Policy paper

Government response to the Law Commission report on ‘Unfitness to Plead’

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Applies to England and Wales

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Ministerial foreword

Although it concerns only a small number of defendants each year, the unfitness to plead procedure is incredibly important and has an impact on some of the most vulnerable people in our criminal justice system.

The law on unfitness to plead applies when a defendant in a prosecution cannot meaningfully participate at trial because of a mental or physical condition. A defendant may not be able to understand the meaning of the charge against them, what the pleas of ‘guilty’ and ‘not guilty’ mean or be capable of instructing a lawyer to represent them.

Devised in the nineteenth century, the rules around unfitness to plead are widely accepted to be outdated and do not take account of contemporary understanding of psychiatric and psychological medical practice or modern-day trial processes.

As a Government, we have a duty to balance the rights of those affected by a crime with the rights of every defendant to a fair trial, and, crucially, public safety.

I thank the Law Commission for its well-considered, detailed report on how the unfitness to plead procedure can be improved. We have considered its recommendations carefully and are accepting the majority of them.

We agree that removing a defendant from the normal criminal trial process should only be a last resort and, where possible, adjustments should be made so that a full trial can take place. This is fairer for the defendant, so they are better able to challenge a prosecution, and fairer for victims – allowing them to convey to the court the impact of a crime.

We also support the recommendation for a new unfitness to plead test that reflects modern medical practice, and to extend the procedure to the Magistrates' and youth courts, which also deal with very vulnerable defendants in the criminal justice system.

We remain fully committed to reforming this area of law, and I would like to thank all stakeholders who have engaged with us so far – their views are critical as we take this work forward. We are considering our next steps, with the intention to bring forward legislation when parliamentary time allows.

It is paramount that our justice system – respected the world-over for its fairness – remains so for all who rely on it. I look forward to working with stakeholders across the system to ensure that happens.

Mike Freer MP
Parliamentary Under-Secretary of State for Courts and Legal Services

Chapter 1: Summary

Chapter 1 provides a summary of the report and the Law Commission's 83 recommendations.

"Unfitness to plead" is the term used when a defendant cannot understand or participate in the legal process of a criminal trial which could be due to a mental health condition, learning disability or other neurodiverse condition. In these cases, the normal criminal prosecution is paused and the defendant instead has a "fact-finding" hearing with a jury to determine if they "did the act", as opposed to a criminal trial, formal conviction and sentence (given they have not been able to participate in their own trial). The aim of the law is to balance the rights of a vulnerable defendant, with those affected by the alleged offence, while protecting the public.

The Law Commission's report emphasises that removing a defendant from the normal criminal trial process should be a last resort and that there should be adjustments to help facilitate a full trial. The report provides 83 recommendations for reform including putting into statute a modernised legal test for unfitness to plead; facilitating full trial through trial adjustments; amending the procedure in the Crown Court; strengthening community supervision; and extending the unfitness to plead procedure to the magistrates' and youth courts.

Chapter 2: Facilitating full trial through trial adjustments

The Law Commission's recommendations in chapter 2 aim to ensure that every effort should be made to enable 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 trial process.

Recommendation 10.1

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

1) to assist them in understanding and identifying participation and communication difficulties experienced by vulnerable defendants; and
2) to raise their awareness of the available mechanisms to adjust proceedings to facilitate the defendant's effective participation.

Government Response

This is not a recommendation to which we can respond. While the government supports the principle of this recommendation, which will help to better the understanding of the needs of vulnerable justice system users, statutory responsibility for judicial training, including magistrates, rests with the Lord Chief Justice, the Senior President of Tribunals, and the Chief Coroner, under the Constitutional Reform Act 2005, Courts and Enforcement Act 2007, and Coroners and Justice Act 2009 respectively. The judiciary is independent of government and training is done by the judiciary for the judiciary.

Judicial college have advised that Judges in the Crown Court and District Judges (magistrate's courts) receive training on vulnerable witnesses and what steps would achieve the best evidence. A similar approach is taken to training magistrates and legal advisers.

Recommendation 10.2

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

1) under 18 years of age; or
2) his or her ability to participate effectively in the proceedings is likely to be diminished by reason of mental disorder (as defined in section 1(2) of the Mental Health Act 1983), a significant impairment of intelligence and social functioning, or a physical disability or disorder.

Recommendation 10.3

The making of a direction for such assistance should remain subject to the court being satisfied that the making of the order is "necessary in order that the accused receives a fair trial".

Recommendation 10.4

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

1) That the court is satisfied that the defendant's ability to participate effectively in the proceedings is likely to be diminished to the extent that granting intermediary assistance is necessary for the defendant to have a fair trial; and
2) That the defendant is:
    a) under 18 years of age; or
    b) his or her ability to participate effectively in the proceedings is likely to be diminished by reason of mental disorder (as defined in section 1(2) of the Mental Health Act 1983), a significant impairment of intelligence and social functioning, or a physical disability or disorder.
3) The extent of the intermediary assistance granted should be limited to that which is necessary to ensure that the defendant can have a fair trial.

Government Response

In criminal proceedings, courts continue to use their inherent powers to order intermediary assistance for defendants in the interests of ensuring a fair trial.

The objective of recommendations **10.2**, **10.3,** and **10.4** has been satisfied through the introduction of criminal procedure rule 18.23 in April 2021. Rule 18.23 of the Criminal Procedure Rules 2020 requires a criminal court to appoint an intermediary for a defendant for as much of the trial as is needed, where the defendant's ability to participate effectively in the proceedings would be diminished either by their age (if under 18), a mental or physical disability or disorder, or a significant impairment of intelligence or social functioning. It is therefore no longer necessary to introduce statutory provisions to this effect.

Recommendation 10.5

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

Government Response

This recommendation has been addressed in part through the introduction of contracted HMCTS-appointed intermediary services (HAIS) in April 2022; these services provide intermediaries to defendants in criminal proceedings, and parties in family courts, civil courts and tribunals.

HAIS introduced specifications for all intermediaries working under the HMCTS contracts which addressed the scope of the intermediary's role in court, the position

with regards to disclosures made to the intermediary, and guidance for out of court contact with the defendant.

The future delivery model for defendant intermediary services will be informed by recommendations from the review of intermediary provision and data collected from the current contracts.

We cannot commit to the request to introduce a registration scheme for defendant intermediaries, as this would bind commercial decision making on the future delivery of intermediary services.

Recommendation 10.6

We recommend that:

1) where there are concerns about the need for an intermediary, or uncertainty surrounding the particular intermediary specialism required; and
2) where the service is available at court;

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

Government Response

Liaison and diversion (L&D) practitioners screen and assess vulnerable people and can advise if a person requires an intermediary or not. L&D services were fully rolled out in March 2020. These services are based in police custody suites, magistrates' courts and 49 of the busiest Crown courts.

This recommendation is considered beneficial in triaging intermediary services effectively, conserving intermediary resources and ensuring impartial decisions are made on whether to use an intermediary where there is uncertainty on this. However, engagement with the NHS indicated that existing L&D services would need expansion and additional funding to meet this ask. A decision on this recommendation is contingent on further analysis involving DHSC.

Recommendation 10.7

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

1) under 18 years of age; or
2) his or her ability to participate effectively in the proceedings as a witness giving oral evidence is likely to be diminished by reason of mental disorder (as defined in section 1(2) of the Mental Health Act 1983), a significant

impairment of intelligence and social functioning, or a physical disability or disorder.

Government Response

This recommendation has already been managed as it has been resolved via the Police, Crime, Sentencing and Courts Act 2022.

Chapter 3: The Legal Test

The Law Commission's recommendations in chapter 3 concern the legal test that the judge applies when deciding if a defendant is unfit to plead. We accept the majority of recommendations in this chapter and we intend to bring forward legislation when parliamentary time allows.

Recommendation 10.8

We recommend that the test for unfitness to plead be reformulated in statute.

Government Response

We accept this recommendation as it is viewed as essential by the government in order to address any inconsistencies with the application of the current common law test.

Recommendation 10.9

We recommend the reformulation of the legal test as an assessment of the defendant's capacity to participate effectively in a trial.

Government Response

We accept this recommendation as it would prioritise effective participation – accommodating advances in psychiatric and psychological thinking by removing the current focus on intellectual abilities and enable the court to more appropriately identify those who are unable to engage with the trial process.

Recommendation 10.10

We recommend that the test for capacity to participate effectively in a trial should require the defendant to be able to participate effectively "in the proceedings on the offence or offences charged", and that assessment of the defendant's abilities in that regard should reflect consideration of the actual proceedings.

Government Response

We accept this recommendation as it is designed to ensure that defendants are only diverted from the full trial process where absolutely necessary, so that a full and fair trial is achieved wherever possible.

Recommendation 10.11

We recommend that the test of capacity to participate effectively in trial should require the court, in applying the test, to take into account the assistance available to the accused in the proceedings.

Government Response

We accept this recommendation as it is designed to ensure that defendants are only diverted from the full trial process where absolutely necessary, so that full and fair trial is achieved wherever possible.

Recommendation 10.12

We recommend that the test should specify a list of relevant abilities and that the court be entitled to consider “any other ability that appears to the court to be relevant in the particular case”.

Government Response

We accept this recommendation as it would give the court the flexibility to take into consideration any relevant ability or impairment which may affect the defendant’s ability to participate effectively.

Recommendation 10.13

We recommend that the test should be structured so that the defendant will be considered to lack capacity where his or her relevant abilities are not, taken together, sufficient to enable the accused to participate effectively in the proceedings.

Government Response

We accept this recommendation as it would again ensure that defendants are only diverted from the full trial process where absolutely necessary.

Recommendation 10.14

We recommend that the ability to understand the charges should require the defendant to have an understanding of what the charge means, its nature, and also an understanding of the evidence on which the prosecution rely to establish the charge in the particular case.

Recommendation 10.15

We recommend that the test include an ability to understand the trial process and the consequences of being convicted.

Recommendation 10.16

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

Recommendation 10.17

We recommend that the ability to give instructions to a legal representative should be included within the statutory test.

Recommendation 10.18

We recommend that the statutory test include the ability to "follow the proceedings in court".

Recommendation 10.19

We recommend the inclusion of the ability to give evidence as part of the statutory test.

Recommendation 10.20

We recommend that the test should include as relevant abilities: the ability to make a decision about whether to plead guilty or not guilty, the ability to make a decision about whether to give evidence, and (where relevant) the ability to make a decision about whether to elect Crown Court trial.

Recommendation 10.21

We recommend that the test should include as a relevant ability the ability of the defendant to make "any other decision that might need to be made by the defendant in connection with the trial".

Recommendation 10.22

We recommend that the ability to make decisions should be defined in the test by specific reference to the Mental Capacity Act criteria.

Recommendation 10.23

We do not recommend the inclusion of a diagnostic threshold as part of the legal test.

Government Response

We accept recommendations 10.14 to 10.23 which specify the list of abilities designed to assist in ensuring that the same approach is taken and the same considerations applied across all unfitness to plead cases.

Recommendation 10.24

We recommend that the statutory test for capacity to participate effectively in trial should be reformulated to require the defendant's relevant abilities to be sufficient to

enable him or her to participate effectively “in the proceedings on the offence or offences charged”.

Government Response

We accept this recommendation as it will capture, in addition to trial and sentencing proceedings, pre-trial proceedings which have a bearing on the conduct of the trial itself.

Recommendation 10.25

We recommend that the test explicitly exclude from “proceedings on an offence” proceedings under section 6 of the Proceeds of Crime Act 2002.

Government Response

We accept this recommendation because confiscation proceedings are often much more complicated than the process which led to the triggering conviction; and because confiscation proceedings are not an unavoidable part of the prosecution process (unlike sentencing).

Recommendation 10.26

We recommend the separation of the capacity to plead guilty from the capacity to participate effectively in a trial.

Recommendation 10.27

We recommend that the separate test of capacity to plead guilty would be one applied only in cases which satisfy the following requirements:

1) the defendant has been found to lack the capacity to participate effectively in a trial;
2) two suitably qualified experts have specifically addressed in oral or written evidence the defendant’s capacity to plead guilty notwithstanding the defendant’s lack of capacity to participate effectively in a trial; and
3) the defence apply, immediately following a determination of lack of capacity for trial, for the court to determine whether the defendant has the capacity to plead guilty.

Recommendation 10.28

We recommend that the test of capacity to plead guilty should incorporate a requirement that the defendant has sufficient relevant abilities in relation to his or her understanding of the charge, the evidence adduced in relation to it, what it means to plead guilty and the consequences of doing so. The relevant abilities should also include the defendant’s ability to give instructions, follow the remainder of the

proceedings and to make the decisions required of him or her in connection with the decision to plead guilty.

Government Response

We reject recommendations 10.26 to 10.28 because the positive benefits of a separate test to determine whether an individual is fit to plead guilty following a finding that they are unfit to participate effectively in a trial will be limited and is considered to be an inefficient use of time.

Recommendation 10.29

We recommend that guidance, or a code of practice, for clinicians in applying the tests should be drafted to accompany the statutory tests themselves.

Government Response

We accept this recommendation because it is designed to help ensure further consistency in the application and interpretation of the statutory test.

Chapter 4: Assessing the defendant

The Law Commission's recommendations in chapter 4 deal with the process for assessing a defendant when deciding if a defendant is unfit to plead. We accept the majority of recommendations in this chapter and we intend to bring forward legislation when parliamentary time allows.

Recommendation 10.30

We recommend that:

1) There should be a statutory presumption of capacity to participate effectively in trial, for both adult and juvenile defendants.
2) It should be a duty of the prosecution, defence, and the court, to keep the defendant's ability to participate under review and to raise the issue of lack of capacity promptly where concerns arise.
3) The court should have the power to order an investigation into the defendant's capacity to participate effectively in the trial and to determine the defendant's capacity to participate effectively in the trial of its own motion.

Government Response

We accept this recommendation as it is already the status quo but it is not in statute. There is also already a statutory presumption for capacity for civil proceedings (s.1 Mental Capacity Act 2005).

Recommendation 10.31

We recommend that:

1) Where the defence raise the issue of lack of capacity, they should bear the burden of establishing lack of capacity on a balance of probabilities.
2) Where the prosecution raises the issue of lack of capacity, they should bear the burden of establishing lack of capacity beyond reasonable doubt.
3) Where the court determines the issue of capacity of its own motion, the prosecution should bear the burden of establishing lack of capacity on behalf of the court, but the standard of proof should be the balance of probabilities.
4) The burden and standard of proof in these different situations should be set out in the statute for the avoidance of doubt.

Government Response

We accept this recommendation as consensus from the majority of stakeholders that have been consulted recognise this is the current, standard procedure.

Recommendation 10.32

We recommend that the minimum requirement for a determination of the defendant's lack of capacity to participate effectively in the trial should be written or oral evidence from two experts.

Government Response

We accept this recommendation as this is standard procedure as recognised by stakeholders.

Recommendation 10.33

We recommend that:

1) The minimum evidential requirement for a determination of effective participation be two experts competent to advise on the defendant's particular condition.
2) One of those experts must be a section 12 Mental Health Act (MHA) approved registered medical practitioner.
3) The other expert should be either a registered medical practitioner, or a registered psychologist or an individual having a qualification appearing on a list of appropriate disciplines and levels of qualification, approved by the Department of Health.

Government Response

We accept this recommendation in principle. The Government recognises that relaxing the evidential requirement to include registered psychologists, and

potentially other disciplines, may ensure specialist insight into different conditions and help reduce delays by widening the pool of qualified experts. Further work is needed to define the training and experience required by professionals to partake in this role, and to explore other implementation considerations. This work will be taken forward by DHSC in due course.

Recommendation 10.34

We recommend that:

1) The Criminal Practice Direction be amended to require the court or the parties to make use of liaison and diversion services at court (where available) to provide an initial assessment of the defendant (subject to his or her consent), where there are doubts as to his or her capacity, but it is unclear whether a full expert assessment is required.
2) Where a party has obtained an expert report indicating that the defendant lacks the capacity to participate in the trial, that they should be required to serve that report on the opposing party and the court as soon as reasonably practicable.
3) Where a party has served on the court and opposing party a first report indicating a lack of capacity for trial, that the normal process should be for the court to order that the second expert be jointly instructed by the defence and prosecution, unless such a course would not be in the interests of justice.

Government Response

We accept this recommendation as it will address the difficulties arising out of delayed disclosure and the sequential obtaining of reports.

Recommendation 10.35

We recommend that:

1) The need to address the defendant's prospects for recovery, and the likely timeframe for achieving capacity for trial should be addressed by all experts instructed to assess the capacity of the defendant. The code of practice drafted to accompany the legal test should stipulate this as a requirement of every assessment.
2) Once two expert reports have been prepared, and prior to commencing a hearing to consider the defendant's capacity to participate effectively in trial, there should be a statutory requirement for the court to consider whether it is appropriate to postpone proceedings for the defendant to achieve the capacity to participate effectively.
3) The proceedings should only be adjourned where it is in the interests of justice, taking into account in particular whether there is a real prospect of the defendant having capacity to participate effectively after a period of

adjournment and whether it is reasonable to delay proceedings in the circumstances.

4) Save in exceptional circumstances, the period between postponement and the beginning of the determination of capacity, alternative finding procedure or full trial should not extend beyond 12 months.

Government Response

We accept this recommendation. Although we agree with the Law Commission that this would be rarely used, where appropriate, this would help ensure that all efforts are made to give defendants the opportunity to answer the allegation(s) in the normal trial process where that is achievable and reduce the frequency of resumption of the prosecution upon recovery.

Recommendation 10.36

We recommend that section 36 of the Mental Health Act 1983 be amended as follows:

1) section 36 MHA be extended to apply to defendants remanded in custody for offences for which the penalty is “fixed by law”, namely murder, prior to conviction or determination of the facts;
2) the duration of a section 36 MHA remand be extended to a maximum of 12 months; and
3) a section 36 MHA remand be reviewed by the Crown Court every 12 weeks.

Government Response

We accept this recommendation in part. Extending the time limit for section 36 remands under the MHA to a maximum of 12 months will allow for better continuity of care for the defendant where a remanded patient continues to require treatment after the current 12-week limit. This is important to ensure we can take forward recommendation 10.35, above, which enables proceedings to be deferred for a maximum of 12 months where there is a reasonable prospect of recovery.

To provide safeguards against unnecessarily long hospital stays, we agree with the Law Commission’s recommendation that section 36 MHA remand should be regularly reviewed by the Crown Court. Further work is needed to explore if a review every 12 weeks, as proposed, is appropriate and operationally deliverable.

We do not consider it appropriate to extend section 36 MHA to offences where the penalty is fixed by law, namely murder. Accepting this recommendation in full could lead to a situation where high-risk individuals facing murder charges are remanded to hospital for up to 12 months with no Justice Secretary oversight, which carries a significant public protection risk. We remain committed to ensuring that individuals with mental health needs can access the treatment they need as quickly and early as possible in their journey through the criminal justice process. However, we consider that the existing system, which allows a transfer to hospital (where the statutory criteria are met) to be directed by the Secretary of State remains the most

appropriate way for these needs to be met whilst also managing the risk which may be posed by these individuals.

Recommendation 10.37

We recommend that:

1) A finding that a defendant lacks the capacity to participate effectively in the trial should remain effective in the proceedings unless and until the 326 contrary is established, the court having received evidence from two suitably qualified experts.
2) The standard of proof should be the balance of probabilities, the burden resting on the party raising the issue or the prosecution if the issue is raised by the court.

Government Response

We accept this recommendation as it addresses the fact that there is currently no procedure for a situation where a defendant who has been found unfit recovers fitness before the determination of facts.

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

The Law Commission's recommendations in chapter 5 address the procedure following a finding that an individual is unfit to plead.

Recommendation 10.38

We recommend that:

1) the judge in the Crown Court has the discretion to decline to proceed with the alternative finding procedure;
2) the judge should apply an interests of justice test, with specified factors to be taken into account, in considering whether to exercise this discretion; and
3) exercise of the discretion not to proceed should not act as a bar to resumption of proceedings on recovery, subject to successful application by the prosecution or the defendant.

Government Response

We reject this recommendation as the decision about whether to proceed with a prosecution is a matter for the CPS, who are best placed to consider relevant factors when reaching such a decision. In addition, there is already an existing procedure for 'abuse of court process' if the court is of the opinion that to allow the prosecution to continue would amount to an abuse of the process of the court.

Recommendation 10.39

We recommend that:

1) The prosecution be required to establish all elements of the offence charged against a defendant who has been found to lack capacity for trial.
2) Where the jury are satisfied that the prosecution has established all the elements of the offence beyond reasonable doubt, they will return a finding that the allegation is proved against the defendant.
3) Where they are not so satisfied they will acquit the defendant.

Government Response

We reject this recommendation because this proposal would turn the procedure into a full criminal trial, in circumstances where it has been decided the defendant does not have capacity.

This recommendation would likely take up more court time than the current s.4A hearing and involve far greater judicial case management of the proceedings in order to ensure the procedure could be properly conducted in a way which had regard for the interests of the defendant and was compatible with article 6 rights.

Furthermore, requiring the jury to consider the fault element of the offence will likely impose a greater burden on prosecutors, particularly as defendants who lack capacity are often not able to give evidence in their own defence. This in turn will mean that juries will find it difficult to be sure of the defendant's guilt, in circumstances where they are told the defendant does not have capacity and not to hold it against him if he does not give evidence. These difficulties may mean the jury has no choice but the acquit, and the court will not be able to make an order which would protect the public.

Recommendation 10.40

We recommend:

1) A special verdict, synonymous with an insanity verdict at full trial, be available to the jury at the alternative finding procedure.
2) Either party, or the court of its own motion, should be entitled to raise the issue of insanity at the alternative finding procedure.
3) A special verdict should only be available where the court has received evidence from two registered medical practitioners, one of whom is duly approved.
4) Where the issue of insanity is raised, it should be considered by the jury in a single-stage fact-finding process.

Government Response

We reject this recommendation as it is dependent on accepting recommendation 10.39 (which we are rejecting).

Recommendation 10.41

We recommend that the partial defences should not be available at the alternative finding procedure.

Government Response

We reject this recommendation as it is dependent on accepting recommendation 10.39 (which we are rejecting).

Recommendation 10.42

We recommend that at an alternative finding procedure, any full defence (or basis for acquittal other than a partial defence) should be left to the jury, where there is evidence on which a properly directed jury might reasonably find the defence made out, or the essential element of the offence unproven.

Government Response

We reject this recommendation as it is dependent on accepting recommendation 10.39 (which we are rejecting).

Recommendation 10.43

We recommend that the available verdicts, in relation to each charge, in a single-stage alternative finding procedure should be:

1) a finding that the allegation is proved against the defendant;
2) an outright acquittal; or
3) a qualified acquittal (a “special verdict” synonymous with an insanity verdict in full trial).

Government Response

We accept clause 1 and 2 of this recommendation. However, we are rejecting clause 3 as it is dependent on accepting recommendation 10.39 (which we are rejecting). We intend to bring forward legislation when parliamentary time allows.

Recommendation 10.44

We recommend that a code of practice or guidance document should be drafted to assist representatives appointed by the court to put the case for the defendant.

Government Response

While we support this recommendation, this is not for us to accept or implement.

Recommendation 10.45

We recommend that the following procedural arrangements should be set out in statutory provisions:

1) that in every case the court should be required to appoint a person to put the case for the defendant following a finding of lack of capacity;
2) in doing so the court should take into account the views of the defendant, in so far as they can be identified. However, an appointment should be made even where the defendant would prefer not to be represented;
3) where a representative is already instructed for the defendant, the court should appoint that individual, unless the court is satisfied that the advocate will not be competent to deal with the issues arising in the hearing; and
4) the representative should be required to give effect to the defendant's instructions, in so far as they can be identified, unless he or she concludes that to do so would be contrary to the defendant's legal best interests.

Government Response

We accept this recommendation as it is very similar to current practice and there are no objections to this being put in statute. We intend to bring forward legislation when parliamentary time allows.

Recommendation 10.46

We recommend:

1) That there should be a rebuttable statutory presumption that the alternative finding procedure in relation to any defendant should be conducted separately from the trial of any co-defendants.
2) The starting position should therefore be separate proceedings, unless, on the application of any party, or the court of its own motion, the court determines that it is in the interests of justice for the alternative finding procedure and the trial of co-defendants to proceed together.
3) In considering whether simultaneous proceedings would be in the interests of justice, the court should take into account how joint proceedings would be likely to affect:
    (a) the interests of the defendant who lacks capacity;
    (b) the interests of other defendants in the proceedings;
    (c) witnesses in the proceedings, and others affected by the offence or offences charged; and
    (d) the public interest.

Government Response

We accept this recommendation as, although simultaneous proceedings in relation to unfitness to plead will be incredibly rare, in circumstances where it would be in the interests of justice, this recommendation would ensure the court has the power to facilitate that. We intend to bring forward legislation when parliamentary time allows.

Recommendation 10.47

We recommend that:

1) the defendant should be entitled to elect for the alternative finding hearing to be conducted by a judge sitting alone;
2) such an election should not be available where the alternative finding procedure is to be conducted at the same time as the trial of co-defendant(s); but
3) in an application for simultaneous proceedings, the fact that the defendant might otherwise opt for a judge-only alternative finding procedure should be a matter to be considered by the judge in assessing where the interests of justice lie.

Government Response

We reject this recommendation as we believe this would be regarded as an erosion of jury trial, and would contradict previous government positions. Furthermore, we do not believe it is feasible to expect a defendant, who has been found to lack capacity for trial, to understand the issues involved in the right to jury trial and to be able to make an informed decision.

Recommendation 10.48

We recommend that:

1) Although no conviction can result, the alternative finding procedure should be conducted as proceedings to which the strict rules of evidence apply.
2) The Criminal Practice Direction on vulnerable defendants (paragraphs 3G.1 to 3G.6) should be amended so that it also applies in the alternative finding procedure to defendants who lack capacity for trial.

Government Response

We accept this recommendation as it is very logical and no objections have been raised. We intend to bring forward legislation when parliamentary time allows.

Chapter 6: Disposals

The Law Commission's recommendations in chapter 6 focus on what disposals should be available to the court where a defendant lacks capacity and the allegation against them has been proven.

Recommendation 10.49

We recommend that:

1) The provisions for supervision orders be amended so that the local authority, in the area in which the defendant ordinarily resides, has sole responsibility for supervising the individual who lacks capacity, where the court decides that a supervision order is appropriate.
2) For an adult, the supervising officer provided by the local authority should be a social worker of the local authority.
3) For an individual under the age of 18, the supervisor should be either a social worker operating within a children's services team, or a person with social work experience (or in Wales a social worker) operating as part of a youth offending team.

Recommendation 10.50

We recommend:

1) for every supervision order the supervised person be required to attend supervision meetings, rather than simply to "keep in touch" with the supervising officer as currently; and
2) that a constructive support requirement be available to be imposed as part of a supervision order, requiring the supervised person to comply with arrangements made with a view to dealing with his or her needs including education, training, employment and accommodation needs. Such a requirement should be imposed only where the court is satisfied that it is desirable in the interests of:
    (a) supporting the supervised person;
    (b) preventing any repetition of the conduct that led to the making of t the supervision order; or
    (c) preventing involvement in conduct which poses a risk of harm to the supervised person or others.

Recommendation 10.51

We recommend that:

1) The following restrictive requirements be available to be imposed as part of a supervision order:
    (a) A prohibited activity requirement, including the capacity to prohibit the individual's possession, use or carriage of a firearm within the meaning of the Firearms Act 1968.

(b) An exclusion requirement, prohibiting the supervised person from attending at a specified place.

2) No restrictive requirement should be imposed unless the court is satisfied that it is necessary in the interests of:
    (a) supporting the supervised person;
    (b) preventing any repetition of the conduct that led to the making of the supervision order; or
    (c) preventing involvement in conduct which poses a risk of harm to the supervised person.

Recommendation 10.52

We make two recommendations in relation to the incorporation of risk assessment, monitoring and review in order to enhance the effectiveness of supervision orders:

1) The court imposing a supervision order should have the power to include a requirement:
    (a) providing for periodic review of the order, with flexibility to vary the intervals of such reviews;
    (b) requiring the attendance of the individual at a review hearing;
    (c) requiring reports by the supervising officer and any registered medical practitioner directing treatment under the order; and
    (d) allowing for subsequent reviews to be conducted without oral hearing where appropriate.
2) Section 327(4) of the Criminal Justice Act 2003 should be amended so that where a specified violent or sexual offence (listed in schedule 15 of the Criminal Justice Act 2003) has been proved against an individual at the alternative finding procedure (or a special verdict has been returned in that regard), an individual made subject to a supervision order in relation to that offence should also be made subject to MAPPA for the period of the order.

Recommendation 10.53

We recommend that:

1) Provisions addressing a supervised person's failure to comply with a supervision order should be introduced.
2) Breach should only be established where the court is satisfied that the supervised person has wilfully and without reasonable excuse failed to comply with one or more of the requirements of the order.
3) The breach hearing should not proceed where the supervised person is found to lack capacity for that hearing.
4) On breach being established, the Crown Court should have the following powers:
    (a) To make no order.
    (b) To amend or revoke the existing order.
    (c) To require an adult to pay a fine up to a maximum of £10,000.
    (d) To make a curfew order (with or without electronic tagging).

(e) Subject to prior warning, to revoke the supervision order and impose on an adult individual a custodial term not exceeding two years' imprisonment, or the maximum term that would have been available for the offence for which the supervision was imposed, whichever is the lesser.
(f) Subject to prior warning, and where the original offence was imprisonable, to revoke the supervision order and to impose on a youth a youth rehabilitation order with intensive supervision and surveillance.

Recommendation 10.54

We recommend that the maximum length of the supervision order be extended from two years to three years.

Government Response

We are issuing a holding response for recommendations 10.49-10.54 as they deal with complex issues and will require consultation and agreement from a wide range of other stakeholders.

Recommendation 10.55

We recommend removing the mandatory requirement that a restriction order be imposed on a defendant who is otherwise suitable for hospitalisation under section 37(2) of the Mental Health Act 1983 and against whom there has been an adverse finding at the section 4A hearing in relation to an offence the sentence for which is fixed by law.

Government Response

We reject this recommendation as we consider there is objective justification for the difference in outcomes resulting from the current regime. Restriction orders play an important role in ensuring appropriate oversight and risk management of high-risk patients and it is prudent to maintain this automatic oversight for those who have been found by the courts to have done the act of murder, the most serious offence.

Recommendation 10.56

We recommend that a restraining order be available to the court where a defendant has had an allegation proved against him or her at the alternative finding procedure.

Government Response

We accept this recommendation as, whilst a restraining order would not be appropriate in every case, we are of the view that there could be a case where it would be beneficial. In addition, it remains illogical that someone who is found unfit to plead but acquitted of the act can be given a restraining order, and someone who

has actually been found to have done the act, cannot. We intend to bring forward legislation when parliamentary time allows.

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

The Law Commission's recommendations in chapter 7 look at expanding the legal framework for addressing unfitness to plead into the magistrates' and youth courts, with limited alternative procedures that only focus on whether the accused requires a hospitalisation or a guardianship order.

Recommendation 10.57

We recommend that a statutory framework for determining a defendant's capacity to participate effectively, comparable to that which we recommend for the Crown Court, should be created in the summary jurisdiction.

Government Response

We accept this recommendation, as there is a consensus from stakeholders that this recommendation would fill a gap in the summary courts when it comes to these types of cases. Accepting this addresses that lacuna and we intend to bring forward legislation when parliamentary time allows.

Recommendation 10.58

We recommend that the statutory framework for determining a defendant's capacity to participate effectively in the summary jurisdiction should be applicable to all criminal offences.

Government Response

We partially accept this recommendation. We agree that there are currently limited alternatives in the magistrates' courts, and that the unfitness to plead framework should be extended to summary-only, imprisonable offences. However, we believe it would be disproportionate to extend this to summary-only, non-imprisonable offences. For example, in issuing a defendant with a supervision order for a non-imprisonable offence, it would place them in a very different position to a defendant in ordinary criminal settings, who would usually just receive a fine. Our position on this is aligned with other stakeholders such as the CPS, the Law Society, and the Magistrates' Association.

Recommendation 10.59

Save where it is necessary to make procedural adaptations, we recommend that the same statutory test for capacity to participate effectively in a trial, and capacity to plead guilty, should apply in all courts: Crown, adult magistrates' and youth courts.

Government Response

We partially accept this recommendation. There is almost unanimous support to apply the same statutory test for capacity to participate effectively in a trial, as we believe it would risk overcomplicating the procedure to have different tests across the board. (Any differences between youths and adults should be picked up by a clinician regarding the expert assessments of capacity). However, as we are rejecting the introduction of a separate test for capacity to plead guilty in the Crown Court, we will mirror this in the magistrates' court.

Recommendation 10.60

We recommend that the same evidential requirement for a finding that a defendant lacks capacity for trial should apply in the adult magistrates' and youth courts as in the Crown Court.

Government Response

As with recommendation 10.33, we accept in principle this recommendation in the magistrates' and youth courts for the same reasons. It could help improve timeliness and case progression and enables participation of a wider range of disciplines who may be more appropriate in addressing issues.

Recommendation 10.61

We recommend that:

1) Cases where an issue as to the capacity of the defendant to participate effectively in a summary trial has been raised should be reserved to district judges for determination and subsequent procedures.
2) District judges should receive specific training on the reformed test and the procedures to address issues of effective participation in the summary courts.

Government Response

We accept this recommendation because, while there were concerns around capacity of district judges [DJ], there are various benefits of ringfencing this to DJs only. First, training, and periodically refreshing training of all magistrates would be a very substantial undertaking, especially considering most magistrates won't come across an unfitness to plead case given their rarity. Moreover, as trials of this nature will be substantially longer and more complicated, it may be unfair to put that on magistrates. It would also mean the same DJ could hear both the hearing to determine capacity and subsequent trial, if found unfit. This position is supported by

both the senior judiciary and the Magistrates' Association and we intend to bring forward legislation when parliamentary time allows.

Recommendation 10.62

We recommend that:

1) Where an adult defendant has the right to elect jury trial, on an either way charge for which the magistrates' court has accepted jurisdiction, if an issue arises as to his or her capacity to participate effectively in the proceedings, the case should be retained in the magistrates' court for determination of that issue.
2) If the defendant is found to be able to participate effectively in the proceedings, or the issue is abandoned by the party who raised it, then the mode of trial procedure should continue in the usual way.
3) If the defendant is found to lack the capacity to participate effectively in the proceedings, all further hearings in relation to that case should be retained in the magistrates' court.

Government Response

We reject this recommendation. Whilst we understand the reasoning behind it and the potential benefits, ultimately, like recommendation 10.47, we believe that this proposal would be seen as an erosion of the right to jury trial. Various stakeholders support this decision for concerns including an increased risk of adjournments and delays.

Recommendation 10.63

In relation to section 35 of the Mental Health Act 1983 we recommend:

1) Section 35 of the MHA should be extended to be applicable prior to conviction or an alternative finding procedure, to all defendants charged with imprisonable matters without the need for the defendant's consent.
2) Section 35 of the MHA should be applicable to all defendants charged with imprisonable matters following a conviction or alternative finding in relation to an imprisonable offence.

Recommendation 10.64

In relation to section 36 of the Mental Health Act 1983 we recommend that:

1) Section 36 of the MHA be applicable to defendants in the magistrates' courts who are remanded in custody in relation to imprisonable matters prior to conviction or an alternative finding procedure.
2) That the maximum duration of a section 36 remand in the magistrates' court should be six months.

Government Response

We agree that extending section 35 and section 36 into the Magistrates Court would provide defendants with more direct access to assessment and treatment. However, this change could significantly increase the use of these sections, beyond just those individuals involved in unfitness to plead proceedings. The impact of this change, including on the healthcare system therefore needs to be carefully considered and managed. We will also consider whether additional safeguards are required to ensure these powers are used proportionately and appropriately.

Recommendation 10.65

We recommend that all defendants under 14 years of age, appearing in the youth court for the first time, must be screened for participation difficulties, unless the defendant has already been assessed prior to attending court.

Government Response

We reject this recommendation as we believe the need for screening should depend on the individual child and not their age. Screening children at their first appearance at court is also potentially too late and could lead to unnecessary court delays. Nonetheless we agree with the importance of identifying participation difficulties amongst young defendants and we will explore ways to improve the current mechanisms for doing this.

Recommendation 10.66

We recommend that:

1) The district judge in the magistrates' or youth court should have the discretion to decline to proceed with the alternative finding procedure.
2) The judge should apply an interests of justice test, with specified factors to be taken into account, in considering whether to exercise this discretion.
3) Exercise of the discretion not to proceed should not act as a bar to resumption of proceedings on recovery, subject to successful application by the prosecution or the defendant.

Government Response

We reject this recommendation as the decision about whether to proceed with a prosecution is a matter for the CPS, who are best placed to consider relevant factors when reaching such a decision. In addition, there is already an existing procedure for 'abuse of court process' if the court is of the opinion that to allow the prosecution to continue would amount to an abuse of the process of the court.

Recommendation 10.67

We recommend:

1) There should be an alternative finding procedure before the district judge seized of the case, but otherwise in the manner recommended for the Crown Court.
2) The available outcomes at the alternative finding procedure in the magistrates' and youth courts would therefore be:
    (a) a finding that the allegation is proved against the defendant;
    (b) an outright acquittal; or
    (c) a special determination that the defendant is not guilty by reason of insanity.
3) In every case the court should be required to appoint a person to put the case for the defendant where an alternative finding procedure is held, (in accordance with the recommendations made for the Crown Court).

Government Response

We reject this recommendation as, similarly to recommendation 10.43 in the Crown Court, this would turn the procedure into the equivalent of a full criminal trial in magistrates' courts, in circumstances where it has been decided the defendant does not have capacity.

Recommendation 10.68

We recommend that where an allegation is proved against a defendant, or a special determination is arrived at, in relation to a non-imprisonable offence, the available disposals in adult magistrates' courts should be:

1) a supervision order (with or without medical treatment); and
2) an absolute discharge

Government Response

We reject this recommendation given that we are not proposing to extend the unfitness to plead framework to non-imprisonable offences in recommendation 10.59)

Recommendation 10.69

We recommend that where an allegation is proved against a defendant, or a special determination is arrived at, in relation to an imprisonable offence, the available disposals in adult magistrates' courts should be:

1) a hospital order (without restriction);
2) a supervision order (with or without medical treatment); and
3) an absolute discharge

Government Response

We agree with the Law Commission's finding that the existing range of disposals is too restrictive, however further work is needed to consider the definition and scope of a supervision order before we can introduce it as a new disposal in the summary courts.

Recommendation 10.70

We recommend that, where the district judge considers that a restriction order should be imposed, he or she should have the power to commit the defendant to the Crown Court for a restriction order to be imposed.

Government Response

We accept this recommendation as restriction orders are a significant deprivation of liberty, with the risk assessment involved in the imposition of such an order not one usually carried out in the summary courts. We intend to bring forward legislation when parliamentary time allows.

Recommendation 10.71

We recommend that the magistrates' courts' powers to sanction adult defendants in respect of breach of a supervision order should mirror those available in the Crown Court, save that a custodial sanction should not be available in the summary jurisdiction.

Government Response

We are issuing a holding response for this recommendation given the extensive work that needs to be undertaken in relation to supervision orders.

Recommendation 10.72

We recommend that where at the alternative finding procedure an allegation is proved against a child or young person, or a special determination is arrived at, the available disposals in youth court should be:

1) a hospital order (without restriction), but only where the adverse finding relates to an imprisonable offence;
2) a supervision order (with or without medical treatment); and
3) an absolute discharge.

Government Response

We agree with the Law Commission's finding that the existing range of disposals is too restrictive, however further work is needed to consider the definition and scope of

a supervision order before we can introduce it as a new disposal in the summary courts.

Recommendation 10.73

We recommend that, in the youth court, where the district judge considers that a restriction order should be imposed, he or she should have the power to commit the defendant to the Crown Court for a restriction order to be imposed, but only where the defendant is aged 14 or over.

Government Response

We accept this recommendation as a restriction order is a significant deprivation of liberty and the decision to impose one should be reserved to the Crown Court. We intend to bring forward legislation when parliamentary time allows.

Recommendation 10.74

Sanction for breach of a supervision order should be restricted to:

1) amendment of the supervision order to add a curfew requirement with or without an electronic monitoring requirement; or
2) the revocation of the supervision order and imposition of a youth rehabilitation order with intensive supervision and surveillance.

Government Response

We agree with the Law Commission's finding that the existing procedure for children who breach supervision orders needs to be amended, however further work is needed with stakeholders to consider the definition and scope of this.

Recommendation 10.75

We recommend that there should be mandatory specialist training on issues relevant to trying youths (particularly awareness training in relation to participation and communication issues arising out of learning disability, mental health difficulties, developmental immaturity and developmental disorders) for all legal practitioners and members of the judiciary engaged in cases involving young defendants in any criminal court.

Government Response

This is not a response to which we can respond. Statutory responsibility for judicial training, including magistrates, rests with the Lord Chief Justice, the Senior President of Tribunals, and the Chief Coroner, under the Constitutional Reform Act 2005, Courts and Enforcement Act 2007, and Coroners and Justice Act 2009 respectively. The judiciary is independent of government and training is done by the judiciary for the judiciary.

Chapter 8: Appeals from the Crown and magistrates' courts

The Law Commission officially agreed in July 2022 to accept a reference from the Ministry of Justice to conduct a review of the law governing appeals in criminal cases and consider the need for reform. As such, we will refrain from consideration of the recommendations in this chapter until the outcome of the Law Commission's review.

Chapter 9: Resuming the prosecution

The Law Commission's recommendations in chapter focus on what should happen when an individual who has previously been found to lack capacity for trial gains or recovers that capacity after a disposal has been imposed. We accept the majority of recommendations in this chapter and we intend to bring forward legislation when parliamentary time allows.

Recommendation 10.79

We recommend:

1) That the prosecution be entitled to apply to the Crown Court for leave to resume prosecution in respect of an individual against whom, at an alternative finding procedure, a jury:
    (a) found proved a specified violent or sexual offence;4 or
    (b) returned a special verdict in respect of an allegation of murder.
2) That such leave should only be granted if:
    (a) the court is satisfied that there are reasonable grounds to believe that the individual would have the capacity to participate effectively in such a trial; and
    (b) the court determines that it is in the interests of justice that the individual be.
3) In determining whether it is in the interests of justice for the individual to be tried, the court must take into account, amongst any other relevant matters:
    (a) the seriousness of the offence(s) alleged;
    (b) the impact of the alleged offence(s);
    (c) the views of those affected by the alleged offence;
    (d) the views of witnesses, and their availability and willingness to give evidence;
    (e) the lapse of time since the alleged offence(s) and since any alternative finding procedure;
    (f) any order(s) made in respect of the individual following an alternative finding procedure; and
    (g) the likely sentence if the individual is convicted.
4) The prosecution should have a similar right to apply for leave to resume prosecution in respect of an individual in relation to whom the judge declined

to hold an alternative finding procedure, where the indictment contained a specified violent or sexual offence.5
5) The Secretary of State's power to remit a recovered individual to court or prison should not be replicated in the new statutory provisions.
6) Where leave to resume proceedings is granted following an alternative finding procedure, all offences in respect of which the jury found the allegation proved against the individual, should be the subject of resumed prosecution.
7) Where leave to resume proceedings is granted where no alternative finding procedure has previously been held, all charges which appeared in the same indictment as the triggering specified offence should be the subject of resumed prosecution.

Government Response

We partially accept this recommendation. Clause 1b relies on us accepting recommendation 10.40, which we reject. Clauses 4 and 7 rely on us accepting recommendation 10.38 which we are also rejecting.

We partially accept clause 5 as the Secretary of State's power to remit a recovered individual to court or prison is a crucial lever to ensure that patients who become fit to plead reach court in a timely manner. We suggest that instead, the Secretary of State's power to remit remain in place for restricted patients in hospital, and for all other disposals (hospital order without restriction, supervision order and discharge), the new process would apply.

Recommendation 10.80

We recommend that the prosecution should have the same entitlement to apply for leave to resume proceedings in the magistrates' courts as in the Crown Court.

Government Response

We partially accept this recommendation in accordance with the response above. This recommendation proposes all the same measures as above (10.79), also be introduced in the magistrates' court.

Recommendation 10.81

We recommend:

1) That a defendant be entitled to apply to the Crown Court for an order that prosecution be resumed against him or her, where that defendant was previously found to lack capacity in the proceedings.
2) This entitlement should arise in relation to any allegation which was found proved against the defendant at an alternative finding procedure, or in relation to which a special verdict was returned.

3) The entitlement should also arise where the judge declined to hold an alternative finding procedure.
4) That such an order should only be made if:
(a) the court is satisfied that there are reasonable grounds to believe that the individual would have the capacity to participate effectively in such a trial; and
(b) the court determines that it is in the interests of justice that the defendant be tried.
5) In determining whether it is in the interests of justice for the individual to be tried, the court must take into account, amongst any other relevant matters:
    (a) the seriousness of the offence(s) alleged;
    (b) the impact of the alleged offence(s);
    (c) the views of those affected by the alleged offence(s);
    (d) the views of witnesses, and their availability and willingness to give evidence;
    (e) the lapse of time since the alleged offence(s) and since any alternative finding procedure;
    (f) any order(s) made in respect of the defendant following the alternative finding procedure; and
    (g) any delay in the defendant's making of the application for leave and the reason for it.
6) Where an order to resume proceedings is made following an alternative finding procedure, all offences in respect of which the jury found the allegation proved against the individual, or in respect of which a special verdict was returned, should be the subject of resumed prosecution.
7) Where leave to resume proceedings is granted where no alternative finding procedure has previously been held, all charges which appeared in the indictment when the lack of capacity determination was arrived at should be the subject of resumed prosecution.

Government Response

We partially accept this recommendation. Clause 2 relies on us accepting recommendation 10.40, which we reject. Clause 3 relies on us accepting recommendation 10.38(1), which we reject.

Recommendation 10.82

We recommend that a defendant, found in the magistrates' court to lack capacity for trial, on achieving capacity should have the same entitlement to apply for proceedings to be resumed against him or her as he or she would enjoy in the Crown Court.

Government Response

We partially accept this recommendation in accordance with the response above. This recommendation proposes all the same measures as above (10.81), also be introduced in the magistrates' court.

Recommendation 10.83

We recommend, in relation to proceedings where leave has been given, or an order made, for prosecution to be resumed:

1) Where prosecution is resumed against an individual who previously lacked capacity, any findings made in the alternative finding procedure, and any live disposal (a hospital order, a restriction order or a supervision order) consequent on such a finding, should remain in effect until the conclusion of the resumed proceedings.
2) Once leave has been granted, or an order made, for the prosecution to be resumed, the judge should have the power to revoke any disposal and remand the defendant in custody, before or after trial.
3) Where an issue is raised in resumed proceedings as to the capacity of the defendant for trial, the issue should be resolved in accordance with the usual capacity procedures.
4) Where an individual has been found to lack capacity in the resumed proceedings, he or she should not be subject to a second alternative finding procedure, unless it is in the interests of justice for the procedure to be conducted afresh.
5) Where the finding(s) from the original alternative finding procedure remain in effect, or where the second alternative finding procedure yields the same finding(s) as previously returned, any original extant disposal should remain in effect.
6) The court should have the power to revoke or amend any disposal currently extant (but not to extend a supervision order beyond three years' duration) or to impose a hospital order (with or without a restriction order).

Government Response

We accept this recommendation. These measures are standard procedure and should be addressed in order to avoid difficulties arising.