Title: Unfitness to Plead **IA No:** LAWCOM0043	Impact Assessment (IA)
Lead department or agency: Law Commission	**Date: 25/01/2016**
Other departments or agencies: Ministry of Justice	**Stage:** Final
	Source of intervention: Domestic
	Type of measure: Primary legislation
	Contact for enquiries: Jessica Uguccioni Jessica.uguccioni@lawcommission.gsi.gov.uk

Contact for enquiries: Jessica Uguccioni, Jessica.uguccioni@lawcommission.gsi.gov.uk

Summary: Intervention and Options

RPC Opinion: RPC Opinion Status

Cost of Preferred (or more likely) Option				
Total Net Present Value	**Business Net Present Value**	**Net cost to business per year** (EANCB on 2009 prices)	**In scope of One-In, Two-Out?**	**Measure qualifies as**
-£5.76m	£m	£m	Yes/No	In/Out/zero net cost

What is the problem under consideration? Why is government intervention necessary?

1) The current legal test for unfitness to plead does not capture all those defendants who are unable to participate effectively in criminal proceedings. This means that some defendants are being tried when fair trial is not possible.
2) The current procedures for defendants who are unfit for trial unfairly disadvantage the unfit defendant.
3) The community-based disposal for unfit individuals lacks provisions to encourage compliance with the order.
4) Unfitness to plead procedures do not apply in the magistrates' and youth courts. The current arrangements in those courts do not ensure that all defendants can participate effectively in trial, and available disposals are inadequate.
5) Available adjustments to the trial process for defendants with participation difficulties are inadequate.
Government intervention is required because the necessary reforms cannot be achieved without primary legislation.

What are the policy objectives and the intended effects?

1) Ensure the swift, accurate and cost-effective identification of defendants who may lack capacity for trial.
2) Reformulate the legal test so that it is appropriate, accessible, and consistently applied.
3) Ensure that all defendants who can fairly be tried are tried in the normal way.
4) Ensure that alternative procedures for defendants who cannot participate effectively are fair but robust.
5) Protect the public and prevent future offending by creating tailored and supportive community disposals.
6) Improve public confidence and victim satisfaction in the criminal justice system.
The intended effect is the creation of fair and robust procedures for the most vulnerable defendants.

What policy options have been considered, including any alternatives to regulation? Please justify preferred option (further details in Evidence Base)

Option 0: Do nothing
Option 1: a) Reform the test for unfitness to plead and all related procedures.
Option 2: a) Reform the test for unfitness to plead and all related procedures; and
b) Extend capacity for trial procedures to the magistrates' (including youth) courts.
Option 3: c) Enhance trial adjustments for defendants with participation difficulties.
Option 4: a) Reform the test for unfitness to plead and all related procedures; and
c) Enhance trial adjustments for defendants with participation difficulties.
Option 5: a) Reform the test for unfitness to plead and all related procedures; and
b) Extend capacity for trial procedures to the magistrates' (including youth) courts; and
c) Enhance trial adjustments for defendants with participation difficulties.
We prefer Option 5 because it addresses all of the problems identified in relation to these procedures and meets the identified policy objectives in our recommendations.

Will the policy be reviewed? It will not be reviewed. **If applicable, set review date:**

Does implementation go beyond minimum EU requirements?			No		
Are any of these organisations in scope? If Micros not exempted set out reason in Evidence Base.	**Micro** Yes/No	**< 20** Yes/No	**Small** Yes/No	**Medium** Yes/No	**Large** Yes/No
What is the CO_2 equivalent change in greenhouse gas emissions? (Million tonnes CO_2 equivalent)			**Traded:**	**Non-traded:**	

I have read the Impact Assessment and I am satisfied that (a) it represents a fair and reasonable view of the expected costs, benefits and impact of the policy, and (b) that the benefits justify the costs.

Signed by the responsible SELECT SIGNATORY: .... Date: ....

Summary: Analysis & Evidence

Policy Option 1

Description: (a) Reform the test for unfitness to plead and all related procedures.

FULL ECONOMIC ASSESSMENT

Price Base Year 2014/15	PV Base Year 2014/15	Time Period Years 10	Net Benefit (Present Value (PV)) (£m)		
			Low: £0.32	High: £4.15	Best Estimate ("b/e"): £2.23

COSTS (£m)	Total Transition (Constant Price)	Years	Average Annual (excl. Transition) (Constant Price)	Total Cost (Present Value)
Low	Negligible	1	0.67	**5.56**
High	Negligible		0.96	**7.96**
Best Estimate	Negligible		0.81	**6.76**

Description and scale of key monetised costs by 'main affected groups'

Transitional costs: Training for judiciary and legal practitioners [Judicial College and legal practitioners].
Ongoing costs: Increase in demand for expert reports (including addendum reports) required in Crown court, b/e £236,250 (£180,000 for expert reports plus £56,250 for addendum reports) [Legal Aid Agency]. Increase in court time, b/e £97,500 [HMCTS]. Increase in the number of supervision orders, b/e £422,170 [local authorities]. Sanctions for breach per year, b/e £7,020 [MoJ]. Increase in number of defendants subject to MAPPA, b/e £49,830 [NOMS].
For a more detailed breakdown of monetised costs and benefits please see Annex A: Summary Tables of Annual Costs and Benefits.

Other key non-monetised costs by 'main affected groups'

We estimate a slight increase in the number of custodial sentences as a result of guilty pleas but it has not been possible to monetise this cost [MoJ/NOMS].

BENEFITS (£m)	Total Transition (Constant Price)	Years	Average Annual (excl. Transition) (Constant Price)	Total Benefit (Present Value)
Low	0	0	0.70	**5.88**
High	0		1.46	**12.11**
Best Estimate	0		1.08	**8.99**

Description and scale of key monetised benefits by 'main affected groups'

Reduction in additional expert reports, b/e £315,000 (£135,000 from relaxing the evidential requirement plus £180,000 from joint instruction) [Legal Aid Agency]. A b/e of 5 unfit defendants per year who receive a supervision order instead of a hospital order resulting in savings, b/e £766,500 [Department of Health]. Reduction in section 48 transfers from custody to hospital, it has not been possible to monetise this benefit due to a lack of available data [MoJ]. **For a more detailed breakdown of monetised costs and benefits please see Annex A: Summary Tables of Annual Costs and Benefits.**

Other key non-monetised benefits by 'main affected groups'

Reduction in number of fact-finding procedures as a result of guilty pleas [HMCTS], reduction in delays and adjournments represents a significant benefit to complainants, witnesses and those affected by alleged offending in terms of swifter resolution, and reduced anxiety and uncertainty, and a cost saving to HMCTS. Allowing time for defendants to recover the ability to participate effectively in proceedings, promises significant benefits in terms of victim and witness satisfaction in achieving full trial, and in terms of public protection where the court is able to impose a wider range of sentences. The reformed alternative findings procedure will reduce uncertainty and piecemeal development in this aspect of the law [legal practitioners, vulnerable defendants].

Key assumptions/sensitivities/risks **Discount rate (%)** 3.5

See Annex B

BUSINESS ASSESSMENT (Option 1)

Direct impact on business (Equivalent Annual) £m:			In scope of OITO?	Measure qualifies as
Costs:	**Benefits:**	**Net:**	Yes/No	IN/OUT/Zero net cost

Summary: Analysis & Evidence

Policy Option 2

Description: (a) Reform the test for unfitness to plead and all related procedures; and

(b) Extend capacity for trial procedures to the magistrates' (including youth) courts.

FULL ECONOMIC ASSESSMENT

Price Base Year	PV Base Year	Time Period Years	Net Benefit (Present Value (PV)) (£m)		
2014/15	2014/15	10	Low: -£8.09	High: -£13.67	Best Estimate: -£10.86

COSTS (£m)	Total (Constant Price)	Transition Years	Average Annual (excl. Transition) (Constant Price)	Total Cost (Present Value)
Low	Negligible	1	2.89	**24.07**
High	Negligible		5.08	**42.26**
Best Estimate	Negligible		3.98	**33.14**

Description and scale of key monetised costs by 'main affected groups'

See corresponding section for Policy Option 1 in addition to:
Transitional costs: Training of the judiciary and legal practitioners, minor cost [Judicial College]. Ongoing costs: Expert reports (including addendum reports) where lack of capacity raised, b/e £1,755,000 (£1,462,500 for additional expert reports and £292,500 for addendum reports) [Legal Aid Agency]. Supervision orders, b/e £1,313,420 (£8,640 per year per local authority) [local authorities]. Sanctions for breach, b/e £48,200 (£14,000 for electronic monitoring and £34,200 for community rehabilitation with ISS) [MoJ]. Screening for participation difficulties for defendants under the age of 14 years, b/e £55,400 per year [NHS England and NHS Wales]. **For a more detailed breakdown of monetised costs and benefits please see Annex A: Summary Tables of Annual Costs and Benefits.**

Other key non-monetised costs by 'main affected groups'

See corresponding section for Policy Option 1 in addition to:
It is expected that the reservation of effective participation cases to DJ's will result in a small, non-monetisable cost in terms of listing arrangements [HMCTS].

BENEFITS (£m)	Total (Constant Price)	Transition Years	Average Annual (excl. Transition) (Constant Price)	Total Benefit (Present Value)
Low	0	0	1.92	**15.98**
High	0		3.44	**28.59**
Best Estimate	0		2.68	**22.28**

Description and scale of key monetised benefits by 'main affected groups'

See corresponding section for Policy Option 1 in addition to:
Savings from screening by Liaison and Diversion Services b/e £215,000 per year [Legal Aid Agency]. Savings from using the magistrates' courts rather than more expensive Crown Court, it has not been possible to monetise this due to a lack of available data [HMCTS]. Reduction in hospital orders imposed due to more robust supervision orders, b/e £1,383,000 [Department of Health]. **For a more detailed breakdown of monetised costs and benefits please see Annex A: Summary Tables of Annual Costs and Benefits**

Other key non-monetised benefits by 'main affected groups'

See corresponding section for Policy Option 1 in addition to: The introduction of a statutory test and procedure is expected to result in fairer and more consistent practice. Resulting certainty and clarity will reduce stays and discontinuances [HMCTS, vulnerable defendants, legal practitioners]. Early intervention is liable to result in substantial savings in the long term [MoJ]. Adjournments, and the cost of them arising out of uncertainty over appropriate procedures should be avoided [HMCTS]. Costs to local authorities in respect of supervision orders are balanced by savings for NOMS, since defendants receiving supervision orders would be likely otherwise to have received community sentences. Increased compliance with disposals and desistance from offending and the resulting reduction in future offending are significant long term benefits [HMCTS, vulnerable defendants, general public].

Key assumptions/sensitivities/risks	**Discount rate (%)**	3.5
See Annex B		

BUSINESS ASSESSMENT (Option 2)

Direct impact on business (Equivalent Annual) £m:			In scope of OITO?	Measure qualifies as
Costs:	Benefits:	Net:	Yes/No	IN/OUT/Zero net cost

Summary: Analysis & Evidence

Policy Option 3

Description: (c) Enhance trial adjustments for defendants with participation difficulties.

FULL ECONOMIC ASSESSMENT

Price Base Year 2014/15	PV Base Year 2014/15	Time Period Years 10	Net Benefit (Present Value (PV)) (£m)		
			Low: £4.07	**High: £6.11**	**Best Estimate: £5.09**

COSTS (£m)	**Total Transition** (Constant Price) Years		**Average Annual** (excl. Transition) (Constant Price)	**Total Cost** (Present Value)
Low	Negligible	1	N/Q	**N/Q**
High	Negligible		N/Q	**N/Q**
Best Estimate	Negligible		N/Q	**N/Q**

Description and scale of key monetised costs by 'main affected groups'

Transitional costs: The creation of a training scheme, registration scheme and drafting of a guidance manual are expected to incur additional costs [MoJ], which we are unable to estimate due to a lack of data.
Ongoing costs: Recruitment and training of defendant intermediaries to result in ongoing costs [MoJ]. Increase in demand for defendant intermediaries as a result of introducing a statutory entitlement. However, we do not anticipate that this will represent a significant increase in cost. It has not been possible to monetise these costs due to a lack of available data.
For a more detailed breakdown of monetised costs and benefits please see Annex A: Summary Tables of Annual Costs and Benefits

Other key non-monetised costs by 'main affected groups'

BENEFITS (£m)	**Total Transition** (Constant Price) Years		**Average Annual** (excl. Transition) (Constant Price)	**Total Benefit** (Present Value)
Low	0	0	0.49	**4.07**
High	0		0.73	**6.11**
Best Estimate	0		0.61	**5.09**

Description and scale of key monetised benefits by 'main affected groups'

Ongoing benefits: Regulating the costs of defendant intermediaries, b/e £612,360 per annum [MoJ].

For a more detailed breakdown of monetised costs and benefits please see Annex A: Summary Tables of Annual Costs and Benefits

Other key non-monetised benefits by 'main affected groups'

We identify the following non-monetisable benefits [legal practitioners, vulnerable defendants]: increased certainty of the entitlement to a defendant intermediary, more consistent and accountable conduct and greater engagement in the criminal justice process. A more tightly regulated fee structure, made possible by a registered scheme for defendant intermediaries, will allow the MoJ to have greater control over defendant intermediary costs. We estimate that in the long term this will recover the cost of introducing registration for defendant intermediaries and result in ongoing savings.

Key assumptions/sensitivities/risks **Discount rate (%)** 3.5

See Annex B

BUSINESS ASSESSMENT (Option 3)

Direct impact on business (Equivalent Annual) £m:			In scope of OITO?	Measure qualifies as
Costs:	**Benefits:**	**Net:**	Yes/No	IN/OUT/Zero net cost

Summary: Analysis & Evidence — Policy Option 4

Description: (a) Reform the test for unfitness to plead and all related procedures; and (c) Enhance trial adjustments for defendants with participation difficulties.

FULL ECONOMIC ASSESSMENT

Price Base Year 2014/15	PV Base Year 2014/15	Time Period Years 10	Net Benefit (Present Value (PV)) (£m)		
			Low: £4.40	**High: £10.26**	**Best Estimate: £7.33**

COSTS (£m)	**Total Transition** (Constant Price) Years		**Average Annual** (excl. Transition) (Constant Price)	**Total Cost** (Present Value)
Low	Negligible	1	0.67	**5.56**
High	Negligible		0.96	**7.96**
Best Estimate	Negligible		0.81	**6.76**

Description and scale of key monetised costs by 'main affected groups'

See corresponding sections for Policy Options 1 and 3.

For a more detailed breakdown of monetised costs and benefits please see Annex A: Summary Tables of Annual Costs and Benefits

Other key non-monetised costs by 'main affected groups'

See corresponding sections for Policy Options 1 and 3.

BENEFITS (£m)	**Total Transition** (Constant Price) Years		**Average Annual** (excl. Transition) (Constant Price)	**Total Benefit** (Present Value)
Low	0	0	1.20	**9.96**
High	0		2.19	**18.22**
Best Estimate	0		1.69	**14.09**

Description and scale of key monetised benefits by 'main affected groups'

See corresponding sections for Policy Options 1 and 3.

For a more detailed breakdown of monetised costs and benefits please see Annex A: Summary Tables of Annual Costs and Benefits

Other key non-monetised benefits by 'main affected groups'

See corresponding sections for Policy Options 1 and 3.

Key assumptions/sensitivities/risks — **Discount rate (%)** 3.5

See Annex B

BUSINESS ASSESSMENT (Option 4)

Direct impact on business (Equivalent Annual) £m:			**In scope of OITO?**	**Measure qualifies as**
Costs:	**Benefits:**	**Net:**	Yes/No	IN/OUT/Zero net cost

Summary: Analysis & Evidence

Policy Option 5

Description: (a) Reform the test for unfitness to plead and all related procedures;
(b) Extend capacity for trial procedures to the magistrates' (including youth) courts; and
(c) Enhance trial adjustments for defendants with participation difficulties.

FULL ECONOMIC ASSESSMENT

Price Base Year 2014/15	PV Base Year 2014/15	Time Period Years 10	Net Benefit (Present Value (PV)) (£m)		
			Low: -£4.02	**High: -£7.55**	**Best Estimate: -£5.76**

COSTS (£m)	Total (Constant Price)	Transition Years	Average Annual (excl. Transition) (Constant Price)	Total Cost (Present Value)
Low	Negligible	1	2.89	**24.07**
High	Negligible		5.08	**42.26**
Best Estimate	Negligible		3.98	**33.14**

Description and scale of key monetised costs by 'main affected groups'

See corresponding sections for Policy Options 2 and 3.

For a more detailed breakdown of monetised costs and benefits please see Annex A: Summary Tables of Annual Costs and Benefits

Other key non-monetised costs by 'main affected groups'

See corresponding sections for Policy Options 2 and 3.

BENEFITS (£m)	Total (Constant Price)	Transition Years	Average Annual (excl. Transition) (Constant Price)	Total Benefit (Present Value)
Low	0	0	2.41	**20.05**
High	0		4.17	**34.70**
Best Estimate	0		3.29	**27.38**

Description and scale of key monetised benefits by 'main affected groups'

See corresponding sections for Policy Options 2 and 3

For a more detailed breakdown of monetised costs and benefits please see Annex A: Summary Tables of Annual Costs and Benefits

Other key non-monetised benefits by 'main affected groups'

See corresponding sections for Policy Options 2 and 3.

Key assumptions/sensitivities/risks **Discount rate (%)** 3.5

See Annex B

BUSINESS ASSESSMENT (Option 5)

Direct impact on business (Equivalent Annual) £m:			In scope of OITO?	Measure qualifies as
Costs:	**Benefits:**	**Net:**	Yes/No	IN/OUT/Zero net cost

Evidence Base

Introduction

1. This impact assessment sets out the evidence that has been used to assess the impact of the Law Commission's recommendations for reform in relation to the test for unfitness to plead and related procedures.

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

Consultation process

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

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

---

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

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

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

[4] The Ministry of Justice faces a drop in budget of approximately a third over a five-year period, from a budget of approximately £8.7 billion (£9.24 billion when estimated in real terms to allow for inflation) in 2011-2012 (Ministry of Justice, *Annual Report and Accounts 2011-12* (2012) at p 21, https://www.gov.uk/government/publications/ministry-of-justice-annual-report-and-accounts-2011-12 (last visited 11 November 2015)) to a projected settlement of £6.2 billion for 2015-16 (HM Treasury, *Spending Round 2013* (June 2013) at p 10, https://www.gov.uk/government/publications/spending-round-2013-documents (last visited 11 November 2015)).

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

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

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

5. 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.

6. 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.

7. 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.

8. 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 interested government departments.

9. We considered it particularly important that we speak directly with stakeholder groups. Importantly, we have engaged directly with stake-holder groups. As a result, we have consulted with family members of victims of homicide in cases involving unfitness issues[8] and conducted a half-day session with a group of consultees with autism spectrum conditions. This session included a visit to a magistrates' court and the Crown Court and a group discussion session.[9]

10. 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 HMCTS. We have also worked with NHS England in relation to liaison and diversion services, and directly with academics gathering empirical data, in order to refine our projections within this Impact Assessment.

11. 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 CJS 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 and is underpinned by the data collection efforts that we have made.

12. Despite this extensive consultation and rigorous data collection, there are inevitably limitations to the accuracy of the costings for these proposals and any savings that are thought likely to be generated. Figures are based on the most up-to-date statistics provided by the Ministry of Justice, and the Department of Health and we are confident that they represent the most accurate picture possible.

Current arrangements for addressing unfitness to plead

Facilitating full trial through trial adjustments

13. The Criminal Procedure Rules ("CrimPR")[10] and the Criminal Practice Directions ("CrimPD")[11] 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".[12]

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

---

[8] Kindly arranged by Victim Support.

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

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

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

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

supporting adult, the use of frequent breaks to aid concentration, adopting clear language and following "toolkits".[13]

15. Statutory entitlement to assistance for vulnerable defendants in communicating with the court is, however, extremely limited in contrast to the provisions for vulnerable witnesses.[14] 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.[15]

The legal test

16. 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*.[16] Following the case of *Davies*,[17] 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.

17. 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*,[18] which were approved by the Court of Appeal and in which express reference is made to the need to be able to give evidence.

18. In that case the judge directed the jury[19] that the accused should be found unfit to plead if any one or more of the following was beyond his or her capability:

    (1) understanding the charge(s);

    (2) deciding whether to plead guilty or not;

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

    (4) instructing solicitors and/or advocates;

    (5) following the course of proceedings; and

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

Assessing the defendant

19. 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").[20] The procedure for this hearing is set out in section 4 of the Criminal Procedure (Insanity) Act 1964 ("CP(I)A").

---

[13] 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).

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

[15] 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.

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

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

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

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

[20] 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.

The procedure for the unfit defendant who lacks capacity for trial in the Crown Court

20. Following a finding that a defendant 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.[21] There is no criminal trial in the usual sense, and the defendant 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.

21. 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.[22] 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.[23]

Disposals

22. 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.

23. 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").[24] These are engaged where an individual, as a result of the unfitness procedures and subsequent disposal, is made subject to sex offender notification requirements.[25] 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,[26] and has received either a hospital order or a guardianship order.[27]

Effective participation in the magistrates' court (including the youth court)

24. 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

---

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

[22] 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).

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

[24] 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.

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

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

[27] 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.

(Sentencing) Act 2000 (the "PCCSA")) and to make a hospital order or a guardianship order[28] without convicting a defendant (under section 37(3) of the MHA).

25. 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.

Appeals

26. 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.[29]

Resumption of the prosecution

27. 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.[30] 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.[31]

Problems under consideration

28. This section identifies the key problems in relation to:

    (1) the test for unfitness to plead and related procedures;

    (2) arrangements in the magistrates' and youth courts; and

    (3) trial adjustments for defendants with participation difficulties.

(1) Problems in relation to the test for unfitness to plead and related procedures

The legal test

Inaccessibility and inconsistency of application

29. 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[32] and by the courts.[33]

Undue focus on intellectual ability

30. 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

---

[28] Under a guardianship order, the individual is placed under the responsibility of a local authority or a person approved by the local authority.
[29] 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.
[30] 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).
[31] CP(I)A, s 5A(4).
[32] See for example RD Mackay and G Kearns, "An upturn in unfitness to plead? Disability in relation to the trial under the 1991 Act" [2000] *Criminal Law Review* 532, 538.
[33] Contrast for example *Moyle* [2008] EWCA Crim 3059, [2009] Criminal Law Review 586 following *John M*, with the summary of the test in *Wells and Others* [2015] EWCA Crim 2, [2015] 1 WLR 2797 at [1], which omits reference to the giving of evidence. In relation to empirical research addressing this issue see R D Mackay, B J Mitchell and L Howe, "A continued upturn in unfitness to plead - more disability in relation to the trial under the 1991 Act" [2007] *Criminal Law Review* 530, 536.

effective part in his or her defence may be seriously impeded through delusions or severe mood disorders.

No consideration of decision-making capacity

31. 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

32. Fair trial guarantees under article 6 of the European Convention on Human Rights ("ECHR") require a defendant to be able to participate effectively in proceedings. 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

33. 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.

Assessing the defendant

Identification of unfitness issues

34. One of the most significant challenges to effective unfitness to plead procedures is the accurate and timely identification of those accused who are unfit to plead, especially where the accused 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.[34]

Unduly restrictive evidential requirement

35. 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.[35]

Delays in the preparation and service of expert reports

36. 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

37. 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.

---

[34] See Report para 3.23 and following.

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

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

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

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

Difficulty in dividing the external and fault elements of an offence

39. 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.[36]

Inchoate offences

40. 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

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

Disposals

Difficulties identifying a supervising officer for supervision orders

42. 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.[37] 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.

43. 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 under section 5 of the CP(I)A.

Difficulties monitoring and ensuring compliance with the order

44. 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.

---

[36] For examples see Report paras 1.63 to 1.64.

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

Lack of constructive elements

45. 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.

Appeals

No power to order a rehearing

46. 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.[38] 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

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

Resumption of the prosecution

Prosecution power to resume prosecution unduly limited

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

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

49. 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.[39] 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

50. 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.[40] Disposals, which at present lapse on the individual’s return to court,[41] also have to be considered afresh.

(2) Arrangements in the magistrates’ (including youth) courts

No specific consideration of unfitness to plead in the magistrates’ courts

51. Unfitness to plead procedures under the CP(I)A do not apply in magistrates’ and youth courts. 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

[38] Criminal Appeal Act 1968, s 16(4).
[39] See *Sultan* [2014] EWCA Crim 2648 at [9].
[40] See *R (Julie Ferris) v DPP* [2004] EWHC 1221 (Admin), [2004] All ER (D) 102.
[41] CP(I)A, s 5A(4).

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

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

Alternative procedures unduly limited

53. 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".[42]

Stay of proceedings problematic

54. 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

55. 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.[43]

(3) Trial adjustments for defendants with participation difficulties

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

56. 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

57. There is currently no statutory entitlement to assistance from an intermediary[44] for vulnerable defendants, in contrast to the entitlement for witnesses to have intermediary assistance.[45] In recent

[42] MHA 1983, s 1(2A).
[43] See Report para 7.43 and House of Commons Health Committee*, Children's and adolescents' mental health and CAMHS: Third Report of Session 2014–15* (November 2014), p 5.
[44] An intermediary is a communication expert whose role is to facilitate a witness' or defendant's understanding of, and communication with, the court.
[45] Youth Justice and Criminal Evidence Act 1999 ("YJCEA"), s 29. YJCEA, s 33BA, which makes such provision for defendants, has not been brought into force.

years, applications for intermediaries for defendants have been granted on an ad hoc basis by judges in the exercise of their inherent jurisdiction.[46] This has resulted in inconsistent provision.

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

58. 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. In some cases trial proceeds even where an order has been previously made by the court for intermediary assistance.[47]

No registration scheme for defendant intermediaries: no quality assurance

59. There is no registration scheme for defendant intermediaries 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

60. 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.[48]

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

61. 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.

Rationale for intervention

62. The conventional economic approach to government intervention to resolve a problem is based on efficiency or equity arguments. The government may consider intervening if there are strong enough failures in the way markets operate (for example, monopolies overcharging consumers) or if there are strong enough failures in existing government interventions (for example, waste generated by misdirected rules). In both cases the proposed new intervention itself should avoid creating a further set of disproportionate costs and distortions. The government may also intervene for equity (fairness) and redistribution reasons (for example, to reallocate goods and services to the more needy groups in society).

63. As will be apparent from the problems identified with the current law above, there are both efficiency and equity arguments for government intervention in this area.

64. In terms of efficiency arguments, there are a number of inefficiencies that can be identified in the current procedures, including:

    (1) An unnecessary number of expert reports are prepared in some cases as a result of the evidential requirement for a finding of unfitness.

    (2) There are costly delays and adjournments because of the small pool of experts able to satisfy the evidential requirement.

    (3) Proceeding to a determination of unfitness before allowing time for recovery, sometimes results in a costly second jury process.

---

[46] *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.
[47] See the case of C*ox* [2012] EWCA Crim 549, 2 Cr App R 6.
[48] Intermediaries acting for witnesses receive £36 per hour, resulting in an approximate daily rate of £252. The largest provider of adult intermediaries for defendants, Communicourt, charges £495 per day. See paras 129 to 130 below for more detail.

(4) The difficulty of identifying the elements of the offence which make up the "act or omission" leads to unnecessary appeals.

(5) The lack of unfitness to plead procedures in the magistrates' courts results in some defendants electing Crown Court trial where they would otherwise remain in the magistrates' court.

65. In terms of equity arguments, there are a number of features of the current law which are liable to lead to significant unfairness for vulnerable defendants. In particular:

(1) The test does not identify and therefore provide protection for some vulnerable defendants who are unable to participate effectively in trial.

(2) In some cases the unfit individual is substantially disadvantaged in comparison to a defendant facing the same allegation in full trial.

(3) Defendants in the magistrates' courts do not enjoy the same protections as those in the Crown Court in relation to unfitness to plead.

(4) The range of disposals for defendants with participation difficulties in the magistrates' courts is inadequate to address his or her needs and to protect the public.

(5) Youths are disadvantaged in comparison to adults in relation to unfitness to plead procedures and available disposals.

(6) Defendants previously found unfit have no mechanism to clear their name on recovery.

66. Statutory intervention is plainly required for reform in relation to a number of aspects:

(1) The problems which have arisen from the common law formulation of the test can only be addressed by clear restatement in statute.

(2) Amendments to the procedures for determining whether a defendant can engage in trial, and for the alternative process which follows, require amendment to existing statute. Where reform can be achieved by amendment to the Criminal Procedure Rules we have made that clear in our report. However, most aspects of our reform recommendations require statutory intervention.

Policy objectives

67. In a legal area as complex as this one, there are inevitably a considerable number of policy objectives. We set out below the main objectives which we focus on in formulating our recommendations for reform.

1) Ensuring swift, accurate and cost-effective identification of defendants who may lack the capacity to participate effectively in trial

68. We aim to improve the ability of professionals within the court system to identify accurately those defendants who may lack capacity and to act effectively to address the issue. Our objective in this regard is also to reduce the cost and delays involved in obtaining the necessary evidence to put before the court.

2) Reformulating the legal test so that it is appropriate, accessible and consistently applied

69. Our objective is to ensure that the test is appropriate in that it accurately identifies only those defendants who cannot have a fair trial because they lack the capacity to participate effectively in the process. We also aim to enhance the accessibility of the test itself for the many different individuals who may be affected by it, such as complainants and the lay volunteers who support them, defendants who lack capacity themselves and their supporters, and members of the public and press. Finally, we aim to enhance the consistency with which the test is applied by clinicians and the courts.

3) Ensuring that all defendants who can fairly be tried are tried in the usual way

70. We aim in particular to ensure that all those who can be fairly tried, with suitable adjustments to the process, are enabled to do so wherever fair and practicable. We believe that the full trial process is

the optimum process for all, whether they are a defendant, complainant, witness or member of the public. We consider this an essential objective in ensuring equal access to justice for all.

4) Ensuring that alternative procedures for those who cannot participate are fair and robust

71. We also aim to ensure that the alternative procedures for those who lack the capacity to participate effectively in trial appropriately balance the rights of those vulnerable individuals not to be disadvantaged as a result of their lack of capacity, against the rights of complainants and witnesses, and the need to protect the public from dangerous behaviour.

5) Protecting the public and preventing future offending by creating tailored and supportive community disposals

72. For those individuals who, even with the full range of support available, cannot participate effectively in trial, it is crucial that there are sufficiently robust disposals in place. These should be effective in securing successful integration and stabilisation of vulnerable individuals in the community while providing suitable protection for victims and the public through stringent supervision and monitoring.

6) Improving public confidence and victim satisfaction in the criminal justice system

73. A critical policy objective of our reforms is to raise the public's understanding of, and confidence in, the criminal justice system's response to those who are unable to participate effectively in trial. We also aim in particular to enhance victim confidence and satisfaction in these procedures, particularly by reducing the uncertainty and delays involved, and enhancing the accessibility of the legal process. It is, however, difficult to measure such an increase of public and victim confidence and to directly attribute this to the reforms we are recommending.

Scale and context

74. This section outlines the number of unfitness to plead cases each year, and provides further detail in relation to how unfitness to plead procedures are engaged, and the outcomes in those cases.

75. This section is broken down into five parts:

    (1) Preliminary points on scale and context.

    (2) Statistical data and costing information for unfitness to plead cases in the Crown Court.

    (3) Statistical data and costing information for cases involving participation issues in the magistrates' courts (including youth courts).

    (4) Statistical data and costing information regarding the use of defendant intermediaries.

    (5) Key stakeholders.

1) Preliminary points on scale and context

Limited data available

76. It is important to acknowledge at this stage that that there is very little data available in relation to unfitness to plead cases in the Crown Court. We are grateful to Professor Ronnie Mackay, who has conducted the most recent empirical research in relation to unfitness to plead, for his assistance and for allowing us to use his most recent findings.[49]

77. There is also very little data in relation to the raising of participation issues in the magistrates' and youth courts. Such issues are raised rarely and are not systematically recorded. Likewise, because of the lack of statutory entitlement and the unregulated provision of assistance by defendant intermediaries, there is very little data in relation to their work.

[49] R D Mackay, *Unfitness to Plead – Data on Formal Findings from 2002 to 2014,* Appendix A to the Report.

The Law Commission's data gathering exercise

78. In order to address these data deficits we have also conducted our own data gathering exercise with the assistance of HMCTS. We asked each Crown Court in England and Wales over a four month period (September to December) in 2014 to record all cases live and listed during the period where unfitness to plead issues had been raised, and to track their progress across the period. The intention was to provide a snapshot of how such issues were being dealt with, the volume of expert evidence required and how many such cases progressed to determinations of unfitness (under section 4 of the CP(I)A) and then on to findings of fact (section 4A of the CP(I)A) and disposals (section 5 of the CP(I)A).

79. We invited all the Greater London magistrates' and youth courts[50] to record the same information in relation to cases where participation difficulties had been raised. Finally, we also asked both Crown Courts and Greater London magistrates' and youth courts to record all cases where the need for defendant intermediary assistance was raised, and to record thereafter whether applications were made, whether they were granted and for how long the assistance was provided or intended to be provided.

80. The data that we obtained necessarily has its limitations. The information sought is not recorded in a searchable way on HMCTS IT systems therefore the accuracy of the data relies on the application and understanding of the individual tasked to complete the data collection forms. Inevitably, the information contained will be significantly incomplete, although we are confident that what it provides is not an overestimate of the position.[51]

2) Statistical data and costing information for unfitness to plead cases in the Crown Court

The number of unfitness to plead cases each year

81. Research conducted by Professor Mackay[52] identifies that there are approximately 100 findings of unfitness to plead per year. Between 2002 and 2014 there were a total of 1308 cases where the defendant was found to be unfit to plead and for whom a fact-finding hearing was held. This gives an annual average of 100.6 findings of unfitness per year across the 13 year period. In the last five years of the study the annual average was 97.6 findings per year. This represents a finding of unfitness to plead in approximately 0.11% of defendants tried in the Crown Court (a total of 85,943 defendants were proceeded against in the Crown Court in 2014[53]).

82. Between 2002 and 2014, the 89.7% of those found unfit were males compared to 10.3% for females. The mean age at the time of the offence was 36.2 (the range being 12 to 89). The most prevalent age range for both males and females was 20 to 29, with the majority of those found unfit falling within the age range 20 to 29 or 30 to 39 (54.1%). However, we acknowledge that in light of the current prevalence of historic sexual abuse cases in the court system, it is likely that the mean age of accused found unfit to plead will rise in the coming years.

[50] Being those magistrates' courts served by the London Regional Support Unit.

[51] In particular, the data for the period in relation to unfitness to plead reveals overall numbers which are significantly lower than Professor Mackay's findings (see Report, Appendix A).

[52] R D Mackay, *Unfitness to Plead – Data on Formal Findings from 2002 to 2014*, Appendix A to the Report.

[53] Ministry of Justice, *Criminal Justice Statistics 2014 England and Wales: Ministry of Justice Statistics bulletin* (May 2015), p 8, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/428932/criminal-justice-statistics-december-2014.pdf (last visited 11 November 2015).

Table 1: Total number of findings of unfitness per year between 2002 and 2014

	Frequency	Percent	Cumulative Percent
2002	115	8.8	8.8
2003	92	7.0	15.8
2004	85	6.5	22.3
2005	118	9.0	31.3
2006	109	8.3	39.7
2007	100	7.6	47.3
2008	114	8.7	56.0
2009	82	6.3	62.3
2010	91	7.0	69.3
2011	101	7.7	77.0
2012	111	8.5	85.5
2013	95	7.3	92.7
2014	95	7.3	100.0
Total	1308	100.0	

Source: R D Mackay, Report Appendix A, p 4

Arriving at a finding of unfitness to plead (section 4 of the CP(I)A)

Expert reports

83. When a defendant's fitness is in issue, medical expert reports will be prepared and served on parties and the court. Currently, the evidence of two or more registered medical practitioners, one of whom must be approved under section 12 of the Mental Health Act 1983, is required before the court can find an accused unfit to plead.[54]

84. Expert reports present one of the major expenditures in the unfitness process. For a psychologist's report, figures range between £2,070 and £2,691, and for a psychiatrist, figures range between £1,800 and £2,700 (these costs include time spent reading and attending adult).

85. Current costs for expert reports are as follows:

Table 2: Cost of expert reports, London and non-London, 2015

Psychiatrist		London: £90	Non-London: £135
Activity	**Typical time spent**	**Costs London**	**Costs non-London**
Reading	5 hours	£450	£675
Attending adult	5 hours	£450	£675
Report	10 hours	£900	£1350
TOTAL		**£1,800**	**£2,700**
Psychologist		London: £90	Non-London: £117
Activity	**Typical time spent**	**Costs London**	**Costs non-London**
Reading	5 hours	£450	£585
Attending adult	5 hours	£450	£585
Psychological adult testing	3 hours	£270	£351
Reporting	10 hours	£900	£1170
TOTAL		**£2,070**	**£2,691**

Source: Legal Aid Agency, *Guidance on the Remuneration of Expert Witnesses* (Version 4, April 2015)[55]

[54] 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.

[55] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/420106/expert-witnesses-fees-guidance.pdf (last visited 11 November 2015).

86. In some cases an addendum report is required from an expert, where the defendant's condition fluctuates during the proceedings. Current costs of preparing an addendum report are as follows:

Table 3: Cost of addendum expert reports, London and non-London, 2015

Psychiatrist		London: £90	Non-London: £135
Activity	**Typical time spent**	**Costs London**	**Costs non-London**
Addendum report	5 hours	£450	£675
Psychologist		London: £90	Non-London: £117
Activity	**Typical time spent**	**Costs London**	**Costs non-London**
Addendum report	5 hours	£450	£585

Source: Legal Aid Agency, *Guidance on the Remuneration of Expert Witnesses* (Version 4, April 2015)[56]

87. The Legal Aid Agency was unable to provide us with figures for its annual spend on psychiatric and psychological reports specifically in relation to unfitness to plead. However, to provide some context, Table 4 below details the annual spend on psychiatric and psychological reports more generally in the Crown Court.

Table 4: Legal Aid Agency Annual Spend on Psychiatric and Psychological Reports in the Crown Court

	2012/13	**2013/14**	**2014/15**
Psychiatric Reports	£7,000,000	£6,797,000	£6,973,000
Psychological Reports	£2,459,000	£2,405,000	£2,343,000
Total	**£9,459,000**	**£9,202,000**	**£9,316,000**

Source: Legal Aid Agency (2015, unpublished)

Numbers of reports prepared

88. In the first instance two reports are obtained by the party applying for a finding of unfitness, generally the defence. The party who intends to rely on the reports serves them on the opposing side who are entitled themselves to obtain their own independent report, or indeed any number of further reports, subject to their securing funding and achieving the adjournment of the proceedings. There are not infrequently three, sometimes four or more, reports prepared and served.

89. Not infrequently expert psychological assessment is required before clinicians can comment definitively on whether, in their opinion, a defendant is unfit to plead. This is particularly the case where the difficulty causing participation problems arises from a learning disability. As a result, although two expert medical reports are the minimum requirement before a defendant can be found unfit to plead, in practice three, and sometimes more, reports are required. This is because currently a psychologist is unable to act as one of the experts required by section 4(6) of the CP(I)A.

More unfitness to plead expert investigations than subsequent findings

90. Anecdotal observation by those involved in the court process suggests that for every case in which there is a finding of unfitness, there are many more where one or more expert reports has been prepared to consider whether the defendant is unfit to plead. Despite the initial concerns of representatives, not infrequently the defendant is found to be fit to plead, especially if trial adjustments can be put in place, for example intermediary assistance.

91. Figures from the Law Commission data collection exercise, referred to at paragraphs 78 to 80 above, support these anecdotal observations. Table 5 below shows an analysis of the data for three

[56] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/420106/expert-witnesses-fees-guidance.pdf (last visited 11 November 2015).

Crown Courts (Wood Green, Central Criminal Court and Manchester Minshull Street).[57] The table shows data relating to the period 1 September to 31 December 2014 in which each court was asked to record all live cases where the issue of the defendant's potential unfitness to plead had been raised. The courts were asked to complete a spreadsheet which traced the progress of the case and, where known, recorded the preparation of psychiatric and other expert reports.

Table 5: Snapshot data for all live cases between 1 September to 31 December 2014 inclusive in which unfitness to plead issue raised

Court Centre	No. of live cases where UTP raised	No. of those cases where UTP issue resolved within collection period	No. of UTP findings within collection period	No. of defendants found fit or UTP issue not pursued within collection period	No. of reports prepared where defendant found fit/UTP not pursued
Wood Green Crown Court	14	7	0	7	8
Central Criminal Court	34	19	0	19	31
Manchester Minshull Street Crown Court	20	7	0	7	11
Totals	68	33	0	33	50

92. Table 5 above clearly shows that unfitness to plead is raised as an issue very much more frequently than unfitness to plead findings are arrived at in the courts involved in the survey. Across the three courts, unfitness to plead had been raised as an issue in 68 cases which were live in the sample period. Of those 68 cases, in just under half of them (33) the issue of unfitness to plead had been resolved by the end of the period. In none of those 33 cases was a defendant found to be unfit to plead. Yet at least 50 expert reports, at a cost of between £90,000 and £135,000,[58] were prepared in those 33 cases.

Numbers of adjournments

93. It generally takes between 6 and 12 weeks for the preparation of an expert report on unfitness to plead. It can take longer, particularly where there are difficulties obtaining the defendant's medical records or gaining access to a defendant in custody. Reports are commonly prepared sequentially. The prosecution for example, will only begin the process of instructing their own expert once two reports have been received from the defence. It will be plain that these lengthy processes result in repeated adjournments and listings of the case for mention to consider progress.

Length of the hearing to determine unfitness to plead

94. The Court may, but is not obliged to, hear live evidence from experts. Hearing length for the determination of unfitness to plead, conducted before a judge sitting alone, can be very short. Cases going beyond a single day to decide this issue are unusual.[59]

The determination of facts procedure (section 4A of the CP(I)A)

Length of hearing to determine whether the defendant "did the act or made the omission"

95. At present, the fact-finding procedure considers only whether the defendant "did the act or made the omission" charged. The fact-finding hearing is therefore, inevitably, shorter than a trial would be for the same offence. This is particularly because, first, there is no requirement to prove that the defendant had the required mental state to have committed the offence, so no evidence needs to be put before the jury on that issue. Secondly, although they are entitled to do so, unfit defendants very

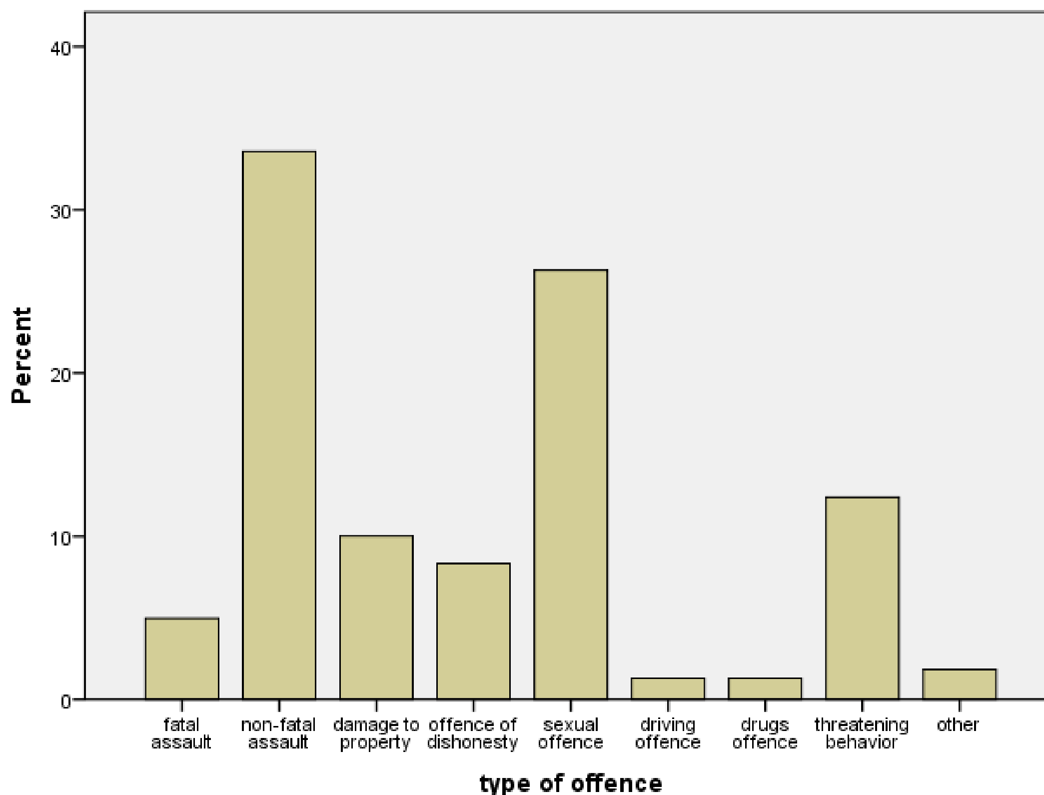
[57] These Crown Courts are selected here because they are significant Crown Court centres and because the data provided by those courts was full and appeared to be more robust than in other returns. It should be noted that the Central Criminal Court deals with proportionately more unfitness to plead cases than other court centres, predominantly because of the nature of the cases heard there, in particular the prevalence of very serious offences and homicides.
[58] Based on the minimum cost of £1,800 per psychiatric report prepared (London) and a maximum of £2,700 per psychiatric report prepared (non-London). See Table 2: Cost of expert reports, London and non-London, 2015 at para 85 above.
[59] Anecdotal observation.

rarely give evidence. In combination with the determination of unfitness, the two procedures rarely extend beyond the time that full trial for the offence would have required. Indeed many cases are uncontested, meaning that there is little or no challenge to the evidence relied on by the prosecution and the hearing is therefore substantially shorter than a normal trial.[60]

Type of offence

96. Table 6 below sets out the type of offences which predominate in cases where the defendant is found to be unfit to plead. Non-fatal offences against the person (including robbery, kidnap/child abduction, false imprisonment and child cruelty) remain the most common type of offence, accounting for 440 of the total cases (33.6%). This total of non-fatal violence offences is raised to 503 (38.5%) if rape allegations are included. The next most prominent category is sexual offences with a total of 344 (26.3%) of which 63 offences were rape. Thereafter, offences involving threatening behaviour and damage to property are most prevalent. Fatal offences account for 65 cases (5%).

Table 6: Main offence charged where defendant found unfit 2002-2014



Source: R D Mackay, Report Appendix A, p 13

Results of fact-finding hearings

97. Of the 1,308 cases between 2002 and 2014 where the defendant was found unfit to plead, Professor Mackay's research reveals that in 71.2% of cases the defendant was found to have done the act in relation to at least one of the charges. The defendant was found to have done the act in relation to all of the charges in 68.7% of the cases. The defendant was acquitted on all the charges in only 2.6% of the cases (it is unclear what the outcome was in 22.2% of cases).

98. Although it is currently mandatory to proceed to a fact-finding hearing once an accused has been found to be unfit to plead, there were some cases where no fact-finding hearing occurred. This arose for a variety of reasons, most commonly because the prosecution offered no evidence (in 17

[60] R D Mackay, B J Mitchell and L Howe, "A continued upturn in fitness to plead – more disability in relation to the trial under the 1991 Act" [2007] *Criminal Law Review* 530, 538: in the majority of cases examined the section 4A hearing did not appear to be contested.

cases), or the judge stayed the proceedings or ordered the indictment to lie on file, that is ordered that the charges should not be proceeded with without leave of the court (in 13 cases).

Disposals (section 5 of the CP(I)A)

99. The current range of disposals available following a finding that an individual is unfit to plead, but "did the act or made the omission charged" is as follows:[61]

(1) a hospital order (with or without restriction order): section 5(2)(a) of the CP(I)A 1964 and section 37(2) of the MHA 1983;

(2) a supervision order: section 5(2)(b) of the CP(I)A 1964; or

(3) an absolute discharge.

100. The breakdown for disposals imposed in unfitness cases between 2002 and 2014 is as follows:

Table 7: breakdown of disposals in unfitness cases 2002-2014

	Frequency	Percent	Cumulative Percent
none given	64	4.9	4.9
restriction order without limit of time	411	31.4	36.3
restriction order with limit of time	6	.5	36.8
hospital order	374	28.6	65.4
guardianship order	20	1.5	66.9
supervision (& treatment) order - 2 years	214	16.4	83.3
supervision (& treatment) order - under 2 years	43	3.3	86.5
absolute discharge	98	7.5	94.0
D died prior to disposal	3	.2	94.3
not known	52	4.0	98.2
defendant discharged	23	1.8	100.0
Total	1308	100.0	

Source: R D Mackay, Report Appendix A, p 24

Hospital orders

101. As can be seen from Table 7 above, between 2002 and 2014 hospital orders were imposed in 28.6% of cases where a disposal was recorded. The percentage of hospital orders remains level in comparison to the 2002 to 2008 study[62] but represents a rise in comparison to 1997 to 2001 levels when hospital orders were imposed in 24% of cases where a disposal was recorded.[63]

---

[61] The Domestic Violence Crime and Victims Act 2004 repealed s 3 of the Criminal Procedure (Insanity and Unfitness to Plead) Act 1991 (as of March 2005) which made available a guardianship order.

[62] R D Mackay, "Unfitness to Plead- Data on Formal Findings from 2002 to 2008" Appendix C to CP197.

[63] R D Mackay, B J Mitchell and L Howe, "A continued upturn in unfitness to plead - More disability in relation to the trial under the 1991 Act" [2007] *Criminal Law Review* 530, 544.

Restriction orders

102. A restriction order can only be imposed where a defendant is suitable for a hospital order, and where a restriction order is necessary to protect the public from serious harm (section 41 of the MHA 1983). A restriction order must be imposed where a defendant is found to have done the act of murder and is suitable for a hospital order (section 5(3) of the Criminal Procedure (Insanity) Act 1964). Such an order means that the defendant has to be treated in a hospital which is secure and cannot be released or allowed to leave from the hospital without the approval of the Secretary of State.

103. As can be seen from Table 7 above, restriction orders were imposed in 31.9% (however, see Professor Mackay's caveat concerning the reliability of the restriction order data: the Ministry of Justice data for restriction orders in the same period is 35.5%).[64] Overall the number of restriction orders has declined in recent years, falling from 38.9% in 1997 to 2001 and 36.2% in 2002 to 2007.[65]

104. As a result, the overall percentage of hospital-based disposals (including restriction orders) in the period 2002 to 2014 was 60.5%.

105. With regard to the hospital disposals, between 80 and 90% of these cases will be sent to medium or high secure hospitals depending on their risk profile, the remainder will be in low secure or locked rehab.[66] The unit cost per patient for secure services is as follows:

Table 8: Unit costs for secure services 2013

Security Type	Daily cost per bed	Annual equivalent cost per bed
Low secure	£420	£153,300
Medium secure	£483	£176,295
High secure (women's services)	£979	£357,335
High secure (mental health/psychosis)	£744	£271,560
High secure (learning disability)	£835	£304,775
High secure (personality disorder)	£795	£290,175

Source: Centre for Mental Health, *Briefing Note: Secure care Service* (2013)[67]

Supervision orders

106. As will be apparent from Table 7 above, supervision orders were made in 19.7% of cases where a disposal was recorded. This represents a rise in comparison to previous periods (17.9% in 1997 to 2001 and 15.7% in 2002 to 2008).[68] However, this equates to only approximately 20 supervision orders imposed per year under section 5 CP(I)A. These 20 orders are split between supervision providers, who can either be a social worker of the local authority, a probation officer, or a provider of probation services working in the local probation area.

107. Therefore, these orders are extremely unusual both within local authorities (of which there are 152 with social care responsibilities) and local probation service areas. There is no data available as to what costs are allocated in different local authorities or probation areas for supervising unfit offenders who are subject to supervision orders under the CP(I)A.

[64] R D Mackay, *Unfitness to Plead – Data on Formal Findings from 2002 to 2014,* Report Appendix A. See footnote 3 on p 2 for discussion as to the discrepancy identified and potential causes for it.

[65] "Unfitness to Plead- Data on Formal Findings from 2002 to 2008" CP197, Appendix C, p 222.

[66] Department of Health (2015, unpublished).

[67] http://www.centreformentalhealth.org.uk/secure-care-a-briefing-note (last visited 3 November 2015).

[68] R D Mackay, "Unfitness to Plead- Data on Formal Findings from 2002 to 2008" CP197, Appendix C, p 222.

108. We set out below the average unit costs of community orders with particular requirements so as to provide some indication of what a supervision order might cost:

Table 9: National average unit costs of community orders

Community order with supervision requirement (per case)	£1,033
Community order with mental health treatment requirement (per completion)	£2,200[69]
Community order with rehabilitation activity (per completion)	£854
Community order with activity requirement (per completion)	£1,262
Community order with programme requirement (per completion):	£6,388

Source: NOMS Planning Analysis Group, *Probation Trust Unit Costs* (7 January 2015, unpublished)

109. Table 7 above shows that in the majority of cases where supervision (and treatment) orders were imposed they were made for the maximum period of two years (214 cases). Supervision (and treatment) orders were made for less than two years in only 43 cases.

Absolute Discharges

110. As can be seen from Table 7 above, absolute discharges were imposed in 7.5% of the cases. This represents an increase on absolute discharge levels in earlier periods (standing at 3.6% in 1997 to 2001 and 6.3% in 2002 to 2008).[70]

MAPPA for unfit defendants

111. Under the current law, unfit defendants who have been found to have done the act of a specified offence (under schedule 15 to the Criminal Justice Act 2003) and who have received a hospital order (with or without restriction) or a guardianship order (although these are now no longer available for unfit defendants) fall within the provisions for Multi-Agency Public Protection Arrangements ("MAPPA"). MAPPA operate to protect the public from serious harm by sexual and violent offenders. It is a framework through which relevant agencies, including the police, probation, prison services and other agencies such as the local social services authority, local housing authority and local education authority, can exercise their statutory duties in a coordinated manner.[71]

112. There are three categories under MAPPA which deal with registered sexual offenders, violent offenders and other dangerous offenders respectively.[72] Within those categories offenders are risk assessed and placed under a level between one and three which dictates the degree of agency engagement required. Within the scheme's structure unfit offenders fall under category three with the level dependent on an assessment of the risk they pose. As can be seen from Table 10 below, 97.7% of offenders are subject to MAPPA at level 1. However, that level is not used for MAPPA defendants in Category 3.[73]

---

[69] Cost derived from an example of the cost of a Mental Health Treatment Requirement in Milton Keynes (probation costs with the added NHS funded treatment provision): Department of Health (2015, unpublished).

[70] "Unfitness to Plead- Data on Formal Findings from 2002 to 2008" CP197, Appendix C, p 222.

[71] For further information see NOMS*, MAPPA Guidance 2012: Version 4* (2012), https://www.justice.gov.uk/downloads/offenders/mappa/mappa-guidance-2012-part1.pdf (last visited 11 November 2015).

[72] There is an ongoing review of MAPPA eligibility commissioned by the Responsible Authority National Steering Group. It is due to report to Ministers (Ministry of Justice and Home Office) by the end of March 2016.

[73] Ministry of Justice, *Multi-Agency Public Protection Arrangements Annual Report 2014/15* (October 2015), p 7.

Table 10: Number of offenders supervised by category and management level

Management level	Category 1 Registered sexual offenders	Category 2 Violent offenders	Category 3 Other dangerous offenders	Total number of offenders supervised
Level 1	48,784	17,857	-	66,641
Level 2	645	582	225	1,452
Level 3	37	54	30	121
Total	49,466	18,493	255	68,214

Source: Ministry of Justice, *Multi-Agency Public Protection Arrangements Annual Report 2014/15*, p 8 (October 2015)[74]

113. The total number of offenders supervised, as detailed in Table 10 above, includes those supervised in custody, in the community, in hospital and those obliged to report to the police on a regular basis or similar who are not managed by probation. For those supervised in the community, the guideline costs to NOMS of MAPPA supervision (not including other supervision costs and based on the pre-Transforming Rehabilitation operating model) are as follows:

Table 11: Guideline cost of MAPPA supervision

Management level	Guideline cost of MAPPA supervision (per case per year)[75]
Level 1	£259
Level 2	£1,661
Level 3	£3,692

Source: NOMS Planning Analysis Group, *Probation Trust Unit Costs* (7 January 2015, unpublished)

Appeals

114. There are proportionately many more appeals in relation to unfitness to plead, than in relation to prosecutions which result in full trial.[76] These appeals predominantly address issues arising as a result of the uncertainty surrounding the division of the external and fault elements for many common offences, and the difficulty establishing what constitutes objective evidence for the purpose of allowing an unfit defendant to rely on a defence at the section 4A CP(I)A hearing.

115. The total costs per day in the Court of Appeal are estimated to be £15,000.[77]

Remission and resumption of the prosecution

116. Cases where a previously unfit defendant has recovered fitness to plead and has been remitted for trial by the Secretary of State are rare. The total number of cases remitted for trial per year in the last five years across England and Wales is as follows:

Table 12: Number of cases remitted for trial per year, 2010 to 2014

	2010	2011	2012	2013	2014
Total number of cases remitted for trial (per year)	5 or fewer[78]	5 or fewer	10	5 or fewer	9

Source: Mental Health Casework Section, Ministry of Justice (unpublished).

---

[74] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/471408/mappa-annual-report-2014-15.pdf (last visited 3 November 2015).

[75] Note this is not the total cost of supervising these offenders, but only the cost of the MAPPA-related activities. The changes implemented by the "Transforming Rehabilitation" project mean that these guideline costs may need refreshing.

[76] See for example the conjoined appeal of *Wells and Others* [2015] EWCA Crim 2 which dealt with four appeals arising out of proceedings at first instance in late 2013 or 2014. Three other cases heard at the same time resulted in separate judgments: *Chinegwundoh* [2015] EWCA Crim 109; *Sultan* [2014] EWCA Crim 2648; and *Ahmed* [2014] EWCA Crim 2647. Considering that, as set out above, there are only approximately 100 unfitness to plead cases per year, the proportion of unfitness cases that have recently resulted in appeal can be seen to be substantially higher than in respect of cases which proceed to full trial.

[77] Estimate from IT Unit, Criminal Appeal Office and Administrative Court Office (January 2015, unpublished). Staff and judicial costs alone per day are estimated to be £3,100, on 2014/15 prices, rounded to the nearest £100: Justice Statistics Analytical Services, Ministry of Justice (2015, unpublished).

[78] Where the number of cases is 5 or fewer, for data protection purposes the Ministry of Justice are unable to release the exact figure.

(3) Statistical data and costing information for cases involving participation issues in the magistrates' courts (including youth courts)

Contextual information and statistics

117. In the 12 months ending March 2015 the magistrates' courts dealt with just over 94% of all criminal prosecutions. In this period, 1,383,443 defendants were proceeded against in the magistrates' courts, whilst 86,949 defendants were sent to the Crown Court for trial.[79] A considerable proportion of all criminal offences dealt with in the magistrates' courts are traffic offences. In the 12 months ending March 2015, 551,100 defendants were proceeded against at the magistrates' courts for summary motoring offences.[80]

Use of mental health disposals on conviction in the magistrates' and youth courts

118. Considering the numbers of defendants proceeded against in the magistrates' courts, mental health disposals are very rarely imposed on conviction.

Table 13: Adults receiving mental health disposals on conviction or referral to the Crown Court in the magistrates' courts, 2010 to 2014

	2010	2011	2012	2013	2014
Committal to Crown Court for Restriction Order (under section 43 or 44 of the Mental Health Act 1983)	10	6	-	-	7
Hospital Order (under section 37(1) of the Mental Health Act 1983)	179	146	146	180	149
Guardianship Order (under section 37(1) of the Mental Health Act 1983)	10	7	5	3	4

Source: Justice Statistics Analytical Services, Ministry of Justice (2015, unpublished)[81]

Table 14: Juveniles receiving mental health disposals on conviction or referral to the Crown Court in the magistrates' courts, 2010 to 2014

	2010	2011	2012	2013	2014
Youth rehabilitation order with mental health treatment requirement	1	-	-	-	-
Committal to Crown Court for Restriction Order (under section 43 or 44 of the Mental Health Act 1983)	2	-	-	-	-
Hospital Order (under section 37(1) of the Mental Health Act 1983)	19	15	8	8	12
Guardianship Order (under section 37(1) of the Mental Health Act 1983)	-	-	1	-	-

Source: Justice Statistics Analytical Services, Ministry of Justice (2015, unpublished).

[79] Ministry of Justice, *Criminal Justice Statistics Quarterly Update to March 2015: England and Wales: Ministry of Justice Statistics bulletin* (August 2015), p 7, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/453309/criminal-justice-statistics-march-2015.pdf.pdf (last visited 5 November 2015).

[80] Ministry of Justice, *Criminal Justice System Statistics Quarterly: March 2015*, Overview Tables, Table Q3.2a, https://www.gov.uk/government/statistics/criminal-justice-system-statistics-quarterly-march-2015 (last visited 5 November 2015).

[81] The statistics relate to persons for whom these offences were the principal offences for which they were dealt with. When a defendant has been found guilty of two or more offences the principal offence is the offence for which the heaviest penalty is imposed. Where the same disposal is imposed for two or more offences, the offence selected is the offence for which the statutory maximum penalty is the most severe.

Use of procedures for addressing participation difficulties in the magistrates' and youth courts

Use of section 37(3) of the Mental Health Act 1983

119. The current unfitness to plead procedures under the Criminal Procedure (Insanity) Act 1964 are not available in the magistrates' and youth courts. As discussed at paragraph 2424 above, the only statutory procedure to address issues connected with effective participation problems is that available under section 37(3) of the Mental Health Act 1983. This provides for a hospital order or guardianship order to be imposed without convicting the defendant.

120. Section 37(3) of the MHA applies in the youth court as well as the adult magistrates' court, although a guardianship order is only available for defendants who have reached the age of 16.

121. As with mental health disposals on conviction in the magistrates' and youth courts, the powers under section 37(3) of the MHA are very rarely used. Indeed Ministry of Justice statistics record that between 2010 and 2014 no disposals were imposed on defendants under section 37(3) in the magistrates' court (including the youth court).[82]

Lack of formal data on cases stayed on the basis of the defendant's inability to participate effectively in the proceedings

122. The Ministry of Justice do not collect formal data on the number of cases which are stayed on the basis of the defendant's inability to participate effectively in the proceedings. Although we know from consultees and reported cases that there are instances where this exceptional approach is taken by the courts.

Further investigation to identify frequency with which effective participation issues are raised

123. As part of our data collection exercise, conducted with the help of HMCTS, we asked magistrates' and youth courts in the Greater London area to collect data on every case listed within a five month period (September 2014 to January 2015 inclusive) in which issues relating to effective participation were raised, or where proceeding under section 37(3) of the Mental Health Act 1983 was considered. As discussed at paragraph 80 above, the data collected will inevitably be incomplete given the throughput of those courts and the fact that the accuracy of the reporting depends on the engagement of the individual nominated to gather the data, and his or her understanding of the issues. Nonetheless, we consider that the data gives us an idea of the frequency with which issues of this sort are raised in the magistrates' and youth courts.

124. Returns received reveal 60 cases in which issues relating to effective participation were raised, or where proceeding under section 37(3) of the Mental Health Act 1983 was considered, within the five month period across the whole of Greater London. In none of those cases was an application to stay made within the five month period. We were not notified of any findings of fact being made under section 37(3) of the MHA, nor any disposals ordered under that section during the period. However, in 11 cases a psychiatrist (or other registered medical practitioner) had been instructed or had prepared a report on the defendant. In six further cases the reporting indicates the assessment of the defendant by forensic mental health practitioners (generally operating as part of court liaison and diversion schemes).

Comparison of sitting costs in the Crown Court and magistrates' (including youth) courts

125. The cost of proceeding against a defendant in the magistrates' (including youth) courts is much lower than proceeding against a defendant in the Crown Court. The average cost per day (staff and judicial costs only) for a magistrates' court sitting is approximately £1,200 (2014/15 prices, rounded to the nearest £100). By contrast the average cost of a sitting day in the Crown Court (staff and judicial costs only) is approximately £1,500.[83]

---

[82] Justice Statistics Analytical Services, Ministry of Justice (2015, unpublished).

[83] Justice Statistics Analytical Services, Ministry of Justice (2015, unpublished).

(4) Statistical data and costing information regarding the use of defendant intermediaries

Funding for non-registered defendant intermediaries

126. As set out at paragraph 57 above, an ad hoc system has evolved whereby judges, using their inherent jurisdiction, grant unregistered intermediaries for defendants who then operate outside the cost and conduct regulated witness scheme. Until October 2013, funds for defendant intermediaries came from HMCTS through the local court budgets. Initial assessments and reports by defendant intermediaries were funded by the Legal Services Commission (now the Legal Aid Agency). Since November 2013 payments have come directly from central funds. However, the Ministry of Justice do not keep total figures for the spend in this regard.

Demand for defendant intermediaries

127. Between June 2011 and May 2012, 203 applications for prior authority for a defendant intermediary were submitted to the Legal Services Commission. Of these, 147 were granted, 31 were rejected on the basis that they were for court appearances and would be paid from HMCTS, and 25 were rejected requesting more information.[84] Professor Penny Cooper and David Wurtzel's work confirms anecdotal observations, and reports from intermediaries,[85] that the number of applications for intermediary assistance for defendants is rising steadily over time.

128. Figures from the leading providers of defendant intermediaries confirm this rapid rise in demand.[86] Prevalence of applications, however, is notably concentrated in particular areas. Unsurprisingly, those courts which have effective liaison and diversion schemes operating within them produced the highest number of requests for intermediaries, including Wood Green Crown Court and Newcastle Crown Court. With the national roll-out of NHS England's liaison and diversion schemes on track for completion in 2017, there is a strong likelihood that these figures are set to increase at an ever faster rate. Returns from our data collection exercise demonstrate much stronger judicial support in courts such as Wood Green Crown Court, Snaresbrook Crown Court and the Central Criminal Court, where liaison and diversion programmes are integrated in the court.

Current spend on defendant intermediaries

129. In the absence of statistics from the Ministry of Justice we can only estimate the current spend on defendant intermediaries, using figures compiled by Communicourt, the leading provider of adult defendant intermediaries. Their statistical data from August 2014 reveals that at that time they were receiving on average 60 referrals per month. The average number of sitting days for which Communicourt provided a defendant intermediary was 4.2 days. At that time they charged a minimum of £495 per day, with travel and overnight accommodation a separate cost. We understand that Communicourt has experienced a steady rise in demand for defendant intermediaries since that time.

130. By contrast, the Witness Intermediary Scheme pays registered intermediaries an estimated £252 per day (based on £36[87] per hour and attendance on the defendant of 7 hours in the day, excluding the costs of travel, subsistence and overnight stays). There is also a large variance in the travel and accommodation costs associated with contracting defendant intermediaries through private providers and booking registered intermediaries through the cost-regulated Witness Intermediary Scheme.

Supply of Registered Intermediaries and the stretching of the system

131. In January 2014 there were 72 active Registered Intermediaries who were available to take on new witness work. By June 2014 this figure had dropped to 53, although more Registered Intermediaries are currently being trained on behalf of the Ministry of Justice.[88] The number of active Registered Intermediaries fluctuates daily as they take on more cases or cases are cancelled. In the same year,

---

[84] P Cooper and D Wurtzel, "A day late and a dollar short: in search of an intermediary scheme for vulnerable defendants in England and Wales" (2013) *Criminal Law Review* 4, 16.
[85] See P Cooper, *Highs and Lows: The 4th Intermediary Survey* (July 2014), p 22, https://www.city.ac.uk/__data/assets/pdf_file/0011/280496/INTERMEDIARY-SURVEY-REPORT-5-July-2015.pdf (last visited 11 November 2014).
[86] See Communicourt, *Report 1 – "Number Crunching": Understanding the vulnerable defendant population* (August 2014).
[87] CPS, *Special Measures, Annex F: Rates of remunerations for Registered intermediaries* http://www.cps.gov.uk/legal/s_to_u/special_measures/index.html#a06 (last visited 3 November 2015).

there was an average of 273 requests for Registered Intermediaries per month, with the last four months of the year seeing over 300 requests each month, and averaging at 322.5 requests. The total number of applications made for intermediaries per year under the Witness Intermediary Scheme in 2014 was 3,334[89] a figure that far outstretches the capacity of the current supply of Registered Intermediaries.

132. Many Registered Intermediaries work with defendants as well as work for witnesses, in separate cases. As the demand for intermediaries to support defendants rises, this also increases pressure on the Witness Intermediary Scheme.

(5) Key Stakeholders

133. The key stakeholders that will be affected by these reforms are:

1) Ministry of Justice
2) Department of Health
3) NHS England (in relation to the Liaison and Diversion Pilot Scheme)
4) Local authorities
5) Crown Prosecution Service (CPS)
6) HM Courts and Tribunals Service (HMCTS)
7) Legal Aid Agency (LAA)
8) National Offender Management Service (NOMS)
    i. Prisons
    ii. Probation
9) Judicial College
10) Legal practitioners
11) Psychiatrists and registered medical practitioners
12) Registered psychologists
13) Intermediaries
14) Vulnerable defendants, complainants, witnesses and the public who will be affected by these reforms more generally

[88] Ministry of Justice (2014, unpublished) as cited in P Cooper, *Highs and Lows: The 4th Intermediary Study* (July 2014), p 23. The number of active Registered Intermediaries for 2014 ranged between 72 and 94 (Victim and Criminal Proceedings Policy Unit, Ministry of Justice (2015, unpublished)).
[89] Victim and Criminal Proceedings Policy Unit, Ministry of Justice (2015, unpublished). Note, a request for an intermediary does not necessarily result in an intermediary assisting in a trial.

Description of options considered:

134. Option 0 represents the current position. Options 1 to 5 represent the possible ways in which our recommendations for reform might be implemented. Parts a) (Crown Court unfitness to plead reforms) and c) (enhanced trial adjustments for defendants with participation difficulties) are self-contained and can stand alone. Part b) (extending capacity for trial procedures to the magistrates' and youth courts) would be most effectively implemented in conjunction with parts a) and c). However, part b) can easily be implemented with part a) alone. We prefer option 5, incorporating parts a), b) and c), because this presents the most effective strategy for achieving our policy aims.

135. The final report contains many recommendations for reform. This impact assessment focuses on the key recommendations which give rise to costs or benefits. Of these, we have sought to monetise reform options where possible.

Option 0:

Do nothing. The key features and associated problems of the current position are summarised at paragraphs 13 to 61 above.

Option 1:

a) **Reform the test for unfitness to plead and all related procedures**

Option 2:

a) **Reform the test for unfitness to plead and all related procedures; and**

b) **Extend capacity for trial procedures to the magistrates' (including youth) courts**

Option 3:

c) **Enhance trial adjustments for defendants with participation difficulties**

Option 4:

a) **Reform the test for unfitness to plead and all related procedures; and**

c) **Enhance trial adjustments for defendants with participation difficulties**

Option 5 (preferred option):

a) **Reform the test for unfitness to plead and all related procedures;**

b) **Extend capacity for trial procedures to the magistrates' (including youth) courts; and**

c) **Enhance trial adjustments for defendants with participation difficulties**

136. We now address in turn each of the three elements a) to c) which comprise the options identified above:

a) Reform the test for unfitness to plead and all related procedures

The legal test

A test of capacity for effective participation in a trial

137. 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

138. 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

139. 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 CJS on the part of the public and those affected by the offence.

A separate test of ability to plead guilty

140. 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

141. 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.

Assessing the defendant

Improving identification of defendants with participation difficulties

142. 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.

Relaxing the evidential requirement

143. 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.

144. 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

145. 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

146. 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

147. 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[90] 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[91] from custody, which can make it difficult to achieve continuity of treatment for the defendant and can be more time consuming and costly.[92]

The procedure for the individual who lacks capacity for trial

A discretion not to proceed to an alternative finding hearing (section 4A CP(I)A)

148. 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

[90] Available only in respect of a defendant who would otherwise be remanded in custody.
[91] 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.
[92] 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”.

introducing the flexibility to divert an individual out of the criminal justice process following a finding of lack of capacity is critically important.

149. 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.

150. 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

151. 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.

152. 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.

153. 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".

Disposals

Clear responsibility for supervising individuals who lack capacity

154. We recommend the removal of the option for probation officers, or providers of probation services, to supervise adults subject to an adverse finding.[93] We do so, first, because our consultees made clear the inappropriateness of probation providers supervising individuals who have not been convicted of an offence. Secondly, we consider that social workers within local authorities are better placed to co-ordinate the socially supportive and health elements of the order than probation providers. Finally, we take note of the changes within probation services referred to above.[94]

155. 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.[95] 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

[93] 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.

[94] Para 43.

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

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

156. 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

157. 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

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

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

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

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

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

Extending the maximum period for the order

159. We also propose that the maximum length of the order be extended from two years to three years,[96] providing greater flexibility for the judge when imposing the disposal and extending the time period within which the individual can receive constructive support in the community.

Multi-Agency Public Protection Arrangements ("MAPPA")

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

Appeals

A power to order a rehearing

161. 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.

[96] This would bring it into line with community orders imposed on conviction for example a Community Order (CJA 2003, s 177), a Youth Rehabilitation Order and a Youth Rehabilitation Order with Intensive Supervision and Surveillance (both under Criminal Justice and Immigration Act 2008, s 1) are all orders with a three year duration.

Appeal rights exercisable by legal representatives

162. 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

163. 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.

Resumption of the prosecution

Widening prosecution power to resume prosecution

164. 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[97] 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

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

Addressing procedural difficulties

166. 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.

167. 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.

168. 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.

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

b) Extend capacity for trial procedures to the magistrates' (including youth) courts

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

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

169. 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.

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

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

171. 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

172. 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

173. 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,[98] 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

174. 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.

c) Enhance trial adjustments for defendants with participation difficulties.

Introducing a statutory entitlement to assistance from an intermediary

175. 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

176. 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

177. 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.

---

[98] 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.

Costs and Benefit Analysis

178. This Impact Assessment identifies both monetised and non-monetised impacts on individuals, groups and businesses in England and Wales, with the aim of understanding what the overall impact to society might be from implementing these options. The costs and benefits of each option are compared to the do nothing option. Impact assessments place a strong emphasis on valuing the costs and benefits in monetary terms (including estimating the value of goods and services that are not traded). However, there are substantial benefits of our proposed reforms which are impossible to quantify sensibly in monetary terms. For example:
    (1) the positive benefits of updating the language of the test, so that it reflects modern approaches to disability, and so that it is accessible to those affected by it; and
    (2) the savings to the CJS which arise from identifying at an early stage participation difficulties in a young defendant, who might thereby be able to benefit from a supportive disposal.
179. When calculating the net present value ("NPV") for the impact assessment we have used a time frame of ten years, with the present being year 0. We have assumed that the transitional costs and benefits occur in years 0, 1 and 2, and ongoing costs and benefits accrue in year 1 to 10. We have used a discount rate of 3.5%, in accordance with HM Treasury guidance. Unless stated all figures are in 2014/15 prices, and have been uprated using the GDP deflator.
180. The aim of the document is to arrive at an appreciation of the overall impact to society of implementing any one of the proposed policy options that we consider. The costs and benefits of each option are compared to the "do-nothing" option 0.

Challenges for quantifying costs and benefits: lack of data

181. The accurate estimation of costs and benefits has been particularly challenging in the context of unfitness to plead, where there are so few cases each year, and where current data collection by the Ministry of Justice and other departmental bodies, is minimal. We have sought to address this difficulty by conducting our own data collection exercise (see paragraph 78 and following above). However, it remains difficult to assess even the current cost of the provision for unfit defendants and those who cannot participate.

Option 0: Do nothing (base case)

182. The "do-nothing" option is compared against itself and therefore its costs and benefits are necessarily zero.
183. However, were option 0 to be followed, the numerous problems outlined above in the current law relating to unfitness to plead will continue. The current arrangements for addressing those defendants who are unable to participate effectively result in wasted costs in a number of areas. In particular there are unnecessary costs which result from appeals arising out of the piece-meal development of the law, the increasingly stretched and unregulated system for defendant intermediaries and the absence of adequate provision for defendants with participation difficulties in the magistrates' courts.

Option 5 (preferred option):

a) Reform the test for unfitness to plead and all related procedures;

b) Extend capacity for trial procedures to the magistrates' (including youth) courts; and

c) Enhance trial adjustments for defendants with participation difficulties.

a) Reform the test for unfitness to plead and all related procedures

Costs

Transitional costs

Administrative cost of parliamentary procedure

184. The statutory reformulation of the test will result in a small non-monetisable cost for the Parliamentary procedure involved in placing the legal test and effective participation framework on a statutory footing.

Training for members of the judiciary

185. The Judicial College consider that there will be only minor costs associated with specialist training for members of the judiciary in relation to the recommended effective participation test and procedures, since it can be incorporated into their upcoming training arrangements. For legal practitioners, who are required to update their professional skills as part of their Continuing Professional Development requirements, the costs should not be considerable.

Ongoing costs

Increased number of individuals found to lack capacity for trial

186. The reframing of the test as one of capacity for effective participation incorporating decision-making capacity will, we anticipate, result in at most a doubling of the number of individuals found to lack capacity in the Crown Court. This would represent, as a high estimate, an increase from approximately 100 individuals per year to 200 individuals per year. Our best estimate, as set out in Table 15 below, is an increase of 80 individuals found to lack capacity in the Crown Court representing an increase from approximately 100 individuals per year to 180 individuals per year.

187. It is extremely difficult to assess how many individuals might be caught by the proposed test, but we take into account the following in reaching that outside estimate of a doubling of numbers:

    (1) Some clinicians already interpret the current *Pritchard* test to include capacity to participate effectively and decision-making capacity.

    (2) The proposed reforms emphasise facilitation of full trial wherever practicable and fair.

    (3) The reformed test is to be applied in context, so that where proceedings are less demanding of a defendant, the threshold for lack of capacity is higher.

    (4) The reformed test does not include determinative factors, but requires the judge to take a view “in the round” of a defendant’s capacity to participate effectively in the proceedings he or she faces.

188. The most substantial cost area in relation to defendants found to be unfit to plead, or to lack capacity under our recommendations, is the expense of the preparation of expert clinical reports. The Law Commission’s data collection exercise reveals that there are already many more cases in which reports to address unfitness are prepared than ever lead to a section 4 CP(I)A formal fitness determination and fewer still that result in the defendant being found unfit.

189. What those figures suggest is that legal representatives initiate an enquiry into the fitness to plead of their client, not on the basis of a minute analysis of the test itself, but rather as a result of difficulty that they have in taking instructions or other concerns that they have as to their client’s ability to engage with proceedings. This observation is not intended to criticise legal representatives who rightly must follow up on concerns if they arise. However, as a result of this approach we do not consider our recommendation to broaden the test will result in a considerable rise in the number of reports ordered to assess the capacity of defendants. Rather, we consider that the increased numbers of defendants found to lack capacity for trial will predominantly come from amongst those defendants who are already the subject of unfitness assessment but not found unfit to plead under the current law. In most of these cases our data collection suggests that one, not infrequently two, reports are prepared before the assessment is concluded. We therefore consider it reasonable to

suggest that there would be only a very modest number of cases in which an additional report or reports would be required.

190. We estimate the cost of this increase in reports required using the average cost of preparation of an expert report of £2,250 (taken as the average of the cost of preparing an expert report set out at paragraph 85 above) (this cost would be borne by the Legal Aid Agency).

Table 15: Estimated increase in costs of expert reports arising out of amendments to the legal test per year

	Low estimate	Best estimate	High estimate
Increased number of cases	60	80	100
Number of additional reports required	60	80	100
Total cost (using average £2,250)	**£135,000**	**£180,000**	**£225,000**

191. Our best estimate of an increase in costs in relation to the assessment of the capacity of defendants of £180,000 is marginal when considered in the context of the annual spend of the Legal Aid Agency on expert psychological and psychiatric reports, as set out in Table 4 at paragraph 87 above. The best estimate of £180,000 represents an increase of 1.9% on 2014 to 2015 figures (£9,316,000).

Marginal increase in custodial sentences arising from capacity to plead guilty

192. There is a risk that enabling defendants to plead guilty, who would otherwise be found to be lacking in capacity for trial, will result in greater numbers of custodial sentences. Research conducted into the abilities of defendants found unfit to plead reveals that approaching one third of those individuals found to be unfit to plead, whilst lacking other abilities, were able to understand plea.[99] This suggests, and psychiatrists confirm,[100] that there are a reasonable number of individuals who might be able to enter a plea in such cases. However, the actual numbers likely to be considered by a judge to be safely able to enter a plea, and willing to do so, might be anticipated to be substantially lower. We consider 15% to be a generous estimate of those individuals lacking capacity for trial who might be found to have capacity to enter a plea and go on to plead guilty. This would amount to 30 individuals per year (based on our estimate of 200 individuals per year found to lack capacity).

193. For individuals who have capacity for trial, of those who plead guilty, approximately half receive a custodial sentence.[101] We consider that the proportion of custodial sentences would be substantially lower amongst vulnerable defendants who have pleaded guilty but otherwise lack capacity for trial. We consider it reasonable to estimate that one third of the 30 estimated individuals, namely 10 individuals, might receive a custodial sentence under our proposed reforms.

194. Given the low numbers, the fact that these individuals would have received some form of disposal or sentence in any event, and since it is not possible to predict with any accuracy what length of term might be imposed, we consider that it is not possible to quantify this cost as anything other than marginal in the circumstances.

Encouraging postponement of the determination of capacity where appropriate

195. There is a marginal cost associated with legislative provisions encouraging the court to postpone the determination of capacity to enable a defendant to recover or gain capacity for trial. Since the clinical experts will be required to include in their initial report an assessment of the defendant's ability to recover or gain capacity within a reasonable time period, there should not be substantial initial associated expert costs.

[99] R D Mackay, B J Mitchell and L Howe, "A continued upturn in unfitness to plead - More disability in relation to the trial under the 1991 Act" [2007] *Criminal Law Review* 530, 536.
[100] Discussed further in our Report at para 3.139 and following.
[101] In the 12 months ending March 2015 77,403 defendants entered guilty pleas in the Crown Court resulting in 40,676 custodial sentences (Ministry of Justice, *Criminal Justice Statistics Quarterly Update to March 2015: England and Wales: Ministry of Justice Statistics bulletin* (13 August 2015), p 7.

196. To an extent postponement of this sort is already occurring. However, we anticipate that introducing a statutory requirement to consider adjournment will result in a marginal increase in the number of cases where postponement is pursued, and addendum reports required.

197. We calculate the average cost of an addendum report as £562.50 (using an average of the figures in Table 3 at paragraph 86 above). We estimate that postponement may be appropriate, and two addendum reports required in 50 cases per year as a best estimate (28% of the estimated 180 cases per year in which an individual is found to lack capacity[102]). (This cost would be borne by the Legal Aid Agency).

Table 16: Estimated annual increase in costs per year from addendum expert reports arising out of introduction of duty to consider postponement

	Low estimate	Best estimate	High estimate
Increased number of cases	30	50	70
Number of additional reports required	60	100	140
Total cost (using average £562.50)	**£33,750**	**£56,250**	**£78,750**

198. However, where postponement is pursued and the defendant is able to recover capacity, the benefit in non-monetisable terms (discussed below at paragraph 227) far outweighs, in our view, the likely marginal cost of the process. In addition, where postponement for recovery of capacity prevents the alternative finding procedure and disposal being proceeded with, and then shortly after that resumption of the prosecution on recovery, substantial cost savings will follow, since a second jury process will have been avoided (discussed below at paragraph 228).

Table 17: Estimated annual increase in costs from both expert reports arising out of amendments to the legal test (Table 15 above) and from addendum reports arising out of introduction of duty to consider postponement (Table 16 above)

	Low estimate	Best estimate	High estimate
Total cost from Table 15	£135,000	£180,000	£225,000
Total cost from Table 16	£33,750	£56,250	£78,750
Combined total cost of Tables 15 and 16	**£168,750**	**£236,250**	**£303,750**

Marginal increase in court time arising out of changes to alternative finding procedure

199. The extension of the matters to be proved by the prosecution at the fact-finding stage to all elements of the offence is likely to marginally increase the average length of the fact-finding hearing, called the alternative finding procedure under our recommendations. The alternative finding procedure will operate in a manner closer to full trial than the current section 4A procedure. We anticipate that there will be more contested hearings under our recommendations. However, we consider the increase in court time to be marginal because in the majority of cases the defendant will still be unable to give evidence.

200. Our best estimate is that on average the extension of the matters to be proved by the prosecution to all elements of the offence will result in a half-day increase in court time (cost borne by HMCTS).

[102] See para 186 above.

Table 18: Estimated annual increase in court time costs associated with extension of matters to be proved by the prosecution

	Low estimate	Best estimate	High estimate
Total number of cases of lack of capacity	160	180	200
Total number of cases where alternative finding procedure proceeds (allowing for discretion to divert)	120	130	140
Increased length of alternative finding hearing	½ day	½ day	½ day
Increase in number of court sitting days (judge and jury)	60	65	70
Cost (based on cost of sitting day in the Crown Court)[103]	**£90,000**	**£97,500**	**£105,000**

201. We consider that these costs will be offset by more substantial savings in court time, set out below, in particular savings associated with the discretion to decline to proceed to an alternative finding procedure.

Increased number and cost of supervision orders

202. Inevitably our recommendations to increase the management powers of supervision orders and to introduce constructive elements will increase the cost of a supervision order. We provide the following representative examples. Costings are based on NOMS costings for community orders set out at paragraph 108 above. (Note: NOMS community orders are for a term up to three years, as are our recommended enhanced supervision orders):

Low-level supervision order:

> **Example 1** A defendant, F (autism spectrum condition, living at home with supportive family, index allegation: possession of an offensive weapon), receives a three year supervision order.
>
> Estimated cost over the term of the order: **£1,033** (based on cost of community order with supervision requirement at paragraph 108 above).

Mid-level supervision order:

> **Example 2** A defendant, G (moderate learning disability, index allegation robbery), receives a two year supervision order with prohibited activity and anger management course.
>
> Estimated cost over the term of order: supervision £1,033 + programme £6,388 = **£7,421** (based on cost of community order with supervision requirement and a community order with programme requirement at paragraph 108 above).

High-level supervision order:

> **Example 3** A defendant, H (moderate learning disability, paranoid schizophrenia, previously homeless, index allegation: sexual assault), receives a three year supervision order with medical treatment requirement, constructive requirement (supervising officer supports the defendant to get a place in sheltered accommodation and requires his attendance on a course addressing sexually harmful behaviour), prohibited activity requirement, and review by the court.
>
> Estimated cost over the term of the order: supervision £1,033 + treatment £2,200 + programme £6,388 + rehabilitation/social support approximately £5,000 = **£15,000**[104] (as above using costings for community orders with supervision requirement, mental health treatment requirement, and programme requirement at paragraph 108 above, with an estimated uplift to account for rehabilitation/social support).

---

[103] Average staff and judicial cost per sitting day in the Crown Court: 2014-15: £1,500 (rounded to nearest £100). Note this does not include the cost of a jury for which we have been unable to obtain costs. Justice Statistics Analytical Services, Ministry of Justice (2015, unpublished).

[104] Rounded to the nearest £500.

203. At present 20 supervision orders are made per year across the jurisdiction. We anticipate that the number of supervision orders made in the Crown Court under our recommendations would be at most in the region of 60 per year. This high estimate is arrived at by factoring in our anticipation that, at most, numbers found to lack capacity will double in the Crown Court to 200 individuals per year. However, we have also included an uplift from 40 to 60 orders because we anticipate that, were the orders to be made more comprehensive and assertive as we recommend, then they would be more attractive to judges, particularly where otherwise a hospital order might have been considered the only option capable of providing sufficient public protection.

204. We estimate that 20 of those orders would be at the lowest level of additional cost (as in the case of F above), 20 of the orders would be at the mid-level (as in the case of G above) and 20 would be at the higher level (as in the case of H above).

Table 19: Estimated cost of supervision orders in the Crown Court per year

	Low estimate	Best estimate	High estimate
Number of supervision orders[105]	48	54	60
Number of low-level orders (cost)	16 (£16,528)	18 (£18,594)	20 (£20,660)
Number of mid-level orders (cost)	16 (£118,736)	18 (£133,578)	20 (£148,420)
Number of high-level orders (cost)	16 (£240,000)	18 (£270,000)	20 (£300,000)
Total cost[106]	**£375,260**	**£422,170**	**£469,080**

205. We therefore estimate the maximum total cost per year of 60 supervision orders to be: (20 x £1,033) + (20 x £7,421) + (20 x £15,000). Total cost = £20,660 + £148,420 + £300,000, = £469,080.

206. Although this represents a substantial cost, it is important to bear in mind that the majority of our high estimate of 60 individuals would be likely to be the subject of some sort of order or sentence at present. 20 of those individuals would be subject to a supervision order under the current provisions. The majority of the remaining 40 would otherwise be likely to be convicted at trial or following a plea of guilty, resulting in community orders of comparable cost, or more expensive custodial orders. A smaller proportion might receive conditional or absolute discharges or fines, whilst some may be acquitted, or the subject of stays or discontinuance. Taking these varying outcome options into account, we consider that the increased cost of enhanced supervision orders is likely to be balanced by the savings made because those individuals subject to enhanced supervision orders will not have to be dealt with by way of sentence. We therefore consider that the aggregate cost of enhancing supervision orders is likely to be marginal.

207. Currently the cost of supervision orders is borne by NOMS (probation services) and local authorities, either of which can provide supervision for the defendant under the current order. Under our recommendations, local authorities will be the only bodies with responsibility for supervising the orders. Thus there is a transference of costs, on aggregate, to local authorities.[107]

208. In order to take on this role, supervising officers will require some additional training. We acknowledge that this "new burden" would require resources. It has not, however, been possible to assess the cost of such training.

209. Although this results in a cost increase to local authorities in supervising these additional individuals, we consider that it is significant to note that many such individuals will already be the subject of local authority intervention in any event, and so these additional costs should not, in their entirety, be considered to be newly accruing liabilities.

---

[105] Our high estimate of 60 supervision orders per year represents 30% of our high estimate of 200 individuals per year anticipated to be found to lack capacity under our recommendations. The low and best estimates of the number of supervision orders anticipated have been arrived at by applying 30% to our low (160) and best (180) estimates of individuals per year anticipated to be found to lack capacity under our recommendations.

[106] Rounded to the nearest 10.

[107] This transference of costs to local authorities may fall under the "new burdens doctrine", the Department for Communities and Local Government agreed with this in meeting with them on 1 October 2015. For further information see Department for Communities and Local Government, *New burdens doctrine: Guidance for government departments* (June 2011), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/5960/1926282.pdf (last visited 11 November 2015).

Cost of introducing sanctions for breach

210. As set out at paragraph 158 above, we recommend that sanctions be available for breach of a supervision order. The orders are designed to be tailor-made, with various different requirements that can be added to the order, so as to be able to correspond with the limitations on the defendant's ability to comply with the order, and to provide support and supervision for him or her. As a result we anticipate that sanctions for breach will be imposed in an extremely limited number of cases.

211. Across the 60 supervision orders that we consider as a high estimate are likely to be imposed each year in the Crown Court, we anticipate that no more than 8 defendants are likely to be the subject of breach proceedings, with no more than 5 found to be in breach.[108] Given the very low numbers of defendants likely to be subject of breach proceedings we do not consider the court costs of such proceedings to amount to a sufficiently considerable cost to address here, given that hearings are likely to last no more than an hour at the very most.

212. Where breach is established, we recommend that there should be no requirement to impose a sanction, and we propose stepped sanctions, including curfew with electronic monitoring, fine and custodial sanction (but only after previous warning).

213. In light of the vulnerability of defendants found to lack capacity, we anticipate that custodial sanction is likely to be imposed extremely rarely, and estimate that this will occur in, at most two cases per year, with monitored curfew likely to be imposed in a further three cases per year. The additional cost of such provision is estimated as follows:

Table 20: Estimated cost of sanctions for breach per year

	Low estimate	Best estimate	High estimate
Total number of cases in which custodial sanction likely to be imposed	0	1	2
Cost of likely short custodial term (4 months)[109]	0	£25,300[110]/6[111] = £4,216.67	£4,216.67 x 2 = £8,433.33
Total number of cases in which electronic monitoring likely to be imposed	1	2	3
Cost of electronic monitoring	**£1,400**[112]	**£2,800**	**£4,200**
Total[113]	**£1,400**	**£7,020**	**£12,630**

[108] We consider these figures to represent a reasonable estimate based on the fact that the supervision order when originally imposed will be tailored to the capacity of the particular defendant, and it is then able to be reviewed and amended where required by the court. We therefore estimate that figures for breach should be low.

[109] As there are currently no like arrangements to compare to, a short term sentence of 4 months is an estimation.

[110] The estimated marginal annual cost per prisoner (2014/15) rounded to the nearest £100, this is based on the marginal costs from Ministry of Justice, *Costs per place and costs per prisoner: NOMS Annual report and Accounts 2013-14 Management Information Addendum* (October 2014), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/367551/cost-per-place-and-prisoner-2013-14-summary.pdf (last visited 23 September 2015) and up rated using the July 2015 GDP deflator, https://www.gov.uk/government/statistics/gdp-deflators-at-market-prices-and-money-gdp-july-2015-summer-budget-2015 (last visited 23 September 2015).

[111] These estimations are calculated on the basis that two months of the sentence are served as for custodial sentences under 12 months, the person is normally released from prison after serving half of his or her sentence: https://www.gov.uk/types-of-prison-sentence/determinate-prison-sentences-fixed-length-of-time (last visited 3 November 2015).

[112] Based on the cost of a 90 day Adult Curfew Order: National Audit Office, *Electronic Monitoring of Adult Offenders* (30 January 2006), http://www.nao.org.uk/wp-content/uploads/2006/02/0506800.pdf (last visited 11 November 2015).

[113] Rounded to the nearest 10.

Increased number of defendants subject to MAPPA arrangements

214. Currently defendants charged with murder or a specified violent or sexual offence will only be subject to MAPPA if they receive a hospital order[114] or are subject to notification requirements under Part 2 of the Sexual Offences Act. We recommend widening MAPPA supervision to include those subject to a supervision order in relation to specified violent or sexual offences.

215. Although we anticipate that there will be 54 supervision orders imposed in the Crown Court as a best estimate (60 as a high estimate) under our recommendations, many of these defendants will already be subject to MAPPA arrangements as notifiable sex offenders (since 26.3% of all unfitness cases currently relate to sexual offending).[115] Of those supervision order cases which are not already subject to MAPPA, a proportion of them will relate to offences which are not specified violent offences (see Table 6 at paragraph 96 above). Therefore, we consider it a reasonable estimate that there may be an additional 30 defendants each year subject to MAPPA. The cost for MAPPA provision per year, based on a level 2 assessment (likely, we consider, for defendants subject to a supervision order) is £1,661 per year (costs borne by NOMS).[116]

Table 21: Additional cost of MAPPA arrangements per year

	Low estimate	Best estimate	High estimate
Number of MAPPA defendants	20	30	40
Annual cost per defendant (across the term of the order)	£1,661	£1,661	£1,661
Total additional cost	**£33,220**	**£49,830**	**£66,440**

Resumption of prosecution

216. We have recommended broadening the scope for the prosecution to apply to resume proceedings against a recovered defendant and introducing a right for the defendant him or herself to apply for proceedings to be resumed. We do not consider that these extended powers will have anything more than a nominal effect.

217. In terms of resumption at the instigation of the prosecution, at present the number of individuals in relation to whom proceedings are resumed stands at fewer than 10 per year, often under 5 per year.[117] Although we are widening the scope for resumption of prosecution, we consider that any increase in numbers will be balanced by the reduction in resumption numbers occasioned by the emphasis on postponement before determination of lack of capacity to allow for recovery. In those circumstances we do not consider that there will be any rise in the number of defendants against whom proceedings are resumed at the instigation of the prosecution.

218. Our recommendation to introduce a power for the defendant to apply for leave for prosecution to be resumed is wholly new. Whilst we consider it an important right, for a recovered defendant to be able to clear his or her name, we do not anticipate that there will be more than one or two applications per year by a defendant wishing for his or her prosecution to be resumed. In the circumstances we do not consider the cost of such applications to be more than nominal.

Benefits

Transitional benefits

219. No transitional benefits identified.

[114] Under s 327(4) of the Criminal Justice Act 2003.
[115] R D Mackay, *Unfitness to Plead – Data on Formal Findings from 2002 to 2014,* Report Appendix A, p 13.
[116] See para 113 above and NOMS Planning Analysis Group, *Probation Trust Unit Costs* (7 January 2015, unpublished).
[117] See Table 12 at para 116 above.

Ongoing benefits

A separate test of ability to plead guilty

220. Set against the marginal cost associated with guilty pleas identified at paragraph 192 and following above, the introduction of a separate test of capacity to plead guilty is likely to result in more substantial cost savings.

221. As calculated at paragraph 193 above, we estimate that approximately 30 defendants per year might be able safely to plead guilty rather than undergo a fact-finding procedure. In each of such case there would be no requirement for an alternative finding procedure before a jury. This would result in a considerable cost saving in each case. There are no available figures for the average length of a section 4A hearing, so it is not possible to estimate the cost saving.

Example 4 A defendant, A, suffers from a learning disability and attention deficit disorder. He has an IQ of 58. Expert assessment concludes that he would be unable to give evidence, due to his suggestibility, and unable to follow the course of the proceedings. Nonetheless, the experts conclude that he is capable of entering a plea of guilty. He understands the evidence against him (on a charge of assault occasioning actual bodily harm caught on CCTV) and appreciates the consequences of doing so.

He is found to be unable to participate effectively but able to enter a plea of guilty. Instead of a two day fact-finding finding procedure requiring the empanelling of a jury, he pleads guilty and receives a community order. This represents a cost saving arising from the saving of court time (2 x daily court cost of judge sitting with a jury).

Relaxing the evidential requirement

222. Relaxing the evidential requirement to allow the required evidence from two experts to include evidence from a psychologist is liable to reduce the number of cases in which a third or subsequent report is needed. At present, in many cases psychological assessment is required but does not satisfy the evidential requirement, so that two medical experts have to be instructed as well as the psychologist. This can result in three reports being prepared in many cases. Every case under our recommendation where an additional psychiatric or psychological report is not needed represents an estimated average saving of £2,250.[118]

Example 5 In relation to defendant A above, a psychiatrist instructed to assess his fitness to plead would inevitably have advised that a psychological assessment would be necessary to assess A's learning disability and low IQ. The defence would then have to obtain a second psychiatric report to satisfy the evidential requirement. At least three reports would be required in total.

Under our recommendations a maximum of two reports would be required: the first psychiatric report and the psychological report.

The saving in such a case would amount to between £1,800 and £2,700 (based on the estimated cost of the extra psychiatric/psychological report, see paragraph 85 above.

223. We consider it reasonable to estimate that this relaxation of the evidential requirement has the potential to result in savings in 60[119] cases per year (savings for the Legal Aid Agency).

Table 22: Estimated annual savings on additional expert reports from relaxing the evidential requirement

	Low estimate	Best estimate	High estimate
Number of cases where cost of third report avoided	50	60	70
Cost saving based on average expert report cost (£2,250)[120]	**£112,500**	**£135,000**	**£157,500**

[118] This figure was reached taking the average of the minimum cost of £1,800 per psychiatric report prepared (London) and a maximum of £2,700 per psychiatric report prepared (non-London). See Table 2: Cost of expert reports, London and non-London, 2015 at para 85 above.

[119] This is an estimation as there is currently no comparable arrangement to draw on.

[120] See Table 2: Cost of expert reports, London and non-London, 2015 at para 85 above.

224. Currently there are significant delays in unfitness to plead cases because of the limited number of psychiatrists available to prepare the two required reports. Widening the range of experts who can satisfy the evidential requirement to include psychologists will also reduce the strain on available practitioners and result in a reduction in delays and adjournments required. This will result in further cost savings.[121] The non-monetisable benefit to complainants, witnesses and those affected by alleged offending in terms of swifter resolution and reduced anxiety and uncertainty is also considerable.

Joint instruction

225. At present the party not raising the issue of unfitness to plead is entitled to obtain their own report or reports, in addition to the two or more reports prepared by the party asserting unfitness. This leads to significant delays, and the proliferation of reports. Our proposed reforms will reduce both delay and the production of additional costly reports by requiring the judge to order joint instruction of a second expert, where that is in the interests of justice.

Example 6 A defendant, B, is a schizophrenic whose condition cannot be managed effectively with treatment so as to enable her to have capacity for trial. The allegation is one of murder.

Under the current provisions, the defence would obtain two psychiatric reports confirming that the defendant lacks capacity for trial. Once served, the prosecution would consider those reports and is entitled to instruct their own expert. In light of the allegation, the prosecution would almost certainly require their own psychiatrist to examine the defendant and report on her condition. This causes a further delay of 8 weeks and necessitates the preparation of a third report at a cost of between £1,800 to £2,700 (see paragraph 85 above).

Under our recommendations, the defence would be obliged to serve their first report, indicating that the defendant is unfit to plead, at the earliest opportunity. Following consideration by the court and the prosecution, the judge would, if satisfied that it is in the interests of justice to do so, recommend that the second psychiatric report be prepared by a psychiatrist jointly instructed by the defence and Crown. A third report is not required. The need for adjournment is reduced and the trial or determination of lack of capacity is able to proceed 8 weeks earlier.

226. We consider it reasonable to estimate that joint instruction will result in the reduction of the number of reports required in 80[122] cases per year (this could means savings to the Legal Aid Agency).

Table 23: Estimated annual savings on additional expert reports from joint instruction

	Low estimate	Best estimate	High estimate
Cases where cost of at least one expert report saved	60	80	100
Cost saving based on expert report average cost (£2,250)[123]	**£135,000**	**£180,000**	**£225,000**

Table 24: Estimated annual cost saving on both additional expert reports from relaxing the evidential requirement (Table 22 above) and on additional expert reports from joint instruction (Table 23 above)

	Low estimate	Best estimate	High estimate
Cost saving from Table 22	£112,500	£135,000	£157,500
Cost saving from Table 23	£135,000	£180,000	£225,000
Combined cost saving from Tables 22 and 23	**£247,500**	**£315,000**	**£382,500**

[121] Due to a lack of data it has not been possible to estimate the average cost of an adjournment.
[122] This is an estimation as there is currently no comparable arrangement to draw on.
[123] See Table 2: Cost of expert reports, London and non-London, 2015 at para 85 above.

Encouraging postponement of the determination of capacity where appropriate

227. Increasing the court's power to postpone proceedings to enable the defendant to gain or regain capacity for trial will have minimal immediate costs (set out at paragraphs 195 to 198 above). However, the non-monetisable gains where the postponement results in the defendant being able to undergo full trial are truly substantial, in terms of victim and witness satisfaction. Where full trial can be achieved, the allegations of complainants and witnesses can be fully scrutinised and the court is able to arrive at a determination of the culpability or otherwise of the defendant. In addition, where full trial is possible, the witnesses are spared the prospect of having to give evidence a second time in resumed proceedings, should the defendant recover capacity. There are also substantial non-monetisable gains in terms of public protection since, following full trial, the court is able to impose the full range of sentences, including custody where that is appropriate.

228. There are also non-monetisable benefits which arise out of the avoidance of the need to resume proceedings in serious cases. Such resumed proceedings require a costly second jury process. We discuss these savings and offset them against costs in widening the availability of resumption of proceedings at paragraph 198 above.

Savings arising out of requiring the prosecution to prove all elements of the offence

229. The reformed alternative finding procedure will remove the need for the external and fault elements of an offence to be split for the purposes of the alternative finding hearing. It will also remove the need to identify the objective evidence required to engage a defence. Both of these aspects currently present significant difficulties for the court. This will result in savings of court time, since there will be no need for legal argument on these issues. It will also result in non-monetisable savings in terms of the consistent development of the law and the avoidance of arbitrary outcomes, which are a problem under the current system.

230. This reform will also reduce the number of appeals in relation to capacity cases. The majority of recent appeals in capacity cases (which are proportionately high in comparison to cases where capacity is not raised as an issue) will result in further, non-monetisable, cost savings.[124]

Extension of section 36 of the Mental Health Act 1983

231. Extending the duration and application of section 36 of the MHA (see paragraph 147 above), which enables a defendant to be remanded to hospital for treatment to allow for his or her recovery, means that the expense of section 48 transfers from custody to hospital are avoided where possible. This will also reduce unnecessary listings for mention in the Crown Court.[125] There is, in addition, a substantial non-monetisable benefit to enabling a defendant to recover so that he or she can undergo full trial, rather than moving to a lack of capacity determination and an alternative finding procedure.

Disposals

Arrangements to support compliance and the introduction of constructive elements into supervision orders

232. Our consultees make clear to us that increasing the powers within supervision orders to monitor and support compliance, and introducing constructive elements into the order, will enhance the effectiveness of the disposal and will encourage their greater use. As we have set out above (at paragraphs 202 to 209) these enhanced supervision orders under our recommended reforms do present a cost increase. However, we anticipate, on the basis of the observations of clinical and judicial consultees, that these enhanced orders will also offer a much more robust and attractive disposal alternative to the courts than the current supervision order. We anticipate, as a result, that there will be some cases where, under the current framework a hospital order would have been considered necessary to ensure treatment of the defendant and protection for the public, but under our proposed reforms a more robust supervision order, with medical treatment, would be suitable. We anticipate that there will be on average five defendants each year[126] in the Crown Court who,

[124] See para 114 above.
[125] Mental Health Act 1983, ss 36(4) and (5).
[126] This is a conservative estimate based on observations made to us by judges and clinical experts who estimate that were a more robust supervision order available, in a small number of cases it would be possible for a disposal in the community to be imposed instead of a hospital order.

instead of a hospital order, will receive an enhanced supervision order. This will result in very substantial cost savings (which will fall to the Department of Health) in relation to these defendants each year.

233. We calculate these savings on the basis that the defendant would otherwise be detained in a low security hospital (at the cost of £153,300 per year[127]), which we consider to be the most likely. Plainly, were the defendant otherwise to have been held in a higher security setting then the savings would be dramatically increased.

Table 25: Estimated annual savings from a reduction in hospital orders

	Low estimate	Best estimate	High estimate
Cases where supervision order imposed rather than hospital order	3	5	7
Annual saving based on low secure hospital costing (£153,300)	**£459,900**	**£766,500**	**£1,073,100**

Increased number of defendants subject to MAPPA arrangements

234. There is also a substantial non-monetisable benefit in terms of public protection and prevention of further offending by the engagement of MAPPA for a wider range of defendants who lack capacity, as discussed at paragraph 160 above. We take the view that this non-monetisable benefit far outweighs the identifiable costs which that extension incurs, set out at paragraph 214 and following above.

Net impact analysis: aspect a) Reform the test for unfitness to plead and all related procedures

235. The most sizeable identifiable costs of reforming unfitness to plead procedures in the Crown Court arise in relation to the potential for additional expert reports to be required. However, we consider these to be offset against the savings to be made in the reduction of the number of reports required by virtue of relaxing the evidential requirement and the introduction of provisions for the swift service of expert evidence and the instruction of joint experts. In addition, there are substantial ongoing savings to be made in the potential for even very few defendants who lack capacity being supervised on robust supervision orders rather than receiving hospital orders. Furthermore, there are also the non-monetisable benefits of improving capacity procedures.

b) Extend capacity for trial procedures to the magistrates' (including youth) courts

Costs

Transitional costs

Administrative cost of Parliamentary procedure

236. There will be a small non-monetisable cost for the parliamentary procedure involved in introducing statutory provisions for considering effective participation in the magistrates' and youth courts.

Transitional training costs

237. There will be minor cost implications for members of the judiciary and legal practitioners to receive training on the new procedures. This will be dealt with through newsletter information and insertion into all new magistrate training and three yearly refresher training (other training recommendations are dealt with separately at paragraph 258 and following below).

[127] See Table 8: Unit costs for secure services 2013 at para 105 above.

Ongoing costs

Number of defendants being found to lack capacity and against whom the offence is proved

238. We estimate that a maximum of 800 defendants per year in the magistrates' courts will be found to lack capacity under our recommendations with around 416 (as a best estimate) individuals against whom the offence is proved at the alternative findings procedure.

239. Our reasoning in reaching these figures is as follows:

(1) Based on government figures for the 12 months ending March 2015,[128] there were 832,343 defendants proceeded against at the magistrates' courts who would potentially engage our recommended participation procedures (1,470,392 defendants proceeded against at magistrates' courts less 86,949 tried at the Crown Court and less 551,100 defendants proceeded against at the magistrates' courts for summary motoring offences[129] (since we anticipate very few of these will result in incapacity hearings)).

(2) In the Crown Court, the current annual average number of unfitness to plead findings is approximately 100.[130] In the 12 months ending March 2015 this was approximately 0.1% of those tried at the Crown Court. We anticipate this will, at most, double under our proposed reforms[131] to approximately 0.2%. If we apply this percentage to the 832,343 of defendants proceeded against at the magistrates' courts who it is estimated would have the potential to engage our recommended capacity procedures, 1,665 individuals would be found to lack capacity in the magistrates' courts.

(3) However, we believe a straight application of this proportion is not appropriate when we turn to the magistrates' courts. In fact it is expected that this figure will be reduced by approximately half to 800, taking account of:

(i) Greater numbers of unrepresented defendants[132] who are less likely to be identified as lacking in capacity for trial. Although some will be identified by the court, or by liaison and diversion services, we anticipate that a high proportion will not.

(ii) The reformed test is to be applied in context, so that where proceedings are less demanding of a defendant, the threshold for lack of capacity is higher. Summary proceedings are more accessible and shorter by design. We therefore anticipate that a very significant degree of impairment would be required before a defendant was found to lack capacity for summary trial.

(iii) A likely higher rate of discontinuance in magistrates' courts. Given the lower level of seriousness of cases dealt with in the magistrates' courts, we anticipate that in many more cases the Crown Prosecution Service will not proceed where there are substantial capacity issues.

(iv) Legal representatives may be less inclined in the magistrates' courts to propose pursuing capacity proceedings for minor matters in light of the robust nature of some of the available disposals, the time proceedings will take and the administrative burden of doing so.

(v) We appreciate that amongst this number are those young defendants tried in the youth court. We acknowledge that not all these factors are relevant in youth courts where the defendant will be represented and

---

[128] Ministry of Justice, *Criminal Justice Statistics Quarterly Update to March 2015: England and Wales: Ministry of Justice Statistics bulletin* (August 2015), p 7, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/453309/criminal-justice-statistics-march-2015.pdf.pdf (last visited 5 November 2015).

[129] Ministry of Justice, *Criminal Justice System Statistics Quarterly: March 2015*, Overview Tables, Table Q3.2a, https://www.gov.uk/government/statistics/criminal-justice-system-statistics-quarterly-march-2015 (last visited 5 November 2015).

[130] Average across the period 2002 to 2014: R D Mackay, *Unfitness to Plead – Data on Formal Findings from 2002 to 2014,* Report Appendix A.

[131] The reasoning for this estimation is explored at para 186 above.

[132] There is a higher proportion of unrepresented defendants in the magistrates' courts. See Ministry of Justice, *Experimental Statistics: Legal Representation in the Crown Court, England and Wales*: *January to December 2014* (June 2015), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/437677/annex-b-legal_representation.pdf (last visited 11 November 2015).

may face more serious allegations. We balance that against the specialist nature of youth proceedings and the higher threshold for lack of capacity in that context.

(4) Of these 800 cases, not all will proceed to an alternative findings procedure. We anticipate that this figure will be reduced by the court opting to use our recommended discretion not to proceed. We consider it reasonable to estimate that in approximately 20% of cases the court will not hold an alternative finding procedure, reducing the number of individuals reaching that stage of the capacity procedures to 640. We expect that this discretion will be more readily used in the magistrates' courts than the Crown Court.

(5) Of the 1,308 cases between 2002 and 2014 where the defendant was found unfit to plead in Crown Court proceedings, Professor Mackay's research reveals that in 71.2% of cases the defendant was found to have done the act in relation to at least one of the charges.[133] We do not believe it is appropriate to apply this figure directly to our proposed reformed procedures because we anticipate a slightly higher acquittal rate due to our recommendation that the prosecution be required to prove all elements of the offence at the alternative finding procedure. Thus we think it reasonable to estimate that in 65% of alternative finding procedures in magistrates' courts, the allegation will be proved against the defendant. When applied to our estimate of 640 defendants lacking capacity in the magistrates' courts and proceeding to an alternative findings procedure, this could mean in the region of 416 cases per year in which the allegation is proved against the defendant (65% of (800-160) = 416). For the calculations that follow, we hold 416 to be the best estimate with a low estimate of 270 and a high estimate of 560 individuals per year against whom the allegation is proved at an alternative finding procedure.

Court time

240. We anticipate that the alternative finding procedure in almost all such cases will be shorter than a normal trial, on the basis that a defendant lacking capacity is unlikely to give evidence. In addition, many cases will be shorter still because, given likely difficulties in providing instructions, it is reasonable to anticipate that there will be less challenge to the prosecution case (as occurs in Crown Court section 4A hearings currently). Likewise, the determination of lack of capacity is not likely to add substantially to the overall length of a case. Although expert evidence can be heard, these determinations, which will be conducted by a District Judge, can be very brief. Taking the determination of capacity and the alternative finding procedure together, we do not consider that, in terms of court time, they will together take substantially more time than full trial proceedings.

241. The increase in court time is likely to arise as a result of adjournments to obtain expert evidence. We anticipate there will be 800 defendants found to lack capacity each year in the magistrates' court.[134] In the Crown Court there are very many more investigations into unfitness than the number of individuals subsequently determined to be unfit. However, we consider that there will not be so many such expert investigations in the magistrates' courts. This is because there will be less inclination to pursue such issues in relation to summary and less serious either way matters. Also the robust procedures for assessing lack of capacity will not, we consider, be engaged by defendants in the magistrates' courts unless there are significant capacity issues which obviously need to be addressed. We take into account, in addition, the extension of liaison and diversion services across England and Wales which will assist in identifying (on the day of the hearing in many cases) defendants whose capacity for effective participation may be in doubt. We therefore consider it reasonable to suggest that capacity issues will be pursued in a manner which affects the progress of the case, and necessitates the production of at least one expert report, in 1600 cases as a high estimate.

242. We have not been able to obtain costings for adjournments in the magistrates' courts and so are not able to estimate the potential cost of adjournments in these cases. We note also that, in many such cases, in the absence of a statutory capacity framework currently in the magistrates' courts, there are already significant delays and further hearings whilst the court attempts to identify a suitable mechanism to address the vulnerable defendant's difficulties.

---

[133] R D Mackay, *Unfitness to Plead – Data on Formal Findings from 2002 to 2014,* Report Appendix A, Table 8a.

[134] See para 237 and following above.

The cost of preparing expert reports

243. We have estimated that in relation to 1600 defendants (as a high estimate) there will be an investigation into capacity issues. These individuals represent those defendants appearing in the magistrates' courts who have the most profound difficulties engaging in proceedings. They are likely to have significant mental health issues or learning disabilities. We anticipate that the majority of these defendants will already be the subject of expert reports in ordinary trial proceedings, either to consider their ability to participate effectively under the current arrangements, their capacity to have formed the fault element or to identify the appropriate sentence. Many of these would be the subject of investigation under section 37(3) of the Mental Health Act 1983, or amongst the approximately 150 defendants per year who are the subject of hospital orders in the magistrates' courts (see paragraph 118 above).

244. Taking these factors into account we consider that it is reasonable to suggest 800 expert reports are likely to be required under our recommendations, in addition to those currently obtained, in relation to our high estimate of 1600 capacity investigations. We set out the estimated costs below:

Table 26: Estimated annual increase in costs of additional reports required for cases in which lack of capacity is raised in the magistrates' courts

	Low estimate	Best estimate	High estimate
Number of cases lack of capacity raised	1,000	1,300	1,600
Number of additional reports required	500	650	800
Average expert report cost[135]	£2,250	£2,250	£2,250
Average total cost	**£1,125,000**	**£1,462,500**	**£1,800,000**

The cost of preparing addendum reports

245. As with the Crown Court, see paragraph 195 and following above, we anticipate that introducing a statutory requirement to consider adjournment will result in a number of cases where postponement is pursued, and addendum reports required. We estimate that there will be a need for two updated addendum reports in 260 cases per year as a best estimate (20% of our best estimate of 1300 cases per year in which lack of capacity is anticipated to be raised).[136] We calculate the average cost of an addendum report as £562.50 (using an average of the figures in Table 3 at paragraph 86 above. (This cost will be borne by the Legal Aid Agency).

Table 27: Estimated annual increase in costs from addendum expert reports arising out of introduction of duty to consider postponement

	Low estimate	Best estimate	High estimate
Increased number of cases	156 (12% of 1300)	260 (20% of 1300)	364 (28% of 1300)
Number of additional reports required	312	520	728
Total cost (using average £562.50)	**£175,500**	**£292,500**	**£409,500**

[135] This figure was reached taking the average of the minimum cost of £1,800 per psychiatric report prepared (London) and a maximum of £2,700 per psychiatric report prepared (non-London). See Table 2: Cost of expert reports, London and non-London, 2015 at para 85 above.

[136] This estimation is based on our calculation at para 197 above that addendum reports are expected to be required in 28% of cases in which lack of capacity is raised in the Crown Court. We anticipate that postponement will be appropriate and addendum reports required in the magistrates' and youth courts less frequently than in the Crown Court. Thus, our high estimate is in 28% of cases (the same proportion estimated for the Crown Court), our best estimate is in 20% of cases addendum reports will be required, and our low estimate is in 12% of cases addendum reports will be required.

Table 28: Estimated annual increase in costs of both additional reports required for cases in which lack of capacity is raised in the magistrates' courts (Table 26 above) and from addendum reports arising out of introduction of duty to consider postponement (Table 27 above)

	Low estimate	Best estimate	High estimate
Total cost from Table 26	£1,125,000	£1,462,500	£1,800,000
Total cost from Table 27	£175,500	£292,500	£409,500
Combined total cost of Tables 26 and 27	**£1,300,500**	**£1,755,000**	**£2,209,500**

Number and distribution of disposals

246. Following a finding that the allegation is proved against a defendant who lacks capacity we recommend that the magistrates' courts should have the power to impose a hospital order, a supervision order or an absolute discharge. Table 29 below presents the anticipated distribution of these disposals in the magistrates' court.

Table 29: Expected distribution of disposals in the magistrates' courts per year

		Low estimate	Best estimate	High estimate
Disposal	% Disposal	270	416	560
A. Absolute discharge	30	81	125	168
B. Supervision order	55	149	229	308
C. Hospital based disposals	15	40	62	84

247. These figures were reached by considering the distribution of such disposals in the Crown Court (see Table 30 below) and then making allowance for the differences in the type of cases dealt with by the courts:

Table 30: Distribution of disposals in the Crown Court 2002 to 2014

Disposal	Percentage of disposals
Absolute discharge	7.5%
Supervision order	19.7%
Hospital based disposals[137]	60.5%

248. We have concluded that the proportion of absolute discharges will be substantially higher in the magistrates' courts than in the Crown Court. This is on the basis that absolute discharges will more often be more appropriate in the summary jurisdiction where the trigger offences are less serious, than in the Crown Court. (We consider that absolute discharges will most often be imposed where the alternative finding procedure is considered appropriate in order to achieve ancillary orders, such as sexual harm prevention orders, or sex offender notification requirements).

249. We have concluded that the use of hospital orders will be comparatively much less frequent in the magistrates' courts than in the Crown Court. This is because, although the disposal is not dictated by the severity of the offending in capacity proceedings, as a matter of proportionality a hospital order will less frequently be appropriate where a summary only, or either way, offence is found proved against a defendant.

[137] Hospital orders, restriction orders without limit of time and restriction orders with limit of time: R D Mackay, *Unfitness to Plead – Data on Formal Findings from 2002 to 2014,* Report Appendix A, Table 9a.

Cost of disposals

250. The proposed reforms do not change the qualification requirements for a hospital order to be imposed. An individual who would receive a hospital order under our recommendations should have inevitably received a hospital order under section 37(1) or 37(3) of the Mental Health Act 1983 under the current arrangements. We therefore believe there will be no increase in the use of hospital orders in the magistrates' courts and therefore no increase in costs to the Department of Health as a result of the proposed reforms.

251. Rather, we consider that the introduction of enhanced supervision orders for defendants who lack the capacity for trial is likely to reduce the rate at which hospital orders are imposed in the summary jurisdiction (see discussion in relation to the Crown Court at paragraph 232 and following above) on the basis that more robust arrangements are now available in the community.

252. In relation to supervision orders, those individuals who are suitable for a supervision order under the proposed reforms, would be likely to have received a community rehabilitation order under current arrangements or a short custodial sentence. We therefore believe that any additional cost of the recommended disposal is likely to be minimal, and there may be savings where a defendant would previously have received a custodial sentence. We do, however, acknowledge that the funding for our recommended supervision orders will come from local authority budgets rather than from NOMS, as is currently the case for community rehabilitation orders.

253. As discussed at paragraph 107 and following above, we have been unable to obtain current costings for supervision orders. In order to estimate an example cost of a supervision order under the proposed reforms we have based our estimations on the cost for corresponding community orders (see Table 9 at paragraph 108 above).

254. Using our best estimate of 229 supervision orders in the magistrates' court per year, we anticipate that the orders would break down as follows: 115 low-level order, 68 mid-level orders and 46 high-level orders.[138] The costs would therefore be approximately: 115 x £1,033, 68 x £7,421 and 46 x £15,000 = 118,795 + 504,628 + 690,000 = £1,313,423.[139] We appreciate that the spread of individuals requiring supervision will not be even across the jurisdiction. However, to provide a very rough estimate of the spread of spend across local authorities, this total cost would average out across the 152 local authorities as an average of £8,640 per authority per year.[140] This sum will be offset by the fact that a considerable proportion of these individuals will already be likely to be known to, and receiving support from, the local authority.

Table 31: Estimated annual cost of supervision orders in the magistrates' and youth courts

	Low estimate	Best estimate	High estimate
Number of supervision orders	149	229	308
Number of low-level orders (cost)	74 (£76,442)	115 (£118,795)	154 (£159,082)
Number of mid-level orders (cost)	45 (333,945)	68 (£504,628)	92 (£682,732)
Number of high-level orders (cost)	30 (£450,000)	46 (£690,000)	62 (£930,000)
Total cost[141]	**£860,390**	**£1,313,420**	**£1,771,810**

[138] We estimate that half of the supervision orders imposed are likely to be low-level orders, reflecting the low level of seriousness of many allegations in summary proceedings. Of the remaining orders, we consider it reasonable to anticipate that high-level orders will be required in less than half of the cases. We apply these percentages (50% low-level orders, 30% mid-level orders and 20% high level orders) to calculate the low and high estimates of the annual cost of supervision orders in the magistrates' and youth courts in Table 31.

[139] Based on the cost of supervision orders set out at para 202 above (cost per order: low-level orders £1,033, mid-level orders £7,421, high level orders £15,000).

[140] This transference of costs to local authorities may fall under the "new burdens doctrine", the Department for Communities and Local Government agreed with this in meeting with them on 1 October 2015. For further information see Department for Communities and Local Government, *New burdens doctrine: Guidance for government departments* (June 2011), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/5960/1926282.pdf (last visited 11 November 2015).

[141] Rounded to the nearest 10.

Cost of sanctions for breach

255. As set out at paragraph 158 above we recommend that sanctions be available for breach of a supervision order. As discussed at paragraph 210 above, the orders are designed to be tailor-made and we anticipate that sanctions for breach will be imposed in an extremely limited number of cases.

256. Across the 229 supervision orders that we consider are likely to be imposed each year in the magistrates' courts, we anticipate that no more than 30 defendants are likely to be the subject of breach proceedings, with no more than 20 found to be in breach.[142] Given the very low numbers of defendants likely to be subject of breach proceedings we do not consider the cost of such proceedings to amount to a sufficiently substantial cost to address here, given that hearings are likely to last no more than an hour at the very most.

257. Where breach is established in the magistrates' court, we recommend that there be no custodial sanction available. The recommended available penalties are a curfew order with electronic monitoring requirement, or a fine or committal to the Crown Court (but only where the Crown Court imposed the original supervision order). However, we recommend that a youth rehabilitation order with intensive supervision and surveillance be available for a youth in breach of a supervision order (following a warning).

258. In light of the vulnerability of young defendants found to lack capacity, we anticipate that the community rehabilitation order with Intensive Supervision and Surveillance ("ISS") is likely to be imposed in 4 cases per year as a best estimate, with monitored curfew likely to be imposed in a further 10 cases per year. The additional cost of such provision is estimated as follows:

Table 32: Estimated annual cost of sanctions for breach per year

	Low estimate	Best estimate	High estimate
Number of cases in which community rehabilitation order with ISS imposed	3	4	5
Cost of community rehabilitation order with ISS	£8,550[143] x 3 = £25,650	£8,550 x 4 = £34,200	£8,550 x 5 = £42,750
Total number of cases in which electronic monitoring likely to be imposed	8	10	12
Cost of electronic monitoring	£1,400[144] x 8 = £11,200	£1,400 x 10 = £14,000	£1,400 x 12 = £16,800
Total cost	**£36,850**	**£48,200**	**£59,550**

Judicial training

259. As set out in our recommendation, we propose that cases where effective participation is raised should be reserved to District Judges until the case concludes following an alternative finding procedure, or the defendant has been found to have capacity for trial, or the issue is no longer being pursued by the parties or the court. Specific training will be required for all District Judges dealing with new procedures in the magistrates' courts to conduct hearings to establish ability to participate effectively in trial, fact-finding procedures, and to impose alternative disposals. The Judicial College have confirmed[145] that this training on new capacity provisions could be included in their yearly seminars without substantial additional costs because modules are devised on areas of legislative change in any event.

[142] This estimation takes into account the fact that the supervision order is tailored, on imposition, to reflect the capacity of the supervised individual. It is also subject to review and amendment by the court, so that any avoidable difficulties in terms of compliance can be removed. We anticipate that breach cases, therefore, should be few.
[143] The average of the low estimate (£7,800) and high estimate (£9,300) of a Youth Rehabilitation Order with a six month Intensive Supervision and Surveillance Requirement: National Audit Office, *The youth justice system in England and Wales: Reducing offending by young people* (2010), p 24, http://www.nao.org.uk/wp-content/uploads/2010/12/1011663.pdf (last visited 11 November 2015).
[144]Based on the cost of a 90 day Adult Curfew Order: National Audit Office, *Electronic Monitoring of Adult Offenders* (30 January 2006), http://www.nao.org.uk/wp-content/uploads/2006/02/0506800.pdf (last visited 11 November 2015).
[145] Meeting with the Judicial College 15 April 2015.

260. We also recommend that there be mandatory specialist training on issues relevant to trying youths for all legal practitioners and members of the judiciary engaged in cases involving young defendants in court. This would focus on participation issues arising out of learning disability, mental disorders common in childhood, developmental immaturity and disorders. For legal practitioners we consider that this could be dealt with as a CPD requirement and the expense borne would be met by the practitioner. For members of the judiciary, those trying youths are most commonly District Judges (magistrates' courts) and lay magistrates. In relation to lay justices, we understand from the Judicial College that such training could be provided as part of the qualification process for sitting in the youth court. For District Judges, as discussed above, the Judicial College are content that such a module could be included in their yearly updating training without substantial costs being incurred.

261. For Circuit Judges and Recorders, hearing cases in the Crown Court, the issue is less straightforward. The Judicial College does not favour ticketing of Crown Court judges in respect of youth cases. The Judicial College is, however, in the process of preparing an online resource which will address the issues likely to be covered in such training. We recommend that material be incorporated into the mandatory training required of judges before they can preside over trials of serious sexual allegations, enabling that cohort of judges to be qualified to try youths as well. This would involve adding a module on to the existing Serious Sexual Offences Seminar which we believe would not result in substantial additional costs.[146]

Listing issues

262. We propose that cases where the issue of effective participation has been raised should be reserved to District Judges (magistrates' courts) for subsequent hearings. This will result in the need for careful listing of such cases. Whilst we consider that this will give rise to some additional non-monetisable costs in terms of listing, we do not consider that they will be particularly substantial given the low number of cases in which such issues are likely to arise, and the likelihood that such cases, presenting difficulties as they do under the current provisions, are at present reserved to District Judges in any event.

Screening young defendants appearing for the first time in the youth court

263. We recommend (at paragraph 173 above) that young defendants who are appearing for the first time in the youth court should be subject to mandatory screening for participation difficulties, unless already screened by liaison and diversion or other forensic mental health practitioners earlier in the proceedings (such as in the police station). We consider that this screening would be best conducted by liaison and diversion teams or Youth Offending teams in the police station or at court. The cost of screening a young defendant for participation difficulties is estimated by NHS England at £100.[147]

264. Working from youth justice statistics, we calculate that in 2013 to 2014, approximately 7,382 defendants aged between 10 and 17 years appeared for the first time in the youth court. Of those approximately 1,108 were under 14 years of age.[148] We consider that it is reasonable to assume, given the vulnerability of 10 to 13 year olds in the CJS, that half of this number will previously have been screened and been the subject of assessment by liaison and diversion services in the police station, or at court. Thus our recommendation at this stage for screening for all young defendants under 14 years of age would cost, as a best estimate, £55,400 each year. This cost is calculated as follows:

---

[146] The Judicial College acknowledge that incorporating mandatory training for cases involving youths with the Serious Sexual Offences Training might be a solution, but they are concerned that the Serious Sexual Offences Seminar is already a demanding course without further additions (meeting 15 April 2015).

[147] This estimate is based on a two hour assessment with a Band 7 practitioner (typically a community psychiatric nurse) resulting in a short written report. This estimate includes overheads. Note these costs include the assessment time only. Depending on the nature of the case and the individual's presentation, follow-up contacts may be required. Travel and waiting time are not taken into account: NHS England (2015, unpublished).

[148] Youth Justice Board/Ministry of Justice, *Youth Justice Statistics 2013-14: England and Wales Statistics bulletin* (January 2015), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/399379/youth-justice-annual-stats-13-14.pdf (last visited 11 November 2015). In 2013 to 2014, 5,463 young defendants received convictions as first time entrants into the CJS. 30% of those, approximately 1,639 defendants were aged between 10 and 14 years. Approximately half of those 1,639 were under 14 years old. There are no figures for the number of defendants who appeared for the first time in the youth court but were acquitted. However, on the basis that 45,891 young people were proceeded against in 2013 to 2014 and of those 33,902 were sentenced, we assume a conviction rate of 74%. Therefore we estimate the following for defendants appearing for the first time in the youth court in 2013-14: all aged 10 to 17 = 7,382, 10 to 14 years = 2,215, 10 to 13 years = 1,108.

Table 33: Estimated annual cost of additional screenings of young defendants

	Low estimate	Best estimate	High estimate
Number of 10 to 13 year olds screened for the first time in the youth court per year	277 (25% of 1,108)	554 (50% of 1,108)	831 (75% of 1,108)
Total cost (based on £100 per screening)	**£27,700**	**£55,400**	**£83,100**

Benefits

Transitional benefits

265. No transitional benefits identified.

Ongoing benefits

Increased certainty and consistency

266. It is expected that the introduction of a statutory test and procedure would result in fairer and more consistent practice. Stays and discontinuances will be reduced allowing for proper services to be engaged to support vulnerable defendants. The cost benefits of this more consistent practice are substantial but non-monetisable. As discussed below at paragraph 267, early intervention, especially for defendants with mental health and learning difficulties, is liable to result in substantial savings in the long term.

267. At present, in cases where the issue of effective participation is raised, there tend to be repeated adjournments because of the uncertainty of the procedures, or the need for skeleton arguments to be prepared on application to stay the proceedings. Although both the current provision and the proposed changes involve some adjournment in the preparation of reports, adjournments arising out of uncertainty over the appropriate proceedings should be avoided entirely once training has been provided.

Reduction in future offending

268. There is a substantial long term cost benefit in engaging focused support for vulnerable defendants who offend. Early intervention would allow for mental health and learning difficulty issues to be addressed before more significant offending behaviour occurs and the resulting sentences or disposals become more expensive. This is particularly the case for those who have mental health difficulties because if their offending behaviour escalates, and any disorder or condition goes untreated, this can result in lengthy hospital stays which, as explored at paragraph 102 and following above, are extremely expensive. Additionally, the very high rate of mental illness in our custodial population[149] reveals a clear link between untreated and unsupported mental health difficulties, and learning disability, and future imprisonment. The recommendations for effective participation procedures in the youth and magistrates' courts offer the realistic prospect of breaking that link at an early stage. The cost benefits are again non-monetisable but truly substantial.

Procedural fairness leading to increased compliance

269. In addition to enabling suitable support for vulnerable defendants, the introduction of fair and workable procedures for addressing participation difficulties in the magistrates', and especially youth, courts promises to enhance defendant compliance. There is a growing body of evidence[150] to suggest that if a defendant feels the process is procedurally fair, they are more likely to comply with disposals and desist from offending.

---

[149] Prison Reform Trust, *Bromley Briefings Summer 2015*, pp 6 to 7, http://www.prisonreformtrust.org.uk/Portals/0/Documents/Prison%20the%20facts%20May%202015.pdf (last visited 11 November 2015).

[150] For example see T R Tyler, *Why People Obey the Law* (1990) and Criminal Justice Alliance, *To be fair: procedural fairness in courts* (October 2014), available at http://www.justiceinnovation.org/sites/default/files/attached/To%20Be%20Fair%20Procedural%20Fairness%20in%20Courts.pdf (last visited 11 November 2015).

Victim and public confidence in the criminal justice system

270. Introducing a workable process for dealing with defendants in the magistrates' and youth courts who cannot participate in trial will raise the confidence of complainants and witnesses in the CJS. Those affected by offending of this sort experience significant distress and anxiety as a result of delay and uncertainty, which would be significantly alleviated by our recommended reforms.[151] This is a substantial non-monetisable benefit.

Enhanced public protection

271. The Crown Prosecution Service have expressed considerable disquiet about the inadequacy of the current arrangements in the magistrates' courts for dealing with defendants, especially young defendants, who are unable to participate effectively in trials.[152] Such cases are frequently stayed, meaning that no useful intervention can be achieved, leading not infrequently to further instances of offending.[153] The introduction of a fair and robust system for dealing with such defendants would be of substantial benefit, albeit non-monetisable, in terms of enhancing the protection of the public and the prevention of future offending.

Screening: reduction in number of reports and court time required

272. Some of the cost incurred in screening young defendants who are first time entrants (as discussed at paragraph 263 and following above) will be offset by the savings made where screening is able to identify that psychiatric or psychological assessment is not required. Using the costing range for expert assessment (set out in Table 2 paragraph 85 above) less £100 for the cost of the screening, the saving in each case where screening avoids the need for further expert assessment is between £1,700 and £2,600. Of the estimated 554 additional screenings of 10 to 13 year olds by Liaison and Diversion services appearing for the first time in the youth court,[154] we estimate that this screening will avoid the need for further expert assessment in approximately 100 cases (as a best estimate). The estimated cost savings from this reduction in need for further expert assessment and number of expert reports is set out in Table 34 below:

Table 34: Estimated annual cost savings from the reduction in need of expert reports as a result of screening in the youth courts

	Low estimate	Best estimate	High estimate
Number of cases where screening avoids need for expert report	50	100	150
Cost savings[155]	£85,000 - £130,000	£170,000-£260,000	£255,000-£390,000
Average cost savings	**£107,500**	**£215,000**	**£322,500**

273. Such screening will also result in a saving of court time, in those cases where the screening of the defendant confirms that no further investigation is required, or, conversely, where the appropriate expert required to conduct further assessment is swiftly identified. These benefits are substantial but cannot be accurately estimated.

Reduction in cases being sent to the Crown Court

274. We recommend that, where an issue in relation to the capacity of an adult defendant to participate is raised before the conclusion of mode of trial procedures for either way offences, such cases should be retained in the magistrates' courts. Currently, where it is plain that there is an issue as to the fitness of the defendant, such cases more often than not are sent to the Crown Court for trial where unfitness to plead procedures can be engaged.

275. The effect of this recommendation is that a small but not insubstantial number of cases will be retained in the magistrates' courts rather than being sent up for more expensive proceedings in the

[151] Meeting with Victim Support, 13 January 2015.
[152] Crown Prosecution Service response to CP197.
[153] See by way of example the case of *R(P) v Derby Youth Court* [2015] EWHC 573 (Admin), (2015) 179 JP 139.
[154] See para 264 and Table 33 above.
[155] Based on a £1,700 - £2,600 saving in each case, see para 271 above.

Crown Court. Not only are court sitting costs substantially lower in the magistrates' than Crown Court, but magistrates' proceedings are shorter than Crown Court proceedings.

276. It is not possible to estimate accurately how many such cases there might be. Although it is clear that there is a substantial saving to be made in each court sitting day which occurs in the magistrates' court (estimated at approximately £1,200 per day) rather than the Crown Court (estimated at approximately £1,500 per day).[156]

Reduction in number of hospital orders

277. As discussed at paragraph 249 above, there will be no increase in the use of hospital orders in the magistrates' courts. Rather, we consider that the introduction of robust supervision orders for defendants who lack the capacity to participate effectively in trial is likely to reduce the rate at which hospital orders are imposed in the summary jurisdiction. We think it is not unreasonable to suggest that there may be 10 individuals per year (as a best estimate), who would otherwise have received a hospital order on sentence, who could alternatively receive a tailored and robust enhanced supervision order with treatment requirement. If we take the cost of treating a single individual per year in a low secure unit to be £153,300 (see Table 8 paragraph 105 above), the potential savings are substantial. For example, the cost savings per individual: £153,300 less the cost of a high-level supervision order (£15,000)[157] = £138,300 cost savings.

Table 35: Estimated annual cost savings from the reduction in hospital orders imposed in the summary jurisdiction

	Low estimate	Best estimate	High estimate
Number of individuals who would otherwise have received a hospital order	8	10	12
Total cost savings (based on £138,300 per individual)	**£1,106,400**	**£1,383,000**	**£1,659,600**

Net impact analysis: aspect b) Extend capacity for trial procedures to the magistrates' courts

278. The substantial ongoing cost increase in the introduction of capacity procedures in the magistrates' courts lies in the rise in the number of expert reports which we estimate will be required. However, we consider that cost to be more than off-set by the non-monetisable gains in the introduction of capacity procedures in the magistrates' courts. These are particularly sizeable in terms of future cost savings and public protection in providing a system which is capable of effectively identifying and addressing at an early stage the needs and risks presented by defendants who have significant mental health and learning disability issues.

c) Enhance trial adjustments for defendants with participation difficulties

Costs

Transitional costs

Administrative cost of Parliamentary procedure

279. There will be a small non-monetisable cost for the parliamentary procedure involved in creating a statutory entitlement to an intermediary for a defendant, and extending the eligibility criteria for live link.

Creation of a training scheme

280. The creation of a training scheme for defendant intermediaries would entail the adaptation of the current witness intermediary training scheme to encompass defendant work. We understand from

[156] Judicial costs plus staff costs, but not including the cost of sitting with a jury (2014/15 prices, rounded to the nearest £100): Justice Statistics Analytical Services, Ministry of Justice (2015, unpublished).
[157] See example 3, paragraph 202 above.

those who conduct the course for witness intermediaries[158] that extending the course to encompass defendant work represents no difficulty.[159] We anticipate that this would result in a modest cost for creating additional course modules, but have been unable to estimate the cost more accurately. The Ministry of Justice have been unable to provide us with costings for the current witness intermediary training scheme.

Creation of a registration scheme

281. The creation of a statutory entitlement to a *registered* intermediary for vulnerable defendants necessitates a registration structure with quality assurance oversight. Such a structure is already in existence for intermediaries assisting witnesses, functioning as the Intermediaries Registration Board ("IRB") and the Quality Assurance Board ("QAB"). Informed by discussions with intermediaries involved in the registration scheme for witness intermediaries, we anticipate that adapting the IRB and QAB to encompass intermediaries assisting defendants would not be problematic. We anticipate, again, that this would result in a modest expense. We understand from the Ministry of Justice that there are no available figures to give an indication of the cost of setting up the IRB and QAB. However, we do not consider that this would represent a substantial additional expense.

Drafting of a guidance manual

282. In line with the Witness Intermediary Scheme, we recommend that there should be a guidance manual or code of conduct for intermediaries assisting defendants. There is already such a document for witness intermediaries: *The Registered Intermediary Procedural Guidance Manual*.[160] Those who were involved in drafting this document confirm that this could be expanded to encompass defendant intermediary work without difficulty. Again we anticipate that this would result in a modest expense but do not have costings for the creation of the *Registered Intermediary Procedural Guidance Manual* from which to provide an accurate estimate.

Recruitment and training of intermediaries

283. As discussed at paragraphs 127 and 128 above, there is a steadily increasing demand for intermediaries to assist defendants. However, there is already a shortage of intermediaries both Registered Intermediaries to assist witnesses (as we discuss at paragraph 131 above) and non-registered intermediaries for defendants. The introduction of a statutory entitlement to assistance for defendants from a Registered Intermediary will necessitate the recruitment of a considerable number of communication experts onto the newly created registered scheme for defendant intermediaries, and thereafter the training of them on an approved basis.

284. We understand that the Ministry of Justice do not collect statistical data on the current demand for defendant intermediaries, nor are they able to calculate their current total spend in that regard. It is therefore difficult for us to estimate with any accuracy the number of intermediaries who would need to be recruited and trained at the outset of the scheme to meet the current need. We have set out the demand experienced by the leading provider of intermediaries for adults (Communicourt) at paragraph 129 above. In light of those figures, we anticipate that the demand for intermediaries to assist defendants is likely to require at the very least 50 intermediaries registered to conduct defence work. It is likely that they would need to be recruited, probably from amongst those already doing defendant intermediary work, from those who are already registered to act as witness intermediaries and from communication experts in fields such as speech and language therapy and specialist teaching.

[158] Professor Penny Cooper and David Wurtzel.
[159] See IP responses of Professor Penny Cooper and David Wurtzel.
[160] Victims and Witnesses Unit, Ministry of Justice, *The Registered Intermediary Procedural Guidance Manual* (February 2012), http://www.cps.gov.uk/publications/docs/RI_ProceduralGuidanceManual_2012.pdf (last visited 11 November 2015).

Ongoing costs

Registration and quality assurance for intermediaries registered to do defendant work

285. There will be ongoing costs which arise from maintaining the register of intermediaries approved to do defendant work and the quality assurance of them. Under our recommendation this would be provided by the extended Witness Intermediary Scheme, the IRB and QAB. As such, we do not consider this to be a substantial ongoing cost.

286. Perhaps the most substantial ongoing cost for the Witness Intermediary Scheme is the matching service provided for police officers and the Crown Prosecution Service. The service matches a witness' need for an intermediary with a suitable candidate available to provide the assistance required. We do not consider such a service necessary for defendants, whose representatives are more than capable of identifying suitable intermediaries, as they are at identifying other experts to assist in case preparation. We anticipate that the list of intermediaries registered to work with defendants could be available through the court, through Liaison and Diversion services or online.

Recruitment and training of intermediaries

287. There will need to be periodic recruitment and training of further intermediaries to conduct defendant work, as there is for the Witness Intermediary Scheme. We have not been able to obtain any data to assist us to estimate what such ongoing recruitment and training would cost. However, we do not consider this to represent a substantial cost.

No more than gradual increase in the use of defendant intermediaries

288. We have considered with care whether the introduction of a statutory entitlement will lead to a substantial increase in demand for intermediaries to support defendants. We do not consider that statutory intervention is liable to create a spike in demand of this sort. We base this analysis on a number of factors:

    (1) There is already considerable demand for defendant intermediaries which is growing steadily and is met by judges using their inherent jurisdiction to grant intermediary assistance to defendants. The introduction of a statutory entitlement would, for the most part, simply put onto a consistent and clear footing a practical reality.

    (2) Introduction of a robust test for the granting of an intermediary to assist a defendant, and the limitation of that assistance to only those parts of the trial where such assistance is necessary to ensure a fair trial, will curtail any unnecessary grant by judges.

    (3) The creation of a statutory right to intermediary assistance for defendants in Northern Ireland (for the giving of evidence) has not resulted in a substantial increase in applications for, or the grant of, such assistance.[161]

Increased use of live link

289. We do not anticipate that there will be a substantial increase in the demand for the use of live link for defendants as a result of our recommendation to widen the eligibility criteria for grant. There are no available statistics for the use of live link by defendants, but anecdotal report and empirical research suggests that this facility is used very infrequently.[162] Most defendants who require live link would be eligible under the current criteria, and so we do not anticipate a substantial number of additional orders for live link assistance, should our recommendation be enacted. In addition, live link facilities are now available in all Crown Courts and over half of magistrates' courts and so the costs arising out of any additional grants are likely to be negligible.

Benefits

Transitional benefits

290. No transitional benefits identified.

---

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

[162] See ESRC doctoral research of Samantha Fairclough at Birmingham University (article forthcoming).

Ongoing benefits

Increased consistency and avoidance of unnecessary grant

291. At present judges grant defendant intermediaries under their inherent power to ensure fair trial. There is currently no strict test to be applied by a judge considering granting a defendant intermediary, and no eligibility criteria. As a result there is liable to be inconsistency in the granting of intermediaries and it is reasonable to assume that there will be occasions where an intermediary is granted where not absolutely necessary.

292. Our recommendation for the introduction of a legal test and eligibility criteria will ensure certainty and consistency of grant, and will substantially reduce the chance of unnecessary grant. There is non-monetisable benefit in this increased consistency, as well as more clearly definable savings where unnecessary grant is avoided. On an average case, avoiding unnecessary grant would result in a saving of at least £2,079 (£495 (Communicourt basic daily fee) x 4.2 (average length of case taken by Communicourt).[163] These savings are likely to be substantial over the longer term.

Fewer delays for victims and witnesses

293. The lack of statutory entitlement has led to resourcing difficulties where a judge grants a defendant the assistance of an intermediary but no appropriate intermediary can be identified. This not infrequently leads to cases being delayed to be fixed for a time that an intermediary can attend. This delay is liable to cause distress and anxiety to witnesses and complainants. The avoidance of this difficulty, by the introduction of a statutory entitlement, would have substantial non-monetisable benefits in terms of witness and victim satisfaction and may increase public confidence in the CJS.

Conduct regulation

294. The introduction of a registered defendant intermediary scheme, with appropriate guidance, would ensure that all intermediaries are suitably qualified and trained, and would allow for quality assurance of their work. There is currently is no professional conduct regulation, nor any authorised and continuing professional development, monitoring or supervision for them. Given the critical role that intermediaries assisting defendants play, at the heart of the trial process, it is perhaps surprising that there is not at present such quality assurance. There has already been at least one case where issues raised about the conduct of defendant intermediaries have delayed trial proceedings.[164] There are substantial non-monetisable benefits to a scheme which ensures the quality of intermediary work. Such scrutiny is to the advantage of the court, the parties and their representatives, and to witness, complainants and the general public.

Cost regulation

295. Introducing a registered scheme for defendant intermediary work will enable the Ministry of Justice to introduce cost regulation and to bring defendant intermediary fees in line with those paid to registered intermediaries working with witnesses. This could represent a truly substantial year on year saving.

296. We do not have statistics for intermediary demand for defendants. We take as an example the major provider of adult intermediaries, Communicourt. In August 2014, Communicourt were receiving approximately 60 referrals per month. The average length for which they were required was 4.2 days.[165] Their day rate is £495 plus travel and overnight accommodation.

297. On these figures, assuming that Communicourt take on 50 of those referrals each month (as a best estimate, some cases being unsuitable for intermediary support or legal aid not granted) for 4.2 days, without taking account of travel and overnight stays, we calculate that the Ministry of Justice will have paid Communicourt £1,247,400 in fees over the year. However, the cost of that work could reasonably be halved if the Ministry of Justice introduced a registered and regulated scheme, remunerated at the rates paid to witness intermediaries of £252 per day (based on £36 per hour[166]

[163] See para 129 above.
[164] *Piggin* (March 2015) (unreported, Recorder of London).
[165] Communicourt, *Report 1 – "Number Crunching": Understanding the vulnerable defendant population* (August 2014).
[166] CPS, *Special Measures, Annex F: Rates of remunerations for Registered intermediaries* http://www.cps.gov.uk/legal/s_to_u/special_measures/index.html#a06 (last visited 3 November 2015).

and attendance on the defendant of 7 hours in the day,[167] excluding the costs of travel, subsistence and overnight stays). The same calculation, with this reduced fee, suggests a reduction by approximately half with savings, in relation to Communicourt alone, of £612,360. When intermediaries' expenses, such as travel costs, subsistence and overnight accommodation, are taken into account, it is anticipated that the savings will be even greater.

Table 36: Estimated annual cost savings (in relation to Communicourt alone) in introducing a registered defendant intermediary scheme

	Low estimate	Best estimate	High estimate
Number of cases intermediary provided	40	50	60
Cost of provision of intermediaries (based on Communicourt rate)	£997,920	£1,247,400	£1,496,880
Cost of provision of intermediaries (based on witness intermediary rate)	£508,032	£635,040	£762,048
Total cost savings[168] (in relation to Comunicourt alone)	**£489,890**	**£612,360**	**£734,830**

298. Such cost regulation would only be available if, in line with our recommendation, a registered scheme is introduced for defendant intermediaries.

Greater engagement in the criminal justice process

299. An expanded registered scheme promises greater engagement by defendants in the criminal justice process, with the prospect of better compliance and less costly criminal justice interventions for vulnerable defendants in the future. This is a further substantial but non-monetisable benefit.

Preventing discrimination

300. The Ministry of Justice have obligations under the Equality Act 2010 to provide reasonable adjustment for defendants who have a disability. Many individuals whose communication and social functioning is sufficiently impaired to justify intermediary assistance would also satisfy the definition of disability for the purposes of the Equality Act 2010 of a "physical or mental impairment" which has a "substantial and long-term adverse effect" on their ability to carry out normal day to day activities.[169]

301. The Divisional Court has concluded that the current situation, the provision of a registered intermediary service to witnesses by way of statutory entitlement with no comparable provision for a defendant in similar difficulty, produces "a risk of unfairness or at its lowest a perceived risk of unfairness".[170] Our recommendations have the substantial (although non-monetisable) benefit of removing this discriminatory position.

Net impact analysis in relation to aspect c): enhance trial adjustments for defendants with participation difficulties

302. We acknowledge that the introduction of a registered defendant intermediary scheme would, at the outset, have substantial cost implications. However, we consider that these transitional costs would be more than met by the ongoing savings arising from the introduction of the statutory entitlement and registration scheme, which would enable regulation of the grant of intermediary assistance and the cost of such provision. Even on the partial figures that we are able to provide the cost saving is clear. The demand for defendant intermediaries looks likely to continue, and will continue to result in unnecessary expense to the Ministry of Justice if cost regulation is not introduced.

---

[167] Although a Crown Court day is estimated by HMCTS at 4.5 hours, we anticipate that a defendant assisting an intermediary is likely to be required at court to assist the defendant both before and after sitting hours, and for some time during the lunch break.
[168] Rounded to the nearest 10.
[169] Equality Act 2010, s 6.
[170] *R (on the application of OP) v Secretary of State for Justice* [2014] EWHC 1944 (Admin), [2015] 1 Cr App R 7 at [46].

Specific impact tests

Statutory equality duty

303. We anticipate that overall our reforms will have a positive impact for individuals who have the protected characteristics of disability and age, in respect of their youth. Many of the unfit defendants who are currently disadvantaged by current procedures may have the protected characteristic of disability. If our recommendations are implemented and have the intended effect of creating a fair and robust procedures for the most vulnerable defendants, this can only have a positive impact on this group.
304. In respect of youths, we have identified the current disadvantages created by the lack of unfitness to plead procedures in the youth courts. Again, if our recommendations are implemented this can only have a positive impact on this group.
305. The positive impacts of our recommendations have been confirmed to us in the substantial research and engagement with stakeholders that we have undertaken.

Competition

306. We do not anticipate that our reforms will have any particular effect, whether positive or negative, on competition.

Small Business

307. We do not anticipate that our reforms will have any particular effect, whether positive or negative, on small business.

Environmental impact and wider environmental issues

308. We do not anticipate that our reforms will have any particular effect, whether positive or negative, on environmental impact and wider environmental issues.

Health and well-being

309. We have already considered the impact that the proposed reforms could have on health and well-being (in terms of improved accessibility and enhanced measures). Therefore, it is unnecessary to conduct a further, specific Impact Assessment on this issue.

Human rights

310. We have already considered the impact that the proposed reforms could have on human rights throughout the Impact Assessment.

Justice system

311. We have already considered the impact that the proposed reforms could have on the criminal justice system throughout the Impact Assessment.

Annex A: Summary Tables of Annual Costs and Benefits

Summary Table 1a: Annual monetisable costs for Option 5 (preferred option)

		Low estimate	Best estimate	High estimate
	Transitional costs	Negligible/Non-monetisable	Negligible/Non-monetisable	Negligible/Non-monetisable
	Ongoing Costs			
(a) Reform the test for unfitness to plead and all related procedures	Expert reports (including addendum reports) in Crown Court[171]	£168,750	£236,250	£303,750
	Increase in Crown Court time[172]	£90,000	£97,500	£105,000
	Supervision orders (Crown Court)[173]	£375,260	£422,170	£469,080
	Sanctions for breach (Crown Court)[174]	£1,400	£7,020	£12,630
	MAPPA[175]	£33,220	£49,830	£66,440
(b) Extend capacity for trial procedures to the magistrates' (including youth) courts	Adjournments to obtain expert evidence[176]	*It has not been possible to monetise this cost due to a lack of available data*		
	Expert reports (including addendum reports) in magistrates' and youth courts[177]	£1,300,500	£1,755,000	£2,209,500
	Supervision orders (magistrates' and youth courts)[178]	£860,390	£1,313,420	£1,771,810
	Sanctions for breach (magistrates' and youth courts)[179]	£36,850	£48,200	£59,550
	Screening[180]	£27,700	£55,400	£83,100
(c) Enhance trial adjustments for defendants with participation difficulties[181]	*It has not been possible to monetise the ongoing and transitional costs associated with our recommendations for enhancing trial adjustments for defendants with participation difficulties due to a lack of available data.*			
	Total costs	**£2,894,070**	**£3,984,790**	**£5,080,860**

[171] See Table 17, para 198.
[172] See Table 18, para 200.
[173] See Table 19, para 204.
[174] See Table 20, para 213.
[175] See Table 21, para 215.
[176] See para 242.
[177] See Table 28, para 245.
[178] See Table 31, para 254.
[179] See Table 32, para 258.
[180] See Table 33, para 264.
[181] See para 279 to 289.

Summary Table 1b: Annual monetisable benefits for Option 5 (preferred option)

		Low estimate	Best estimate	High estimate
	Transitional benefits	Negligible/Non-monetisable	Negligible/Non-monetisable	Negligible/Non-monetisable
	Ongoing benefits			
(a) Reform the test for unfitness to plead and all related procedures	*Separate test of ability to plead guilty*[182]	*It has not been possible to monetise this benefit due to a lack of available data*		
	Reduction in additional expert reports[183]	£247,500	£315,000	£382,500
	Savings on hospital orders (Crown Court)[184]	£459,900	£766,500	£1,073,100
	Reduction in s 48 transfers[185]	*It has not been possible to monetise this benefit due to a lack of available data*		
(b) Extend capacity for trial procedures to the magistrates' (including youth) courts	Screening by liaison and diversion services[186]	£107,500	£215,000	£322,500
	Using magistrates' court rather than Crown Court[187]	*It has not been possible to monetise this benefit due to a lack of available data*		
	Savings on hospital orders (magistrates' and youth courts)[188]	£1,106,400	£1,383,000	£1,659,600
(c) Enhanced trial adjustments for defendants with participation difficulties	*Unnecessary grant avoided*[189]	*It has not been possible to monetise this benefit due to a lack of available data*		
	Regulating the cost of defendant intermediaries[190]	£489,890	£612,360	£734,830
	Total benefits	**£2,411,190**	**£3,291,860**	**£4,172,530**

[182] See paras 220 and 221.
[183] See Table 24, para 226.
[184] See Table 25, para 233.
[185] See para 231.
[186] See Table 34, para 272.
[187] See para 274 to 276.
[188] See Table 35, para 277.
[189] See paras 291 and 292.
[190] See Table 36, para 297.

Summary Table 2a: Annual monetisable costs for Option 1

		Low estimate	Best estimate	High estimate
	Transitional costs	Negligible/Non-monetisable	Negligible/Non-monetisable	Negligible/Non-monetisable
	Ongoing Costs			
(a) Reform the test for unfitness to plead and all related procedures	Expert reports (including addendum reports) in Crown Court	£168,750	£236,250	£303,750
	Increase in Crown Court time	£90,000	£97,500	£105,000
	Supervision orders (Crown Court)	£375,260	£422,170	£469,080
	Sanctions for breach (Crown Court)	£1,400	£7,020	£12,630
	MAPPA	£33,220	£49,830	£66,440
	Total costs	**£668,630**	**£812,770**	**£956,900**

Summary Table 2b: Annual monetisable benefits for Option 1

		Low estimate	Best estimate	High estimate
	Transitional benefits	Negligible/Non-monetisable	Negligible/Non-monetisable	Negligible/Non-monetisable
	Ongoing benefits			
(a) Reform the test for unfitness to plead and all related procedures	*Separate test of ability to plead guilty*	*It has not been possible to monetise this benefit due to a lack of available data*		
	Reduction in additional expert reports	£247,500	£315,000	£382,500
	Savings on hospital orders (Crown Court)	£459,900	£766,500	£1,073,100
	Reduction in s 48 transfers	*It has not been possible to monetise this benefit due to a lack of available data*		
	Total benefits	**£707,400**	**£1,081,500**	**£1,455,600**

Summary Table 3a: Annual monetisable costs for Option 2

		Low estimate	Best estimate	High estimate
	Transitional costs	Negligible/Non-monetisable	Negligible/Non-monetisable	Negligible/Non-monetisable
	Ongoing Costs			
(a) Reform the test for unfitness to plead and all related procedures	Expert reports (including addendum reports) in Crown Court	£168,750	£236,250	£303,750
	Increase in Crown court time	£90,000	£97,500	£105,000
	Supervision orders (Crown Court)	£375,260	£422,170	£469,080
	Sanctions for breach (Crown court)	£1,400	£7,020	£12,630
	MAPPA	£33,220	£49,830	£66,440
(b) Extend the capacity for trial procedures to the magistrates' (including youth) courts	Adjournments to obtain expert evidence	*It has not been possible to monetise this cost due to a lack of available data*		
	Expert reports (including addendum reports) in magistrates' and youth courts	£1,300,500	£1,755,000	£2,209,500
	Supervision orders (magistrates' and youth courts)	£860,390	£1,313,420	£1,771,810
	Sanctions for breach (magistrates' and youth courts)	£36,850	£48,200	£59,550
	Screening	£27,700	£55,400	£83,100
	Total costs	**£2,894,070**	**£3,984,790**	**£5,080,860**

Summary Table 3b: Annual monetisable benefits for Option 2

		Low estimate	Best estimate	High estimate
	Transitional benefits	Negligible/Non-monetisable	Negligible/Non-monetisable	Negligible/Non-monetisable
	Ongoing benefits			
(a) Reform the test for unfitness to plead and all related procedures	*Separate test of ability to plead guilty*	*It has not been possible to monetise this benefit due to a lack of available data*		
	Reduction in additional expert reports	£247,500	£315,000	£382,500
	Savings on hospital orders (Crown Court)	£459,900	£766,500	£1,073,100
	Reduction in s 48 transfers	*It has not been possible to monetise this benefit due to a lack of available data*		
(b) Extend the capacity for trial procedures to the magistrates' (including youth) courts	Screening by liaison and diversion services	£107,500	£215,000	£322,500
	Using magistrates' court rather than Crown Court	*It has not been possible to monetise this benefit due to a lack of available data*		
	Savings on hospital orders (magistrates' and youth courts)	£1,106,400	£1,383,000	£1,659,600
	Total benefits	**£1,921,300**	**£2,679,500**	**£3,437,700**

Summary Table 4a: Annual monetisable costs for Option 3

		Low estimate	Best estimate	High estimate
	Transitional costs	Negligible/Non-monetisable	Negligible/Non-monetisable	Negligible/Non-monetisable
	Ongoing Costs			
(c) Enhance trial adjustments for defendants with participation difficulties	*It has not been possible to monetise the costs associated with our recommendations for enhancing trial adjustments for defendants with participation difficulties due to a lack of available data.*			
	Total costs	**-**	**-**	**-**

Summary Table 4b: Annual monetisable benefits for Option 3

		Low estimate	Best estimate	High estimate
	Transitional benefits	Negligible/Non-monetisable	Negligible/Non-monetisable	Negligible/Non-monetisable
	Ongoing benefits			
(c) Enhance trial adjustments for defendants with participation difficulties	*Unnecessary grant avoided*	*It has not been possible to monetise this benefit due to a lack of available data*		
	Regulating the cost of defendant intermediaries	£489,890	£612,360	£734,830
	Total benefits	**£489,890**	**£612,360**	**£734,830**

Summary Table 5a: Annual monetisable costs for Option 4

		Low estimate	Best estimate	High estimate
	Transitional costs	Negligible/Non-monetisable	Negligible/Non-monetisable	Negligible/Non-monetisable
	Ongoing Costs			
(a) Reform the test for unfitness to plead and all related procedures	Expert reports (including addendum reports) in Crown Court	£168,750	£236,250	£303,750
	Increase in Crown Court time	£90,000	£97,500	£105,000
	Supervision orders (Crown Court)	£375,260	£422,170	£469,080
	Sanctions for breach (Crown Court)	£1,400	£7,020	£12,630
	MAPPA	£33,220	£49,830	£66,440
(c) Enhance trial adjustments for defendants with participation difficulties	*It has not been possible to monetise the costs associated with our recommendations for enhancing trial adjustments for defendants with participation difficulties due to a lack of available data.*			
	Total costs	**£668,630**	**£812,770**	**£956,900**

Summary Table 5b: Annual monetisable benefits for Option 4

		Low estimate	Best estimate	High estimate
	Transitional benefits	Negligible/Non-monetisable	Negligible/Non-monetisable	Negligible/Non-monetisable
	Ongoing benefits			
(a) Reform the test for unfitness to plead and all related procedures	*Separate test of ability to plead guilty*	*It has not been possible to monetise this benefit due to a lack of available data*		
	Reduction in additional expert reports	£247,500	£315,000	£382,500
	Savings on hospital orders (Crown Court)	£459,900	£766,500	£1,073,100
	Reduction in s 48 transfers	*It has not been possible to monetise this benefit due to a lack of available data*		
(c) Enhanced trial adjustments for defendants with participation difficulties	*Unnecessary grant avoided*	*It has not been possible to monetise this benefit due to a lack of available data*		
	Regulating the cost of defendant intermediaries	£489,890	£612,360	£734,830
	Total benefits	**£1,197,290**	**£1,693,860**	**£2,190,430**

Annex B: Assumptions and risks

Option 5: associated risks and assumptions for implementation

Assumptions	Risks
Option 5:a) Reform the test for unfitness to plead and all related procedures	
Increased number of defendants in the Crown Court who are unable to participate. Estimate: x 2 Arrived at as follows: Consider numbers raised by: 1) Expansion of the capacity factors. 2) Widening of the test to incorporate decision-making capacity. 3) Greater awareness of issues and training in new test and procedures. Numbers mitigated by: 1) Application of test in context. 2) Abilities required become factors to be taken into consideration rather than determinative (judicial discretion). 3) Greater use of trial adjustments to facilitate effective participation. 4) Diversion of defendants lacking capacity out of CJS prior to determination of facts. 5) Separate test for ability to plead guilty. 6) Some clinicians and judges already interpret the *Pritchard* test in line with our recommendations.	Risk that numbers are underestimated. We consider the level of risk to be low because: 1) Judicial discretion will ensure no out of control increases. 2) The widening of the *Pritchard* test in other jurisdictions (such as Scotland and Jersey) has not resulted in a significant rise in demand.

Assumptions	Risks
Increased number of defendants in Crown Court for whom investigation to consider capacity and report(s) required. Estimate: marginal but not substantial rise in numbers investigated Arrived at considering: Numbers raised from current but not substantially because: 1) Broader test of capacity might encourage use and might reasonably catch more defendants. (+ve) 2) Following training, representatives may be better able to identify where defendant has considerable capacity difficulty. 3) Data collection exercise shows substantial numbers of reports already being prepared without a finding of unfitness. Numbers mitigated because: 1) Investigations generally triggered by representative's instinctive lay concerns which will remain unchanged. 2) With the national roll-out of liaison and diversion schemes on track for completion in 2017, will allow for at court consideration of the issue which will avoid the need for many expert assessments. 3) Many defendants who are likely now not to be unfit but may lack capacity under reforms would, because of instinctive concerns of representatives, already be the subject of investigation or subject to assessment at sentence in any event.	Risk that numbers are underestimated: We consider the level of risk to be low because: 1) Authority for the funding to instruct experts remains a matter of application to Legal Aid Agency, who retain the capacity to reject groundless claims. 2) More likely that we have underestimated how frequently reports are prepared under the current law. 3) Already a much greater number of reports being obtained than section 4 hearings being held; advocates are already obtaining reports to address participation issues.
Decrease in the average number of reports per defendant whose capacity is investigated. 1) Relaxation of the evidential requirement to receive psychologist reports – no need for two medical experts plus psychologist as is often the case currently. 2) Early requirement to disclose and emphasis on joint instruction of the second expert should reduce need for more than two reports to be prepared. 3) Where liaison and diversion services are available, less chance that wrong expert will be initially instructed.	Risk reduction in number of reports required is over-estimated. We consider the level of risk to be low because: 1) Current number of reports prepared not subject to any restriction bar obtaining prior authority. 2) No possibility reforms could achieve anything but a reduction in numbers of reports required per defendant.

Assumptions	Risks
Capacity procedures, on average, require no more court time than jury trial. Arrived at as follows: 1) Although two part procedure, the trial of issue is before judge alone. Frequently no evidence heard, alternatively a half or single day hearing at most. 2) Second part – alternative finding hearing will be more frequently contested where mental element in issue, but will infrequently involve defendant giving evidence. Will also be shorter where defendant forgoes right to jury trial, balancing out on average the time spent on the trial of issue.	Risk court time required has been underestimated. We consider the level of risk to be low because: 1) Estimation is based on experienced views of trial and hearing length.
No substantial increase in the number of secure hospital bed days required for remanded Crown Court defendants. Arrived at considering: 1) Although proposed reforms will expand scope of section 36 MHA remands to encompass those charged with murder, if requiring a secure bed awaiting trial, this is otherwise achieved by using other MHA mechanisms (namely section 3 and section 48). 2) Although time period for remands extended, where this is necessary it is achieved by other mechanisms at present (namely section 35 and section 3 or section 48).	Risk number of hospital admissions has been underestimated. We consider the level of risk to be low because: 1) No change in the eligibility criteria. 2) Hospital an available disposal regardless of a finding of lack of capacity and our recommended reforms.
Decrease in number of hospital orders: slight but notable. Arrived at considering: 1) More robust supervision orders make community disposal a more suitable option in more cases.	Risk number of hospital orders avoided may be overestimated. We consider the level of risk to be low because: 1) In light of observations made by clinicians in consultation and at symposium. 2) Considering the ever-increasing pressure on secure hospital beds.

Assumptions	Risks
Modest estimation of cost of enhanced supervision orders Estimation arrived at considering: 1) Costing based on NOMS costings for community orders. (No costings available from local authorities for current supervision orders)	Risk cost of supervision orders has been underestimated: We consider the level of risk to be moderate: 1) No data on current costings for supervision orders with which to compare. 2) Support provided, and thus costs, may vary significantly between local authorities and in response to the needs of the particular defendant. Risk mitigated by: 1) Orders which carry expenditure, beyond supervision, require confirmation that such arrangements can be made before order with those requirements can be imposed.
Modest increase in number of supervision orders. Estimate arrived at considering: 1) More defendants found to lack capacity, especially on the basis of lack of decision-making capacity – likely to result in rise reflected in greater numbers of supervision orders. 2) Making supervision orders more robust so individuals who might otherwise receive a hospital order get supervision order.	Risk that this is an underestimate. We consider the level of risk to be low and the impact of that risk is minimal: 1) Cost of supervision order lower than secure bed and custody. 2) Cost of supervision order not substantially higher than cost of community disposals on conviction in Crown Court.
Marginal increase in number of MAPPA offenders under extension to supervised defendants where index offence a specified violent or sexual offence. Estimate arrived at considering 1) Many such defendants are already MAPPA as a result of being notifiable sex offenders. 2) Reduction for individuals given supervision orders for offences not specified violent or sexual.	Risk underestimation of additional MAPPA offenders: We consider level of risk to be low: 1) We have accurate figures from empirical research over 10 years from which to estimate number of individuals who lack capacity who are sex offenders and thus already MAPPA. 2) We have accurate figures from empirical research over 10 years from which to estimate number of individuals who commit offences which are not specified violent or sexual offences.

Assumptions	Risks
We estimate no significant cost arising from cases where prosecution is resumed. Estimation arrived at considering: 1) Currently very low numbers of defendants against whom prosecution is resumed (generally around or less than 5 per year). 2) Postponement to allow for recovery will result in fewer such resumptions over time. 3) Although prosecution resumption powers have been extended, there is limited scope for recovered defendants to come to CPS attention beyond the current position. 4) Although a defendant right to apply for leave is important, it will be rarely exercised: since defendant would put him or herself in jeopardy of conviction.	Risk underestimation of remission cases: We consider the level of risk low: 1) Stretched prosecution resources are unlikely to be expended on resuming prosecution save against serious offences. 2) Judicial discretion to grant leave will prevent unmeritorious applications.
Option 5:b) Extend capacity for trial procedures to the magistrates' (including youth) courts	
Decrease in number of cases involving unfitness to plead procedures in the Crown Court, with a proportion instead remaining in the magistrates' court. Arrived at considering: 1) Committing unfitness cases to the Crown Court the only option under current provisions where hospitalisation or guardianship inappropriate. Reforms remove that necessity. 2) Under reforms capacity procedures in the magistrates' courts likely to be more advantageous for defendant: no change of court, swifter procedures,	Risk that this is an underestimate: We consider the risk to be moderate because: 1) There is no comparable procedural change against which we can test our estimation. 2) Statistical data in the magistrates' courts is limited and thus not available to inform assumption. Risk mitigated by: no significant costing based on this assumption.
Modest rise in additional expert reports prepared as a result of introduction of capacity procedures. Estimation arrived at considering: 1) Substantial number of reports already being prepared in the magistrates' courts. 2) Liaison and Diversion likely to reduce the number of fruitless or unnecessary unfitness investigations. 3) Adjournment for report to be prepared unlikely to be granted except in cases where there is an obvious need for assessment. 4) Liaison and Diversion teams likely to provide at court assessment to remove unnecessary report preparation. More defendants investigated for lack of capacity in light of greater awareness amongst reps. 5) More defendants investigated for lack of capacity in light of appropriate procedures being available.	Risk this is an underestimate. We consider this risk to be low: 1) There is already the scope to argue effective participation issues in the magistrates' courts. 2) Report funding still has to be agreed by Legal Aid Agency which will prevent unnecessary reports being prepared. 3) Resource and time constraints on legal representatives likely to curtail significantly the number of reports obtained speculatively. 4) Few defendants likely to be so impaired in capacity to participate that they are unable to participate effectively in magistrates' proceedings.

Assumptions	Risks
Estimate that approximately 800 defendants per year will be found to lack capacity in the magistrates' and youth courts. Estimate achieved by: 1) Careful calculation from current figures. 2) Calculation examined in context and cross-checked against available data and experience.	Risk that this is an underestimate. We consider the risk to be low because: 1) Calculation conducted on logical basis. 2) Modest account taken of resource and timing difficulties for legal representatives which are likely to reduce the number of findings of lack of capacity. 3) Judicial discretion in test will prevent inappropriate determinations. 4) Estimations are inkeeping with the current number of hospital orders imposed in the magistrates' and youth courts.
Determination of capacity and alternative finding hearing not significantly longer than trial. Estimation arrived at considering: 1) District Judge hears both capacity determination and alternative finding procedure. 2) Live expert evidence not always required. 3) Individual who lacks capacity will rarely give evidence. 4) Defendant's instructions to challenge prosecution case likely to be more limited than in full trial.	Risk this is an underestimate. We consider this risk to be low: 1) Little scope for extension of time required for either hearing. 2) Even where contested, determination of capacity issue unlikely to extend beyond two hours/half a day. 3) District Judge's case management powers should ensure effective use of court time, particularly where vulnerable defendant involved.
Modest estimation of number of hospital orders imposed on defendants found to lack capacity, in comparison to proportion imposed in Crown Court: Arrived at considering: 1) Low numbers of hospital orders granted currently on sentence or section 37(3) MHA in magistrates' courts. 2) Fewer cases in summary jurisdiction in which a hospital order a proportionate disposal.	Risk that this is an underestimate. We consider the risk to be low because: 1) Calculation is arrived at in consideration of current statistics on the imposition of hospital orders. 2) No extension of the eligibility criteria for the grant of hospital orders. 3) Hospital orders currently available on sentence and section 37(3) so no reason to consider need for hospital orders currently unidentified.
Option 5:c) Enhance trial adjustments for defendants with participation difficulties	
Introduction of statutory entitlement not likely to lead to significant rise in demand beyond current levels. Estimation arrived at by considering: 1) Introduction of statutory entitlement for intermediary support for giving evidence (with trained support for rest of trial) in Northern Ireland has not resulted in spike in demand. 2) Raised awareness not likely to increase demand significantly because intermediaries currently available under inherent jurisdiction.	Risk that this is an underestimate of demand for intermediaries for defendants. We consider that this risk is low: 1) Judicial discretion to grant will curtail unmeritorious applications. 2) Legal Aid Agency still required to approve funding.

Assumptions	Risks
Introduction of legal test will improve consistency and should prevent inappropriate grant. Estimation arrived at considering: 1) No strict test currently applied. 2) Reasonable to assume some inconsistency, especially where current awareness of intermediary role amongst the judiciary is not consistent.	Risk that this is an overestimate of advantage of statutory entitlement. We consider the risk to be low: 1) Estimation based on logic and in depth investigation into the operation of the current system.
Introduction of cost regulation will result in ongoing savings of approximately half the cost of defendant intermediary provision. Estimation arrived at considering: 1) Known costs of most substantial provider. 2) Known fees paid to witness intermediaries. 3) Estimate is very conservative: travel and accommodation costs likely to be much more significant.	Risk that this is an overestimate of savings: We consider the risk to be low: 1) In the context of scarce intermediary resources, providers only likely to raise, and not reduce, fees.