrial under section 131 Criminal Justice Act 2003. See also *R, M & L* [2013] EWCA Crim 708.

Appeals

7.44 The only aspect on which we invite further input is the question identified by Master Venne, of who should be entitled to exercise the defendant's rights of appeal. Given the possibility that a ground of appeal might arise, even where the defendant continues to lack capacity, we consider it important that he or she be able to exercise that right, through another party if necessary.

7.45 Unlike in the civil context, there is no court appointed guardian to act in criminal proceedings in the best interests of the defendant who lacks capacity. There is, as a result, no individual to give formal consent, on behalf of a defendant who lacks capacity, 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 condition prevents the lodging of an appropriate application for appeal.

7.46 Our provisional view is that, in those circumstances, the legal representatives of the defendant should be able to exercise the defendant's right to appeal. In doing so, the representative should be required to take instructions from the defendant, insofar as that is possible and can be facilitated, and reflect in their decision the defendant's identifiable will and preferences but only insofar as they are congruent with the protection of the defendant's best interests in pursuing proper grounds of appeal.

7.47 In weighing the advantages and disadvantages of such a proposal, we bear in mind that there is no sanction for unmeritorious appeals in terms of loss of time served,[29] since no custodial sentence can be imposed. We also appreciate that the creation of such a power might necessitate amendment of the codes of conduct for solicitors and barristers[30] to entitle them to engage in litigation in this way.

7.48 **Further Question 32: Do consultees consider that the rights of appeal vested in the unfit defendant should be exercisable by his or her legal representatives?**

[29] Where an application for leave to appeal is considered to be wholly without merit, the Court of Appeal can direct that part or all of any time spent by a defendant in custody after lodging notice of application for leave to appeal should not count towards sentence, under Criminal Appeal Act 1968, s29.

[30] See for example rC9.2.a, The Bar Standards Board, Handbook 1st Edition – January 2014.

PART 8
UNFITNESS TO PLEAD IN THE MAGISTRATES' AND YOUTH COURTS

THE CURRENT POSITION[1]

8.1 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 CP(I)A, which sets out how those issues are dealt with in the Crown Court, have no application in the magistrates' or youth courts.

8.2 However there are two powers in the summary jurisdiction[2] for dealing with mentally disordered defendants who are charged with imprisonable offences:

(1) Section 37(3) MHA 1983 provides that the court can make a hospital order (or a guardianship order in respect of an accused aged 16 or over) without convicting him or her if satisfied that the defendant "did the act or made the omission charged." Such orders can only be made if the requirements of section 37(1) MHA 1983 are satisfied, namely that the defendant suffers from a "mental disorder" which makes treatment in hospital, or supervision under a guardianship order, appropriate, according to the evidence of two mental health practitioners, one of whom is a duly approved psychiatrist. Where a hospital order is made, the magistrates have no power to impose a restriction order under section 41 MHA 1983. 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 MHA 1983.[3]

(2) Section 11(1) Powers of Criminal Courts (Sentencing) Act 2000 (the "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 where, again, the court is satisfied that the defendant "did the act or made the omission."

8.3 There remains the power for a defendant who faces a charge triable either way to be sent for trial to the Crown Court, where fitness to plead issues can be considered.[4]

8.4 The defendant in the magistrates' court has the right to participate effectively in trial, guaranteed under article 6 of the ECHR.[5] This is more frequently argued in relation to young defendants, but it is a right enjoyed by adults as well. Where

[1] Discussed in the CP, paras 8.3 to 8.13.

[2] By "summary jurisdiction" or "summary courts" we mean the magistrates' and youth courts together.

[3] 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 section 43 MHA 1983.

[4] Under section 51 Crime and Disorder Act 1998, which now covers the sending for trial to the Crown Court of both either-way and indictable-only offences.

special measures cannot adequately address participation concerns, the remedy for a defendant unable to participate effectively is to apply to stay proceedings as an abuse of process.

PROBLEMS WITH THE CURRENT ARRANGEMENTS: MAGISTRATES' COURTS[6]

8.5 Despite the observations of Wright J that the above provisions create a "complete statutory framework" for the consideration of all the issues arising in a case concerning a defendant who may have a mental impairment,[7] practitioners, clinicians and academics have raised significant problems with the current system.

8.6 At the time of drafting the CP, 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 the CP we raised tentative concerns about the likely difficulties being encountered in practice. 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. In this section we set out all the difficulties identified to date, both in the CP and as confirmed by consultees.

No specific consideration of "fitness to plead"

8.7 The most fundamental deficiency of the current summary system is that the defendant's fitness to plead is never specifically considered. The focus of section 37(3) MHA 1983 is on the suitability of the defendant for a particular disposal, namely a hospital or guardianship order. Anecdotally we understand that, as a result, reports prepared concentrate on whether the individual is suffering from a "mental disorder" and whether that condition is susceptible to treatment such that either of the orders is appropriate. What the statute does not invite is a consideration of whether the individual is capable of understanding or participating in the trial process, ie the defendant's fitness to plead.

No declared test to be applied in relation to unfitness to plead

8.8 It follows that there is no test for fitness to plead in the summary jurisdiction.

Narrow focus of the statutory procedure

8.9 The statutory procedure under section 37(3) MHA 1983 is restricted to defendants who are suffering from a "mental disorder" as defined by section 1 MHA 1983. This limits the provision significantly. 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."[8]

[5] *SC v United Kingdom* App No 60958/00, [29]. Discussed more fully at para 2.8 above.

[6] Discussed more fully in the CP, paras 8.14 to 8.21. The AR sets out responses in more detail at paras 1.467 to 1.527.

[7] *R (P) v Barking Youth Court* [2002] EWHC Admin 734, [10].

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

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."

The arbitrary identification of unfitness/effective participation concerns

8.10 Even within this narrow focus, it is unclear what will trigger an enquiry into an accused's mental state or their capacity for effective participation in the summary jurisdiction. As we observed in the CP,[9] 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.[10] Even where a defendant is represented, the simpler nature of most summary proceedings, and the focus on delivering "swift" justice under the "Stop Delaying Justice" initiative for summary trials[11] means that there is less opportunity for a defendant's representatives to gain an understanding of, and raise as an issue, a defendant's fitness to plead or lack of capacity for effective participation.

Organisation of the assessment of the accused

8.11 Where the defendant is unrepresented, it is unclear how an assessment under section 11 PCCSA (or of their capacity for effective participation[12]) should be organised. Anecdotally it is understood that 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.[13]

Election by unfit defendants

8.12 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.[14] This is a highly significant decision, not only because of the importance of 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 unfit to plead is still required to make that decision himself, even though

[9] CP, para 8.15.

[10] See Legal Services Commission, K Souza and V Kemp, *Study of defendants in Magistrates' Courts* (2009) which provides insight into barriers to representation in the magistrates' courts (p8).

[11] 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] *Criminal Law Review* 100, 101.

[12] Using article 6 ECHR arguments: see para 8.4 above.

[13] This issue was raised by the National Bench Chairmen's Forum.

[14] Crime and Disorder Act 1998, s 50A(3).

they may lack the capacity to appreciate what is being asked of them, or what the repercussions of such a decision may be.[15]

No statutory procedure for deciding whether a defendant "did the act or made the omission"

8.13 Unlike in the Crown Court[16], there is no statutory procedure for deciding whether the defendant "did the act or made the omission" where the section 37(3) MHA 1983 procedure is being followed. Several reported cases have sought to establish what the procedure should be when an order under section 37(3) is contemplated.[17] It appears that the finding can be made on the basis of admissions[18] or on the calling of evidence. Significantly, there is no statutory provision for a representative to be appointed to put the case for the defence, as there is in the Crown Court procedure.[19]

8.14 It is also unclear what the relevance of the mental element of an offence will be on the finding of fact in the summary courts. In relation to findings of fact in Crown Court unfitness to plead procedures, the case of *Antoine*[20] established a strict division between the conduct and fault elements of an offence when determining whether a defendant "did the act or made the omission" (although the House of Lords left open to the jury the consideration of defences of mistake, accident and self-defence where there is objective evidence of the same). This division of the conduct and fault elements of an offence continues to cause problems with Crown Court cases.[21] However, it is wholly unclear what approach should be taken to the finding of fact in the summary jurisdiction and whether the case of *Antoine*, even considering the problems it raises, can provide any guidance.

The stage of the section 37(3) MHA 1983 determination

8.15 Even where the court proceeds under section 37(3) MHA 1983 or section 11 PCCSA, strictly speaking the court's determination that the defendant suffers from a "mental disorder" such that the court need not proceed to conviction comes after the substantive finding of fact. In some cases, the court will be fully apprised of the defendant's mental health at the outset of the fact-finding procedure, and adjustments will be made to the fact-finding process and handling of the defendant as appropriate. In other cases, it seems, 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;

[15] This problem was acknowledged by Wright J in *R (P) v Barking Youth Court* [2002] EWHC Admin 734, [10].

[16] The procedure for the finding of fact is governed by section 4A CP(I)A.

[17] *R (P) v Barking Youth Court* [2002] EWHC 734 (Admin), [2002] 2 Cr App R 19, *R v Lincoln (Kesteven) Justices* [1983] 1 WLR 335; *R (Singh) v Stratford Magistrates' Court* [2007] All ER 407; and *Blouet v Bath and Wansdyke Magistrates' Court* [2009] EWHC 759 (Admin).

[18] *R (on the application of Singh) v Stratford Magistrates' Court* [2007] All ER 407, [35]; *R v Lincoln (Kesteven) Justices* [1983] 1 WLR 335.

[19] CP(I)A, s 4A(2).

[20] *R v Antoine* [2001] 1 AC 340. Discussed more fully in Part 5 above, paras 5.1 to 5.3.

[21] For example in the case of *B(M)* [2012] 2 Cr App R 15 (CA) where the Court of Appeal addressed the question of how to isolate the conduct element of a voyeurism charge.

whether the issue is guilt or the commission of the act or making of the omission.[22] Apparently logical attempts to raise the question of a defendant's "fitness to plead" as a preliminary issue in the youth court have been criticised[23] and are plainly outside the statutory powers of the magistrates' courts as currently conceived.

Powers of disposal are too limited

8.16 In contrast to the position in the Crown Court, there is no power in the summary jurisdiction to impose a supervision order[24] or an absolute discharge. Disposal options are limited under section 37(3) MHA 1983 to the imposition of a hospital order or a guardianship order.

8.17 As set out at paragraph 8.2 above, hospital orders can only be imposed in cases where the defendant is suffering from a treatable "mental disorder" within the meaning of the MHA 1983 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 MHA 1983).

8.18 Inevitably, not all those defendants who may have difficulties in engaging with, and understanding, summary proceedings will be suitable for a hospital or a guardianship order. We referred in the CP[25] to the obvious example of a defendant with a severe learning disability who may not be suitable for either disposal, but whose competency issues might be severe.

8.19 The limited disposal options mean that, for a defendant who will not be suitable for either disposal under section 37(3), there is no basis for engaging the section 37(3) MHA 1983 procedure. Unless a stay is achieved on the basis of the defendant's inability to participate effectively, there is no procedure to address his or her unfitness to plead, nor any route to a suitable disposal, without full trial or plea. Consultees have said that this difficulty has the inevitable result that representatives tend to focus on outcome not capacity (National Bench Chairmen's Forum), resulting in trials proceeding in order to secure a suitable disposal, where there is evidence that the defendant may be unfit or lacking in capacity (Council of HM Circuit Judges).

No statutory procedure for considering unfitness to plead issues for defendants charged with non-imprisonable summary offences

8.20 Section 37(3) MHA 1983 and section 11 PCCSA only apply to imprisonable summary offences. There is no statutory procedure at all for dealing with an accused whose unfitness to plead becomes an issue, but who is charged with a non-imprisonable offence, such as "using threatening or abusive words or

[22] This difficulty has been raised by A Turner, "Capacity to stand trial, especially in the youth court" (2008) 172 *Justice of the Peace* 364.

[23] *R (P) v Barking Youth Court* [2002] EWHC Admin 734.

[24] CP(I)A, s 5(2) and Schedule 1: 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.

[25] CP, para 8.25.

behaviour."[26] The only way in which such a defendant can enjoy any protection from conviction in proceedings in which he may be unable to participate is to seek a stay. Given the likelihood that a defendant facing such a charge will be unrepresented, the opportunity for such a defendant to secure that remedy is seriously limited. Alternatively the CPS might be persuaded to discontinue the matter, but this is purely within the discretion of the Crown. Anecdotally, we understand that such cases have the capacity to cause huge case management problems for magistrates' courts.

The power to stay is an exceptional remedy[27]

8.21 The alternative power to stay proceedings where an adult defendant is incapable of participating effectively is rarely used and a stay will be granted on the basis of capacity issues only in "exceptional cases."[28]

A stay does not attract a suitable disposal to address the behaviour of concern[29]

8.22 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 (as identified by the CPS).

PROBLEMS WITH THE CURRENT ARRANGEMENTS: YOUTH COURTS[30]

8.23 The difficulties set out above apply in the youth court as much as in the magistrates' court. 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

8.24 A significant number of consultees emphasised that there is a much greater prevalence of effective participation issues in the youth court.[31] This arises as a result of two interlinking factors.

Natural developmental immaturity

8.25 Clinical advances in our understanding of the child and adolescent brain 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. Increasingly, research findings confirm that juveniles aged under 16 demonstrate inadequate functional and decision-making abilities that are capable of compromising their capacity for effective participation in criminal proceedings. Indeed research in the US revealed that adolescents aged 11-13 were three times as likely as young adults (aged 18-24) to be "seriously impaired"

[26] Contrary to section 5 Public Order Act 1986.

[27] Discussed in the CP, para 8.34.

[28] *CPS v P* [2008] 4 All ER 628, [51].

[29] CP, para 8.34.

[30] Discussed in the CP, paras 8.38 to 8.68.

[31] Including the CPS, Dr Eileen Vizard, the National Bench Chairmen's Forum, the Legal Committee for HM Council of District Judges, and the Association of Panel Members.

on legal abilities and adolescents aged 14-15 were twice as likely to be impaired.[32]

8.26 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.[33]

8.27 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 juvenile offending population, the likelihood of impairment of capacity for criminal proceedings is magnified still further.[34]

8.28 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.[35] The troubled early life experiences of many young defendants further exacerbate this difficulty.[36]

Greater prevalence of psychiatric disorders and learning disabilities or difficulties

8.29 The incidence of mental health difficulties amongst the juvenile offending population is significantly high.[37] Research suggests that, in comparison to the general and adult population, young offenders exhibit much higher rates of:

(1) learning disability;[38]

[32] T Grisso et al, "Juveniles' competence to stand trial. A comparison of adolescents' and adults' capacities as trial defendants" (2003) *Law and Human Behaviour* 27, 333. This was the first large-scale study of age differences in competence to stand trial, assessing 1400 individuals aged 11-24 across four different centres in the US. See also SP 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.

[33] See *Child Defendants*, Royal College of Psychiatrists Occasional Paper OP56 (2006), Chapter 6: "Developmental Psychology and child development" for a helpful discussion of the research and practical implications.

[34] T Grisso et al, "Juveniles' competence to stand trial. A comparison of adolescents' and adults' capacities as trial defendants" (2003) *Law and Human Behaviour* 27, 333. Also F Lexcen, T Grisso and L Steinberg, "Juvenile Competence to Stand Trial" (2004) 24(2) *Children's Legal Rights Journal* 2.

[35] See *Child Defendants*, Royal College of Psychiatrists Occasional Paper OP56 (2006), pages 30 and following.

[36] See *R(D) v Camberwell Green Youth Court* [2005] UKHL 4, [55].

[37] For an overview of the clinical evidence base see E Vizard "Presentation on how 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, 2009), available from: http://www.michaelsieff-foundation.org.uk/content/Report%204%20-%20Eileen%20Vizard's%20presentation.pdf (last accessed 5 April 2014).

(2) post-traumatic stress disorder;[39]

(3) attention deficit hyperactivity disorder (ADHD);[40]

(4) other psychiatric disorders, notably conduct disorder.[41]

Stays remain an exceptional remedy

8.30 Despite the prevalence of effective participation issues as a result of natural developmental immaturity, and the prevalence of psychiatric conditions amongst defendants in the youth courts, staying proceedings as an abuse of process remains a purely discretionary and exceptional remedy even in the youth court.[42]

Lack of existing psychiatric diagnosis

8.31 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). Accessing Child and Adolescent Mental Health Services (CAMHS) as a new referral can result in lengthy delays.

Shortage of facilities for young people

8.32 Due to the shortage of psychiatric facilities for children and young people, even where the clinical criteria are met for hospitalisation under section 37(3) MHA 1983, it is not always possible to secure a placement to admit a young person. 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), 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

8.33 The problematic absence of an unfitness to plead framework in the youth court is more marked than in the magistrates' court or the Crown Court because of the

[38] Loucks N, 2007, *No one knows: Offenders with learning difficulties and learning disabilities –review of prevalence and associated needs.* There is a substantial history of research into the role of learning disability in offending behaviour by children; see for example DJ West and DP Farrington, *Who becomes Delinquent?* (1973), DJ West and DP Farrington, *The Delinquent Way of Life* (1977), M Rutter , H Gillier and A Hagell, *Antisocial Behaviour by Young People* (1998).

[39] Steiner, H., Garcia, I. G. & Mathews, Z. (1997) Post traumatic stress disorder in incarcerated juvenile delinquents. Journal of the American Academy of Child Psychology and Psychiatry, 36, 357–365.

[40] AE Kazdin, "Adolescent development, mental disorders and decision making of delinquent youths" (2000) in *Youth on Trial: A Developmental Perspective on Juvenile Justice* (eds T Grisso and RG Shwartz) pp 33-65.

[41] See *Child Defendants*, Royal College of Psychiatrists Occasional Paper OP56 (2006) page 50 and following for a detailed discussion of psychiatric conditions experienced by young defendants.

[42] See *Crown Prosecution Service v P* [2007] EWHC 946 (Admin).

seriousness of offences which are tried in the youth court.[43] This is arguably discriminatory against young defendants facing serious charges, since children are not currently afforded the same protections as adults enjoy for offences of similar seriousness.[44]

8.34 A young defendant facing a robbery allegation, for example, would be tried in the youth court; he or she would not enjoy the protection from conviction afforded by the unfitness provisions, which would be available to an adult facing an identical charge in the Crown Court.

Disposal inadequacy more marked

8.35 Given the prevalence of effective participation issues amongst very young defendants, the limitations on disposals under section 37(3) MHA 1983 are even more problematic. For defendants aged under 16, the only disposal available under section 37(3) MHA 1983 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.

8.36 As a result, the CPS said 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 raised 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

8.37 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. The CPS observe that stays are more frequently imposed in the youth court than in magistrates' courts, often in relation to serious allegations. They note that this has the result that some young people effectively become immune from prosecution by the youth court, raising significant public protection concerns.

Stays an inadequate and ultimately costly response to youth offending

8.38 The imposition of a stay means that there is both no intervention to tackle concerning behaviour, and that mental disabilities go untreated, which raises the risk of deterioration in the young person's mental state and further offending behaviour.

[43] Juveniles will be tried in the youth court (Magistrates' Courts Act 1980, s 24), unless charged with homicide, long term detention is a realistic possibility (Powers of Criminal Courts (Sentencing) Act 2000, s 91), or where one of a limited number of other exceptions apply (eg where they are charged with offences to which the minimum sentence provisions in section 51A Firearms Act 1968 or section 29 Violent Crime Reduction Act 2006 apply). This point was raised by the CPS and the National Bench Chairmen's Forum.

[44] Kids Company and the Association of Panel Members ("AOPM"). The AOPM is the professional association for community volunteers who sit on Youth Offending Team panels which administer referral orders for young offenders.

Adverse effect on public and victim confidence in the youth justice system

8.39 The confidence of victims and communities is arguably undermined by the inadequacies of the system in the youth court.

CP QUESTIONS

8.40 In light of the limited published material raising the need for a test for determining unfitness to plead (or decision-making capacity) in the summary jurisdiction, we did not make firm proposals for reform of the summary unfitness procedures in the CP. Rather the following questions were formulated:

Magistrates' courts

> *Question 8: Do consultees think that the capacity-based test which we have proposed for trial on indictment should apply equally to proceedings which are triable summarily?*
>
> *Question 9: Do consultees think that if an accused lacks decision-making capacity there should be a mandatory fact-finding procedure in the magistrates' court?*
>
> *Question 10: If consultees think that there should be a mandatory fact-finding procedure, do they think it should be limited to consideration of the external elements of the offence or should it mirror our provisional proposals 8 and 9?*[45]

Youth court

> *Question 11: Do the matters raised in questions 8, 9 and 10 merit equal consideration in relation to the procedure in the youth courts?*[46]

***Doli incapax* and the age of criminal responsibility**

8.41 In the CP we explored the difficulties surrounding the abolition of the rebuttable presumption of *doli incapax*,[47] and the low age of criminal responsibility, set at 10 years. Both of these features, 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 the CP, that there may be sound policy reasons for looking afresh at the age of

[45] CP, para 8.37.

[46] CP, para 8.67.

[47] Until it was abolished by section 34 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): *CPS v P* [2007] EWHC 946. 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 at in the CP, 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 old.

criminal responsibility, and acknowledge the increasingly loud calls for such a review by clinicians and academics.[48] Whilst the issues that prompt such concerns remain in the forefront of our minds in considering the question of how the procedure for dealing with unfit defendants in the summary jurisdiction should be reformed, a broader review of the approach to age in the youth justice system is beyond the scope of this project.

8.42 We did, however, pose a question aimed at identifying the extent to which the low age of criminal responsibility affects decision-making capacity in youth trials:

> *Question 12: How far, if at all, does the age of criminal responsibility factor into the issue of decision-making capacity in youth trials?*

CONSULTEES' RESPONSES: MAGISTRATES' COURTS[49]

8.43 In response to our concerns about the lack of apparent evidence of significant difficulties being encountered in the summary jurisdiction, responses produced a wealth of examples of the inadequacy of the current procedures. These are incorporated into our discussion at paragraphs 8.7 to 8.37 above.

8.44 There was almost unanimous agreement that a scheme for addressing unfitness to plead/capacity issues is required in the magistrates' and youth courts, and that the same principles should apply in the lower courts as in the Crown Court.

Question 8: A capacity-based test for summary hearings

8.45 In addition to the widespread support for the introduction of procedures in the summary jurisdiction to address unfitness issues, consultees raised the following specific benefits that a formalised test for unfitness, which considered the defendant's capacity, would offer in relation to the magistrates' and youth courts:

(1) a defined capacity-based test would assist in achieving a consistent approach to unrepresented defendants who present with apparent capacity issues (National Bench Chairmen's Forum);

(2) such a test would give the court greater control over how proceedings are conducted where capacity issues are raised. The current system places the onus for raising the issue, and the initiative in pursuing it, unduly on defence representatives (National Bench Chairmen's Forum);

(3) lack of clear procedures hampers the already arbitrary means by which accused with capacity issues come to the notice of the court.

[48] See Centre for Social Justice, *Rules of Engagement: Changing the Heart of Youth Justice* (2012), 22 (available from http://www.centreforsocialjustice.org.uk/publications/rules-of-engagement, last accessed 9 April 2014). See also the written evidence submitted to the ongoing Parliamentary Inquiry by Lord Carlile QC into the operation and effectiveness of the youth court, available from: http://www.ncb.org.uk/media/1114210/written_evidence_to_the_inquiry_by_parliamentarians_into_the_operation_and_effectiveness_of_the_youth_court.pdf (last accessed 9 April 2014).

[49] Responses on this issue are discussed more fully in the AR at paras 1.472 to 1.527.

Question 9: A mandatory fact-finding procedure in the magistrates' court?

8.46 This question invited respondents to consider whether the determination of the facts under section 4A CP(I)A, which the Crown Court is required to undertake after finding a defendant unfit, would be necessary in every case in the lower courts. The concern is that such a procedure may be unnecessarily cumbersome and lengthy for summary proceedings. Few respondents addressed the question directly. However the Bar Council/CBA and the Legal Committee for the Council of District Judges both suggested that the hearing to determine the facts should be discretionary following a finding of unfitness in the magistrates' or youth courts. The Association of Panel Members also made a powerful case for a much greater emphasis on diversion out of the criminal justice system for young defendants, and particularly for young defendants whose fitness to plead may be in issue.

8.47 A further two consultees[50] specifically commended the emphasis in the Bradley Report[51] on the screening of mentally disordered defendants and the consideration of diversion of such offenders (both within the criminal justice system, and out of it altogether). Providing an opportunity to divert unfit defendants from the criminal justice process before the fact-finding stage might provide greater opportunity for such work.

Question 10: A two stage fact-finding procedure with special verdict, as in the Crown Court?

8.48 This question asked consultees to consider whether the reforms to the section 4A procedure provisionally proposed in relation to the Crown Court should be adopted for the magistrates and youth courts. Beyond the widespread support for a similar scheme in the Crown and magistrates' courts, this question was not engaged with in great detail.

General observations

8.49 The National Bench Chairmen's Forum felt that there should be consideration of the appointment of a legal representative to protect the interests of the defendant. This, it was felt, would advance the overall objective to deal with cases justly and achieve greater consistency.

8.50 The Legal Committee of the Council of District Judges suggested reserving cases raising issues of unfitness to district judges.

Dissenting views

8.51 The single strongly dissenting view in relation to Questions 8, 9 and 10 raised the valid concern that such proceedings might be too time-consuming in the summary jurisdiction (HHJ Tim Lamb QC).

8.52 In addition, a number of consultees who were broadly in favour of the same system in both jurisdictions (including the CPS) suggested that there should be adjustment of procedures to take account of the reduced formality, high numbers

[50] The Council of HM Circuit Judges, Kids Company.

[51] Department of Health, *The Bradley Report: Lord Bradley's Review of People with Mental Health Problems or Learning Disabilities in the Criminal Justice System* (2009).

of unrepresented defendants, and the shorter time scales appropriate in the summary jurisdiction.

8.53 The Council of HM Circuit Judges thought consideration should be given to cases where unfitness to plead is in issue being committed to the Crown Court to be dealt with, on the basis that a hospital order represents a serious deprivation of liberty.

CONSULTEES' RESPONSES: YOUTH COURTS

Question 11: Comparable procedures in the youth court

8.54 There was overwhelming support (18 of 19 consultees) for the provisional proposal that reform in the youth court is equally merited. As the Justices' Clerks Society reflected in their response: "the rights of the young accused person must qualify for the same level of protection as those of the adult accused."

8.55 In addition to confirming the concerns outlined at paragraphs 8.24 to 8.39 above, consultees observed that:

(1) the Government has already acknowledged the high levels of unmet mental health needs of children and young people in contact with youth justice services, and the difficulty young defendants with learning difficulties, communication and mental health needs experience in understanding court proceedings in *Healthy Children, Safer Communities* (Association of Panel Members);[52] and

(2) a suitable procedure would enhance the statutory objective of the youth justice system, namely to prevent offending by children and young people (National Bench Chairmen's Forum).

Question 12: Taking account of age and developmental immaturity

8.56 There was a broad acknowledgement that the developmental immaturity of very young defendants will be a very significant factor in assessing their decision-making capacity and arguably their capacity for effective participation.[53] Additionally, some consultees suggested that the developmental immaturity of the youngest defendants should be met by additional safeguards.[54]

8.57 It was apparent from a number of clinical responses that any test of fitness which investigates decision-making capacity would be likely to catch a larger number of very young defendants, particularly those under 14, by virtue of their developmental immaturity.[55]

[52] Department of Health, *Healthy Children, Safer Communities: a strategy to promote the health and well-being of children and young people in contact with the youth justice system* (2009), available from: http://webarchive.nationalarchives.gov.uk/+/www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/dH_109771 (last accessed 9 April 2014).

[53] Dr Eileen Vizard, Just for Kids Law, Law Society, Bar Council/CBA, National Bench Chairmen's Forum.

[54] Eg Prison Reform Trust.

[55] Eg Dr Eileen Vizard.

8.58 Several consultees raised the need for any test for unfitness which might be applied in the youth court to be adjusted to take specific account of the developmental immaturity of many young defendants. There were several variations on this proposal:

(1) A new test for juvenile decisional competence should be rooted in scientific evidence on child development, including brain development, in the context of general developmental immaturity (Dr Eileen Vizard).

(2) "Developmental age" should be factored into consideration of capacity (Council of HM Circuit Judges).

(3) A capacity-based test which reflects the *Gillick* criteria[56] is most appropriate, in order to "regularise the protections afforded to children" in youth and civil/family courts (Prison Reform Trust).

(4) Assessment of unfitness to plead for under 18s should include an assessment of cognitive functioning (IQ) (Broadmoor Psychiatrists).

DISCUSSION AND FURTHER QUESTIONS ARISING

8.59 Our tentative concerns about the inadequacy of the current provisions for addressing capacity issues in the summary courts have been overwhelmingly confirmed by consultees. We are persuaded by the powerful case made by consultees for the introduction of a statutory procedure for considering capacity issues in the magistrates' and youth courts. We can see no principled reason why defendants with capacity issues should not enjoy the same protections from summary conviction as are afforded to defendants in the Crown Court.

8.60 Nonetheless, we take the view that it is essential to consider how such a procedure should be adjusted to take account of the distinctive features of the summary trial process: greater accessibility, shorter time-scales, and higher numbers of unrepresented defendants (as stressed by the CPS and HHJ Lamb QC). In addition, it is necessary to consider separately the distinct issues that arise in relation to defendants in the youth court.

8.61 We therefore raise a number of further questions for consideration. We are particularly concerned to produce an optimal system for identifying and supporting young defendants who present with capacity problems. These further questions work from the starting point that the provisional proposals set out in the preceding parts should be applied in the magistrates' and youth courts.

[56] See para 8.121, above.

Procedural issues particular to the magistrates' courts

Should cases where fitness to plead issues arise be reserved to district judges?

8.62 There is capacity in any court for a certain case, or even a certain class of case, to be heard before a specially trained tribunal.[57] It would be possible to restrict the determination of capacity issues, and any section 4A hearing for determination of the facts, to be heard only by legally trained district judges rather than by lay magistrates. The Legal Committee for the Council of District Judges raised the question of whether this might be a suitable restriction and we consider that the option is worth exploring.

8.63 The advantage of reserving such hearings to district judges is that a legally trained tribunal might be better able to deal with the complexities of applying the legal test for unfitness, and considering complex expert evidence. It could be argued that greater consistency of approach might be achieved as a result. Indeed it is noteworthy that in the Crown Court, applying the test for unfitness is now the task of the judge and not the jury.[58]

8.64 Likewise, the section 4A determination of the facts presents challenges in terms of the handling of the hearing, in particular the question of what defences should be left for the tribunal's consideration[59] and in ensuring that the interests of the unfit defendant are adequately represented. Arguably, a legally trained tribunal might be better equipped to address these issues, and to ensure that hearings proceed fairly and smoothly.

8.65 There may however be powerful arguments against reserving such cases to district judges. There is the practical difficulty presented by the low number of district judges in comparison to lay magistrates. Any effort to streamline the system by reserving unfitness hearings to district judges might in fact be frustrated by delays caused by difficulties in finding time for a district judge to hear the case. There is also the difficulty that, unlike in other specialist tribunal arrangements, cases where capacity issues might arise cannot be identified in advance.

8.66 Importantly, lay magistrates are supported by legally trained legal advisers, whose role it is to guide them on the law. Lay magistrates already deal with the application of complex legal tests, for example in considering the admissibility of bad character evidence,[60] and indeed have to consider complex expert evidence on occasion, including for the imposition of hospital orders under section 37(3) MHA 1983. In addition, assuming that an unfit defendant would have a representative appointed for the determination of the facts, under a reformed scheme which reflected Crown Court principles, the position of the unfit

[57] For example, youth cases can only be heard by district judges or magistrates who have been specifically trained for the purpose. There are also restrictions on who can hear sexual offences in the youth court (*Sexual Offences in the Youth Court: A protocol issued by the Senior Presiding Judge*, 31 March 2010).

[58] This change to CP(I)A, s 4(5) was made by section 21 to 23 Domestic Violence and Crime Victims Act 2004.

[59] Discussed in more detail at paragraphs 5.45 and following above.

[60] Under sections 98 to 113 Criminal Justice Act 2003.

defendant should be adequately addressed by their representative, with the guidance of the legal adviser.

8.67 On balance, we doubt whether there is a need for cases with capacity issues to be reserved to district judges, but would welcome consultees' views on the issue. We do, however, consider that training would need to be provided in any event to district judges and lay magistrates were a statutory framework to address capacity issues to be introduced in the summary courts. We therefore ask:

8.68 **Further Question 33: Do consultees agree that it would be unnecessary for capacity determinations and fact-finding hearings to be reserved to district judges? If not, why not?**

Electing Crown Court trial

8.69 Where the defendant faces a charge that can be tried only on indictment at the Crown Court, the case is sent directly to the Crown Court with no absolute requirement that the defendant engage in any decisions in the magistrates' court.[61] (An indication of plea can be given by the defendant but is not a pre-requisite for the case being transferred to the Crown Court.) The investigation of the defendant's capacity can then be addressed in the Crown Court. The same situation arises where the defendant's case can be tried in either court, but the magistrates decline jurisdiction.[62] The case is sent automatically to the Crown Court without necessarily involving any input from the defendant.

8.70 A more difficult situation arises where, in a case which can be tried in either court, the magistrates conclude that they will retain jurisdiction. In that situation it is the defendant's choice as to where the trial should take place.[63] As discussed at paragraph 8.12 above, the decision whether to elect Crown Court trial is significant, and can only be exercised by the defendant. It is clear to us that it would be highly undesirable if a defendant whose capacity for effective participation were in doubt were required to make that decision before a determination as to his capacity had been arrived at, or for defence representatives to make that decision where they are unable to take reliable instructions.

8.71 Our provisional view is that, in such a situation, the magistrates should adjourn the defendant's consideration of whether to elect Crown Court trial or not for the determination of the defendant's capacity to be conducted. Should the defendant be found to have capacity, the court could then proceed to ask the defendant whether he or she chooses Crown Court trial, the court now being confident that the defendant is competent to make the decision to elect or otherwise. If the defendant were found to lack capacity, then the determination of the facts would proceed in the magistrates' court. We consider that the more accessible and less complex nature of proceedings in the magistrates' court would make it the more suitable venue for the determination of facts, in any event, for a defendant lacking capacity in such a case. However our only concern with this option is that it would in effect, and rather arbitrarily, deny the defendant whose lack of capacity is

[61] Crime and Disorder Act 1998, s 51.

[62] Crime and Disorder Act 1998, s 50A(3).

[63] Crime and Disorder Act 1998, s 50A(3).

apparent from the start the right to have the factual determination conducted by a jury; this right would however be enjoyed by a defendant whose lack of capacity only emerged after he or she had elected Crown Court trial.

8.72 Of course, were the proposal for the judge alone to preside over the determination of facts in the Crown Court to find favour,[64] then this concern would fall away.

8.73 The alternative would be for the defendant in such a situation to be sent to the Crown Court for determination of his or her capacity. Were the defendant to be found to have capacity, the defendant could then be asked whether he or she chose trial in the Crown Court or whether he or she accepted summary trial The defendant could then be sent back to the magistrates' court if he or she decided to decline trial by jury. If the defendant were found to lack capacity, the determination of the facts would then proceed in the Crown Court.

8.74 This option has the advantage that it effectively preserves the defendant's right to elect proceedings in the Crown Court, without leaving them open to any more severe disposal than they could have faced in the magistrates' court if they consented to summary trial.[65] It would also mean that a judge would conduct the determination of capacity, more capable, perhaps, of anticipating the nature of the trial, whether held in the magistrates' or Crown Court. However this option is rather cumbersome, and it is likely to involve greater delay, as well as having resource implications since it would increase the workload of the Crown Court.

8.75 We recognise that neither option is without difficulty. We therefore invite consultees to consider both options:

8.76 **Further Question 34: Do consultees consider that, where the defendant's capacity is in doubt, it would be preferable for his or her capacity to be determined in the magistrates' court, and, if the defendant is found to lack capacity, that all further proceedings against him or her should remain in that court?**

8.77 **Further Question 35 (in the alternative): Do consultees alternatively consider that such a case should be sent to the Crown Court for determination of capacity and, if the defendant is found to lack capacity, that all further proceedings against him or her should remain in that court?**

Applicable to all offences?

8.78 Although effective participation rights, guaranteed by article 6 ECHR, apply to anyone "charged with a criminal offence,"[66] the current procedures for imposing a hospital order under section 37(3) MHA 1983 relate only to imprisonable offences. We consider it important to look carefully at whether there should be

[64] See above, paras 5.57 and following.

[65] Assuming our proposal to give magistrates the power to commit a defendant to the Crown Court for a decision on imposing a restriction order, discussed below at para 8.129, is enacted.

[66] Article 6 ECHR.

any similar restriction, if a procedure to consider capacity issues were to be introduced into the summary courts.

8.79 We cannot see any principled reason why the protection of such a statutory scheme ought not to relate to all criminal charges, as article 6 ECHR rights do. Although non-imprisonable offences plainly address the most minor of criminal behaviour, some bear a degree of dishonesty (such as railway fare evasion[67]) whilst others have significant reputational issues (such as kerb crawling[68]). The loss of good character, whatever the penalty, can have a very significant effect on an individual.[69]

8.80 We also note that there is some evidence that the lack of any provision for mentally disordered defendants facing non-imprisonable charges currently causes difficulties with case management (as discussed at paragraph 8.20 above). Therefore, there may be practical advantages in having a procedure in place for dealing with capacity issues arising in all cases.

8.81 Available disposals would have to be limited in the case of non-imprisonable offences. It seems to us that it would obviously be inappropriate for a hospital order to be available in relation to a non-imprisonable offence. However if, as discussed below, a supervision order were to be an available disposal in the magistrates' court for a defendant lacking capacity, we provisionally consider that it may be appropriate for that disposal to remain available to the court in relation to non-imprisonable matters (in addition to the absolute discharge). We appreciate that a community order would not otherwise be available on conviction for such an offence, but we also bear in mind the non-punitive nature of supervision orders following a finding of lack of capacity.

8.82 We also have in mind, of course, the much greater number of defendants who are tried in the magistrates' courts, many of them for non-imprisonable offences. However, we do not envisage that an unmanageable number of findings of lack of capacity would result from the inclusion of non-imprisonable offences. This is firstly because if the test for lack of capacity takes account of the nature of the criminal proceedings in question (as we provisionally consider it should), there should be very few findings of lack of capacity. We consider that a defendant's condition or impairment would have to be extremely severe before he would be considered lacking in capacity in relation to accessible summary proceedings with, most likely, straightforward issues. Secondly, the availability of a supervision order should also serve to deter malingerers, as such a disposal is arguably more

[67] Contrary to Regulation of Railways Act 1889, s 5.

[68] Contrary to Sexual Offences Act 2003, s 51A.

[69] The Legal Aid, Sentencing and Punishment of Offenders Act 2012 reduced the rehabilitation periods under the Rehabilitation of Offenders Act 1974, so that a conviction resulting in a fine will be become spent, and hence no longer declarable to an employer, just one year from the date of imposition. Nonetheless for a great many roles (including the professions and roles involving contact with children or vulnerable adults) spent convictions continue to be disclosable however minor the offence, albeit subject to a very limited filtering process (whereby a minor conviction does not have to be disclosed after 11 years, as long as it is the person's only conviction): Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975, SI 1975 No 1023, as amended by the Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975 (Amendment) (England and Wales) Order 2013, SI 2013 No 1198.

serious disposal than any that would be available upon conviction. We ask, therefore, the following further questions:

8.83 **Further Question 36: Do consultees agree that capacity procedures in the summary courts should be applicable for all criminal offences?**

8.84 **Further Question 37: For non-imprisonable offences, do consultees agree that the available disposals should be limited to a supervision order and an absolute discharge?**

The legal test

8.85 We now turn to consider whether the content of the legal test, as provisionally proposed for the Crown Court, should be adjusted for application in summary proceedings.[70] The test we proposed combines effective participation and decision-making capacity, including the consideration of whether an accused could undergo a trial or plead guilty with the assistance of special measures or other reasonable adjustments.[71]

8.86 In our provisional view, were the test to invite consideration of the nature of the proceedings in which the defendant is actually required to participate, "the determination of the allegation(s) faced," this would allow experts and magistrates to factor into their assessments the accessible and more straightforward nature of proceedings in the summary courts. We would not, in those circumstances, consider it necessary to adjust the test specifically for use in the magistrates' courts. We ask therefore:

8.87 **Further Question 38: Do consultees agree that a legal test which has regard to "the determination of the allegation(s) faced" would allow sufficient effect to be given to the accessible and more straightforward nature of summary proceedings?**

Screening and assessment of the accused

Identification of defendants with capacity issues

8.88 Consultees roundly confirmed our concerns at the arbitrariness by which some defendants' capacity for trial falls to be considered, whilst others pass through the system unnoticed. The swifter nature of proceedings in the summary courts, and the high numbers of unrepresented defendants, mean that there is a danger that the courts, and legal practitioners, will fail to be alerted to capacity issues.

8.89 The challenge in the summary courts lies in isolating how the identification of defendants with capacity issues can be improved. We are unable to identify specific procedural adjustments which would better facilitate that identification. Nonetheless we consider that if the liaison and diversion scheme is rolled out nationwide, as is envisaged, the screening of defendants in the police station and in the magistrates' courts by dedicated teams of mental health workers would go a long way to addressing this difficulty. In particular, the terms of the liaison and

[70] Inevitably the test would require some minor procedural adjustments for application in the summary courts, and in terms of changes to the terminology used.

[71] See above, paras 2.28 to 2.41 and 2.60 to 2.67 and Further Questions 1 to 5 and 9.

diversion scheme[72] require that the court, prosecution and defence representative be informed where mental health issues have been identified in screening.

8.90 In addition, we are confident that the introduction of a statutory scheme for considering capacity issues, with the training of legal practitioners and the judiciary which would be required for implementation, would give the issue of capacity greater prominence for courts and representatives. This should also improve the identification of defendants with capacity issues.

8.91 Nonetheless, we appreciate that consultees may be able to advance more substantive proposals to improve the identification of such individuals. We therefore ask:

8.92 **Further Question 39: Do consultees consider that there are any adjustments to the test, or the procedure, for defendants lacking capacity that would materially improve the prospects of the court identifying those adults with capacity issues?**

Should a finding of unfitness in the magistrates' and youth courts be established on a less formal basis?

8.93 We raise this question having in mind the shorter timescales in the magistrates' courts, and the delays which can currently be caused in the Crown Court by the requirement to obtain the opinions of two registered medical practitioners (one of whom must be section 12 MHA 1983 approved).

8.94 Our provisional view is that there is no logical basis for distinguishing the requirement for expert evidence in the different jurisdictions.

8.95 Nor do we consider that there is necessarily a practical need for such an adjustment. As discussed at paragraphs 4.17 to 4.23 above, we are exploring the possibility of relaxing the evidential requirement such that the evidence of "two expert witnesses competent to address the condition of the defendant" would suffice. Were that provisional proposal to find favour, we would expect that it would considerably ease the current problems with obtaining expert evidence. In particular, the pool of experts available would be considerably widened, and it could, subject to appropriate expertise, embrace those mental health clinicians, including community psychiatric nurses, who at present conduct screening and assessment of many defendants in the magistrates' courts. In addition, we are confident that if, as is intended, the Government's liaison and diversion scheme is rolled out across the country, effective screening and assessment of defendants at a very early stage would be revolutionised.

8.96 **Further Question 40: Do consultees agree that it is appropriate to have the same evidential requirement in the summary courts as in the Crown Court?**

[72] See NHS England's *Operating Model for Liaison and Diversion Services across England (September 2013)* and *2013/14 NHS Standard Contract for Liaison and Diversion Service* (fn 6, Part 1 above).

The procedure for the unfit accused

Should proceeding with the determination of facts hearing be discretionary in the summary jurisdiction?

8.97 This question is considered in relation to the Crown Court at paragraphs 5.26 to 5.31 above, and in Further Question 18[73] we invited consultees to consider whether the Crown Court should be entitled to decline to proceed with the determination of the facts, in order to allow for the diversion of the defendant out of the criminal justice system. We reasoned that, however reformed, the fact-finding procedure has significant limitations, in particular in relation to the limited and nature of the disposals which might follow. Additionally, we acknowledged that the fact finding hearing could have a significantly adverse effect on the unfit defendant.

8.98 We do not propose that there be no determination of the facts procedure in the magistrates' court. There will be cases in the summary courts, especially in the youth court, where public protection concerns require the court to address the behaviour which brought the defendant to the attention of the courts. We have in mind for example, cases such as a 17-year old facing an allegation of sexual assault on a class-mate, or an adult facing an allegation of threats to kill.

8.99 We consider that, whatever the view taken on this issue in relation to the Crown Court, this question should be carefully assessed in relation to the summary courts. In our provisional view, the reasoning which favours giving the court discretion over whether to proceed to a finding of fact is even more persuasive in the summary courts. This is particularly because of the less serious nature of much of the alleged offending dealt with in the summary courts, and the lesser likelihood that the defendant will present a danger to the public such that the more intensive disposal of a hospital order, for example, will be required. There will inevitably be more cases in the magistrates' and youth courts where, once the defendant has been found to lack capacity, the public interest would not be served in proceeding with a fact finding hearing. Such cases might include, for example, an adult facing a first allegation of fare evasion, who is deemed to lack capacity by virtue of a severe learning disability.

8.100 We anticipate that in exercising this discretion the court would take into account a number of factors, including: the seriousness of the offence originally charged, the impact on any identified victims, the risk of future offending should a disposal not be imposed by the courts, whether facilities outside the criminal justice system are available to address the impairment of the defendant, where appropriate, and any other factor which the court considers relevant. We take the view, however, that diversion of an accused out of the criminal justice system should not occur where the accused, or his representative, objects to that course. We consider that the accused, or his representative, should be entitled to put the Crown to proof of the allegation, should they wish to do so. We anticipate that this is only likely to arise where the allegation itself is likely to be reputationally damaging (such as where a sexual offence is charged).

8.101 We therefore invite consultees to consider the question:

[73] Para 5.33 above.

8.102 **Further Question 41: Regardless of the position in the Crown Court, do consultees agree that, in the summary courts, the tribunal should have a discretion whether to proceed to the determination of facts hearing following a finding that the defendant lacks capacity?**

Should the special verdict be available in summary proceedings?

8.103 In the Crown Court we provisionally proposed that a special verdict be available if a defendant who lacked capacity was acquitted on the basis of a mental disorder existing at the time of the offence.[74] The purpose of the special verdict is to enable a disposal to be imposed in such cases, to address any public protection concerns which might arise. We envisaged that such a verdict would only be likely to be required in cases where the offender presented a significant risk of harm to the public or themselves. In this paper, we have provisionally proposed that this special verdict be available to the jury in their initial consideration of the facts, and not be reserved to a discretionary second stage.

8.104 We consider now whether that facility is required in the summary courts. We recognise that the term "verdict" is not generally applicable in the magistrates' courts, and would propose therefore to consider a "special determination" as the summary version of the special verdict. Were the special determination not to be available, then the trial of the facts could result in one of only two determinations: an acquittal, or a determination that the defendant did the act or made the omission charged and there are no grounds for an acquittal.

8.105 In addressing this question we have borne very much in mind the focus on simple and accessible procedures in the summary jurisdiction, and the importance of shorter timescales for the conclusion of proceedings. It could be argued that allowing for a special determination, even without the two-stage process proposed in the CP, would introduce unnecessary complexity into the expert evidence and the determinations required of the district judge or lay bench.

8.106 However, we do not find those arguments compelling. In particular, we consider that even in the absence of the special determination it would still be possible, at the factual determination, for evidence relating to mental disorder at the time of the event to be called (since this will be an available route to an acquittal under our provisional proposals).

8.107 Secondly, although a third possible determination will inevitably increase the task of the tribunal, it will only be in very few cases that there is evidence to support such a determination. In our Discussion Paper on insanity and automatism,[75] ("the Insanity DP"), we considered the infrequency with which defences of insanity and automatism are pursued.[76]

8.108 We are also not persuaded by the argument that the special determination may not be required in the summary courts because they process less serious

[74] See above, paras 5.9 to 5.11 and 5.51 to 5.55.

[75] Law Commission Discussion Paper "Criminal Liability: Insanity and Automatism" (2013), available from: http://lawcommission.justice.gov.uk/docs/insanity_discussion.pdf.

[76] Law Commission Discussion Paper "Criminal Liability: Insanity and Automatism," Annex B, para 14.

offences, and so are unlikely to deal with defendants who present a risk of significant harm to the public. Firstly, magistrates' courts, especially youth courts, deal with many serious matters.[77] Secondly, as we observed in the Insanity DP, to conclude that a person who commits a less serious offence necessarily poses a less serious risk of harm is highly speculative.[78] More likely than not, this will be the case, but it does not necessarily follow in every case. We therefore do not think that the special determination is an unnecessary encumbrance in the magistrates' courts.

8.109 In short, whilst we consider that the special determination will rarely be actively considered at the determination of facts stage, we do not think there are sufficiently compelling practical or logical arguments against its inclusion in the summary procedures. We therefore ask the following question:

8.110 **Further Question 42: Do consultees agree that in reaching its determination on the facts, the tribunal in the summary courts should be able to reach a special determination of acquittal because of mental disorder existing at the time of the offence?**

ADJUSTMENTS TO THE TEST AND PROCEDURE IN THE YOUTH COURT

8.111 As we have already indicated,[79] the scope of this project does not allow us to make recommendations relating to the presumption or defence of *doli incapax* or to review the age of criminal responsibility. Nonetheless, it is plain that the competency issues which arise as a result of the age and developmental immaturity of young defendants are critical to formulating proposals for reform which provide adequate protections for young defendants. We therefore consider it vital to assess how such features can be addressed in the procedure in the youth court.

Improving identification of young defendants with capacity issues

8.112 The consultation responses suggest that there may be a significant number of youth court cases in which issues with the defendant's capacity for effective participation are not adequately identified (Dr Eileen Vizard). In addition, because of the limited framework for addressing capacity issues in the youth court, the impetus to raise and pursue the issue has rested with defence representatives, and not with the court. We are concerned to address both of these issues.

Specialist training

8.113 There is currently no requirement for representatives, or prosecutors, of young people, to have specialised training in child development and psychiatric issues, nor in communication with children.[80] We consider that representatives, particularly defence representatives, play a vital role in screening young defendants for capacity issues, and that their ability to identify such issues can

[77] For instance section 2 or section 2A Protection from Harassment Act 1997 allegations of stalking, an example we gave in the Insanity DP.

[78] Law Commission Discussion Paper "Criminal Liability: Insanity and Automatism" (2013), para 7.14.

[79] Para 8.42 above.

[80] Although there is such a requirement for members of the Family Law Bar, for example.

only be raised effectively through mandatory training. We consider that the same reasoning applies to members of the judiciary and lay magistrates who sit in youth courts. Their current training should, we consider, be expanded to include this area. This proposal has been raised before,[81] and indeed it forms a prominent focus in the evidence to the ongoing inquiry by Lord Carlile QC into the effectiveness of youth court provision.[82] We therefore ask:

8.114 **Further Question 43: Do consultees agree that there should be mandatory specialist training on issues relevant to trying youths, for all legal practitioners and members of the judiciary engaged in cases involving young defendants?**

Screening

8.115 In light of the likely prevalence of capacity issues, and the lack of diagnosis in many cases, we consider that a more proactive approach to screening may be appropriate for very young defendants under 14 years of age, than for older adolescents or for adults.

8.116 We appreciate that this will entail the application of additional resources. However, we consider that, quite apart from the moral obligation to respond to such vulnerability, addressing the needs of this population at an early stage will prove to be an investment for the criminal justice system more generally. Research suggests that males first convicted at an earlier age (10 to 13 years) became the most persistent offenders, with longer and more prolific criminal careers.[83] The likely cost savings of providing effective assistance for this group at an early stage are obvious.

8.117 The challenge of providing such screening will be alleviated by the wider availability of mental health specialists in magistrates' and youth courts now, as part of the Government's Liaison and Diversion commitment. In addition, the dramatic reduction in the number of young defendants in court in recent years should also ease associated logistical difficulties.[84]

8.118 We provisionally consider, therefore, that for defendants aged under 14 there should be mandatory screening to assess whether they have capacity issues.

[81] 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.

[82] The evidence can be accessed at: http://www.ncb.org.uk/media/1114210/written_evidence_to_the_inquiry_by_parliamentarians_into_the_operation_and_effectiveness_of_the_youth_court.pdf. Responses to the question of the need for "youth specialist expertise" in the youth court specialism has been met with an overwhelmingly positive response: see for example pp 6, 15, 21, 27.

[83] See for example D Farrington et al, (1998) 7 *Studies on Crime and Crime Prevention* 85.

[84] The number of children (10 to 14 yrs) entering the criminal justice system for the first time has fallen by 63% since 2009/10: Ministry of Justice and Youth Justice Board statistical bulletin, *Youth Justice Statistics 2012/13 (England and Wales)*, p 24. Available from: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/278549/youth-justice-stats-2013.pdf (last accessed 9 April 2014).

8.119 **Further Question 44: Do consultees consider it appropriate for there to be initial screening for mental health issues for all defendants under 14 years of age, to be conducted by mental health professionals?**

Adjustment of the legal test for young defendants

8.120 We now turn to consider whether, in light of consultees' observations and the particular issues set out at paragraphs 8.25 to 8.40 above, it is necessary for there to be a different or adjusted test for capacity for effective participation in the youth court. Consultees made particular reference to two other potential models for measuring capacity in young people: the *Gillick* competence criteria, and the Grisso framework for assessing competence in juveniles.

8.121 The former test of "*Gillick* competence" arises from a civil case,[85] which considered whether doctors should be able to give contraceptive advice or treatment to children under 16 without parental consent. The guidelines have been more generally applied to assess whether a child has the maturity to make their own decisions and to understand the implications of those decisions. The Grisso framework, although developed in relation to US "adjudicative competence" assessments, is nonetheless the most comprehensive formulation of the capacity to participate for juveniles. Grisso's framework is as follows:

(1) Understanding charges and potential consequences:

(a) ability to understand and appreciate the charges and their seriousness;

(b) ability to understand possible dispositional consequences;

(c) ability to realistically appraise the likely outcomes.

(2) Understanding the trial process:

(a) ability to understand, without significant distortion, the roles of participants in the trial process (for example, judge, defense attorney, prosecutor, witnesses, jury);

(b) ability to understand the process and potential consequences of pleading and plea bargaining;

(c) ability to grasp the general sequence of pre-trial/trial events.

(3) Capacity to participate with attorney in a defense:

[85] *Gillick v West Norfolk & Wisbech Area Health Authority* [1986] AC 112. The test of "*Gillick* competence" arises from Lord Scarman's observation in his judgment (at 189): "...it is not enough that she should understand the nature of the advice which is being given: she must also have a sufficient maturity to understand what is involved."

(a) ability to adequately trust or work collaboratively with attorney;

(b) ability to disclose to attorney reasonably coherent description of facts pertaining to the charges, as perceived by the defendant;

(c) ability to reason about available options by weighing their consequences without significant distortion;

(d) ability to realistically challenge prosecution witnesses and monitor trial events.

(4) Potential for courtroom participation:

(a) ability to testify coherently, if testimony is needed;

(b) ability to control own behavior during trial proceedings;

(c) ability to manage the stress of the trial.[86]

8.122 The framework emphasises in particular the importance of the young person being able realistically to appraise options and outcomes, and to weigh issues without significant distortion.

8.123 We have carefully considered both of these potential tests for juvenile competence in the light of the provisional proposal advanced in paragraph 2.33 above. That provisional proposal suggested a reformed test of capacity for effective participation in criminal proceedings, combining foundational competence principles as set out in *John M* with a decision-making capacity element. We consider that there is nothing in either the *Gillick* or Grisso formulations, save perhaps the capacity to control one's own behaviour and manage the stress of the trial (the final bullet points in the Grisso framework), which is not addressed in the proposed reformed test. The excluded aspects do not appear to us to be so intrinsic to effective participation as to justify an amended test in the youth court.

8.124 We agree with those consultees who made reference to the significance of developmental age, or developmental immaturity in assessing capacity. This will be plain from our observations at paragraphs 8.24 to 8.39 above. However, at this stage we do not support suggestions that the legal test be amended for young people to make specific reference to, or require specific assessment of, the defendant's developmental age. We consider that the proposed effective participation test, in conjunction with an assessment of the capacity for decision-making, will allow clinicians to isolate those aspects of the defendant's developmental immaturity which impinge upon their capacity for effective participation. We consider that it would be undesirable to incorporate a technical

[86] T Grisso, "What we know about youths' capacities as trial defendants" (2000) in *Youth on Trial* (eds T Grisso and RG Schwartz), pp139-171. The competence framework is set out at p142.

term such as "developmental age" or similar into a legal test, since there is a danger, as in the law of homicide, that in due course the test then becomes outdated. To devise a separate legal test for the youth court, encompassing developmental immaturity, would run the risk of introducing greater complexity without securing better outcomes for young defendants.

8.125 We also consider whether the specialised nature of the youth court is adequately reflected in the proposed reformed test. In our view, the adjusted procedures of the youth court are of real significance in the assessment of a young defendant's capacity for effective participation. However, we do not advocate adjustment of the test to reflect this fact. Rather we consider that the "contextualisation" of the test, which invites the court to consider capacity for effective participation in "the determination of the allegation(s) faced," will allow the tribunal to take into account the specialised nature of the youth court, and its amended procedures.

8.126 In light of the above, we therefore ask the following further question:

Further Question 45: Do consultees agree that the provisional reformed test proposed for the Crown Court at paragraph 2.34 above is suitable for application to young defendants without adjustment?

DISPOSALS IN THE SUMMARY JURISDICTION

8.127 We asked no question in the CP about what disposals should be available in the summary courts for a defendant found to lack capacity but to have "done the act or made the omission" under the reformed section 4A fact-finding procedure. However, consultees expressed a general preference for equalising protections and procedures between the Crown and magistrates' courts. Additionally, the evidence provided by consultees in relation to the deficiencies of the current disposal scheme in the summary courts makes plain that legislative change is required.

8.128 We consider that the disposals available should in broad terms reflect those imposed in the Crown Court. However there are several issues that need to be addressed.

Restriction orders

8.129 We would propose to include hospital orders amongst the available disposals, but raise the question of whether there should be a power in the magistrates' court to impose a restriction order, or to commit to the Crown Court for that purpose. We consider that the imposition of a restriction order is an extremely serious deprivation of liberty which is not in keeping with the general sentencing and disposal restrictions on the summary courts. However, we do consider that it should be possible following a finding of lack of capacity under the proposed reforms, for the court to commit the defendant for a restriction order to be imposed, where appropriate. This would bring the disposal regime into line with the power to commit for a restriction order to be imposed following conviction as it is under section 43 MHA 1983.

8.130 **Further Question 46: Do consultees agree that the summary courts should have the power to commit a defendant to the Crown Court for the imposition of a restriction order, but should not have the power to impose one themselves?**

Guardianship orders

8.131 Consultees' responses suggest plainly that there must be a community-based disposal option in the magistrates' and youth courts, as there is in the Crown Court. At present the summary courts retain the power to impose a guardianship order, although it was removed from the Crown Court's scope for dealing with unfit defendants by section 24(1) of the Domestic Violence and Crime Victims Act 2004. As discussed above, there are significant limitations to guardianship orders, not least their availability only to defendants aged 16 or over, and only to those suffering a "mental disorder" as defined in the MHA 1983. No enthusiasm was expressed by consultees for guardianship orders as a disposal for unfit defendants. Nor are they used widely, if at all, in summary courts for defendants who been found to have "done the act or made the omission" under section 37(3) MHA 1983. Ministry of Justice statistics, based on available data, suggest that in the magistrates' and youth courts there were no guardianship orders imposed without conviction under section 37(3) MHA 1983 between 2009 and 2012.[87]

8.132 We take the provisional view that the power to make a guardianship order where a defendant is found to lack capacity would not represent a suitable community disposal option. We therefore consider that such orders should no longer be available under the capacity reforms proposed in this paper. We suggest that it would be preferable for magistrates' courts to have the power to impose a supervision order, with or without a treatment requirement, as is available in the Crown Court. This would introduce equality of provision between the Crown Court and magistrates' court, and would provide a community order which is genuinely applicable in all cases.

Absolute discharges

8.133 To allow proper flexibility of approach for the summary courts, and to equalise disposal options across all courts, we also provisionally consider that it would be appropriate for absolute discharges to be an available disposal option in magistrates' courts.

8.134 We therefore make invite consultees to consider the following question:

8.135 **Further Question 47: Do consultees agree that the following disposals should be available to the magistrates' court on a finding that the defendant has "done the act or made the omission," or where a special determination has been arrived at:**

(a) a hospital order (without restriction);

[87] Ministry of Justice Criminal Justice Statistics, 2013. The statistics relate to persons for whom these offences were the principal offences for which they were dealt with. When a defendant has been found guilty of two or more offences the principal offence is the offence for which the heaviest penalty is imposed. Where the same disposal is imposed for two or more offences, the offence selected is the offence for which the statutory maximum penalty is the most severe.

(b) **a supervision order;**

(c) **an absolute discharge?**

Youth court disposals

8.136 For the reasons set out at paragraphs 8.124 and 8.125 above, we propose for young defendants a disposal regime that in principle mirrors that in the adult courts. However, in the youth court we provisionally consider that it would be beneficial to have a supervision order which can be tailored to young defendants. To achieve this, we consider that the non-penal requirements which can be included as part of a youth rehabilitation order[88] (for example an education requirement or a drug treatment requirement) ought also to be available as part of a non-penal youth supervision order following a finding of lack of capacity.

8.137 We therefore ask the following further question:

8.138 **Further Question 48: Do consultees consider that the non-penal requirements of a youth rehabilitation order should be available as part of a youth supervision order, following a finding that a young person has "done the act or made the omission," or where a special determination has been arrived at?**

REMISSIONS AND APPEALS

Power of the defendant to request remission for trial

8.139 For the reasons set out at paragraphs 7.40 to 7.42 above, we consider it important to retain the power for a defendant dealt with in the magistrates' or youth court to request remission for trial where he or she has recovered capacity. We therefore ask the following question:

8.140 **Further Question 49: Do consultees agree that a defendant against whom there has been a finding in the magistrates' or youth court that he or she had "done the act or made the omission," should be entitled to request remission for trial upon regaining capacity, where recovery is confirmed by the opinion of two experts competent to address the defendant's particular condition?**

Appeals

8.141 Findings or determinations in either of the summary courts under our proposed capacity regime would in any event engage the right of appeal by way of case stated.[89] This is confined, however, to where there has been an error of law or a decision taken in excess of jurisdiction.

8.142 A right of appeal on a question of fact, or against disposal, not in excess of jurisdiction, would need to be created. We provisionally propose that this should mirror the right of appeal against sentence and conviction to the Crown Court under section 108 of the Magistrates' Court Act 1980. The Crown Court would

[88] See section 1 Criminal Justice and Immigration Act 2008.

[89] Magistrates' Courts Act 1980, ss 111 to 114.

then be empowered to confirm, reverse or vary any finding or determination and could remit the matter back to the magistrates' or youth court for rehearing.

8.143 **Further Question 50: Do consultees agree that a new right of appeal should be created from any determination or disposal imposed under a reformed capacity procedure, which would mirror the right to appeal against conviction or sentence under section 108 Magistrates' Courts Act 1980?**

PART 9
SUMMARY OF FURTHER QUESTIONS

PART 2: THE LEGAL TEST

9.1 Further Question 1: Do consultees agree that a reformed legal test for fitness to plead should incorporate a consideration of both decision-making capacity and the capacity for effective participation?

Paragraph 2.33

9.2 Further Question 2: Do consultees consider that an effective participation test, framed around the *John M* criteria (set out at paragraph 2.3 above), with an additional decision-making capacity limb, represents the most appropriate formulation for such a combined legal test? Or do consultees favour another of the formulations set out at paragraph 2.8 above and, if so, why?

Paragraph 2.34

9.3 Further Question 3: Do consultees consider that incorporating an exhaustive list of decisions for which the defendant requires capacity into a reformed legal test for unfitness to plead would assist in maintaining the threshold for unfitness at a suitable level?

Paragraph 2.42

9.4 Further Question 4: Do consultees consider that a reformed test should explicitly refer to a "satisfactory" or "sufficient" level of capacity for effective participation?

Paragraph 2.43

9.5 Further Question 5: Do consultees agree that a diagnostic threshold would be unlikely to assist in maintaining the threshold of unfitness at a suitable level?

Paragraph 2.44

9.6 Further Question 6: Do consultees think that it would be helpful to have a statutory presumption that all defendants are fit to be tried until the contrary is proved?

Paragraph 2.46

9.7 Further Question 7: Do consultees agree that a finding that a person lacks capacity shall remain valid unless and until the contrary is established on the basis of the evidence of two suitably qualified experts?

Paragraph 2.48

9.8 Further Question 8: Do consultees agree that disaggregation of capacity to plead and capacity for trial is undesirable?

Paragraph 2.59

9.9 Further Question 9: Do consultees consider that making the test one of capacity for effective participation "in determination of the allegation(s) faced" would introduce a desirable element of context into the assessment?

Paragraph 2.67

9.10 Further Question 10: Do consultees agree that the United Kingdom's obligations under the UNCRPD and the ECHR can properly be accommodated in the manner outlined in paragraphs 2.80 to 2.82?

Paragraph 2.83

9.11 Further Question 11: Do consultees agree that the difficulties surrounding unrepresented defendants cannot be addressed by amendment to the legal test itself?

Paragraph 2.88

PART 3: SPECIAL MEASURES

9.12 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?

Paragraph 3.22

PART 4: ASSESSING THE CAPACITY OF THE ACCUSED

9.13 Further Question 13: Do consultees agree that in any reformed unfitness test it will be unnecessary for the requirement for two registered medical practitioners, one duly approved under section 12, to remain?

Paragraph 4.22

9.14 Further Question 14: 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?

Paragraph 4.24

9.15 Further Question 15: Do Consultees consider that there is any alternative appropriate mechanism to address the difficulty presented by a defendant whose capacity is in doubt, but who refuses expert assessment?

Paragraph 4.27

PART 5: PROCEDURE FOR THE UNFIT ACCUSED

9.16 Further Question 16: Do consultees consider that, following a finding that the defendant lacks capacity, there should be a power to delay the determination of facts procedure for a maximum six month period, on the agreement of two competent experts, to allow the accused to regain capacity and be tried in the usual way?

Paragraph 5.24

9.17 Further Question 17: Do consultees consider that it would be appropriate to extend the maximum period of a section 36 MHA 1983 remand to hospital for treatment to 24 weeks in these circumstances?

Paragraph 5.25

9.18 Further Question 18: Do consultees consider that the determination of facts procedure for the accused who lacks capacity should be made discretionary following the finding of unfitness, to allow for discontinuance of the proceedings, and diversion out of the criminal justice system into health or related services in appropriate cases?

Paragraph 5.33

9.19 Further Question 19: Do consultees consider that public protection concerns arising in relation to an acquitted, but dangerous, unfit defendant could be adequately met by the use of civil powers under section 3 or 7 MHA 1983?

Paragraph 5.44

9.20 Further Question 20: Do consultees consider that on a determination of the facts, any defence should be left to the jury, after discussion with the advocates, where there is evidence on which a jury properly directed might reasonably find the defence made out or the essential element of the offence unproven?

Paragraph 5.50

9.21 Further Question 21: Do consultees consider that the special verdict should be made available to the jury on their initial consideration of the facts?

Paragraph 5.54

9.22 Further Question 22: Do consultees agree that it is not necessary for the judge to retain the discretion, in cases of exceptional prejudice, to order a second stage process for the consideration of the special verdict, in the manner envisaged in Provisional Proposal 9?

Paragraph 5.56

9.23 Further Question 23: Do consultees consider that the determination of facts in relation to a defendant found to lack capacity could be dealt with by a judge sitting without a jury?

Paragraph 5.60

9.24 Further Question 24: Do consultees agree that a representative, appointed by the court to put the case for the defence, should be entitled to act contrary to the defendant's identified will and preferences, where the representative considers that to do so is necessary in the defendant's best interests?

Paragraph 5.64

PART 6: DISPOSALS

9.25 Further Question 25: Do consultees consider that the requirement for the supervising officer to be willing to undertake supervision of an unfit accused poses such problems in practice that it needs to be amended?

Paragraph 6.14

9.26 Further Question 26: Do consultees consider 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, as available under section 17E-F of the MHA 1983?

Paragraph 6.21

9.27 Further Question 27: Do consultees consider that there are any other enhancements of the powers available under supervision orders which would be beneficial?

Paragraph 6.22

PART 7: REMISSION AND APPEALS

9.28 Further Question 28: Do consultees agree that the power of the Crown to remit a recovered defendant for trial should be statutorily extended to cover all defendants found to have done the act or made the omission?

Paragraph 7.34

9.29 Further Question 29: Do consultees consider that the power to remit an accused for trial should only be exercisable by the Crown where the judge has ruled, following the section 4A hearing, that it is in the public interest for remission to be available should the defendant regain capacity?

Paragraph 7.35

9.30 Further Question 30: Do consultees agree that the Crown's power to remit defendants for trial upon their recovery should not be limited in time?

Paragraph 7.38

9.31 Further Question 31: Do consultees agree that where there has been a finding that a defendant had "done the act or made the omission," he or she should be entitled to request remission for trial on regaining capacity, where recovery is confirmed by the opinions of two experts competent to address the defendant's particular condition?

Paragraph 7.43

9.32 Further Question 32: Do consultees consider that the rights of appeal vested in the unfit defendant should be exercisable by his or her legal representatives?

Paragraph 7.48

PART 8: UNFITNESS TO PLEAD IN THE MAGISTRATES' AND YOUTH COURTS

9.33 Further Question 33: Do consultees agree that it would be unnecessary for capacity determinations and fact-finding hearings to be reserved to district judges? If not, why not?

Paragraph 8.68

9.34 Further Question 34: Do consultees consider that, where the defendant's capacity is in doubt, it would be preferable for his or her capacity to be determined in the magistrates' court, and, if the defendant is found to lack capacity, that all further proceedings against him or her should remain in that court?

Paragraph 8.76

9.35 Further Question 35 (in the alternative): Do consultees alternatively consider that such a case should be sent to the Crown Court for determination of capacity and, if the defendant is found to lack capacity, that all further proceedings against him or her should remain in that court?

Paragraph 8.77

9.36 Further Question 36: Do consultees agree that capacity procedures in the summary courts should be applicable for all criminal offences?

Paragraph 8.83

9.37 Further Question 37: For non-imprisonable offences, do consultees agree that the available disposals should be limited to a supervision order and an absolute discharge?

Paragraph 8.84

9.38 Further Question 38: Do consultees agree that a legal test which has regard to "the determination of the allegation(s) faced" would allow sufficient effect to be given to the accessible and more straightforward nature of summary proceedings?

Paragraph 8.87

9.39 Further Question 39: Do consultees consider that there are any adjustments to the test, or the procedure, for defendants lacking capacity that would materially improve the prospects of the court identifying those adults with capacity issues?

Paragraph 8.92

9.40 Further Question 40: Do consultees agree that it is appropriate to have the same evidential requirement in the summary courts as in the Crown Court?

Paragraph 8.96

9.41 Further Question 41: Regardless of the position in the Crown Court, do consultees agree that, in the summary courts, the tribunal should have a discretion whether to proceed to the determination of facts hearing following a finding that the defendant lacks capacity?

Paragraph 8.102

9.42 Further Question 42: Do consultees agree that in reaching its determination on the facts, the tribunal in the summary courts should be able to reach a special determination of acquittal because of mental disorder existing at the time of the offence?

Paragraph 8.110

9.43 Further Question 43: Do consultees agree that there should be mandatory specialist training on issues relevant to trying youths, for all legal practitioners and members of the judiciary engaged in cases involving young defendants?

Paragraph 8.114

9.44 Further Question 44: Do consultees consider it appropriate for there to be initial screening for mental health issues for all defendants under 14 years of age, to be conducted by mental health professionals?

Paragraph 8.119

9.45 Further Question 45: Do consultees agree that the provisional reformed test proposed for the Crown Court at paragraph 2.34 above is suitable for application to young defendants without adjustment?

Paragraph 8.126

9.46 Further Question 46: Do consultees agree that the summary courts should have the power to commit a defendant to the Crown Court for the imposition of a restriction order, but should not have the power to impose one themselves?

Paragraph 8.130

9.47 Further Question 47: Do consultees agree that the following disposals should be available to the magistrates' court on a finding that the defendant has "done the act or made the omission," or where a special determination has been arrived at:

(a) a hospital order (without restriction);

(b) a supervision order;

(c) an absolute discharge?

Paragraph 8.135

9.48 Further Question 48: Do consultees consider that the non-penal requirements of a youth rehabilitation order should be available as part of a youth supervision order, following a finding that a young person has "done the act or made the omission," or where a special determination has been arrived at?

Paragraph 8.138

9.49 Further Question 49: Do consultees agree that a defendant against whom there has been a finding in the magistrates' or youth court that he or she had "done the act or made the omission," should be entitled to request remission for trial upon regaining capacity, where recovery is confirmed by the opinion of two experts competent to address the defendant's particular condition?

Paragraph 8.140

9.50 Further Question 50: Do consultees agree that a new right of appeal should be created from any determination or disposal imposed under a reformed capacity procedure, which would mirror the right to appeal against conviction or sentence under section 108 Magistrates' Courts Act 1980?

Paragraph 8.143