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## **Unfitness to Plead Summary**

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13 January 2016

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**Law Commission**

# **UNFITNESS TO PLEAD**

## **Summary**

This paper is a summary of the full Report, Unfitness to Plead, Law Com 364, available on our website at <http://www.lawcom.gov.uk/project/unfitness-to-plead/>.



**THE LAW COMMISSION**  
**UNFITNESS TO PLEAD**  
**SUMMARY**  
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# LAW COMMISSION

## UNFITNESS TO PLEAD

### SUMMARY

#### BACKGROUND

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

#### CONSULTATION PROCESS

- 1.2 We published a Consultation Paper on unfitness to plead (“CP197”) in October 2010, in which we asked questions and advanced provisional proposals regarding reform of the test and the procedure for unfitness to plead.<sup>2</sup> We received 55 written submissions from consultees in response.<sup>3</sup> Those responses endorsed many aspects of our provisional proposals. They also raised fresh issues arising both out of our provisional proposals and in relation to the operation of aspects of the current law on unfitness to plead which consultees considered to be problematic.
- 1.3 We were unable to work further on the project between January 2011 and early 2013 because we were required to deploy our resources on other projects. During that period there were significant changes to the criminal justice system. In particular, there has been a very substantial reduction in the budget available

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

<sup>2</sup> Unfitness to Plead (2010) Law Commission Consultation Paper No 197.

<sup>3</sup> Unfitness to Plead: Analysis of Responses (2013), available at [http://www.lawcom.gov.uk/wp-content/uploads/2015/06/cp197\\_unfitness\\_to\\_plead\\_analysis-of-responses.pdf](http://www.lawcom.gov.uk/wp-content/uploads/2015/06/cp197_unfitness_to_plead_analysis-of-responses.pdf).

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

- 1.4 In light of these changes, we published an Issues Paper (“IP”) in May 2014. This document invited consultees to respond to a series of further questions which sought to refine our original proposals for reform and set out a more detailed framework for reform in the newer areas identified by consultees.
- 1.5 On 11 June 2014 we held a symposium at the School of Law, University of Leeds. The event was attended by over 100 experts in the field, including members of the judiciary, solicitors and barristers, academics, psychiatrists, psychologists, specialist nurses, intermediaries and representatives from government departments and interest groups.
- 1.6 There were 45 responses to the Issues Paper from a wide range of stakeholders. The majority were in favour of the approach taken in the Issues Paper.
- 1.7 We have also benefited from views expressed at conferences and specialist seminars, from meetings with the judges sitting at two very significant court centres (Snaresbrook Crown Court and the Central Criminal Court), as well as from meetings with legal practitioners, leading academics, non-governmental organisations and members of affected government departments.
- 1.8 We considered it particularly important that we speak directly with stakeholder groups. As a result, we have consulted with family members of victims of homicide in cases involving unfitness issues<sup>8</sup> and conducted a half-day session

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

<sup>5</sup> Particularly in the wider use of special measures to help vulnerable individuals to engage with the criminal justice system.

<sup>6</sup> Subject to a spending review in late 2015 in relation to Liaison and Diversion Services in England.

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

<sup>8</sup> Kindly arranged by Victim Support.



with a group of consultees with autism spectrum conditions. This session included a visit to a magistrates' court and the Crown Court and a group discussion session.<sup>9</sup>

- 1.9 Finally, in response to the lack of data in a number of areas addressed by this project, we have conducted our own data-gathering exercise, with the assistance of Her Majesty's Courts and Tribunals Service. We have also worked with NHS England in relation to liaison and diversion services, and directly with academics gathering empirical data, in order to inform our recommendations.
- 1.10 The recommendations we make in our report have therefore been refined by an iterative consultation process. The policy has been honed specifically to respond to the reduction of funding within the criminal justice system and the changing approach to vulnerability in the court system. The approach that we recommend has broad support from an extremely wide range of consultees.

### **ACKNOWLEDGEMENTS**

- 1.11 The report is the product of a long and wide-ranging consultation process. Many individuals and organisations assisted us in the preparation of the Consultation Paper which we published in 2010. We acknowledged their substantial contribution in our Consultation Paper at paragraphs 1.36 and following.
- 1.12 We would like to thank all those who responded to our Consultation Paper and to our Issues Paper for their observations, which have informed the final recommendations set out in our full report. We are also grateful to all those who attended our Symposium on Unfitness to Plead on 11 June 2014, and to the School of Law, University of Leeds for generously hosting the event.
- 1.13 We are particularly grateful to all the many individuals who gave up their time to assist the project by meeting with us to discuss aspects of the project, speaking at our symposium, considering early drafts or facilitating our wider consultation with other groups. These include:
  - (1) Academics: Professor Ronnie Mackay, Dr Arlie Loughnan, Rosemary Kayess, Professor Penny Cooper, David Wurtzel, Laura Hoyano, Dame Joyce Plotnikoff DBE, Richard Woolfson, Professor Jill Peay, Helen Howard, Professor Heather Keating, Ann Creaby-Attwood, Natalie Wortley, Marie Tidball, Professor Don Grubin, Dr Charles O'Mahoney, Professor Anna Lawson, Rebecca Parry, and Professor Rob Poole.
  - (2) Members of the Judiciary: the judges sitting at the Central Criminal Court and Snaresbrook Crown Court, Master Michael Egan QC, The Hon. Mr Justice Goss, HHJ Jeremy Richardson QC, HHJ Stephen Ashurst, HHJ Peter Collier QC, HH Robert Atherton, Naomi Redhouse DJ(MC), and Mignon French (JP).
  - (3) Legal practitioners: Treasury Counsel, particularly Mark Heywood QC, Carolyn Taylor, Shauneen Lambe, Rudi Fortson QC, Deepti Patel, and Andrew Hadik.

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

- (4) Clinical experts: Dr Penny Brown, Dr Tim Rogers, Charles de Lacy, Dr Callum Ross, Dr Emily Glorney, Dr Nigel Blackwood, Dr Mike Watts, Dr Eileen Vizard CBE, Dr Nuruz Zaman, Dr Ian Gargan, Karina Hepworth, Janine Lees, Leah Glass, and Alexis Sweby.
- (5) Organisations: Autism West Midlands, Victim Support, David Hines (National Victims' Association), James Bullion (Association of Directors of Adult Social Services), Jon Sutcliffe (Local Government Association), and Together (Mental Health Charity).
- (6) Government: Tony Apperley and Amrita Dhaliwell (Her Majesty's Courts and Tribunals Service), Glyn Thomas (NHS England), Jonathan Solly (Criminal Procedure Rules Committee), Tish Jennings, Lindsay McKean, Neil Stone and Jacqueline Ashby (National Offender Management Service), Ben Connah, Nick Peel, Richard Chown, Rachel Atkinson, Isabel Sutcliffe and Richard Bishop (Ministry of Justice), Andrew Glover and Neil Moore (Crown Prosecution Service), Anne MacDonald (Department of Health), Niall MacEntee Creighton and Bill Kerlake (Youth Justice Board), Judicial College, Ceri Hopewell (Office of the Lord Chief Justice), and Richard Jolley and Ben Bryant (Home Office).

## **AN OVERVIEW OF OUR APPROACH**

### **Full trial wherever fair and practicable**

- 1.14 At the heart of our recommendations lies our belief that the normal criminal trial is the optimum process where a defendant faces an allegation in our criminal justice system. We consider that full trial is best not just for the defendant, but also for those affected by an offence and society more generally. This is because the full criminal process engages fair trial guarantees for all those involved, under article 6 of the European Convention on Human Rights ("ECHR"), and allows robust and transparent analysis of all the elements of the offence and any defence advanced. It also offers the broadest range of outcomes in terms of sentence and other ancillary orders.
- 1.15 Removing any defendant from that full trial process should, we consider, only be undertaken as a last resort. The decision to adopt alternative procedures should be made with great caution and only where it is in the best interests of the defendant, because he or she lacks the capacity to participate effectively in his or her trial. We consider that every effort should be made to afford a defendant whose capacity may be in doubt such adjustments to the proceedings as he or she reasonably requires to be able to participate in the full criminal process, and to maintain that capacity for the whole of the process. However, we do acknowledge that a very small number of defendants will never have the capacity to participate effectively in a trial. (We consider these issues in Chapter 2 of our report).

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

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

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

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

### **Diversion out of the criminal process where appropriate**

- 1.18 Following a finding by the court that a defendant lacks the capacity to participate effectively in the full criminal process, we take the view that the court should have the option not to embark on the alternative procedures for scrutinising the allegation. We have in mind, in particular, cases where a disposal<sup>11</sup> imposed by the court is not necessary to protect the public, or to support the individual to avoid future concerning behaviour, and where it is concluded that it is not in the public interest for any further criminal hearing on the matter. We take this position because any procedure which protects the interests of the vulnerable individual, but appropriately scrutinises the allegation in order to justify imposing disposals on that individual, will inevitably be complex, and demanding of jurors, witnesses and defendants alike. In addition, such alternative procedures cannot result in conviction, because the defendant who cannot participate effectively is unable properly to defend him- or herself. As a result, the disposals available to the court are inevitably limited, and cannot involve punishment of the defendant.
- 1.19 For many individuals who are unfit to plead, the low level of seriousness of the original allegation and the arrangements which can be made in the community, without the court's intervention, mean that further action by a criminal court is unnecessary. We therefore recommend that diversion of such individuals out of the criminal justice system, once they have been found to lack capacity for trial, should be available where the court is satisfied that such an approach is in the interests of justice. (We address this issue in Chapter 5 of our report).

<sup>10</sup> *Pritchard* (1836) 7 C & P 303, 173 ER 135.

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

### **Fair procedures for scrutinising the allegation**

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

### **Effective and robust community disposals**

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

### **Participation issues in the adult magistrates' and youth courts**

- 1.22 The current legal framework for addressing unfitness to plead does not apply in the magistrates' courts, including the youth court. The statutory measures<sup>13</sup> available in the summary jurisdiction<sup>14</sup> are limited to imprisonable matters only, offer unduly limited disposals and do not focus on the ability of the defendant to participate in the criminal process. Applications to stay the proceedings, pursued as an alternative to the statutory measures, are rarely granted and provide no

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

<sup>13</sup> Mental Health Act 1983, s 37(3) and Powers of the Criminal Courts (Sentencing) Act 2000, s 11(1).

<sup>14</sup> By "summary jurisdiction" and "summary courts" we mean adult magistrates' and youth courts together.

effective remedy. As a result, the current provisions do not provide suitable outcomes for many, particularly young, defendants. This raises significant public protection concerns. We consider that reform is urgently needed to introduce procedures for addressing participation difficulties in the summary courts comparable to those available in the Crown Court. (We make recommendations in this regard in Chapter 7 of our report).

### **Enabling the Court of Appeal to remit for rehearing**

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

### **Resuming the prosecution on recovery**

- 1.24 Many of the conditions which give rise to unfitness to plead are liable to fluctuate. It is possible that an individual who was previously unable to participate effectively in trial might recover, or gain, that capacity after the court process has come to an end. Unfitness to plead procedures suspend the prosecution of the defendant, and at present that prosecution can only be resumed where an unfit individual is being treated in a hospital and the court has imposed restrictions on his or her release.<sup>15</sup> The individual him- or herself has no power to ask for the prosecution to be resumed against him or her.
- 1.25 We consider that there should be a wider power for the prosecution to resume full trial proceedings against a recovered individual, and that the individual should also have the right to apply for resumption of the prosecution where he or she wishes to clear his or her name. For both parties we propose the introduction of a leave process, by which the court considers whether it is in the interests of justice for prosecution to be resumed, whether that is sought by the prosecution or the defence. (We consider these issues in Chapter 9 of our report).

## **OUR ANALYSIS AND RECOMMENDATIONS IN MORE DETAIL**

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

- 1.26 The Criminal Procedure Rules (“CrimPR”)<sup>16</sup> and the Criminal Practice Directions (“CrimPD”)<sup>17</sup> require the court to take “every reasonable step” to “facilitate the participation of any person, including the defendant”. This includes ensuring that a defendant is able to “give their best evidence, and enabling a defendant to comprehend the proceedings and engage fully with his or her defence”.<sup>18</sup>
- 1.27 CrimPD 3G extends the trial adjustments previously developed in relation to child defendants to vulnerable defendants more generally. This provides for various

<sup>15</sup> Criminal Procedure (Insanity) Act 1964, s 5A(4).

<sup>16</sup> CrimPR 2015 (SI 2015 No 1490), r 3.9(3).

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

measures including: court familiarisation visits, the defendant being able to sit in court with a family member or other supporting adult, the use of frequent breaks to aid concentration, adopting clear language and following “toolkits”.<sup>19</sup>

- 1.28 Statutory entitlement to assistance for vulnerable defendants in communicating with the court is, however, extremely limited in contrast to the provisions for vulnerable witnesses.<sup>20</sup> At present there is only one “special measure” available to vulnerable defendants under statute, which is the giving of evidence at trial via live link.<sup>21</sup>

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

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

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

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

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

<sup>18</sup> CrimPD I General Matters 3D.2.

<sup>19</sup> The Advocate’s Gateway toolkits provide good practice guidance for professionals preparing for trial in cases involving a witness or defendant with communication needs. They are available at <http://www.theadvocatesgateway.org/toolkits> (last visited 11 November 2015).

<sup>20</sup> Youth Justice and Criminal Evidence Act 1999 (“YJCEA”), ss 16 to 20.

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

<sup>22</sup> An intermediary is a communication expert whose role is to facilitate a witness’ or defendant’s understanding of, and communication with, the court.

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

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

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

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

***No registration scheme for defendant intermediaries: no quality assurance***

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

***No registration scheme for defendant intermediaries: raised costs***

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

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

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

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

***Improving identification of defendants with participation difficulties***

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

***Introducing a statutory entitlement to assistance from an intermediary***

- 1.36 Although intermediary assistance is not a remedy for all participation difficulties, we consider that for many defendants with significant difficulties it offers the best mechanism for facilitating their effective participation in trial. With the overwhelming support of our consultees, we recommend that a statutory entitlement be created for a defendant to have the assistance of an intermediary, both for the giving of evidence and otherwise in trial proceedings, where that is

required. Under our recommendation, intermediary assistance would only be granted where such assistance is necessary for a defendant to have a fair trial, and only for as much of the proceedings as is required to achieve that aim. Replacing the current ad hoc practice, of the court granting intermediary assistance under its inherent jurisdiction, with a statutory scheme and a clear test for granting assistance would ensure more consistent and cost-effective provision for defendants.

### ***Introducing a registration scheme for defendant intermediaries***

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

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

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

### **Chapter 3: The legal test: Current law**

- 1.39 The test that the judge applies when deciding if a defendant is unfit to plead is not set out in statute. It is a common law test; that is, one which comes from case law alone. The test for fitness to plead remains that set down in the 1836 case of *Pritchard*.<sup>25</sup> Following the case of *Davies*,<sup>26</sup> this was generally understood to require a defendant to be able to: plead to the indictment, understand the course of proceedings, instruct a lawyer, challenge a juror and understand the evidence. If an accused was found to lack any one of these abilities that would be sufficient for him or her to be found unfit to plead.
- 1.40 More recently the *Pritchard* test has been interpreted by the courts to make it more consistent with the modern trial process. The most widely favoured formulation comes from the trial judge's directions to the jury in the case of *John M*,<sup>27</sup> which were approved by the Court of Appeal and in which express reference is made to the need to be able to give evidence.
- 1.41 In that case the judge directed the jury<sup>28</sup> that the accused should be found unfit to plead if any one or more of the following was beyond his or her capability:
- (1) understanding the charge(s);
  - (2) deciding whether to plead guilty or not;

<sup>25</sup> *Pritchard* (1836) 7 C & P 303, 173 ER 135.

<sup>26</sup> *Davies* (1853) 3 Car & Kir 328, 175 ER 575.

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

<sup>28</sup> At a time when the jury determined whether a defendant was unfit to plead 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.

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

#### ***Inaccessibility and inconsistency of application***

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

#### ***Undue focus on intellectual ability***

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

#### ***No consideration of decision-making capacity***

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

#### ***Lack of clarity over alignment with "effective participation" test***

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

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

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

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

***Lack of consideration of ability to plead guilty***

- 1.47 The current test and procedures do not allow a defendant who would otherwise be unfit for trial, but who clinicians consider has the capacity to plead guilty, to do so. This may unnecessarily deny the defendant his or her legal agency. It is also liable to undermine victim confidence in the system and denies the court the opportunity to impose sentence where appropriate.

**Chapter 3: The legal test: Key recommendations for reform**

***A test of capacity for effective participation in a trial***

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

***A test explicitly incorporating decision-making capacity***

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

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

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

***A separate test of ability to plead guilty***

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

### ***A statutory reformulation of the test***

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

### **Chapter 4: Assessing the defendant: Current law**

- 1.53 A judge sitting alone applies the test to decide whether an accused is unfit to plead, on the basis of evidence from at least two registered medical practitioners, one of whom must be approved under section 12 of the Mental Health Act 1983 (“MHA”).<sup>30</sup> The procedure for this hearing is set out in section 4 of the Criminal Procedure (Insanity) Act 1964 (“CP(I)A”).

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

#### ***Unduly restrictive evidential requirement***

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

#### ***Delays in the preparation and service of expert reports***

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

#### ***Barriers to postponement of the determination of unfitness***

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

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

<sup>31</sup> Meeting arranged by Victim Support, 13 February 2015.

## **Chapter 4: Assessing the defendant: Key recommendations for reform**

### ***Relaxing the evidential requirement***

- 1.57 Our consultees' clear view was that two expert reports should continue to be required where the court proposes to deviate from full trial. This is because of the gravity of the consequences that flow from the finding of lack of capacity and the protection provided by scrutiny from two experts. Consultees were, however, substantially in favour of relaxing the evidential requirement, so that expert evidence from a registered psychologist could be relied upon by the court as one of the two experts required for a finding of lack of capacity. There was some support for relaxation of the requirement still further to include others with expertise in this area, such as specialist learning disability or psychiatric nurses. However, no specific qualifications were proposed in this latter regard.
- 1.58 As a result, we recommend that the evidential requirement be relaxed to allow one of the two required experts to be a registered psychologist or an individual with a qualification appearing on a list of appropriate disciplines and levels of qualification, approved by the Department of Health. This will reduce the proliferation of costly expert reports. It will also reduce delays since the available pool of experts which can be relied on by the court will be enlarged. This will not only reduce costs but also alleviate the distress occasioned by extended delays in such cases.

### ***Timely service and joint instruction***

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

### ***Encouraging postponement of the determination of capacity where appropriate***

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

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

- 1.61 In order to support recovery where that is a realistic prospect, we propose that the current limitation on remand to hospital for treatment under section 36 of the MHA<sup>32</sup> should be extended to 12 months for defendants facing proceedings in the Crown Court, with a twelve weekly review period. This will also prevent the court having to rely on section 48 MHA transfers<sup>33</sup> from custody, which can make it difficult to achieve continuity of treatment for the defendant and can be more time consuming and costly.<sup>34</sup>

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

- 1.62 Following a finding that an individual is unfit to plead, the court must proceed to a hearing to determine the facts of the allegation according to a procedure set out in section 4A of the CP(I)A.<sup>35</sup> There is no criminal trial in the usual sense, and the individual cannot be convicted of the offence. Rather, a jury is required to consider whether it is satisfied beyond reasonable doubt that he or she “did the act or made the omission charged against him as an offence”. If it is not so satisfied, the jury must return a verdict of acquittal.
- 1.63 In establishing that the individual “did the act or made the omission” the prosecution is only required to prove the external elements of the offence.<sup>36</sup> The prosecution is not required to prove that the individual had the state of mind which would be necessary to prove the offence at full trial, known as the fault element.<sup>37</sup>

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

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

- 1.64 There is currently no discretion for the court to decline to proceed to the determination of facts hearing following a defendant being found unfit. This is problematic because in some cases it will have become clear during the determination of unfitness that the individual is not suitable for any of the disposals currently available following the section 4A hearing. In other cases,

<sup>32</sup> Available only in respect of a defendant who would otherwise be remanded in custody.

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

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

<sup>35</sup> As amended by the Criminal Procedure (Insanity and Unfitness to Plead) Act 1991 and the Domestic Violence, Crime and Victims Act 2004.

<sup>36</sup> The “external elements” of an offence are the physical facts that must be proved. They divide into: conduct elements (what the defendant must do or fail to do); consequence elements (the result of the defendant’s conduct); and circumstance elements (other facts affecting whether the defendant is guilty or not).

<sup>37</sup> *Antoine* [2001] 1 AC 340, [2000] 2 WLR 703.

similar support for the individual, and protection for the public, could be achieved by diverting the individual out of the criminal justice system at that point.

### ***Difficulty in dividing the external and fault elements of an offence***

- 1.65 Identifying for the jury in the determination of facts hearing (section 4A of the CP(I)A) what the “act or omission” consists of, and which aspects of the offence are fault elements which need not concern the jury, is extremely difficult in many common offences. This has resulted in piecemeal development of the law, leading to uncertainty and inconsistency.
- 1.66 For example, in relation to the offence of voyeurism, the Court of Appeal concluded that in proving that the appellant “did the act or made the omission” the external elements included the appellant’s purpose to obtain sexual gratification in observing the private act of another. However, the appellant’s knowledge that the person observed did not consent was held to be part of the fault element and so not a matter for the jury to consider.<sup>38</sup>
- 1.67 This contrasts with the approach taken by the Court of Appeal in the case of *Young*,<sup>39</sup> which concerned an offence of dishonest concealment of a material fact.<sup>40</sup> In that case the Court of Appeal held that the appellant’s purpose in the concealment, and his dishonesty, were part of the fault element of the offence and therefore not for the jury’s consideration. However, the Court concluded that the question of whether the appellant had the intention alleged against him, and whether he had concealed the fact, were external elements to be proved by the Crown.<sup>41</sup>

### ***Inchoate offences***

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

### ***Full defences unavailable in the absence of objective evidence***

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

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

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

<sup>40</sup> An offence under what is now Financial Services Act 2012, s 89.

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

where a fit defendant in the same situation would be able to advance that particular defence at trial.

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

### ***A discretion not to proceed to an alternative finding hearing***

- 1.70 We recommend the introduction of a judicial discretion not to proceed to a hearing to consider the allegation following a finding that the defendant lacks the capacity to participate effectively in the trial. This recommendation is supported by consultees on the basis that it will avoid the need to proceed to a jury hearing where it is clear that none of the available disposals are appropriate, or where more suitable provision can be made for the individual in the community. We consider that introducing the flexibility to divert an individual out of the criminal justice process following a finding of lack of capacity is critically important.
- 1.71 Such a discretion should be subject to an interests of justice test, to be applied by the judge taking into account various factors, including:
- (1) the seriousness of the offence;
  - (2) the effect of such an order on those affected by the offence;
  - (3) the arrangements made (if any) to reduce any risk that the individual might commit an offence in future, and to support the individual in the community; and
  - (4) the views of the defence and the prosecution in relation to the making of such an order.
- 1.72 We recommend, however, that the exercise of such a discretion should not prevent the prosecution from applying for leave to resume prosecution, in appropriate cases, where that individual subsequently achieves capacity for trial.

### ***Introducing a fair but robust fact-finding procedure***

- 1.73 We recommend that the prosecution be required to prove all elements of the offence at the fact-finding hearing. There was resounding support amongst our consultees for such a recommendation. This approach would afford individuals who lack capacity the same opportunity to be acquitted as is enjoyed by defendants who have capacity, enabling them to engage all available full defences. This requirement would therefore address the disadvantage currently experienced by unfit individuals in the section 4A hearing, which many of our consultees considered to be objectionable.
- 1.74 Proof of all elements would also remove the need for the external and fault elements of an offence to be split for the purposes of the fact-finding hearing and the need to identify the objective evidence required to engage a defence. This has been the cause of considerable uncertainty in the law, and the issue in the majority of the significant number of unfitness cases (proportionately) which are the subject of appeal. We have consulted closely with the Crown Prosecution Service on this issue, and it is satisfied that, in general, proof of all elements of an

offence would not impose on prosecutors a significantly greater burden in alternative finding procedures than prosecutors bear in full trial.

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

***Partial defences to murder not available***

- 1.76 We recommend that partial defences to murder (diminished responsibility, loss of control and acting in pursuance of a suicide pact) should not be available at the alternative finding procedure to an individual who lacks capacity. We take that approach because these verdicts do not result in full acquittal but in conviction for manslaughter. Therefore, even were a partial defence to succeed at an alternative finding procedure, the individual would still be subject to a disposal in any event.<sup>42</sup>

***Including a special verdict***

- 1.77 There will inevitably, however, be some individuals who lack capacity at the time of trial but who were also suffering from the same condition, or some other substantial disorder or condition, at the time of the alleged offence. At full trial a fit defendant in that situation might be entitled to a special verdict of not guilty by reason of insanity. The jury would return a special verdict if satisfied that at the time of the offence the defendant was suffering from a “disease of the mind” which resulted in him or her being unable to understand the nature and quality of what he or she did. Or where, as a result of that condition, the defendant did not understand that that act was legally wrong.<sup>43</sup> This is a qualified acquittal which, in order to provide protection to the public where that is necessary, results in the same disposal options as would be available following unfitness to plead procedures.
- 1.78 We recommend that a special verdict of not guilty by reason of insanity, having the same scope as that at full trial, should also be available at the alternative finding procedure, to address the same public protection concerns. The introduction of such a special verdict was broadly supported by respondents to CP197. Such verdicts are complex and we have discussed elsewhere the difficulties that the current formulation of the insanity verdict gives rise to at full trial.<sup>44</sup> Nonetheless, we consider that it is important to make available a special verdict at the alternative finding procedure to address those very rare occasions where such a verdict is appropriate and necessary. This special verdict would trigger the imposition of the same disposals as are available for an individual against whom all elements have been proved at the alternative finding procedure.

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

<sup>43</sup> *M’Naghten’s Case* (1843) 10 Cl & Fin 200, 8 ER 718.

<sup>44</sup> Criminal Liability: Insanity and Automatism (July 2013) Law Commission Discussion Paper.



### ***Judge-only alternative finding procedure***

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

### **Chapter 6: Disposals: Current law**

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

- (1) A hospital order (with or without a restriction order): the individual is securely treated in a hospital and, where a restriction order is in place, cannot be released without the approval of the Secretary of State.
- (2) A supervision order (with or without a treatment requirement): the individual is supervised by a probation officer or social worker in the community and can be subject to a requirement to live in a particular place and to submit to out-patient treatment by a doctor.
- (3) An absolute discharge.

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

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

<sup>46</sup> Under the Sex Offenders Act 1997, Part 1.

<sup>47</sup> As listed in CJA 2003, sch 15.

## **Chapter 6: Disposals: Problems with the current law**

### ***Difficulties identifying a supervising officer for supervision orders***

- 1.82 Unfit individuals can currently be supervised on such orders by either probation officers or social workers. Social workers and probation officers have the power to refuse to consent to being the supervising officer under such an order.<sup>49</sup> The result is that for some individuals for whom a supervision order would be appropriate, and necessary for public protection, no supervision order can be made because no supervisor is willing to undertake that supervision. The only alternative is often an absolute discharge, which raises public protection concerns. In extreme cases a hospital order may have to be imposed instead.
- 1.83 The recent Transforming Rehabilitation reforms of probation services make no provision for the National Probation Service or Community Rehabilitation Companies to supervise unfit individuals subject to supervision orders under section 5 of the CP(I)A.

### ***Difficulties monitoring and ensuring compliance with the order***

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

### ***Lack of constructive elements***

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

## **Chapter 6: Disposals: Key recommendations for reform**

### ***Clear responsibility for supervising individuals who lack capacity***

- 1.86 We recommend the removal of the option for probation officers, or providers of probation services, to supervise adults subject to an adverse finding.<sup>50</sup> We do so, first, because our consultees made clear the inappropriateness of probation providers supervising individuals who have not been convicted of an offence. Secondly, we consider that social workers within local authorities are better placed to co-ordinate the socially supportive and health elements of the order

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

<sup>49</sup> CP(I)A, sch 1A para 2(2).

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

than probation providers. Finally, we take note of the changes within probation services referred to above.<sup>51</sup>

- 1.87 The position is somewhat different for those under 18 years of age. Youth Offending Teams are multi-disciplinary teams, which by law must include an individual with social work experience (or in Wales a social worker) and a person nominated by a local Clinical Commissioning group or Local Health Board.<sup>52</sup> As a result, the necessary close links with clinical services are present in many YOTs, as is a range of experience beyond the more risk management approach of other probation providers. We therefore recommend that, for those under 18 years of age, the supervising officer be a social worker, or person with social work experience, selected either from the youth offending team, or children's services, whichever appears to be more suitable for the particular individual.
- 1.88 We recommend the amendment of supervision orders so that local authorities are obliged to nominate a social worker to supervise individuals made subject to a supervision order. This will prevent public protection concerns arising in relation to individuals for whom supervising officers cannot be identified, and will facilitate the safe support in the community of individuals who are subject to an adverse finding.

#### ***Introducing constructive elements***

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

#### ***Monitoring the order and arrangements to ensure compliance***

- 1.90 We make a number of recommendations in this area. In particular:
- (1) That the court have the optional power to review the order and receive reports on the supervised person's engagement and progress.
  - (2) That a reviewing court have the power to make a finding that the supervised person is in breach of the order.
  - (3) That, following this finding, the court have the power to impose more restrictive elements as part of the order (such as curfew and electronic monitoring).
  - (4) That on breach, and where a previous notice has been given, the court have the power, exercisable in exceptional cases, to impose, on a supervised adult, custody for breach of the order.

<sup>51</sup> Para 1.80.

<sup>52</sup> Crime and Disorder Act 1998, s 39.

***Extending the maximum period for the order***

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

***Multi-Agency Public Protection Arrangements (“MAPPAs”)***

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

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

- 1.93 Unfitness to plead provisions do not apply in the magistrates’ and youth courts. Where a defendant is charged with an imprisonable offence, the court has the power to adjourn proceedings for a report to be prepared on the defendant’s condition (under section 11(1) of the Powers of Criminal Courts (Sentencing) Act 2000 (“PCCSA”)) and to make a hospital order or a guardianship order<sup>53</sup> without convicting a defendant (under section 37(3) of the MHA).
- 1.94 Alternatively, a defendant in the magistrates’ court can apply for proceedings to be stayed on the basis that he or she is unable to participate effectively in trial. No disposal can be imposed following a stay.

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

***No specific consideration of “fitness to plead” in the magistrates’ courts***

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

***No statutory procedures available for non-imprisonable matters***

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

<sup>53</sup> Under a guardianship order, the individual is placed under the responsibility of a local authority or a person approved by the local authority.

### ***Alternative procedures unduly limited***

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

### ***Stay of proceedings problematic***

- 1.98 For a defendant charged with a non-imprisonable offence, or who is unsuitable for an order under section 37(3) of the MHA, the only alternative is for his or her representative to apply to the court to stay proceedings. The basis for such an application would be that the accused could not have a fair trial because he or she could not participate effectively in the process. Stays are an exceptional remedy and very rarely granted, especially before evidence in the trial has been heard. Additionally, a stay simply stops the proceedings, providing no ongoing support or supervision for the defendant. Our consultees raised significant concerns about public protection where stays are imposed in cases of this sort.

### ***Disposals***

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

## **Chapter 7: Effective participation in the magistrates’ and youth courts: Key recommendations for reform**

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

- 1.100 Our consultees argue that there is an urgent need for reform in the summary jurisdiction in respect of participation difficulties, particularly for children and young defendants. They resoundingly supported the recommendation to introduce into the magistrates’ courts procedures to address capacity to participate effectively in trial, comparable to those which we proposed for the Crown Court. This is essential to address the current inadequacy of statutory procedures in the summary jurisdiction. Our recommendations extend such provisions to all non-imprisonable matters.
- 1.101 In cases where the defendant’s capacity is raised as an issue, we take the view that the case should be reserved to a district judge (magistrates’ courts) for all future hearings. We consider this recommendation offers both the most practical arrangement, and the most appropriate, to ensure consistency in dealing with these complex cases.

<sup>54</sup> MHA 1983, s 1(2A).

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

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

***Disposals***

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

- (1) For reasons of proportionality, the power to impose a hospital order would only be available where the original offence charged was an imprisonable matter.
- (2) The magistrates’ courts would not have the power to impose a restriction order. However, the magistrates’ courts would have the power to commit, or send, cases to the Crown Court if a restriction order is considered, potentially, to be appropriate (and the individual is aged 14 years or over). This is on the basis that a restriction order is a substantial deprivation of liberty beyond the normal disposal powers of the summary courts.
- (3) The magistrates’ courts would not have the power to impose a custodial term where an individual is found to be in breach of a supervision order. We consider that such a sanction should be exceptional, and ought not to be required in cases involving adults who lack capacity, where the court retained jurisdiction in respect of the original charge.
- (4) Where a child or young person has been found to be in breach of a supervision order, the youth court should have the power to impose a youth rehabilitation order with intensive supervision and surveillance. Such a sanction would only be available where the original offence charged was imprisonable and where notice had been given previously. We make this recommendation in consideration of the more serious cases which may be retained by the youth court, but taking the view that a custodial term is not appropriate in such cases.

### ***Identifying capacity issues amongst young defendants***

- 1.104 Early identification of young defendants with participation difficulties is key to ensuring suitable and effective procedures in the youth court. We therefore recommend in principle that all defendants appearing for the first time in the youth court should be screened for participation difficulties. We anticipate that this screening could be conducted by liaison and diversion practitioners based in the magistrates' and youth courts, or clinicians operating as part of Youth Offending Teams. Should liaison and diversion services be extended to all areas of England and Wales,<sup>55</sup> we consider that it will be practical to make this recommendation in respect of all defendants and young people under the age of 18. Should such roll-out not be approved, we consider that we can only sensibly recommend a mandatory requirement in respect of all defendants under the age of 14 appearing for the first time in the youth court.

### ***Training in relation to trying youths***

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

### **Chapter 8: Appeals: Current law**

- 1.106 An unfit individual can appeal to the Court of Appeal against a determination of unfitness, a finding of fact at the section 4A hearing or a disposal imposed upon him or her in the Crown Court.<sup>56</sup>

### **Chapter 8: Appeals: Problems with the current law**

#### ***No power to order a rehearing***

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

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

- 1.108 In addition, the power to exercise a right to appeal against a finding under the unfitness to plead procedures lies only with the unfit individual him- or herself. It

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

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

<sup>57</sup> Criminal Appeal Act 1968, s 16(4).

cannot be exercised by anyone acting on his or her behalf. If the individual remains unfit to plead, this has the potential to act as a barrier to a proper appeal being pursued.

## **Chapter 8: Appeals: Key recommendations for reform**

### ***A power to order a rehearing***

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

### ***Appeal rights exercisable by legal representatives***

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

### ***Appeal from the magistrates' courts***

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

## **Chapter 9: Resumption of the prosecution: Current law**

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

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

### ***Prosecution power to resume prosecution unduly limited***

- 1.113 At present, the prosecution's power to resume prosecution for the original offence where an unfit individual recovers is limited to cases where the individual is, at the time of recovery, subject to a hospital order with ongoing restriction. The prosecution cannot be resumed against an unfit individual who received a

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

<sup>59</sup> CP(I)A, s 5A(4).



hospital order without a restriction order, a supervision order or an absolute discharge.

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

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

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

- 1.115 Under current arrangements, where a defendant against whom prosecution is resumed is again found to be unfit to plead, it is necessary to hold the section 4A hearing a second time.<sup>61</sup> Disposals, which at present lapse on the individual's return to court,<sup>62</sup> also have to be considered afresh.

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

***Widening prosecution power to resume proceedings***

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

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

- 1.117 There was also support from the majority of our consultees who addressed the issue for the right to apply for resumption to be extended to a recovered individual. This was considered an important right, as a matter of principle, although there was general agreement that it would rarely be exercised. We therefore recommend the introduction of a right for a recovered individual to apply to the court for leave for the prosecution to be resumed. The court would apply an interests of justice test in considering the application, similar to that proposed for the prosecution application. However, we recommend that the individual should

<sup>60</sup> See *Sultan* [2014] EWCA Crim 2648 at [9].

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

<sup>62</sup> CP(I)A, s 5A(4).

<sup>63</sup> As specified in the Criminal Justice Act 2003, sch 15, parts 1 and 2.

be entitled to make such an application in respect of any adverse finding made against him, regardless of the nature of the original offence.

***Addressing procedural difficulties***

- 1.118 To address the procedural difficulties considered above, we make a number of further recommendations. First, we recommend that any disposal live at the time of resumption of the proceedings should remain in place until the conclusion of the resumed proceedings or further order by the trial judge.
- 1.119 Secondly, where a defendant is found again to lack capacity for trial, we recommend that he or she should not be subject to a second alternative finding procedure, unless it is in the interests of justice for that procedure to be conducted afresh.
- 1.120 Finally we recommend that, where the finding(s) from the original alternative finding procedure remain in effect, or where the second alternative finding procedure yields the same finding(s) as previously returned, any original live disposal should remain in effect, subject to further order by the court.

**CONCLUSION**

- 1.121 This paper summarises our full report. It is not possible in a summary of this length to introduce all of our recommendations. For a list of all of our recommendations please refer to Chapter 10 of our report.
- 1.122 The report also includes an impact assessment which analyses the costs and financial benefits likely to arise from different aspects of our recommendations.
- 1.123 The full report, impact assessment and other relevant documents are available at <http://www.lawcom.gov.uk/project/unfitness-to-plead/>.