



Effective participation in the youth court

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Abstract

The youth justice system in England and Wales functions on the basic premise that children and young people should be afforded greater protection and support than adults when they face a criminal allegation. However, consultation responses received during the Law Commission's project on unfitness to plead have laid bare the surprising reality that, for a child or young person who has significant difficulties participating effectively in their trial, there is less statutory protection than for an adult in the same situation.

This paper explores the measures available in the youth court to ensure the effective participation of a young defendant. A worked example is used to illustrate the concerning difference in treatment between an adult who is unfit to plead in the Crown Court and a young person with comparable difficulties dealt with in the youth court. The paper then considers why a more suitable response to such issues is so critical for young defendants facing trial in the youth court. Reform to the options available in the youth court for defendants with participation difficulties is then considered in light of observations made by consultees to the Law Commission's unfitness to plead project. In particular the paper addresses the need for a statutory test to identify when a defendant is unable to participate effectively in the proceedings and the introduction of fairer fact-finding procedures with constructive and robust disposal options.

Introduction

Our youth justice system functions on the basic premise that children and young people should be afforded greater protection and support than adults when they face a criminal allegation. However, consultation responses received during the Law Commission's project on unfitness to plead have laid bare the surprising reality that, for a child or young person who has significant difficulties participating effectively in their trial, there is less statutory protection than for an adult in the same situation.

This paper looks at what effective participation means and uses a worked example to illustrate the concerning difference in treatment between an adult and a young person with effective participation difficulties. It then considers why a suitable response to such issues is so critical for young defendants, and explores our consultees' views on potential avenues for reform.

The Law Commission's unfitness to plead project

The Law Commission's unfitness to plead project began in 2008 as part of our Tenth Programme of Law Reform.¹ The project looks at how defendants who are unable to engage with the trial process should be dealt with in the court system. We published a Consultation Paper (CP197) in October 2010. We returned to the project in 2013, publishing an analysis of responses to CP197, and then a further Issues Paper in May 2014 in which we sought to hone our provisional recommendations for reform, in light of the responses to CP197 and the changing circumstances of the criminal justice system.

We have had over 100 responses to our two consultation documents. Our consultees are drawn from a wide range of stakeholders. They include members of the judiciary sitting in criminal courts at all levels, legal practitioners, academics, psychiatrists, psychologists, specialist nurses, intermediaries, representatives of government departments and interest groups, and service users themselves.

Why the youth court and why effective participation?

Unfitness to plead procedures only apply in the Crown Court,² and so our interest in the youth court might at first seem surprising. However, responses to our two consultation papers revealed clearly that whilst there are aspects of the Crown Court unfitness to plead processes that are in urgent need of reform, the absence of unfitness to plead procedures, and the inadequacy of the protections currently

¹ The unfitness to plead project was initially part of a joint project which also looked at the defence of insanity. However we are prioritising our work on unfitness to plead in light of responses to our Scoping Paper on the defence of insanity which suggested that more urgent reform was required in relation to unfitness to plead.

² The provisions of the Criminal Procedure (Insanity) Act 1964 which provide for unfitness to plead determinations, findings of fact and disposals are only applicable in the Crown Court.

provided for young defendants who cannot engage in trial in the youth court, are even more striking.

Although effective participation as a legal concept has developed separately from unfitness to plead, the two are closely aligned. In analysing how the test for unfitness to plead might best be reformed so that it protects all those who cannot fairly be tried, we have come to the conclusion that the concept of effective participation encapsulates accurately, and in a readily understandable way, what that essential ability to engage with trial really consists of. We recommend, therefore, that the test of unfitness to plead be reformulated as a test of capacity to participate effectively in trial.

What is meant by effective participation?

The ability to participate effectively in proceedings is an essential aspect of the right to fair trial under article 6 of the European Convention on Human Rights. Effective participation was considered in respect of two eleven-year-old children in the case of *T v United Kingdom, V v United Kingdom* (2000),³ in which the court concluded:

*it is essential that a child charged with an offence is dealt with in a manner which takes full account of his age, level of maturity and intellectual and emotional capacities, and that steps are taken to promote his ability to understand and participate in the proceedings.*⁴

In *SC v United Kingdom* (2005),⁵ the court considered again what effective participation might consist of. In this case, the defendant had also been eleven years old at the time of his trial. The court in its judgment stated:

*... 'effective participation' in this context presupposes that the accused has a broad understanding of the nature of the trial process and of what is at stake for him or her, including the significance of any penalty which may be imposed. It means that he or she, if necessary with the assistance of, for example, an interpreter, lawyer, social worker or friend, should be able to understand the general thrust of what is said in court. The defendant should be able to follow what is said by the prosecution witnesses and, if represented, to explain to his own lawyers his version of events, point out any statements with which he disagrees and make them aware of any facts which should be put forward in his defence.*⁶

³ 2 All ER 1024; 30 EHRR 121.

⁴ 2 All ER 1024; 30 EHRR 121 at [86].

⁵ 40 EHRR 10 (app no 60958/00).

⁶ 40 EHRR 10 (app no 60958/00) at, [29].

In *SC v United Kingdom* (2005), the court went on to observe that where a child or young person is at risk of being unable to participate effectively due to their age, or other difficulties, then ‘it is essential that he be tried in a specialist tribunal which is able to give full consideration to, and make allowance for, the handicaps under which he labours, and adapt its procedure accordingly’.⁷

In summary, passive presence of the defendant at trial is not enough. For a defendant to participate effectively so that the trial can be described as fair, the case law suggests that he or she must be able to have a level of active involvement in the trial process. This entails the defendant not just hearing, or even understanding, the evidence called by the prosecution, but being able to respond to it, by giving instructions to his or her representatives on how his or her defence should be advanced.

A worked example

Let us take as an example, an adult defendant, A, who has an autism spectrum condition and a learning disability. His full IQ is assessed by a psychologist to be 65, placing him in the lowest percentile of the general population (WAIS-IV, Wechsler, 2008). His condition is not susceptible to treatment, meaning that although he requires substantial support in the community, he does not require hospitalisation. He is alleged to have sexually assaulted a fellow service-user, who also suffers from similar difficulties, at a day care centre which they both attend.

When A appears at the Crown Court for his plea and case management hearing where he would ordinarily be required to enter his plea, his representative is unable to take instructions from A who cannot provide a coherent account of the alleged incident. It is clear to his representative that A would find following proceedings extremely difficult and would certainly be unable to cope with being cross-examined at trial.

In the Crown Court, A’s representative would be highly likely to obtain expert medical reports to consider whether A was unfit to plead, and in due course the judge would probably be satisfied, on the balance of probabilities, that he was indeed unfit. In order to make that determination, the judge would apply the test set out in *R v Pritchard* (1836),⁸ which asks, amongst other criteria, whether the defendant could instruct his representatives, follow the course of the proceedings and give evidence. A would then be diverted from the usual criminal trial process, and the risk of conviction.

Instead of full trial, there would be an alternative determination of facts hearing for A under section 4A of the Criminal Procedure (Insanity) Act 1964. In this hearing, a

⁷ 40 EHRR 10 (app no 60958/00) at [30].

⁸ 7 C & P 303, 304, reinterpreted most recently in the case *John (M)* [2003] EWCA Crim 3452.

jury would be required to decide whether A had ‘done the act or made the omission’ and, if the jury concluded that he had done the act of sexual assault, then the judge would have the power to impose a range of protective, but non-punitive, disposals. This range includes a hospital order⁹ (with potential restriction order)¹⁰ if the defendant suffers from a mental disorder that would be susceptible to, and required treatment, or a supervision order,¹¹ where the defendant would keep in touch with a supervising officer in the community, or an absolute discharge.

Let us compare A’s experience with that of a 15-year old-defendant, Y, who has the same condition and difficulties, and faces an identical allegation, against a fellow service-user of a similar age to Y. When Y makes his first appearance in the youth court, his representative would be likely to identify the same participation difficulties as would be identified in A’s case in the Crown Court. What then can Y’s representative do to address those really substantial participation issues, as A’s representative had done in the Crown Court?

No statutory unfitness to plead procedure available

Despite the fact that Y faces the same very serious allegation as A, it is highly likely that he would be tried in the youth court.¹² The Law Commission does not suggest that this is inappropriate in itself; indeed we endorse the view of the Carlile Inquiry¹³ that there should be a presumption that, in all but the most exceptional cases, young defendants will be tried in the youth court. But the difficulty faced by Y is that the statutory unfitness to plead procedures contained within the Criminal Procedure (Insanity) Act 1964, which protected A from conviction, are only applicable in the Crown Court. Even though Y suffers exactly the same difficulties as A, he cannot engage the same protections that A enjoyed. Whilst we consider, and our consultees agree, that there are strong arguments for reforming the unfitness to plead procedures in the Crown Court, those procedures do at least exist in that forum, and afford the unfit defendant protection from conviction.

⁹ Under section 5(2)(a) CP(I)A 1964 and section 37(2) Mental Health Act 1983. Subject to expert evidence from two doctors confirming that the defendant suffers a mental disorder which is treatable, and for which in-patient treatment is the most suitable disposal.

¹⁰ Under section 41 Mental Health Act 1983. Oral evidence from a doctor would be required confirming the need for a restriction order.

¹¹ Section 5(2)(b) CP(I)A.

¹² Section 24 Magistrates’ Courts Act 1980, there being little prospect of long-term detention under section 91 Power of Criminal Courts (Sentencing) Act 2000.

¹³ The Independent Parliamentarians’ Inquiry into the Operation and Effectiveness of the Youth Court (June 2014). Full report accessible at:

http://www.ncb.org.uk/media/1148432/independent_parliamentarians_inquiry_into_the_operation_and_effectiveness_of_the_youth_court.pdf at page 45.

Specialised youth proceedings and special measures sufficient?

It is of course right, and important, to bear in mind that youth court proceedings are by their nature adapted to accommodate the participation needs of young defendants. In all youth court proceedings simplified language is used, and the proceedings are closed to the general public,¹⁴ with reporting restrictions in place.¹⁵ The defendant sits in the well of the court, with a parent or guardian where available, in a court room designed not to be intimidating.

These are essential and significant adaptations of the court process which for most young defendants will suffice to assist them through the process. The district judge, or bench, is also required, as they are in the Crown Court, to consider the Criminal Practice Direction [2014] which requires at 3D.2 that the court take 'every reasonable step' to facilitate the participation of the defendant.¹⁶

For young defendants like Y, who have more substantial participation needs there are also, as there are in the Crown Court, more formal trial adjustments to help them to participate in trial. However, the provision of these 'special measures' for vulnerable defendants, even young defendants, is very limited, in contrast to the much wider entitlement for witnesses. When it comes to giving evidence, there is statutory provision for Y to give evidence by live link,¹⁷ if the judge concludes that this is in the interests of justice and Y's ability to participate effectively in the proceedings is compromised by his level of intellectual ability or social functioning.¹⁸ This does not, however, address any difficulties that Y may have giving instructions, receiving advice, and generally engaging with the proceedings in advance of giving evidence.

The young complainant in Y's case, if she suffers similar difficulties to Y, is highly likely to be assisted by a registered intermediary to give her evidence. Intermediaries are communication experts who assist an individual in understanding the proceedings and provide advice for the court and parties so that the proceedings are conducted in a manner intelligible to the individual they are assisting.¹⁹ However, there is no statutory entitlement currently in force to provide Y with the same assistance.²⁰ Despite the absence of statutory authority, judges

¹⁴ Section 47(2) Children and Young Persons Act 1933.

¹⁵ Section 39 Children and Young Persons Act 1933.

¹⁶ EWCA Crim 1569.

¹⁷ Live link would allow the defendant to give evidence from a room separate from the courtroom, connected to the proceedings by a live video-link.

¹⁸ Section 33A Youth Justice and Criminal Evidence Act 1999 ("YJCEA").

¹⁹ For a fuller examination of the intermediary role see Plotnikoff and Woolfson, 2015.

²⁰ Section 33AB YJCEA/section 104 Coroners and Justice Act 2009 provides for an unregistered intermediary to assist a defendant for the giving of evidence only, and subject to eligibility criteria. However this provision has never been brought into force.

have been granting intermediaries for defendants, particularly young defendants such as Y, under their inherent jurisdiction to ensure the fairness of proceedings.²¹ However, without statutory entitlement and clear funding in place, it is often difficult to obtain such a direction to secure funding and to identify an available intermediary. Indeed case law suggests that intermediary assistance is not always achieved for defendants, even where the court has ruled that it would be desirable.²² Even where an intermediary can be found, such intermediaries assist defendants in an unregistered capacity. They can act without minimum qualifications, and without the guidance of a code of practice, continuing professional development or a complaints procedure to ensure a minimum level of competence.

Even were Y able to enjoy these adjustments, given the difficulties that we identified at the outset, he is highly likely to be unable to participate effectively even with such assistance. What course is open to Y's representative in such circumstances?

Statutory powers: Section 37(3) Mental Health Act 1983

If the defendant faces a charge which carries a sentence of imprisonment, as Y's does, the court can make a hospital order (or a guardianship order where the defendant is aged 16 or over) without convicting Y, where the court is satisfied that the accused 'did the act or made the omission charged'.²³

This is the only statutory procedure that Y's representative can rely on in the youth court, in the absence of unfitness to plead procedures. But as an alternative to unfitness procedures, section 37(3) Mental Health Act 1983 has several fundamental deficiencies. First, the section is only applicable if the defendant suffers from a 'mental disorder' as defined by section 1 of the Mental Health Act 1983. This critically limits the effectiveness of the provision. For example, section 37(3) has no application to young defendants with a learning disability, unless that disability is associated with 'abnormally aggressive or seriously irresponsible conduct',²⁴ nor to defendants whose difficulties may arise as a result of developmental immaturity or delay, or a communication impairment falling outside the statutory definition of 'mental disorder'. These are precisely the difficulties that young people frequently present with in the youth court.²⁵

²¹ *C v Sevenoaks Magistrates' Court* [2009] EWHC 3088 (Admin).

²² *R v Cox* [2012] EWCA Crim 549.

²³ Section 37(3) Mental Health Act 1983 ('MHA'). The Court also has the power to adjourn proceedings for medical reports to be prepared under section 11(1) Powers of Criminal Courts (Sentencing) Act 2000.

²⁴ Section 1(2A) MHA.

²⁵ See for background 'The profile of children who offend' p15 of The Independent Parliamentarians' Inquiry into the Operation and Effectiveness of the Youth Court (June 2014). Full report accessible at:

This problem is made worse by the fact that, in contrast to adult defendants, many young defendants have had no prior contact with mental health services, and will have no pre-existing diagnosis to assist representatives and the court. Accessing Child and Adolescent Mental Health Services as a new referral can result in lengthy delays.

Secondly, the ‘mental disorder’ suffered by the defendant must be such that treatment in hospital, or supervision under a guardianship order, is appropriate.²⁶ Many defendants, such as Y, may have severe participation difficulties, but they cannot engage the protection from conviction provided by section 37(3) because their condition is not susceptible to treatment.

Even where a diagnosis is achieved, and hospitalisation is considered appropriate, the critical shortage of psychiatric facilities for children and young people means that it is not always possible to secure a placement to admit a young person.²⁷ This is a problem in both the Crown Court and the youth court. In our initial consultation exercise the Crown Prosecution Service provided us with an example of a Crown Court case where a young defendant who was unfit to plead in relation to a charge of wounding with intent was assessed as requiring hospitalisation, but no hospital bed could be found for him and he was eventually absolutely discharged. The public protection concerns in such a case are worrying indeed.

Thirdly, as a result of these qualifying criteria, the expert reports prepared inevitably concentrate on whether the defendant is suffering from a ‘mental disorder’ and whether that condition is susceptible to treatment such that either of the orders is appropriate, rather than whether the individual is capable of understanding or participating effectively in the trial process.

Finally, the range of disposals in the youth court is too limited. For defendants who are under 16 years of age, like Y, the only option offered by section 37(3) is in-patient treatment. Guardianship orders can only be imposed on defendants who have reached the age of 16, and an absolute discharge is not available. As a result, even where a young defendant might be treatable in hospital, representatives may be reluctant to pursue section 37(3) if community treatment may be more appropriate.

By contrast, in the Crown Court, if A is found to be unfit to plead and to have “done the act or made the omission” (at the section 4A Criminal Procedure (Insanity) Act 1964 hearing), the Court has the power to impose a supervision order on him,

http://www.ncb.org.uk/media/1148432/independent_parliamentarians_inquiry_into_the_operation_and_effectiveness_of_the_youth_court.pdf.

²⁶ Section 37(2) MHA.

²⁷ House of Commons Health Committee *Children's and adolescents' mental health and CAMHS*, Third Report of Session 2014–15.

which would provide some measure of support, but would allow him to remain living in the community as before.

An impossible situation

Where section 37(3) of the Mental Health Act 1983 cannot be engaged, Y's representative faces an impossible situation. If she wishes to ensure that Y is protected from the risk of being convicted at a hearing in which he cannot participate, then her only option is to attempt to have the proceedings discontinued or stayed. This is problematic for two reasons.

Firstly, achieving a discontinuance or stay is extremely difficult. Representations to the Crown Prosecution Service inviting them to discontinue the case will be unlikely to succeed in a case of sexual assault against a young and vulnerable complainant.²⁸ A stay is equally difficult to achieve, even for an individual with profound difficulties like Y. The defence would argue that the proceedings should be stayed as an abuse of process, on the basis that Y cannot have a fair trial because he is unable to participate effectively. However, the power to stay proceedings in the youth court is very sparingly exercised. Indeed it would only be in exceptional cases that a stay would be granted before evidence is heard.²⁹

The second difficulty with discontinuance or a stay as an alternative to unfitnes to plead procedures is that, if the proceedings are brought to a halt, the court cannot impose a protective disposal on the defendant, who will instead be discharged. The opportunity, presented by Y's appearance in the youth court, to put in place a structured disposal to help him to avoid future concerning behaviour is no longer available to the court. Arguably there is a danger that the youth justice system is undermined as a result, both from the perspective of the complainant, but also from Y's perspective, who may leave court considering that the youth justice system has no capacity to address his behaviour. There is the additional concern that any condition which may lie at the root of that behaviour, or may have contributed to it, will more than likely go untreated. This raises the risk of deterioration in the young person's mental state and further offending behaviour. Clear public protection concerns arise in such cases.

In light of the difficulty of achieving a stay, and the lack of subsequent disposal, the representative may feel that they have no option but to allow Y to undergo trial, or enter a plea of guilty, so that he can receive positive assistance in the community by way of a referral order or as part of a community penalty. This at least has the potential to achieve a constructive outcome for Y in the community, but at the expense of Y finding himself the subject of a trial in which he is unable to

²⁸ Considering the CPS 'Guidelines on Prosecuting Cases of Child Sexual Abuse' accessible at http://www.cps.gov.uk/legal/a_to_c/child_sexual_abuse/, last accessed 4 December 2014.

²⁹ *R(TP) v West London Youth Court* [2005] EWHC 2583 (Admin), [2006] 1 WLR 1219.

participate effectively, or persuaded to plead guilty when he cannot provide coherent instructions.

The recent *Derby Youth Court* case³⁰ demonstrates how problematic the current provisions are. The applicant, P, was 13 years old, and charged with, amongst other offences, a robbery which involved threats and the production of a weapon. He has a significant learning disability and indications of an autism spectrum condition. P had apparently been discharged in relation to an earlier prosecution for racially aggravated common assault when he was 12 years old (following a section 37(3) Mental Health Act 1983 fact-finding process). The youth court bench appear to have accepted that P was again likely to be “unfit to plead”, but it appears that he remained unsuitable for a hospital order. The bench undoubtedly took the view that a second absolute discharge, or a stay, was not likely to be effective in addressing P’s escalating offending, and decided to send him to the Crown Court (under section 51A(3) of the Crime and Disorder Act 1998), presumably so that the wider range of disposals under the unfitness to plead provisions would be available. However the High Court, rightly, decided that sending to the Crown Court was not justified, since P would not be likely to receive a sentence of 2 years’ detention, and quashed the decision. Under the current arrangements it is likely that P will eventually have to be discharged again by the youth court without court ordered support or supervision. Inevitably the youth court will continue to be faced with vulnerable defendants such as P, for whom current procedures offer no effective mechanism to provide support and public protection, unless the processes are reformed.

Those who responded, to both CP197 and the Issues Paper, were virtually unanimous in their view that the procedures and disposals available in the magistrates’ courts are inadequate.³¹ They make plain that, whilst there is a clear need to improve unfitness to plead procedures in the Crown Court, the situation in the youth court requires even more urgent reform.

A widespread difficulty?

In assessing how urgently reform in this area is required, it is worth examining how commonly defendants such as P or Y appear in the youth court. Might this difficulty be infrequently encountered and thus less of a concern than the example suggests? The answer, unfortunately, is that by any standard, children and young people who offend are more likely to have difficulties engaging meaningfully in trial than either adults who offend or the general population at large. This arises as a result of two interlinking factors.

³⁰ *R (on the application of P) v Derby Youth Court* [2015] EWHC 573 (Admin).

³¹ Consultation responses expressing concern about magistrates’ court procedures included the Justices’ Clerks’ Society, the National Bench Chairmen’s Forum, the Council of Her Majesty’s Circuit Judges, the Crown Prosecution Service, the Legal Committee for the Council of District Judges, Kids Company, Just for Kids Law, the Prison Reform Trust and the Law Society,

Natural developmental immaturity

Clinical advances in our understanding of the brains of children and young people reveal that the natural physical development of the brain continues throughout childhood and adolescence (Steinberg and Schwartz, 2000), and the brain may not be fully mature until the individual reaches their early twenties (Sowell et al., 2004). Increasingly, research findings confirm that young people under the age of 16 demonstrate inadequate functional and decision-making abilities that may compromise their capacity for effective participation in criminal proceedings. For example, research in the US has revealed that adolescents aged 11 to 13 were three times as likely as young adults (aged 18 to 24) to be 'seriously impaired' in terms of their legal abilities and adolescents aged 14 to 15 were twice as likely to be impaired. Young people of below average IQ are even more likely to have their capacity for proceedings compromised by developmental immaturity (Grisso et al., 2003).³²

Additionally, child development does not occur in a vacuum. The child's experience of parenting, their learning environment and experience of childhood abuse or other trauma are critical factors (Royal College of Psychiatrists, 2006). The troubled early life experiences of many young defendants further exacerbate this difficulty, as recognised in *R(D) v Camberwell Green Youth Court* [2005].³³

Greater prevalence of psychiatric disorders and learning disabilities or difficulties

The incidence of mental health difficulties amongst young people who offend, especially those in custody, is high (Vizard, 2009). Research suggests that, in comparison to the general and adult population, young people who offend exhibit much higher rates of:

- (1) learning disability (Loucks, 2007);³⁴
- (2) post-traumatic stress disorder (Steiner et al., 1997);
- (3) attention deficit hyperactivity disorder (ADHD) (Kazdin, 2000);
- (4) other psychiatric disorders, notably conduct disorder (Royal College of Psychiatrists, 2006).

³²This was the first large-scale study of age differences in competence to stand trial, assessing 1400 individuals aged 11 to 24 across four different centres in the US. See also (Lexcen, Grisso and Steinberg 2004).

³³ UKHL 4, [55].

³⁴ There is a substantial history of research into the role of learning disability in offending behaviour by children; see for example West and Farrington, 1973; 1977 and Rutter et al.; 1998.

In short, far from young defendants such as Y being infrequently encountered in the youth court, empirical research suggests that young defendants are more likely to have significant participation difficulties than adult defendants. The case for urgent reform is, in our view, compelling.

A direction for reform

The Law Commission's approach to potential reforms in the area of unfitness to plead and effective participation is founded on two central theses. First, we take the view that all defendants who may be unable to participate effectively in proceedings should enjoy the same fundamental protections from unfair trial. This should be the case regardless of the venue in which they appear, and the allegation which they face. In our view young defendants should enjoy, at the very least, comparable rights to those afforded to older defendants.

Secondly, we consider that the normal criminal trial process is the optimum one for a defendant, as it is for complainants, witnesses and society generally. We take the view that the courts should only deviate from full trial with great caution and where doing so is in the best interests of the defendant because he or she is unable to participate effectively in the proceedings. Whilst we acknowledge that some defendants, including perhaps A and Y, will be unable to participate effectively in the proceedings whatever assistance is provided, every effort should be made to afford the defendant whose capacity is in doubt such adjustments to the proceedings as he or she reasonably requires to be able to participate effectively.

Areas beyond the scope of unfitness to plead

A number of our consultees also argue that it is time for the age of criminal responsibility in this jurisdiction, currently set at 10, to be reviewed.³⁵ Likewise, others call for *doli incapax* (the rebuttable presumption that a child aged between 10 and 14 is incapable of committing a criminal offence) or its related defence, to be reintroduced.³⁶ We take the view that there are many sound clinical and policy reasons for the Government to review these issues, but that is beyond the scope of our current project.

Facilitating full and fair trial wherever possible

Our consultees endorse our view that every reasonable effort must be made to ensure that a defendant is able to participate effectively in his or her trial wherever

³⁵ These include the All Party Parliamentary Group for Children, Raymond Arthur (academic), Dr Eileen Vizard CBE (child and adolescent psychiatrist) and the Council of Her Majesty's Circuit Judges.

³⁶ These include the Royal College of Psychiatrists and the Prison Reform Trust. Despite the prospect of a revival of the defence of *doli incapax* in *CPS v P* [2007] EWHC 946, the case of *JTB* [2009] UKHL 20, [2009] 1 AC 1310 confirms that both the presumption and the defence were abolished by section 34 Crime and Disorder Act 1998.

that is possible.³⁷ As the criminal justice system adapts to hear evidence from ever younger and more vulnerable witnesses, it must also, we consider, strive to adapt its procedures to accommodate its more vulnerable defendants as well. This is the thrust of European judgments such as *SC v United Kingdom* (2005), and we must ensure that our system really does, ‘give full consideration to, and make allowance for’³⁸ the participatory difficulties that vulnerable defendants experience.

A statutory entitlement to the assistance of a registered intermediary

Our consultees have responded enthusiastically to two provisional proposals to ensure that as many defendants as possible are able to participate effectively in full trial. The first is the introduction of a statutory entitlement to the assistance of a registered intermediary for a defendant, for as much of the proceedings as is necessary, to ensure fair trial. The overwhelming view that emerges from our consultation process is that the inequity of the current arrangements for intermediary assistance for witnesses and defendants is unjustifiable and must be addressed.³⁹ Our investigations suggest that a statutory entitlement is essential to ensure that there is adequate provision of, and funding for, defendant intermediaries, and that the courts apply a consistent test in granting such assistance for a defendant. A registration scheme for defendant intermediaries is equally essential to ensure that defendant intermediaries are appropriately qualified and trained, and to support them in their role with guidance, supervision and continuing professional development.

Consultees, including legal practitioners, members of the judiciary, and communication experts,⁴⁰ emphasise that intermediary assistance only for the giving of the defendant’s evidence, as envisaged by the unimplemented section 33BA Youth Justice Criminal Evidence Act 1999 and in the recent case of *R (On the application of OP) v Secretary of State for Justice* [2014],⁴¹ is insufficient, in many cases, to address the defendant’s need to participate in the whole of the criminal trial, and would be unworkable in practice.

³⁷ This was particularly emphasised by Victim Support and individual victims spoken to, as well as by those living with a disability or supporting those with a disability, such as Autism West Midlands and Sense.

³⁸ 40 EHRR 10 (app no 60958/00)

³⁹ Only one consultee of the 45 responding to the Issues Paper disagreed with our provisional recommendation that there be a statutory entitlement to the assistance of an intermediary for as much of the proceedings as is required for the defendant to have a fair trial.

⁴⁰ Including, for example, David Wurtzel and Penny Cooper (academics who lead the training for intermediaries) the Council of Her Majesty’s Circuit Judges and Paula Backen (intermediary, from leading intermediary provider Communicourt).

⁴¹ EWHC 1944 (Admin).

Training

The second widely endorsed provisional proposal relates to training on participation issues for those working within the criminal justice system generally, but particularly those who are engaged in cases involving young defendants. Our consultation enquiries suggest that although the Criminal Practice Direction [2014] places a wide duty on the court to take ‘every reasonable step’ to facilitate the participation of a defendant,⁴² this is not always, in practice, achieved. This appears in large part to be because practitioners and the judiciary may not appreciate the extent of the duty, or have the awareness to be proactive in suggesting appropriate adjustments. Beyond general awareness training, the prevalence of psychiatric disorders and learning disabilities amongst young defendants, and the difficulties presented by developmental immaturity, suggest that more focused training on these issues, and the challenges relevant to trying young people, is required for those who are engaged in cases involving children and young people. Our provisional proposal for such training has received overwhelming support from consultees.⁴³

Better processes for identifying young defendants with participation issues

The major challenge for ensuring that young defendants are able to participate effectively, or intervening when they cannot, lies in ensuring that those with difficulties in this regard are identified accurately, and at an early stage. The training proposed above would undoubtedly assist but, given the prevalence of such difficulties amongst young defendants, we consider that there is a good argument for mandatory screening for participation difficulties for some, if not all, of those who appear in the youth court for the first time. NHS England is currently piloting a scheme to place forensic mental health practitioners in all police stations and criminal courts. If that is rolled out nationally, as hoped, we anticipate they may be well placed to conduct such screening.

Introducing effective participation procedures in the youth court

A statutory test

Our consultees make plain that the *Pritchard* test requires reform, and that a statutory test of the defendant’s ability to participate effectively should replace it in the Crown Court, and be introduced in the magistrates’ and youth courts. That test should set out, our respondents suggest, what effective participation requires a defendant to be able to do, namely to have both the foundational ability to engage

⁴² EWCA Crim 1569, 3D.2.

⁴³ This proposal was supported by 16 of 17 respondents to the Issues Paper who addressed this question, including the Magistrates’ Association, the Council of District Judges (MC), the National Bench Chairmen’s Forum, the Law Society, the Royal College of Psychiatrists, the Youth Justice Board, and the Crown Prosecution Service.

actively in the trial, and the capacity to make the decisions that may be required of him or her.⁴⁴

Some readers will query whether there should not be a qualifying psychiatric or medical diagnosis for a finding of inability to participate effectively, or a separate test to be applied to young defendants, which makes reference to developmental immaturity. Our approach in formulating provisional proposals for this new test of effective participation has been to set out what effective participation consists of, rather than to specify the reason why a defendant might experience difficulties at trial. The underlying cause may of course be relevant in terms of assessment and treatment of the defendant but, as we see in relation to section 37(3) Mental Health Act 1983, imposing a diagnosis as a threshold for the application of provisions of this sort can cause significant problems.

We think that a diagnostic threshold may be particularly problematic for young defendants whose inability to participate may arise as a result of natural developmental immaturity, or through a combination of conditions. We would be reluctant for a finding of inability to participate effectively to be dependent on a formal diagnosis or label, which clinicians may understandably be hesitant to apply to a young defendant. However, this does not mean that the young defendant should be assessed in the same manner as an adult, or necessarily by the same experts. Our consultees make clear that assessment of a young person should be conducted by child and adolescent specialists, taking into account their very different abilities to cope with the challenges of the court system.

A test applied in context

Importantly, Law Commission consultees agree that, in deciding whether a defendant can participate effectively, the court should take into account any assistance that can be provided to the young person for the trial, in particular 'special measures' and other adjustments.⁴⁵ Likewise, consultees consider that the court should be obliged to take into account the general nature of the particular proceedings that the defendant faces in deciding whether the defendant would be able to participate effectively. Thus for a young person, the court would have in mind that he or she will be tried in the more suitable environment of the youth court.

⁴⁴ Support for such an approach was resounding, including from senior members of the judiciary, the Legal Committee of HM District Judges (magistrates' court), the Council of HM Circuit Judges The Law Society, The Justices' Clerks Society, leading psychiatrists and psychologists, prominent academics working in the area and the Crown Prosecution Service.

⁴⁵ The only concerns raised by consultees across the two consultations related to resourcing issues rather than the principle of incorporating consideration of such assistance.

Effective participation procedures to be applicable to all criminal offences

As set out above the very limited procedures under section 37(3) Mental Health Act 1983 for a defendant who might be suitable for a hospital or guardianship order currently only apply to imprisonable matters. In considering an effective participation system for the youth and magistrates' court, respondents to our Issues Paper were unanimously of the view that the test and procedures should apply to all offences, whatever the sentence which could be imposed. Fair trial guarantees apply to all criminal proceedings, and we consider that, logically, effective participation issues must do so as well.

Maximising opportunities for discontinuance and diversion

Our consultees generally supported the view that it will not be desirable to proceed to a determination of the facts, and disposal, in every case where a defendant is found unable to participate effectively. Particularly in the youth court, it may be that the value to be gained from criminal proceedings will have been achieved, where the defendant's difficulties have been identified and where, for example, a package of support in the community can be constructed for the defendant. In such situations the majority of our consultees agree that it should be open to the court to decline to proceed to the fact-finding hearing and to divert the defendant out of the criminal justice system at that stage. The judge, in considering whether to divert the defendant out of the criminal justice system, would of course be required to consider any observations made by complainants, the prosecution and the defence.

Fairer fact-finding procedures for the young defendant who is unable to participate effectively

Where the proceedings must continue, consultees also resoundingly supported the introduction of fact-finding procedures in the magistrates' and youth courts comparable to those adopted for the Crown Court. Consultees were almost unanimous in considering that, where the court decides that a defendant is unable to participate effectively, procedures for establishing that the defendant 'did the act or made the omission' should at the very least give the defendant who cannot participate the same opportunity to be acquitted in full as a fit defendant would enjoy in the usual trial process. Consistent with this approach, consultees strongly supported the introduction of a requirement for the Crown to establish all elements of the offence at the fact-finding hearing.

A range of constructive and robust disposals

Finally, our investigations make plain that what is required in all courts is the power to impose a range of robust disposals for the defendant who cannot participate effectively, but who in the fact-finding hearing has been found to have done the act. In particular, there are calls for a more robust supervision order to be available to a defendant of any age. Our enquiries, speaking not only to lawyers, judges and

academics, but also to clinicians, interests groups and people who offend themselves, suggest that both constructive support and, where necessary, more assertive management powers based around risk assessment and monitoring, would enhance the current order.

Conclusion

I return in closing to the different experiences of A in the Crown Court and Y in the youth court. Our consultation responses have laid bare the unjustifiable contrast in treatment and outcome for A and Y under the current procedures. However, we are confident that consultees have also identified a principled case for reform so that effective participation difficulties can be properly addressed, and the defendant dealt with constructively, whatever the forum in which they are tried.

Full details of the Law Commission's unfitness to plead project and our Final Report can be accessed at <http://lawcommission.justice.gov.uk/areas/unfitness-to-plead.htm>.

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