

#07

Effective participation and fitness to plead

s1
Introduction

s2
Effective participation

s3
Fitness to plead

There is no formalised process in law for establishing a child's capacity or ability to effectively participate in criminal proceedings as might exist in other areas of law¹ or other jurisdictions.

This legal guide will:

- explain the legal framework for fitness to plead and effective participation in relation to children going through the criminal justice system
- take you through the key points in a case where concerns about your client's ability to effectively participate arise, and give practical advice on the work that needs to be done by the defence at each stage.

¹ s3(1) Mental Capacity Act 2005 states: 'a person is unable to make a decision for himself if he is unable— (a) to understand the information relevant to the decision, (b) to retain that information, (c) to use or weigh that information as part of the process of making the decision, or (d) to communicate his decision (whether by talking, using sign language or any other means).'

Introduction

England and Wales have a particularly low age of criminal responsibility. The average age of criminal responsibility across Europe is 14 years old² – yet the presumption in England and Wales is that any child is criminally responsible for their actions from the age of 10.

This very low age of criminal responsibility, combined with the evolving scientific consensus with regard to child and adolescent brain development,³ and the prevalence of children with neuro-disabilities and mental illness in the youth justice system,⁴ means it can be difficult for children to participate effectively in criminal proceedings.

The judiciary in England and Wales have created the Equal Treatment Bench Book (ETBB)⁵ to ensure that members of the judiciary and others working in the courts system have better awareness and understanding of the different circumstances of people appearing in courts and tribunals.⁶ Its aim is to enable and facilitate effective communication⁷ and suggest steps which should increase participation by all parties.⁸

The ETBB specifically addresses the effective participation of children, young people and vulnerable adults in the criminal justice system.⁹ It notes that ‘the effective participation in criminal

proceedings by young and vulnerable defendants has been considered in a series of cases and it is relevant to the issue of a fair trial under article 6 of the European Convention on Human Rights’ (ECHR).¹⁰ In consequence: ‘Courts and tribunals are expected to adapt normal trial procedure to facilitate the effective participation of witnesses, defendants and litigants, by taking “every reasonable step to facilitate the participation of any person, including the defendant” in preparation for trial.’¹¹ As the ETBB makes clear: ‘This may present more of a challenge to the decision-maker when parties or witnesses are children or vulnerable adults and have difficulty engaging with the court or tribunal process.’¹²

In its 2016 report, Unfitness to plead, the Law Commission stated that: ‘Early identification of young defendants with participation difficulties is key to ensuring suitable and effective procedures in the youth court.’¹³ The Law Commission went on to recommend in principle that ‘all defendants appearing for the first time in the youth court should be screened for participation difficulties’.¹⁴ To date, the government has not given effect to this recommendation.

- 2 Minimum ages of criminal responsibility in Europe, Child Rights International Network (CRIN), bit.ly/3iwZp81
- 3 ‘Scientific developments in child and adolescent brain development, policy and the law’, S Lambe, International Association of Youth and Family Judges and Magistrates Chronicle, July 2018; ‘Should the science of adolescent brain development inform public policy?’, L Steinberg, Issues in Science and Technology, Vol XXVIII, No 3, Spring 2012, bit.ly/3AIKTGs
- 4 See Nobody made the connection, Children’s Commissioner, 2012, bit.ly/3A6bMOn
- 5 Judicial College, February 2021, bit.ly/2ZOD3IB
- 6 ETBB p4 para 4
- 7 ‘Effective communication underlies the entire legal process: ensuring that everyone involved understands and is understood. Otherwise the legal process will be impeded or derailed’: ETBB p6 para 8
- 8 ETBB p5 para 4
- 9 ETBB ch 2
- 10 ETBB ch 2 p50 para 12
- 11 ETBB ch 2 p56 para 41; Criminal Procedure Rules (CrimPR) 2020 SI 2020/759 (as amended) 3.8(3)(b)
- 12 ETBB ch 2 p50 para 7
- 13 Unfitness to plead (Law Com No 364): Vol 1, Law Commission, 12 January 2016, bit.ly/2YfqJjO, para 1.101
- 14 Unfitness to plead para 1.101

Effective participation

Arguments to ensure compliance with the rules around effective participation

The Criminal Practice Directions (CrimPD) 2015 Division I: 'General matters' at para 3D.1 identifies that children in the criminal justice system are vulnerable solely by virtue of their age: "vulnerable" includes those under 18 years of age'. Many are doubly vulnerable as they may have extra needs due to underlying difficulties.

It is the practitioner's responsibility to remind the court of the special status given to children in the criminal justice system,¹⁵ both in legislation¹⁶ and in rules of procedure.¹⁷

A case involving a vulnerable child defendant requires consideration of the child's individual needs, and in particular:

- whether the child is fit to plead
- whether the child can effectively participate and
- what modifications or special measures may be necessary to ensure that a child is fit to plead and can participate effectively in the proceedings against them.

A defendant's right to effective participation in the criminal process is inherent in Article 6 ECHR (right to a fair trial).¹⁸ A trial in which a child defendant cannot effectively participate may amount to a breach of the child's Article 6 rights. The ETBB defines 'effective participation' as including 'the right to hear and follow proceedings', which in turn includes:

- 'Being informed clearly and in detail, and in language which he or she can understand, of the nature and cause of the accusation against him or her.
- Having a broad understanding of the trial process and what is at stake.
- Being able to understand the general thrust of what is said in court.
- Being able to understand what is said by the prosecution witness and able to point out to his or her own lawyers any statement with which he or she disagrees.¹⁹

These, in many respects, mirror the criteria in *SC v UK*²⁰ set out in the European Court of Human Rights (ECtHR) jurisprudence below. Furthermore domestic case law sets out practical steps which may be taken to facilitate participation in a youth court were set out by the High Court in *R (TP) v West London Youth Court*.²¹ They include:

- keeping the defendant's level of cognitive functioning in mind
- using concise and simple language
- having regular breaks
- taking additional time to explain court proceedings
- being proactive in explaining and ensuring that the defendant understands the ingredients of the charge
- explaining the possible outcomes and sentences
- ensuring that cross-examination is carefully controlled so that questions are short and clear and frustration is minimised.²²

The form modifications might take are wide-ranging and must be tailored to the particular needs and circumstances of the child in question. Ideas of the kinds of modifications that may be necessary are set out in the CrimPD (below).²³ These are not exhaustive: a practitioner should argue for particular modifications as suggested by experts such as psychologists, speech and language therapists or other professionals who know the child.

Practitioners representing child defendants can also argue the welfare duty²⁴ and 'best interests'²⁵ to support applications for any modifications to the court process that are necessary to ensure the child's effective participation and to prevent the child from experiencing intimidation or distress.

15 The parties are under a duty to alert the court to any 'potential impediment to the defendant's effective participation in the trial': CrimPR 3.3(2) (f), inserted by Criminal Procedure (Amendment) Rules 2021 SI 2021/40

16 'Every court in dealing with a child or young person who is brought before it, either as an offender or otherwise, shall have regard to the welfare of the child or young person': s44(1) Children and Young Persons Act (CYPA) 1933; see also CrimPD 3D.2

17 See, in particular, CrimPD 3G 'Vulnerable defendants'; for more details, see Youth Justice Legal Centre's (YJLC's) Legal Guide, Criminal Practice Directions: bit.ly/3atFlKj

18 *SC v UK* [2004] ECHR 263

19 ETBB ch 4 p133 para 116

20 [2004] ECHR 263

21 [2005] EWHC 2583 (Admin)

22 [2005] EWHC 2583 (Admin) para 26

23 See CrimPD 3D-3N and 3P

24 s44(1) CYPA 1933

25 United Nations Convention on the Rights of the Child, Article 3(1): 'In all actions concerning children ... by ... courts of law ... the best interests of the child shall be a primary consideration'

European Court of Human Rights jurisprudence on effective participation

The language of ‘effective participation’ in criminal proceedings was first introduced in 1994, in the decision in *Stanford v UK*,²⁶ in which the ECtHR held that the fair trial element of Article 6 ECHR ‘guarantees the right of an accused to participate effectively in a criminal trial’.²⁷ This case related to an adult defendant.

In 1999, in *V v UK*,²⁸ the concept of ‘effective participation’ was specifically referred to in the context of child defendants in the criminal justice system. The ECtHR found that by trying two 11-year-old boys in the Crown Court,²⁹ the UK had breached their Article 6 right to a fair trial. The ECtHR held that ‘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’.³⁰

The ECtHR also held that when a child is on trial, proceedings should be conducted in such a way as ‘to reduce as far as possible’ the child defendant’s ‘feelings of intimidation and inhibition’.³¹

Six years later, in the 2005 decision of *SC v UK*,³² the ECtHR considered the case of an 11-year-old with a significant degree of learning difficulties, who had been charged with robbery and tried in the Crown Court. In *SC*’s case, modifications had been put in place to facilitate his ability to effectively participate. *SC* sat with his social worker throughout the trial, and steps were taken

to ensure that the procedure was as informal as possible (for example, the legal professionals did not wear wigs and gowns).

However, after his trial and conviction, fresh evidence from the social worker who had been with *SC* throughout the trial suggested that he had had little understanding of the trial process or of its likely consequences. Notwithstanding the modifications to the court process, the ECtHR was not satisfied that *SC* had been capable of participating effectively in his trial to the extent required by Article 6. The ECtHR held that ‘effective participation’ presupposes:

- that the accused has a broad understanding of the nature of the trial process and of what is at stake, including the significance of any penalty which may be imposed
- that the accused should be able to follow what is said by the prosecution witnesses and
- if represented, that the accused is able to explain to their own lawyers their version of events, to point out any statements with which they disagree, and make the representative aware of any facts which should be put forward in their defence.³³

The ECtHR went on to say that for child defendants: ‘It is essential that he be tried in a specialist tribunal which is able to give full consideration to and make proper allowance for the handicaps under which he labours, and adapt its procedure accordingly’.³⁴

Modifications and special measures for effective participation: Criminal Practice Directions and Criminal Procedure Rules³⁵

Background

The decision in *V v UK* led to domestic reforms for children in the criminal justice system in England and Wales in the form of a Criminal Practice Direction – ‘Practice Direction (Crown Court: Young Defendants)’ – issued in 2000 by the then Lord Chief Justice (Lord Bingham). This set out the steps that should be taken in the trials of ‘young defendants’.³⁶

In 2000, the CrimPD applied specifically and exclusively to young defendants, which it defined as ‘children and young persons’, aligning with the language of other legislation relating to children. Since 2000, there have been various amendments and overhauls that have extended the protective elements of the CrimPD to include all vulnerable people in court, whether children or adults.

26 [1994] ECHR 6

27 [1994] ECHR 6 para 26

28 [1999] ECHR 171

29 Who in fact had the functional age of an 8- or 9-year-old

30 [1999] ECHR 171 para 86

31 [1999] ECHR 171 para 87

32 [2004] ECHR 263

33 [2004] ECHR 263 para 29

34 [2004] ECHR 263 para 35

35 Available at: bit.ly/3x0Jl3p

36 [2000] 1 WLR 659 para 1

Principles and eligibility for modifications

The Criminal Procedure Rules (CrimPR) are the law and should be interpreted in combination with the CrimPD. Together they provide a code of current practice that is binding on the courts to which they are directed.³⁷

Practitioners and the court must work together to give effect to a child defendant's right to effectively participate:

- The CrimPR state that parties are under a duty of 'active assistance' to alert the court to any potential impediment to the defendant's effective participation in the trial.³⁸

- The court is under a duty to:
 - take 'every reasonable step' to encourage and facilitate the participation of any person, including the defendant³⁹
 - have regard to the welfare of a child defendant⁴⁰ and
 - enable a witness or defendant to give their best evidence.⁴¹

The court discharges this duty by:

- identifying the needs of witnesses at an early stage and
- making provision for arrangements to meet those needs – whether in the form of statutory special measures or other modifications to the trial process.⁴²

37 CrimPD 1A.3: 'Participants must comply with the Rules and Practice Direction, and directions made by the court, and so it is the responsibility of the courts and those who participate in cases to be familiar with, and to ensure that these provisions are complied with'

38 CrimPR 3.3(2)(f)

39 CrimPD 3D.2; CrimPR 3.8(3)(a), (b)

40 s44 CYP A 1933

41 CrimPD 3D.2

42 CrimPD 3F.24: 'Communication needs ... are common to many witnesses and defendants under 18. Consideration should therefore be given to the communication needs of all children and young people appearing in the criminal courts and to adapting the trial process to address any such needs'

43 Defined in ss16 and 17 Youth Justice and Criminal Evidence Act (YJCEA) 1999 (as amended by the Coroners and Justice Act 2009)

44 s17 YJCEA 1999

45 CrimPR 3.8(3)(b)

46 CrimPR 3.2(2)(b)

47 CrimPR 3.3(1)(a), (2)(c)(iv); 3.5(1), (2)(c); 3.8(7)(a); 18.10(c)

48 CrimPR 18.9(2)

49 The ATC was the forerunner of the Inns of Court College of Advocacy (ICCA); report available at: bit.ly/3mjB9rf. The approach taken by the report was specifically endorsed by the Court of Appeal in R v Wills [2011] EWCA Crim 1938, [2012] 1 Cr App R 2. The report includes and recommends the use of 'toolkits' to assist advocates as they prepare to question vulnerable witnesses

50 These toolkits are available at: bit.ly/2TOSVEM

51 Available at: bit.ly/3uTcxYq

The key parts of the Criminal Practice Directions

CrimPD I 'General matters' 3D: 'Vulnerable people in the courts'

3D.1	<p>Eligibility for special measures</p> <ul style="list-style-type: none"> • 'Vulnerable' and 'intimidated' witnesses⁴³ • Vulnerable witnesses: include those under 18; those with a mental disorder or learning disability and/or a physical disorder or disability; and those who are likely to suffer fear or distress in giving evidence because of their own circumstances or those relating to the case • Intimidated witnesses: witnesses where the quality of evidence given by them is likely to be diminished by reason of fear or distress on their part in connection with testifying in the proceedings⁴⁴
3D.2	<p>Other assistance</p> <ul style="list-style-type: none"> • 'Every reasonable step' must be taken to facilitate the participation of any witness (whether 'vulnerable' or 'intimidated'), including the defendant⁴⁵ • Facilitating participation includes: <ul style="list-style-type: none"> - enabling a witness or defendant to give their best evidence and - enabling a defendant to comprehend proceedings and engage fully with their defence • The pre-trial and trial process should, so far as is necessary, be adapted to meet those ends
3D.3	<p>Identification of special measures and modifications</p> <ul style="list-style-type: none"> • The court must identify the needs of witnesses at an early stage⁴⁶ • The court may require the parties to identify arrangements to facilitate the giving of evidence and participation in the trial⁴⁷ • Under the 'primary rule', an application is not necessary for the court to give a direction as to special measures / modifications⁴⁸
3D.5–3D.8	<p>Endorsement of the use of other resources</p> <p>Advocates should consult and follow the relevant guidance whenever they prepare to question a young or otherwise vulnerable witness or defendant. Examples given are:</p> <ul style="list-style-type: none"> • Raising the bar: the handling of vulnerable witnesses, victims and defendants in court, Advocacy Training Council (ATC), 2011⁴⁹ • Advocate's Gateway toolkits⁵⁰ • Achieving best evidence in criminal proceedings: Guidance on interviewing victims and witnesses, and guidance on using special measures, Ministry of Justice, 2011⁵¹

Updates to the CrimPR⁵² make clear that the court must exercise its power to appoint an intermediary to facilitate a defendant's effective participation in the trial where the defendant's ability to participate effectively is likely to be diminished by reason of age, if the defendant is under 18.⁵³

For more information about the appointment of intermediaries, see the YJLC Legal Guide Intermediaries for child defendants.⁵⁴

The Court of Appeal has held that the special measures and modifications provided for in legislation and the CrimPD and CrimPR, should, when appropriately utilised, enable vulnerable defendants to effectively participate and ensure that there are fewer findings of a defendant being unfit to plead and stand trial.⁵⁵

Available modifications

Below is a summary of the modifications provided for in the CrimPD. Remember, however, that these are not exhaustive: the court retains an inherent

power at common law to make any modifications necessary to ensure a child defendant's effective participation.⁵⁶

CrimPD I 'General matters' 3G: 'Vulnerable defendants'

Before the trial, sentencing or appeal	
3G.1	<ul style="list-style-type: none"> Severance from other adult defendant(s)
3G.2	<ul style="list-style-type: none"> Court familiarisation before hearing
3G.3	<ul style="list-style-type: none"> If an intermediary is being used, intermediary attendance at pre-trial visit
3G.4	<ul style="list-style-type: none"> If use of live link is being considered, a practice session
3G.5	<ul style="list-style-type: none"> Police protection from intimidation, vilification or abuse from public or media A direction to the media about prohibition of photographing on court premises A reporting restriction under s39 or s49 CYPA 1933
The trial, sentencing or appeal hearing	
3G.7	<ul style="list-style-type: none"> Courtroom set up so everyone sits at the same or almost the same level (if practicable and subject to appropriate security arrangements)
3G.8	<ul style="list-style-type: none"> Allowing (subject to appropriate security arrangements) a child defendant to sit with members of their family or others in a like relationship and with another suitable supporting adult (such as a social worker) in a place which permits easy, informal communication with their lawyers A supporting adult should be available throughout proceedings
3G.9	<ul style="list-style-type: none"> Court to ensure proceedings are explained in a way that the defendant can understand Court to remind lawyers and supporting adult of their responsibility to explain each step of the process
3G.10	<ul style="list-style-type: none"> Court hearings to be conducted according to a timetable that takes full account of a defendant's ability to concentrate, with frequent and regular breaks often being appropriate Court to ensure clear language is used that the defendant can understand, and that questioning is short and clear, 'ground rules' followed, and 'toolkits' referred to
3G.11	<ul style="list-style-type: none"> Evidence given via live link, if in the interests of justice
3G.12	<ul style="list-style-type: none"> Removal of robes and wigs, taking into account the wishes of vulnerable defendant and vulnerable witness Security staff for young vulnerable defendant in custody should not be in uniform No recognisable police presence in the courtroom, save for good reason
3G.13	<ul style="list-style-type: none"> Restriction on the attendance of members of the public to a small number, perhaps limited to those with an immediate and direct interest in the outcome Restriction on reporters attending to a number that is practicable and desirable, although the public has a right to be informed about the administration of justice

52 Amended on 5 April 2021, by SI 2021/40

53 CrimPR 18.27(1)(a)(i)

54 Available at: bit.ly/3uKsv8T. See also the YJLC Legal Guide Criminal Practice Directions, bit.ly/3a1Flkj, pp8–10

55 R v Walls [2011] EWCA Crim 443 para 37

56 R (C) v Sevenoaks Youth Court [2009] EWHC 3088 (Admin); R (D) v Camberwell Youth Court [2005] UKLH 4. See also CrimPD 3F.12, 3F.13, 3F.16

Practical guidance – procedural steps

The CrimPD apply to all stages of the criminal justice process, all of which should, so far as necessary, be adapted to ensure that a child defendant can effectively participate.

If intermediary support is needed to ensure effective participation in giving instructions and going through the evidence, you may need to apply for additional financial support from the Legal Aid Agency (LAA). Prior authority should be requested to be extended to cover these costs, as well as attendance at conferences with counsel, pre-trial hearings and at a court familiarisation visit. Use your expert reports to support the application for additional support.⁵⁷

↳ Identify an expert

It is likely that you will need to instruct both a child psychologist and an intermediary – often a speech and language therapist. Get a quote from the proposed expert before applying for prior authority from the LAA. If you explain to the LAA the expert's expertise and that they are a leading expert prepared to work at legal aid rates due to their commitment to assisting children in the criminal justice system, you often do not need to send in two quotes.⁵⁸

↳ Pre-court

If possible, prior to the first appearance, ask family/carers/YOT/the child whether they are aware of anything that may affect the child defendant's understanding and participation in the process. Things to consider include:

- Is the client in education?
- Have they ever needed additional support, eg do they have an Education, Health and Care Plan (EHCP)? Obtain a signed authority in order to access your client's school, social services and medical records.
- Do family/carers have any documentation regarding any previous diagnosis?

↳ First appearance

Apply for an adjournment to obtain the expert report. The court may be reluctant to grant long adjournments, so you will need to be clear about your basis for seeking one. There is guidance in the CrimPD at 3P.5–3P.10 ('Timetable for the commissioning, preparation and consideration of a report or reports') about the length of time to adjourn for expert reports. Outline to the court any concerns identified by the school, YOT or social services, and any difficulties you have had obtaining instructions. Refer to CrimPD 3F.24–3F.26 ('Intermediaries for witnesses and defendants under 18') which at 3F24 states that: 'Consideration should ... be given to the communication needs of all children and young people appearing in the criminal courts and to adapting the trial process to address any such needs.'

If the court insists on proceeding despite your request for an adjournment, enter a 'not guilty' plea and set the matter down for trial. Try to include on the court record that the not guilty plea is based on the need to obtain expert evidence regarding effective participation, in order to preserve the defendant's credit for any eventual guilty plea.

↳ Draft a letter of instruction to the expert

In your letter of instruction to the expert, ensure that you explicitly request that the child psychologist considers:

- effective participation (setting out the legal criteria for this as identified in *SC v UK, R (TP) v West London Youth Court*,⁵⁹ ETBB and CrimPR above)
- fitness to plead, and also
- compliance, suggestibility, IQ and screening for ADHD,⁶⁰ ASD,⁶¹ PTSD⁶² and any emerging mental illness where this is appropriate.⁶³

The latter issues could potentially be relevant to substantive issues (such as defences, the defendant's answers in interview), as well as the defendant's ability to engage with and participate in the trial process.

57 See YJLC Legal Guide Intermediaries for child defendants p5

58 See YJLC toolkit on instructing an expert

59 [2005] EWHC 2583 (Admin)

60 Attention deficit hyperactivity disorder

61 Autism spectrum disorder

62 Post-traumatic stress disorder

63 See YJLC toolkit on instructing an expert

↳ Early identification of issues and notification to the court

In the Crown Court, issues around effective participation should be raised at the plea and trial preparation hearing (PTPH); the PTPH form requires identification of any modifications sought or likely to be sought.

In the youth court, raise concerns at the first appearance and then complete an application for modifications or special measures recommended by the experts; a further case management hearing may be required for these to be considered. If a trial with a vulnerable child defendant and modifications is to take place in the youth court, consider applying for a certificate for an assigned advocate. Be bold in requesting whatever has been suggested, even if this seems outside of usual court practice.

↳ Ground rules hearing

There should be a ground rules hearing (GRH) at which the judge gives directions both in relation to the modifications to the trial process as a whole, and in relation to the defendant's communication support (including if there is to be intermediary support and in relation to the framing of questions).⁶⁴

↳ Trial of the facts in the youth court

If a defendant cannot effectively participate even with modifications, a trial of the facts will follow: the process arises from a combination of s37(3) Mental Health Act (MHA) 1983 and s11 Powers of Criminal Courts (Sentencing) Act (PCCSA) 2000. For more detail, see 'Fitness to plead - the youth court' below.

↳ Fitness to plead in the Crown Court

This a two-stage process. First, the judge will decide, on the basis of expert evidence, whether a defendant is fit to plead; second, if the defendant is found unfit, a jury will be sworn to decide whether the defendant did the acts alleged. See 'Fitness to plead - the Crown Court' below.

↳ Ongoing duty

Practitioners are under a duty to be alive to the issue of effective participation throughout the trial: effective participation is an ongoing issue. If a child defendant is unable to participate effectively despite the modifications in place or because of some change in circumstances, you should inform the court.

↳ Sentence

Consider what practical steps are needed to ensure the appropriate sentence is available. This might include liaising with the YOT and Child and Adolescent Mental Health Services (CAMHS) or local authority learning disabilities team to ensure that the relevant support or placement will be provided and followed up. Provide written details to the court (where possible) in advance.

64 See CrimPD 3E; YJLC Legal Guide Criminal Practice Directions; and YJLC Legal Guide Intermediaries for child defendants

Inability to participate effectively – staying proceedings as an abuse of process

If a defendant is unable to effectively participate despite modifications, technically the proceedings will breach Article 6 ECHR.⁶⁵ The remedy is to stay proceedings as an abuse of process. In practice, however, this rarely happens: stays are an exceptional remedy. In *R (P) v West London Youth Court*,⁶⁶ the High Court held that neither youth nor limited intellectual capability would necessarily lead to a breach of Article 6, the crucial question being whether the tribunal hearing the case was able to adapt its procedures so that the defendant could participate effectively in the proceedings.

The court has a continuing jurisdiction to grant a stay if it becomes apparent during the course of proceedings that a child defendant is incapable of effectively participating. The defence can apply for proceedings to be stayed. This will involve serving a skeleton argument on the CPS and the court and the matter being listed for a hearing.

In the Crown Court, if there are no modifications that will enable a vulnerable defendant to effectively participate, they may be found unfit to plead and a trial of the facts will take place. See ‘Fitness to plead procedure in the Crown Court’ below.

⁶⁵ *V v UK* [1999] ECHR 171; *SC v UK* [2004] ECHR 263

⁶⁶ *R (P) v West London Youth Court* [2005] EWHC 2583 (Admin)

Fitness to plead

The youth court

Procedure

Unlike the Crown Court where there is specific legislation relating to fitness to plead,⁶⁷ the procedure in the youth court is an ad hoc process, contributed to by case law and legislation. The High Court has suggested that the following two-stage process fulfils the same requirements as the statutory fitness to plead procedure in the Crown Court:⁶⁸

↳ Stage 1: Can the child defendant effectively participate? The standard of proof in determining this is the balance of probabilities.⁶⁹

If not:

↳ Stage 2: Has the child done the acts alleged?

The youth court's power is essentially limited to: (a) adjourning proceedings for a report to be prepared on the defendant's condition (s11(1) PCCSA 2000); and (b) making a hospital or guard-

ianship order without convicting the defendant (under s37(3) MHA 1983).⁷⁰

The Law Commission's view was that the limited procedures available are insufficient and in need of reform because they do not consider unfitness to plead specifically:

They focus rather on whether the accused requires hospitalisation or a guardianship order instead. The lack of suitable procedures is liable to result in full trial being proceeded with where the defendant cannot effectively participate, proceedings being stayed without positive outcome ... [But] [s]tays 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.⁷¹

Powers of Criminal Courts (Sentencing) Act 2000 s11

(1) If, on the trial by a magistrates' court of an offence punishable on summary conviction with imprisonment, the court—

(a) is satisfied that the accused did the act or made the omission charged, but

(b) is of the opinion that an inquiry ought to be made into his physical or mental condition before the method of dealing with him is determined, the court shall adjourn the case to enable a medical examination and report to be made, and shall remand him.

Mental Health Act 1983 s37

(3) Where a person is charged before a magistrates' court with any act or omission as an offence and the court would have power, on convicting him of that offence, to make an order under subsection (1)⁷² above in his case, then, if the court is satisfied that the accused did the act or made the omission charged, the court may, if it thinks fit, make such an order without convicting him.

67 Criminal Procedure (Insanity) Act 1964: see further below

68 CPS v P [2007] EWHC 946 Admin

69 R (TP) v West London Youth Court [2005] EWHC 2583 (Admin), para 14

70 P v Barking Youth Court [2002] EWHC 734 (Admin). See also R (Varma) v Redbridge Magistrates' Court [2009] EWHC 836 (Admin), para 10

71 Unfitness to plead paras 1.92 and 1.95

72 s37(1) MHA 1983 provides the power of the court to order admission to hospital

Disposals available for a trial of the facts

If the youth court finds the child defendant did the act or made the omission charged, the court has the power to make an order without convicting the child defendant.

At the conclusion of the trial of the facts, the court can adjourn the case in order for a report to be prepared regarding the child defendant's physical or mental condition before deciding the method of dealing with them (s11(3)(a) PCCSA 2000).

However, the orders that are available to the court under s37(3) MHA 1983 are limited. They are only available where the offence charged carries imprisonment on summary conviction.⁷³ They are as follows:

1. Hospital order

The youth court can impose on a child defendant a hospital order under s37(1) MHA 1983, if:

- the necessary medical evidence required by subsection (2) is present⁷⁴

- the court is of the opinion, having regard to all of the circumstances, including the nature of the offence and the character and antecedents of the offender, and to the other available methods of dealing with them, that such an order is the most suitable method of disposing of the case.

Note that only the Crown Court can impose a hospital order with a restriction order.⁷⁵

2. Guardianship order

A guardianship order places a defendant under the guardianship of a local social services authority or of such other person approved by a local social services authority as may be so specified.⁷⁶ It can only be imposed:

- on the basis of the required medical evidence⁷⁷ and
- where the court is satisfied that guardianship is the most suitable disposal.

Note that a guardianship order is only available for children aged 16 or over.

73 This means that there is no statutory function by which the youth court can address participation difficulties arising in a case concerning non-imprisonable offences, where trial adjustments are not sufficient

74 s37(2) MHA 1983: The conditions referred to in subsection (1) above are that '(a) the court is satisfied, on the written or oral evidence of two registered medical practitioners, that the offender is suffering from mental disorder and that either (i) the mental disorder from which the offender is suffering is of a nature or degree which makes it appropriate for him to be detained in a hospital for medical treatment and appropriate medical treatment is available for him ...'

75 s41 MHA 1983

76 s37(1) MHA 1983

77 See s37(2)(a)(ii) MHA 1983

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

79 (1836) 7 C&P 303

80 [2003] EWCA Crim 2452

81 R v M (John) [2003] EWCA Crim 3452. This last criteria was added later as in 1836, when the original Pritchard test came into being, a defendant did not have a right to give evidence on their own behalf. Note that M (John) was decided before the Domestic Violence, Crime and Victims Act 2004, which introduced judge-only determinations of the defendant's unfitness under s4 CPIA 1964

82 R v Podola [1960] 1QB 325 para 350

83 R v Robertson [1968] 1 WLR 1767 para 695

84 ss4, 4A CPIA 1964 (as amended by the Domestic Violence, Crime and Victims Act 2004)

85 s4(5) CPIA 1964

86 s4(6) CPIA 1964

The Crown Court

Determining fitness to plead

If, despite all of the available modifications, a defendant would still not be able to effectively participate, the court will need to determine whether the defendant is unfit to plead and stand trial. In the Crown Court the process is set out in legislation, ie the Criminal Procedure (Insanity) Act (CPIA) 1964.⁷⁸

The test for determining unfitness has been established by case law and remains that set down by Alderson B in the 1836 case of R v Pritchard.⁷⁹ More recently, the Pritchard test has been interpreted by the courts to make it

more consistent with the modern trial process. The Court of Appeal in R v John M⁸⁰ approved a formulation according to which the defendant will be found unfit to plead if any one or more of the following is beyond their capability in:

1. understanding the charge(s)
2. deciding whether to plead guilty or not
3. exercising their right to challenge jurors
4. instructing solicitors and/or advocates
5. following the course of proceedings
6. giving evidence in their own defence.⁸¹

Procedure

The issue as to whether a defendant is fit to plead is usually raised by the defence. If raised in this way, the burden of proof lies on the defence and it is discharged if the court is satisfied on the balance of probabilities that the defendant is not fit.⁸²

If the prosecution raises the issue, the burden is on the prosecution to establish the defendant's unfitness to the criminal standard of proof.⁸³

The fitness to plead procedure involves a two-stage process:⁸⁴

↳ Stage 1: Is the defendant fit to plead?

- This is decided by a judge alone, on the basis of the Pritchard criteria set out above.⁸⁵
- The judge must do so on the written or oral evidence of two or more registered medical practitioners, at least one of whom is duly approved under s12 the Mental Health Act 1983.⁸⁶

- In reaching a determination, the court ‘must rigorously examine evidence of psychiatrists adduced before them and then subject that evidence to careful analysis against the Pritchard criteria’ before determining that a defendant is unfit to plead.⁸⁷
 - Note that consideration of the question of the defendant’s fitness can be postponed until any time up to the opening of the case for the defence.⁸⁸
- ↳ Stage 2: If the defendant is unfit to plead, did the defendant do the acts alleged?
- This stage is determined by a jury, and is known as a s4A CPIA 1964 hearing, or a ‘trial of the facts’.
 - The jury must decide whether they are satisfied that the accused did the act or made the omission charged.
 - If satisfied, they shall make a finding that ‘the accused did the act or made the omission charged against him or her’.⁸⁹ The defendant is not found guilty of the acts.
 - If the jury are not satisfied, they shall acquit the accused.⁹⁰

The role of the lawyer for the defendant

When a person has been found unfit to plead, but the matter is to proceed as a trial of the facts rather than a normal criminal trial, the lawyer no longer acts on the instructions of the accused but is appointed to put forward the case for the defence.

The court ‘must consider afresh’ who is the right person to be appointed; it will not necessarily

be the same person who represented the accused before the finding.⁹¹ The role of the court-appointed lawyer is very different from a lawyer acting on behalf of a defendant and taking instructions from their client.

Practical advice

Where counsel is court-appointed, payment of fees will be made through central funds and therefore will be outside of the LAA Advocates’ Graduated Fees Scheme (AGFS).⁹²

Remands to hospital

Section 35 MHA 1983 enables the court to order an accused to be remanded to hospital for a report on the accused’s mental condition. It is applicable to any defendant arraigned before the Crown Court for an offence punishable with imprisonment, including murder, prior to conviction.⁹³ This remand is limited to 28 days, with the right of further remand for periods of 28 days, up to 12 weeks in total.⁹⁴

Section 36 MHA 1983 provides for the remand of an accused to hospital for treatment. It is applicable to any individual in the Crown Court in custody awaiting trial for an imprisonable offence, other than an offence the sentence for which is fixed by law (and so is not applicable to a defendant awaiting trial or determination of the facts in relation to a murder charge).⁹⁵ Like s35, the power to remand to hospital under s36 is not available in the youth court. Section 36 has the same time limitation as s35.⁹⁶

87 R v Walls [2011] EWCA Crim 443 para 38

88 s4(2) CPIA 1964

89 s4A(3) CPIA 1964

90 s4A CPIA 1964

91 R v Norman [2008] EWCA Crim 1810 para 34

92 See: bit.ly/3DcXxcn

93 s35(2)(a) and (3) MHA 1983

94 s35(7) MHA 1983

95 s36(2) MHA 1983

96 s36(6) MHA 1983

Final disposals after a trial of the facts

A person found to have 'done the act' is not found 'guilty' as would be the case in a criminal trial. The disposals available to the court when a person is found to have 'done the act' are not intended to be punitive, but rather to provide treatment and support for the individual and/or to protect the public, if necessary.

The disposals are set out in s5 CPIA 1964 and are:

- Hospital order (with or without a restriction order):⁹⁷ 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.
- Supervision order (with or without a treatment requirement):⁹⁸ This order requires the 'supervised person' to be under the supervision of a social worker or a probation officer (this presumably includes any YOT officer, though the Act does not specifically refer to the YOT);⁹⁹ the individual can be subject to a requirement to live in a particular place and to submit to out-patient treatment by a doctor.
- Absolute discharge:¹⁰⁰ This has the same meaning as an ordinary absolute discharge.¹⁰¹

97 s5(2)(a) CPIA 1964; ss37 and 41 MHA 1983

98 s5(2)(b) and Sch 1A Part 1 CPIA 1964

99 Sch 1A CPIA 1964

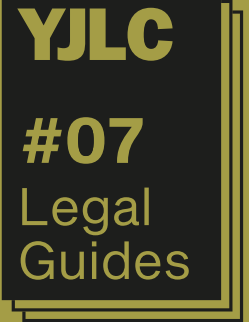
100 s5(2)(c) CPIA 1964

101 s12 PCCSA 2000

#07

Effective participation and fitness to plead

Written by Shauneen Lambe in collaboration with Katya Moran and Laura Cooper at the Youth Justice Legal Centre. With thanks to Daniella Waddoup (Doughty Street Chambers).



#01
Turning 18

#02
Intermediaries for
child defendants

#03
Child Criminal
Exploitation

#04
Criminal
Behaviour Orders

#05
Trauma Informed
Lawyering

#06
Criminal Practice
Directions

#07
Effective
Participation

#08
S.38 Beds

#09
Diversion

#10
Anonymity

#11
Adolescent Brain
Development

#12
Sexual Offending

Youth Justice Legal Centre yjlc.uk

The Youth Justice Legal Centre (YJLC) has been set up by the charity Just for Kids Law to provide legally accurate information, guidance and training on youth justice law. YJLC is a centre of excellence on youth justice law, providing:

- Guidance and expertise on youth justice law to safeguard children's rights in the youth justice system;
- A dedicated website with comprehensive information, legal resources and best practice guides for lawyers, judges, magistrates, youth offending teams, professionals, children and families;
- Training on youth justice issues for lawyers and non legal professionals working with children;
- Free specialist legal advice for children, their families, youth offending teams, the judiciary and lawyers.

Doughty Street Chambers doughtystreet.co.uk

Doughty Street Chambers offers extensive expertise across numerous child rights-related areas and has wide-ranging experience in bringing ground-breaking litigation for and concerning children in public law, extradition, immigration, mental health, community care, prison law, trafficking, education, criminal justice, clinical negligence and inquests. Many of our members specialise in complex and developing areas concerning the rights of children, including female genital cutting (FGC) and children, abortion rights for vulnerable teenagers, unaccompanied minors' rights, the education rights of children in custody, inclusive education for disabled children, children's effective participation in criminal trials, and the rights of LGBTIQ children.

Just for Kids Law justforkidslaw.org

Just for Kids Law is a UK charity that works with and for children and young people to hold those with power to account and fight for wider reform by providing legal representation and advice, direct advocacy and support, and campaigning to ensure children and young people in the UK have their legal rights and entitlements respected and promoted and their voices heard and valued.

The Dawes Trust

The Dawes Trust is a charity set up from funds of the estate of the late Christopher Dawes. The Trust's object is to fight crime, including organised crime, by the protection of people and property, the preservation of public order and the prevention and detection of crime for the public benefit.

The Trust provides funding to various organisations and projects in furtherance of its object.