



Effective Participation of Mentally Vulnerable Defendants in the Magistrates' Courts in England and Wales—The 'Front Line' from a Legal Perspective

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Abstract

Mentally vulnerable defendants who struggle to effectively participate in their trial in the magistrates' courts are not receiving the same protection as those who stand trial in the Crown Court. The Law Commission for England and Wales recognised this lacuna and suggested that the law relating to effective participation should be equally applicable in the magistrates' courts. On closer examination of the law, the legal aid system and perspectives of legal professionals on the 'front line', it is clear that improvements in policy are of greater importance than legal reform and are more likely to meet the needs of these vulnerable individuals. The aim of this paper will be to demonstrate that reform of the law will be insufficient to adequately protect mentally vulnerable defendants in the magistrates' courts and that changes in policy are needed in place of, or alongside, legal reforms.

Keywords

Effective participation, mentally vulnerable defendants, magistrates' courts

Introduction

Mentally vulnerable defendants¹ who struggle to effectively participate in their trial in the magistrates' courts are not receiving the same protection as those who stand trial in the Crown Court.² The Law Commission for England and Wales recognised this lacuna and suggested that the law in relation to

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1. For the purpose of this research, the 'mentally vulnerable defendant' will be defined in the broadest sense to include the defendant suffering from any mental disorder/learning difficulty which might compromise his/her ability to stand trial.
 2. Youth courts are similarly overlooked but the focus here will be on adult defendants.

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unfitness to plead should be equally applicable in the magistrates' courts,³ yet this is not currently the case. On closer examination of the law, the legal aid system and perspectives of legal professionals, it has become clear that, while reform of the law is desirable, improvements in policy are of greater importance and are more likely to better meet the needs of mentally vulnerable defendants. Changing the law to achieve parity between the magistrates' and Crown Courts might be unachievable due to existing policy constraints. Legal aid funding, the 'assembly line'⁴ approach to justice in the magistrates' court and excessive pressures on all those involved in the criminal justice system point to the conclusion that reform of the law is not capable of delivering the appropriate level of protection. These factors combined with the low level of seriousness of summary offences highlight the need for alternative approaches.⁵ This paper will suggest that these could take the form of a more consistent, better funded approach to diversion at an earlier point in time, whether through liaison and diversion services,⁶ the Crown Prosecution Service (CPS) or the police, as well as better communication between various stakeholders and training programmes that cross agency boundaries.

While the treatment of mentally vulnerable defendants within the Crown Court and youth courts is far from perfect, the focus here will remain on trials of adults within the magistrates' courts where it will be submitted that the greatest failings reside. The inadequacy of the law relating to effective participation in the magistrates' courts will be highlighted, as well as the proposals for reform. Subsequently, themes emerging from the views of legal professionals on the front line will be analysed and recommendations will be made. The aim of this paper will be to demonstrate that reform of the law will be insufficient to adequately protect mentally vulnerable defendants in the magistrates' courts and that changes in policy are needed in place of, or alongside, legal reforms.

Methodology

This paper will provide a doctrinal examination of the law relating to unfitness to plead in England and Wales, and of reform proposals made by the Law Commission. Consideration is given to the procedures currently available in the magistrates' courts which might be of assistance to mentally vulnerable defendants. The legal aid system in the lower courts is also scrutinised.

The qualitative aspect of this research involved semi-structured interviews of participants. All interviews were recorded to allow for transcription but personal details were kept confidential. Recognising that time is a valuable resource in the legal profession, interviews took place at participants' places of work or over the phone. Subsequent analysis of the interviews was anonymised save for the description of the participant's occupation. Purposive sampling was adopted in the form of snowball sampling, directed specifically towards professionals who have or had regular contact with mentally vulnerable defendants. The semi-structured interviews aimed to facilitate discussion based around how mentally vulnerable defendants are generally identified, what tends to happen where a defendant is clearly unable to take part in his/her trial and what, in the participant's opinion, should happen where a defendant is clearly unable to participate in his/her trial. The decision was made to use semi-structured interviews in order to allow participants the flexibility to depart from the questions, thus providing rich, detailed answers.⁷ As is often the case with this type of interview, the most significant themes were those that deviated from the standard questions.

3. Law Commission, 'Unfitness to Plead Report' (Law Com No 364, 2016) ch 7.

4. S Brown, *Magistrates at Work: Sentencing and Social Structure* (Open University Press, Milton Keynes 1991) 81.

5. K Bradley, *Review of People with Mental Health Problems or Learning Disabilities in the Criminal Justice System* (Department of Health, London 2009).

6. See *Ibid* ch 5, which sets out a compelling case for liaison and diversion in the courts and police stations.

7. A Bryman, *Social Research Methods* (5th edn OUP, Oxford 2016) 467.

Of the seven participants interviewed, four were barristers⁸ based in London and three were solicitors based in Teesside, in the north east of England. The sample was not large, but the emerging themes were corroborated by the range of other sources adopted, leading to ‘fine-grained data’⁹ and, for the purposes of this paper, data saturation. Combined with a doctrinal analysis of the law, legal aid provision and Law Commission reform proposals, a more complete picture is achieved by the merging of methodologies. All participants had experience of representing mentally vulnerable defendants in the magistrates’ courts, although it is recognised that a small sample cannot be representative of the entire legal profession.

As with all qualitative research, by its very nature, there are barriers to achieving objective data and, with the richness of data collected, care must be taken to carry out ‘true analysis’.¹⁰ In terms of initial coding, it was important not to take statements made by participants out of context. Care was taken not to generalise inappropriately.¹¹ It was also important to recognise that participants might have been reluctant to disclose bad practice. Keeping these barriers to objectivity in mind, after initial coding, analysis of the interviews was thematic, using the inductive approach.¹² Prior to this, and before considering the need for any policy changes in this area, a brief examination of the law and reform proposals in relation to effective participation is required.

The Law

Forming part of the right to a fair trial, the phrase ‘effective participation’ refers to the right of any defendant to take an active part in his/her trial. This term reflects the approach of the European Court of Human Rights in relation to art 6 of the European Convention on Human Rights. Defined in *SC v United Kingdom*¹³:

“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.

Article 6 applies to all court hearings, including criminal trials held in the magistrates’ court.¹⁴ Currently, when a defendant is unable to effectively participate in the trial process due to either mental illness, a lack of capacity or learning difficulties, there are limited options available. In the Crown Court, the defendant would need to satisfy the test for unfitnes to plead. This test requires that the defendant is unable to do one of the following:

- understand the charges
- decide whether to plead guilty or not
- exercise his right to challenge jurors

8. The barristers are labelled B1–B4, while the solicitors are S1–S3. There was a range of experience among participants, the most experienced solicitor [S2] having been qualified for 39 years. One barrister [B3] was a pupil at the time of interviewing, but with a substantial amount of pupillage time spent in the magistrates’ courts.

9. Bryman (n 7) 417.

10. Ibid 570.

11. Ibid 418; see also Onwuegbuzie and Leech, ‘Generalization Practices in Qualitative Research: A Mixed Methods Case Study’ (2010) 44 *Qual Quant* 881.

12. D Thomas, ‘A General Inductive Approach for Analyzing Qualitative Evaluation Data’ (2006) 27 *AJE* 237–46.

13. (2005) 40 EHRR 10 (App No 60958/00) at [29].

14. Section 6 Human Rights Act 1998.

- instruct solicitors and counsel
- follow the course of proceedings
- give evidence in his own defence¹⁵

If found unfit to stand trial in the Crown Court, there is a trial of facts hearing¹⁶ to establish whether the defendant did the act. If found to have committed the act, although this would not be recognised as a criminal conviction, a range of disposal options are available to the court.¹⁷

In the magistrates' court, the unfitness to plead test does not apply. This means that the options available are 'extremely'¹⁸ limited, offering neither support to the defendant, nor adequate protection of the public. The court can either stay proceedings due to abuse of process,¹⁹ on the grounds that any trial would be unfair, or make an order that the defendant did the act or omission but only if all of the following criteria are met²⁰:

- evidence must be given by two registered medical practitioners²¹;
- the offender must be suffering from a mental disorder;
- the mental disorder must be 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; and
- the court is of the opinion that this is the most suitable method of disposing of the case.

The House of Lords has recommended²² that the power of magistrates to find an abuse of process 'should be strictly confined to matters directly affecting the fairness of the trial of the particular accused'.²³ Similarly, in *DPP v P* although this power was recognised, the court commented²⁴ that 'it will be in only exceptional cases that it should be exercised'. The Divisional Court in *R (Ebrahim) v Feltham Magistrates' Court*,²⁵ restated that this 'inherent jurisdiction . . . is one which ought only to be employed in exceptional circumstances'.²⁶ Such a recommendation is unfortunate as it is easy to envisage circumstances under which a defendant failing to engage with or understand the trial process might benefit from proceedings being stayed. One such, anecdotal, example was provided by B1, who described a defendant being presented at court, charged with obstructing a railway. Having suffered from severe depression all of his life, and grieving for a close family member, the defendant was apprehended trying to jump off a railway bridge. At court, B1 was concerned to see that this defendant was 'an absolute broken man . . . there was just this passive acceptance'. The defendant had already pleaded guilty before seeing B1. If proceedings had been stayed at an earlier stage due to an abuse of process, a better outcome might have been achieved for the defendant, and valuable court time could have been saved.

15. *M (John)* [2003] EWCA Crim 3452 [20], adapted from *Pritchard* (1836) 7 C & P 303.

16. Criminal Procedure (Insanity) Act 1964, s 4A, as amended by the Criminal Procedure (Insanity and Unfitness to Plead) Act 1991.

17. *Ibid*, s 5(2).

18. Law Commission (n 3) para 7.1. In contrast, Hughes LJ in *R (Singh) v Stratford Magistrates' Court* described the provisions of ss 37(3) and 11 of the Powers of Criminal Courts (Sentencing) Act 2000 as 'a coherent scheme for dealing with most defendants in the magistrates' court who are suffering from mental illness when they appear'. This view is not endorsed by the author.

19. See *R (Ebrahim) v Feltham Magistrates' Court* [2001] 2 Cr App R 23 at [17], discussed below.

20. Section 37(3) Mental Health Act 1983.

21. One of whom must be approved under s 12 of the MHA.

22. *Horseferry Road Magistrates' Court ex p Bennett* [1994] 1 AC 42.

23. [1994] 1 AC 42, 64 (Lord Griffiths CJ).

24. [2007] EWHC 946 (Admin); [2008] 1 WLR 1005 [51].

25. [2001] 2 Cr App R 23.

26. *Ibid* [17].

The legal professionals interviewed for this paper lamented the absence of a proper procedure in the magistrates' court. B2 stated: 'I think the biggest problem is there is no cohesive framework . . . like the Crown Court. I know it's not perfect, but at least it gives a structure'. B3 expressed surprise that there was no process to test for unfitness to plead in the magistrates' court, adding that there needs to be 'some kind of structure'. B2 commented that 'it's just a mess, there's no cohesion, no framework, it's not set down anywhere, it just depends on your diversion team, on your judge . . .', while B4 described the 'dearth' of a proper procedure. S3 compared the different approaches in the Crown and magistrates' courts, commenting 'when somebody raises concerns that somebody isn't fit to plead in the Crown, there's process, . . . psychiatrists' reports, psychologist reports . . . If these reports say this guy's unfit to plead you have your . . . finding of facts . . . Whereas in the magistrates it's almost a policy consideration'.

The scheme in the magistrates' courts is far from being coherent. There is no process to deal with the defendant who lacks capacity to effectively participate in his/her trial due to learning difficulties, rather than a mental illness. There is no power in the magistrates' courts to impose a restriction order under s 41 of the Mental Health Act 2007.²⁷ The implication of this is that protection of the public is more problematic in the magistrates' court than the Crown Court. Since 2005 it has been possible to make a mental health treatment requirement as a form of community order,²⁸ however the use of these orders has been infrequent.²⁹

On a practical level, in order to ensure a fair trial, legal professionals are expected to keep the following in mind³⁰:

- (i) the defendant's level of cognitive functioning;
- (ii) the use of concise and simple language;
- (iii) having regular breaks;
- (iv) taking additional time to explain court proceedings;
- (v) being proactive in ensuring the defendant has access to support;
- (vi) explaining and ensuring the defendant understands the ingredients of the charge;
- (vii) explaining the possible outcomes and sentences;
- (viii) ensuring that cross-examination is carefully controlled so that questions are short and clear and frustration is minimised.

While 'limited intellectual capacity'³¹ will not necessarily mean that a trial will be unfair, the criteria above demonstrate the scale of the task undertaken by the legal professional on a regular basis. When combined with the themes discussed below, the situation for mentally vulnerable defendants who face a trial in the magistrates' courts is far from ideal.

Findings

Themes emerging from the interviews with legal professionals relate to: (1) how mentally vulnerable defendants are identified, (2) the systemic failings surrounding mental vulnerability, (3) funding issues and (4) pressure on mentally vulnerable defendants to plead guilty. Each of these will be considered in turn.

27. Law Commission (n 3) para 7.4(1).

28. Section 207 Criminal Justice Act 2003 as amended by s 73 Legal Aid, Sentencing and Punishment of Offenders Act 2012.

29. In 2012–13 the MHTR accounted for less than 1 per cent of all community order or suspended sentence order requirements (National Offender Management Service, *Supporting Community Order Treatment Requirements* (2014) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/426676/Supporting_CO_Treatment_Reqs.pdf> accessed 2 July 2019).

30. See *R(TP) v West London Youth Court* [2005] EWHC 2583 (Admin) at [26] which sets out these minimum requirements for a fair trial.

31. *Ibid* [27].

(1) Identification of Mental Vulnerability

One issue raised by participants was that they were sometimes the first to identify that a defendant might have mental health issues. The implication here is that the police might not be identifying the defendant's vulnerability early enough. This could be due to a number of factors: lack of time, lack of training and also the fact that 'sometimes people who have [mental health] difficulties . . . develop strategies to look like they don't'.³² While all of the legal professionals admitted to having no formal training in identifying mental health issues, the general impression was that often they were 'the first ones to notice'³³ or that there was no set manner or predictability in which the mental vulnerability of the defendant was communicated. The mental health of the defendant was sometimes identified by the custody staff³⁴ or on the prosecution papers.³⁵

The general consensus was that, despite having no specialist training in mental health issues, legal professionals identify mental health or learning capacity issues on gut instinct³⁶ or common sense.³⁷ This instinct seems to be honed through experience³⁸ or because legal professionals are 'acute observers of human behaviour and pick up signs'.³⁹ S3 commented that ' . . . a lot of it is common sense. If I'm meeting a new client . . . and he's behaving in a strange way or if talking to him doesn't feel like talking to him should', then it is necessary to be aware of possible mental health issues. S3 summarised as follows: 'I guess dealing with people who have problems, legal problems and [mental health] problems, they go hand in hand'. Commendable as this ability to identify mentally vulnerable defendants seems, it is very much dependant on the willingness of the legal professional to take the extra time necessary to assist such a defendant. When combined with the limitations on legal aid funding, discussed below, it is likely that not all mentally vulnerable defendants will receive the necessary support.

(2) Systemic Failings

All of the legal professionals interviewed identified significant failings from their viewpoint within the criminal justice system. This is unsurprising given that the Law Commission has been critical of the absence of a test for effective participation in the magistrates' courts.⁴⁰ What is interesting is that the failings are pervasive, from the initial police interview, through to conviction, and they are largely attributable to a lack of time or the need for expediency, rather than the need for a change in the law.

In relation to the police interview, S1 commented: 'I've had cases at the police station where someone is clearly unfit to be interviewed . . . but they've been assessed [as fit]'. They are subsequently sectioned, 'then my argument is 'you're saying he's fit for interview, but after an interview which he shouldn't have had you then section him?'' S1 added 'clearly he wasn't [fit]. [This] happens all the time'. B4 gave the example of a forensic medical examiner seeing a client 'for a couple of minutes' finding them 'aggressive or difficult as people with mental health problems often are', and pronouncing them fit. The problem here is that such a brief assessment will not always be sufficient to identify mental vulnerability.

The CPS will sometimes proceed with a prosecution where the view of the legal professional is that it is not in the public interest to do so; this can result in 'a nonsense trial'.⁴¹ With regard to proceedings failing

32. S3.

33. B2, S1.

34. B1, B3 and B4.

35. B3.

36. B4.

37. S3.

38. S1: 'with experience you learn yourself how to identify people who've got issues'; B2: ' . . . something about him that I thought was similar to another client'.

39. S2.

40. Law Commission (n 3).

41. S3.

to be discontinued at an early enough point in time, B1 was of the opinion that '[with] a lot of the cases I've done, particularly the more seriously mentally ill people . . . there's absolutely no public interest [in prosecuting them]'. If the CPS has insufficient time to screen these types of cases, the time pressure and workload is then transferred to the legal professionals and the magistrates' courts. It is clear that further research into this area is required, as the CPS could play a key role in diverting mentally vulnerable defendants away from the criminal justice system.

Once at court, participants felt that some district judges and magistrates were under too much pressure to properly investigate mental vulnerability. B2 commented 'there was a district judge . . . I couldn't quite believe he said . . . 'this client is unwell. He's not fit to stand trial, he's not fit to plead . . . he might need to see the diversion team . . . but, you know, as far as I'm concerned . . . most people who come into the magistrates' court will have something wrong with them . . . we'll just crack through the list, see how far we can get . . .'. B2 added 'there's this bizarre obsession, we've started proceedings now [let's] get through it'. B3 described an instance where 'it felt very wrong that [the defendant] was on trial. Even the judge recognised it . . . but didn't stop the trial. I felt . . . [the court] was almost wilfully blind to this chap's mental health issues which were so plain to see from his behaviour in court'.

In relation to mental health institutions, B4 commented on the difficulty of finding a place where a mentally vulnerable defendant would be safe: 'I was ringing mental health institutions myself to try and get her sectioned . . . [A]t the end of the day I was left with the choice of having the hearing go ahead and her being remanded and taken to a prison, a girl of good character who's got mental health issues, or throwing her out on the street where she wasn't fit'. S2 recounted a similar frustration when a defendant prone to attempting suicide was prosecuted for causing a public nuisance. S2 was of the opinion that such a person 'is not a criminal. They need mental health treatment but, if the local mental health facility is saying "oh no they don't," what do you do?' Without the availability of sufficient beds, again the burden of treating a mentally vulnerable individual is transferred to the criminal justice system.

These anecdotes provide a picture of mentally vulnerable defendants being failed by the criminal justice system. B1 described an instance where a defendant 'thought he was Jesus, got through the police station without it being flagged'. The court 'sent him back down to cells because they thought he was being . . . obnoxious'. When he subsequently refused to leave his cell, he was remanded in custody. 'This was a man who had never been in trouble before, who had been picked up . . . because he had been shouting in the street, who ended up spending 2 weeks in prison having never been in trouble before . . . and being seriously unwell'. The failings here were compounded by the fact that the defendant's wife had reported him missing and only found out that he was in custody by sheer luck. S1 added 'the ultimate failing for [those] 2 weeks in custody had in my view lay with that bench . . . who didn't pick up that he was extremely seriously ill'.

Similar misgivings were echoed by S1 who stated 'you're sometimes put in a position where there's a voice in your head saying "well actually there's something else should be done here" but you end up going through the process and people are dealt with because they are minor offences'. S1 added that in the magistrates' courts defendants are 'churned in and churned out and we have people who . . . get convicted when they shouldn't'. S2 was also of the view that some mentally vulnerable defendants are convicted of criminal offences in the magistrates' courts when they should not be, but added that, given limited resources, 'there is no perfect solution'. S3 agreed that this happens: '[i]t will undoubtedly happen. I think it's probably happened. That does have a ring of familiarity to it'.

These failings are compounded when legal professionals find themselves in a Catch 22 scenario. For example, B1 described 'a complete Catch 22 . . . where I felt [the defendant] really needed assistance from the mental health team . . . who wouldn't assess her because her behaviour was too unpredictable'. B4 was of the view that 'the hospitals don't take [mentally vulnerable defendants] so the police keep them and they send them to the court and there's no one really at the court who can deal with them properly'. B2 had experienced situations where an inability to take instructions from a defendant sometimes resulted in the court's response being 'we'll take it as not guilty, we'll have the trial . . . then we'll decide . . .'. B4, in relation to one defendant, described that 'it felt very wrong that he was on trial.

Even the judge recognised it . . . but didn't stop the trial'. A new legal framework for effective participation in the magistrates' courts might provide clarity in dealing with mentally vulnerable defendants, but is unlikely to provide a practical solution to these failings, given current legal aid funding constraints.

(3) Funding

Legal aid funding for representation in the magistrates' courts is perhaps the greatest obstacle to the introduction of a test for effective participation in the lower courts. Legal aid for representation in the magistrates' court, as well as advice before and after charge are all termed 'crime lower'.⁴² Standard fee claims account for the majority of money spent for representation in the police stations and magistrates' courts.⁴³ Non-standard fee claims in the magistrates' courts are made by submitting a work assessment form detailing cost information and reasons for being a non-standard fee.⁴⁴ One option available on this form is that the core costs exceed the higher limit; there is also a section marked 'Other'.⁴⁵ Clearly, the potential to claim a non-standard fee due to a defendant's mental vulnerability is possible. How frequently this occurs as opposed to how frequently it should occur is open to debate since no breakdown of information is available as to the amount of non-standard fee claims.⁴⁶ Within the guidance provided by the Legal Aid Agency for crime lower, mental health is mentioned only three times.⁴⁷ The implication here is that there is a disincentive to the legal professional to request a non-standard fee on the grounds of a mentally vulnerable defendant. In short, standard fees are paid for the majority of magistrates' court work⁴⁸ and are insufficient for the type of expert opinion which might be needed by the mentally vulnerable defendant. This view is supported by the interviews with legal professionals, in particular, the solicitors.

S1 commented that 'the bigger firms won't always go to the extent of in every case testing and doing it properly because they've got so many clients coming through; it's the only way they can exercise. They don't do it; they should do it'. S1 added that 'smaller firms are more ready to get reports, to challenge it, to prevent it going any further. When you're a duty [solicitor] at court you don't have that luxury, you've got to make quick decisions, and normally people just want to be dealt with and get out that day if they're in custody or they don't want to come back in case they don't get funding'. The risk here, according to S2 is that 'the worst thing you can do is get yourself known for [requesting reports, as] other solicitors will send their clients [in order to avoid paying for them]'.

While legal aid cuts provide a disincentive for the legal professional to do the best possible job for a defendant in the magistrates' court, a complete absence of representation is also clearly a barrier to

42. Legal Aid Agency, *User Guide to Legal Aid Statistics, England and Wales* (June 2019) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/793074/user-guide-legal-aid-statistics-oct-dec-2018.pdf> accessed 30 March 2020.

43. *Ibid* 39, 41.

44. *Ibid* 40.

45. Form CRM7 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/604166/crm7-v12-october-2016.pdf> accessed 30 March 2020.

46. Ministry of Justice and Legal Aid Agency, *Legal Aid Statistics quarterly, England and Wales, October to December 2018* (March 2019) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/789886/legal-aid-statistics-bulletin-oct-dec-2018.pdf>; Legal Aid Agency, *Annual Report and Accounts 2017 to 2018* <<https://www.gov.uk/government/publications/legal-aid-agency-annual-report-and-accounts-2017-to-2018>> accessed 30 March 2020.

47. Legal Aid Agency, *Guidance for Reporting Crime Lower Work*, v6 (June 2018) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/713316/Crime_Lower_Guidance__2018_update_pdf> accessed 30 March 2020. (1) as a code under equal opportunities monitoring, (2) an offence of sexual intercourse with patients (s 128 MHA 1959) and (3) an offence of ill treatment of persons of unsound mind (s 127 MHA 1983).

48. Legal Aid Agency, *Criminal Legal Aid Manual: Applying for Legal Aid in Criminal Cases in the Magistrates' and Crown Court*, v18 (April 2019) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/791907/criminal-legal-aid-manual_april_2019.pdf> accessed 30 March 2020. 44.

identifying a mentally vulnerable defendant. As S1 commented ‘if you can’t get legal aid, you’re snookered because, even if you get the duty [solicitor], they might represent you on the first occasion. They can’t then represent you on the second time, so you can’t get a report . . . In an ideal world you should always get representation but just because you’ve got mental health problems it isn’t necessarily enough if it’s a minor offence’. S2 went further and commented that ‘for a summary only offence . . . [i]t’s not a proper use of resources . . . to involve a forensic psychiatrist . . . , possibly two, if you’re going in to the issue of a person’s fitness . . . and compare that with the possible penalties—you resolve that usually by means of an appropriate plea in mitigation. It’s a question of balancing one against the other. In theory, yes, you could say that the person’s acquired a conviction but unfortunately we live in a world of finite resources and no more so than in the criminal law area and also mental health. So it’s a question of managing it’.

Furthermore, in order to make a profit, in the view of S2, some solicitors will persuade a mentally vulnerable client to plead guilty: ‘that is going on all the time. This government, and the last, tried to turn us into legal factories . . . Once you create that mentality, then people will do the least work for the most profit’. This mentality is supported by Zander’s prediction that legal representatives ‘would be mainly bidding [for legal aid contracts] on the basis of fixed fees. They would need a sufficient number of cases to make that viable on a “swings and roundabouts” basis of cases involving little work compensating for others involving more work’.⁴⁹ The Jeffrey Review⁵⁰ echoes this criticism in the quality of criminal advocacy, commenting that ‘the significance of legal aid fee levels cannot be ignored’⁵¹ in the reduction of quality of legal representation.

The implication of the legal aid position in the magistrates’ court is that the introduction of the same legal test for effective participation is unlikely to be achievable. As S3 summarised: ‘if I’m getting psychiatric reports for a common assault . . . [the Legal Aid Board are] going to say “why do you need this?.” Technically you could argue it but it’s not something we’ve done’. S2 also questioned the practicality, in financial terms, of introducing the test into the magistrates’ court: ‘if you allowed us as a profession to get psychiatric reports paid for by the state, there would be a lot of them’.

When combined with the limits placed on legal aid funding, it is possible that the Law Commission has under-estimated the impact of introducing the same test for effective participation to the magistrates’ courts. This key recommendation that any reform of the law relating to unfitness to plead should be equally applicable in the magistrates’ courts was made due to the perception that the law relating to ‘participation difficulties in the summary courts is in urgent need of reform’.⁵² This perception is not disputed; however, the Law Commission does not consider that such an inclusion would produce an unmanageable caseload. The reason given for this is that a defendant’s capacity should be assessed in relation to the complexity of proceedings and that his or her condition or impairment ‘would have to be extremely severe before he or she would be unable to participate effectively in most summary proceedings’.⁵³ The Justices’ Clerks Society and the CPS share this view,⁵⁴ but interviews conducted for this paper seem to throw some doubt on the practicality of this recommendation.

In an Impact Assessment,⁵⁵ the Law Commission estimates 800 defendants per year are likely to be found to lack capacity in the summary courts. This estimate was based on:

49. Zander, ‘Bad News for Legal Aid—Part II’ (2013) 177 JPN 287, 288.

50. B Jeffrey, *Independent Criminal Advocacy in England and Wales* (Ministry of Justice, London 2014).

51. *Ibid* 4.

52. Law Commission (n 3) para 7.2.

53. *Ibid* para 7.59.

54. *Ibid* para 7.59.

55. <<http://lawcom.gov.uk/project/unfitness-to-plead/>> accessed 30 March 2020. Appendix B Impact Assessment, paras 80 and 124.

- government figures for the number of magistrates' court proceedings (minus motoring offences) in a given year and the percentage of unfitness to plead findings in the Crown Court for that period; (para 239)
- a lack of formal data on stayed proceedings; (para 122)
- a five month collection of data in magistrates' and youth courts in the Greater London area—participating courts were asked to record every case in which issues relating to effective participation were raised or where s 37(3) of the MHA 1983 was considered; (para 123, only 60 cases were identified)
- an estimate that there will be a larger number of unrepresented defendants in the magistrates' courts, and a high proportion of these will not be identified as unable to effectively participate in a trial; (para 239(3))
- an estimate that summary proceedings are less complex and will therefore be more accessible to more defendants who might lack capacity in the Crown Court; (para 239(3))
- an estimate that there is a higher rate of discontinuance from the Crown Prosecution in the magistrates' courts; (para 239(3))
- an estimate that legal representatives might be less likely to pursue effective participation proceedings for minor offences, given the range of disposals available. (para 239(3))

The Law Commission recognises the weaknesses in this data,⁵⁶ which is based, out of necessity, on guesswork. In response to the above estimate, the following should be considered:

- a five month collection of data which recorded when effective participation issues were raised could not have taken into account the times when effective participation *should* have been raised;
- while it might be correct that a large number defendants in the magistrates' courts are either unrepresented or not identified as being unable to effectively participate in a trial, this should not be used as a reason for a lower estimate. The need for identification and representation of these defendants should be addressed alongside the introduction of a test for effective participation in the magistrates' court. A policy on unrepresented defendants is clearly needed, as the situation for unrepresented vulnerable defendants in the magistrates' court is concerning. Epstein comments that there is little guidance for judges on how to proceed with an unrepresented defendant, describing such defendants as 'invisible';⁵⁷
- an estimate that legal representatives might be less likely to pursue effective participation proceedings for minor offences, given the range of disposals available is a position that should be rectified, not used as an excuse to save costs;
- the estimate that summary proceedings are less complex and will therefore be more accessible is not borne out by comments in interviews conducted for this paper. There is also a suggestion that mental health issues appear more frequently in the magistrates' courts.

Perceptions of the participants in this study vary as to the frequency of mental vulnerability in magistrates' courts. B1 commented that 'when you take the full spectrum into account it's not rare at all'. B2 commented that mental vulnerability is 'not rare at all. Almost every client I've had, with the exception of a handful certainly in the magistrates' court'. S2 added that mental vulnerable defendants are seen 'every day' and 'it depends on where you place the level of vulnerability'.

This contrasts with the views of B3 and S3 that mental vulnerability is 'quite rare actually, 5 or 6 in my 6 months . . . unusual' and 'not something we tend to deal with on a daily basis'. More significantly, B3 clarified this answer by adding 'in the majority of cases probably there's some mental health issue in

56. Ibid para 80.

57. R Epstein, 'Vulnerable Defendants' (2016) 180 JPN 394, 396; commenting on Transform Justice, *Justice Denied? The Experience of Unrepresented Defendants in the Criminal Courts* (London 2016).

the background but in terms of something that's relevant to whether [there is] going to be a trial then that's much rarer'. It seems from this that mental vulnerability may be a factor for many, or even most, defendants in the magistrates' courts, however its impact on a defendant's effective participation is less common. The suggestion here is that all stakeholders involved in the criminal justice system should err on the side of caution. The exercise of caution is key, given that some of the legal professionals raised concerns about the ability of stakeholders to identify mental vulnerability. B4 commented that '[it] might be a little too much for magistrates to decide whether someone should be sectioned or whether they're not fit'. Furthermore, S3 cautioned that 'sometimes people who have [mental health] difficulties... develop strategies to look like they don't', and S1 added 'there [have] been times where you just stand there thinking this is ridiculous, this person shouldn't be here'.

In addition to the issue of adequately funded legal representation, medical reports would be needed for defendants for whom issues of effective participation are raised. The Law Commission recognises the 'lengthy process' of obtaining two expert reports but that 'significant curtailment' of a defendant's rights should require robust expert evidence.⁵⁸ This should remain the case regardless of the court used. The Divisional Court in *Blouet v Bath and Wansdyke Magistrates' Court*⁵⁹ confirmed the current procedure in the magistrates' court to order a fact-finding exercise in lieu of a trial, stating that⁶⁰:

1. There should be up-to-date medical evidence;
2. The issue should then be tried in accordance with s 11(1) of the Powers of Criminal Courts (Sentencing) Act 2000,⁶¹ allowing an adjournment for further medical reports;
3. Then the matter can proceed to s 37(3) MHA 1983.

The need for up-to-date medical evidence and the potential for an adjournment, where necessary, would exacerbate the funding problems described above by the legal professionals. A better approach might be to use psychiatric nurses and other forensic mental health practitioners who are part of Liaison and Diversion teams, and who could 'contribute significantly to the identification of capacity issues in the magistrates' court'.⁶² The Law Commission strongly supports the roll out of Liaison and Diversion scheme⁶³; improved funding and a more robust use of this scheme might be a better alternative to implementing the same test for effective participation in both the Crown and magistrates' courts.

Avoiding a two-tier justice system is an ideal supported by almost all participants. S1 was of the view that, in an ideal world, 'you would get the funding to test everything properly'... and 'we should have either a judge or a bench who were able to deal with mental health as opposed to juveniles'. S3 would support the introduction of the same test for unfitness to plead as occurs in the Crown Court, commenting, 'it's not perfect... but if you have the same system as the Crown in the magistrates', it would at least make sense'. B1 would prefer the first step to be 'deciding whether it was in the public interest to prosecute' and this view was endorsed by B2, who also commented that we 'need a proper framework'.

Given the funding position, applying the same test for effective participation in both the Crown and magistrates' courts seems unachievable. B3, pragmatically, preferred the flexibility of the diversion process in the magistrates' courts, especially given the short time frames available. This view is endorsed reluctantly here, for purely pragmatic reasons. The position in relation to legal aid funding is unlikely to improve and is neatly summarised by S3: 'you don't win elections by doing that kind of thing. People are going to say, well why are you helping criminals?' If the funding position remains unchanged, then the

58. Law Commission (n 3) para 7.82.

59. [2009] EWHC 759 (Admin).

60. *Ibid* [9].

61. If, on a trial before a magistrates' court of an offence punishable on summary conviction with imprisonment, a court (a) is satisfied that the accused...

62. Law Commission (n 3) para 7.83.

63. *Ibid*.

practical solution is for the CPS or Liaison and Diversion teams to actively seek to divert the mentally vulnerable defendant away from the criminal justice system, in order to avoid subjecting him to the rigours of a trial or, even, the stress of entering a plea.

(4) Pressure to Plead

The test for effective participation recommended by the Law Commission distinguishes between D's ability to plead and his ability to stand trial,⁶⁴ the rationale being that the former is more easily comprehended.⁶⁵ Accordingly, if implemented, a defendant might be unfit to stand trial, but might still be fit to enter a guilty plea. This recommendation was supported by the Court of Appeal in *Marcantonio*.⁶⁶ Views given by the legal professionals who were interviewed cast doubt on the appropriateness of introducing this option to the magistrates' courts. Only B3 acknowledged the advantages of an early disposal: 'that could probably save time ... [you] can be fit to plead but not to stand trial'.

B1 queried 'if they can't properly participate in a trial, how can they enter a plea? ... I would worry people would slip through the net', and 'I could just see it opening up a situation whereby they say ... you can plead, we don't have to deal with whether you're fit for trial and then the classic line that we hear all the time ... "your client knows whether they've done it, it doesn't matter whether they're bipolar and it doesn't matter whether they're severely depressed. They know whether they've done it so they can enter a plea. Get on and do it"'. B2 commented: 'I worry ... it's just the sort of thing I could imagine a magistrates' court doing, taking a guilty plea and ... not sentenc[ing] for ages'. B4 was concerned that this could be 'a slippery slope ... you do that and people are forced to plead as they don't want to be remanded'. S1 commented that 'there's so much pressure on people to plead guilty because they get credit and that's getting worse ... I don't think you can separate the two'.

S2 added that 'to understand some of the charges, you need a law degree ... My concern is ... that some people lack the intellect to fully understand the charges' while S3 commented 'I think that would lead to problems. If you're saying this guy can't stand trial but he can plead, the next thing is the client says not guilty and then you've got a trial. For me ... the two things are very closely linked ... If you're going to find them fit to plead, find them fit to stand trial. If you can plead, then surely you need to understand the consequences of that plea?'

These concerns are shared elsewhere; a defendant's mental vulnerability could undermine his autonomy in making a guilty plea.⁶⁷ Those with learning difficulties or mental disorders are more susceptible to the incentive to offer a guilty plea.⁶⁸ It seems common sense that a defendant with a learning difficulty, for example, might be more susceptible to making a false guilty plea. Equally, a defendant suffering from a mental disorder might put in a guilty plea in order to be allowed to go home. All of the above concerns seem to caution against allowing a two part test for effective participation in the magistrates' courts, even if the recommendation makes good sense in the Crown Court.

Discussion of Findings and Recommendations

The difference in geographical location of the above participants is worthy of comment. While it was not the author's intention to differentiate between locations, there was a perception among many of the participants that the more significant problems are occurring in the London area. This could be due to a number of factors: people with mental vulnerabilities might gravitate towards larger cities, in which case,

64. Clause 6, Criminal Procedure (Lack of Capacity) Bill, Law Com No 364 'Unfitness to Plead Report—Volume 2: Draft Legislation'.

65. Law Com No 364 (n 3) 'Unfitness to Plead Report' (2016) para 3.150.

66. [2016] EWCA Crim 14 [8] (Lloyd Jones LJ).

67. RK Helm, 'Conviction by Consent? Vulnerability, Autonomy and Conviction by Guilty Plea' (2019) J Crim L 161, 164–5.

68. J Peay and E Player, 'Pleading Guilty: Why Vulnerability Matters' (2018) 81(6) MLR 929, 930.

greater difficulties could be perceived in these areas. S3 commented, ‘I tend to find that [individuals with] obvious mental health issues tend to cluster towards cities . . . I wonder if people like that flock to cities or if cities make . . . that more prevalent’ and that ‘homelessness tends to go hand in hand with a lot of mental illness’. While it is not within the scope of this article to investigate this distinction further, other explanations for this perception could be that liaison and diversion teams are more effective, or better funded, in the north east of England. There might be greater pressure on the courts and other agencies in a larger city. S2 was of the view that ‘Teesside has a very tight sense of community and sense of connection’ which can be a strength when it comes to personal connections within the relevant agencies.

In addition to earlier research undertaken in this area,⁶⁹ unsurprisingly, this current research confirms the flaws within the current test for unfitness to plead, none being more evident than the absence of a procedure in the magistrates’ and youth courts. From a theoretical standpoint, the moral conversation at the heart of the criminal justice process cannot occur where a defendant lacks the capacity to engage in such an exchange.⁷⁰ From a legal perspective, the failure to offer equal treatment to mentally vulnerable defendants in the magistrates’ and youth courts suggests a discriminatory approach which cannot be condoned. Furthermore, it is highly likely that some mentally vulnerable defendants are being deprived of the right to a fair trial, in contravention of art 6 of the European Convention on Human Rights. This failure is reflected in the Law Commission’s proposals to apply the legal test for effective participation to the Crown, magistrates’ and youth courts.

What is more surprising, and significant, is the discovery that the implementation of parallel tests in the lower courts is unlikely to ameliorate the issues which have been identified. Identical procedures for effective participation in the magistrates’ and Crown Courts are likely to be impractical, inefficient and unworkable. Legal aid funding is inadequate and resources are already woefully stretched. In particular, restrictions on legal aid funding in the magistrates’ courts are likely to deter legal professionals from seeking psychiatric reports for some defendants. While it is recognised that summary offences are not serious and offer a wide range of disposal options, the outcome for the mentally vulnerable defendant is still a conviction. Regardless of the level of seriousness, criminal convictions carry a stigma,⁷¹ as well as, potentially, other adverse consequences, in terms of the defendant’s employment prospects, family life and finances. A criminal conviction sends a message to the defendant that he or she is responsible for his or her act.⁷² If a defendant is unable to understand or challenge that message, then a conviction seems inappropriate.⁷³

Unless policy changes are made, mentally vulnerable defendants will continue to be failed by the criminal justice system. The need for more widespread legal aid funding is echoed in a Justice Committee Report.⁷⁴ The concerns for the treatment of mentally vulnerable defendants in the magistrates’ courts are likely to be exacerbated by the introduction of video link hearings⁷⁵ and by offering the ability to enter guilty pleas online.⁷⁶ This ‘proposed upheaval in the way courts deliver justice could leave vulnerable people unable to get the legal advice—or decisions—they need’.⁷⁷

69. H Howard, ‘Unfitness to Plead and the Trial of Facts: A Critical Review of the Law Commission’s Proposals and the Decision in *R v MB*’ (2012) *J Crim L* 421; H Howard, ‘Unfitness to Plead and the Vulnerable Defendant: An Examination of the Law Commission’s Proposals for a New Capacity test’ (2011) *J Crim L* 194; H Howard and M Bowen, ‘Unfitness to Plead and the Overlap with *Doli Incapax*: An Examination of the Law Commission’s Proposals for a New Capacity Test’ (2011) *J Crim L* 380.

70. H Howard, ‘Lack of Capacity: Reforming the Law on Unfitness to Plead’ (2016) *J Crim L* 428, 431.

71. A Ashworth, ‘Is the Criminal Law a Lost Cause?’ (2000) 116 *LQR* 225, 236.

72. RA Duff, ‘Fitness to Plead and Fair Trials: (1) A Challenge’ (1994) 419 *Crim LR* 420–21.

73. Howard (n 70) 428.

74. Justice Committee, ‘Report: Court and Tribunal Reforms’, 31 October 2019, para 218 <<https://publications.parliament.uk/pa/cm201919/cmselect/cmjust/190/19002.htm>> accessed 30 March 2020.

75. *Ibid* para 82

76. *Ibid* para 25.

77. <<https://www.parliament.uk/business/committees/committees-a-z/commons-select/justice-committee/news-parliament-2017/courts-tribunals-reform-report-published-19-20/>> accessed 30 March 2020.

While this paper has suggested that reform of the law is unlikely to be the solution on its own, more research is required to determine how policy should develop. It appears that early diversion away from the criminal justice system will be key to improving the situation for mentally vulnerable defendants. This could be achievable by the CPS halting a prosecution where it is not in the public interest to proceed. A recent consultation process⁷⁸ might provide the opportunity to produce better guidelines for prosecutors when dealing with mentally vulnerable defendants. Consistent and better funded provision of Liaison and Diversion services, whether in police stations or magistrates' courts would also assist in early diversion. Recommendations made by the *JUSTICE Report on Mental Health and Fair Trial*,⁷⁹ include that liaison and diversion practitioners should screen every suspect who comes into custody.⁸⁰ Without adequate time and funding, fulfilment of this task might be meaningless. As discussed above, a brief screening process is unlikely to lead to the successful identification of all mentally vulnerable defendants, especially in view of the fact that mental health issues can be hidden by the defendant, or periods of improved mental health mean that a vulnerable defendant might appear to have sufficient capacity at that particular point in time.

Further recommendations in the *JUSTICE Report* are that police training should be provided on how to respond to vulnerability,⁸¹ and dedicated district judges should ensure appropriate treatment of vulnerable defendants, as well having the power to direct the CPS to review its decision to prosecute.⁸² These suggestions will go some way towards protecting the mentally vulnerable defendant from an unfair trial, but it might also be advisable to introduce additional training to all stakeholders who work with mentally vulnerable defendants in the magistrates' courts. Areas for development and engagement with other stakeholders should address the need for a more consistent approach to diversion at an earlier point in time, for better training and guidelines that cross boundaries,⁸³ and for improvements in communication between various stakeholders within the criminal justice system. The solution is far from straightforward and, without the better funding of legal aid and liaison and diversion provision, as well as the availability of a range of mental health services, the burden of treating a mentally vulnerable individual is being borne by the criminal justice system.

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78. Crown Prosecution Service, *Mental Health Conditions and Disorders: Draft Prosecution Guidance* (2019) <<https://www.cps.gov.uk/publication/mental-health-conditions-and-disorders-draft-prosecution-guidance>> accessed 30 March 2020.

79. *JUSTICE Report on Mental Health and Fair Trial* (2017).

80. *Ibid* 99.

81. *Ibid* 100.

82. *Ibid* 101. B4 also advocated that 'a court in the area in each catchment should have a person that is medically trained, that is there and if the police know or you know that your client has [a] mental health [issue] that's where they should be diverted... so that they can be assessed'.

83. Transform Justice (n 57) at 17 suggests that training is required to identify hidden vulnerability.