Home Office Circular 93/1991

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The Courts Administrator
The Chief Clerk to the Crown Court
The Clerk to the Justices (with a copy for the Chairman of the Bench)
The Chief Officer of Police
The Chief Probation Officer

cc *Director of Public Prosecutions*
Clerk to the County Council
The Clerk to the Magistrates' Courts Committee
Clerk to the Police Authority
Chairman, Regional Health Authority
Chairman, District Health Authority
The Director of Social Services
The General Manager, Regional Health Authority
The General Manager, District Health Authority
General Council of the Bar
The Law Society
The Managing Medical Officer, HM Prison

Dear Sir/Madam

HOME OFFICE CIRCULAR NO. 93/1991
THE CRIMINAL PROCEDURE (INSANITY AND UNFITNESS TO PLEAD) ACT 1991

1. I am directed by the Secretary of State to inform you that the Criminal Procedure (Insanity and Unfitness to Plead) Act 1991 (**the 1991 Act**) will be brought into force on 1 January 1992. The new Act amends a number of acts including, in particular, the Criminal Procedure (Insanity) Act 1964 (**the 1964 Act**). It applies only to the higher courts (*i.e.* not magistrates' courts), although magistrates' courts do have a role in revoking or amending supervision and treatment orders made under the 1991 Act (Part III of Schedule 2).

2. This circular sets out the principal changes, and offers guidance on the operation of the revised procedure. A copy of the 1991 Act is at Annex A. Notes on each provision are at Annex B. The amendments introduced by the 1991 Act are procedural: no changes have been made to the substantive common law on the defence of insanity or the rules determining when a person is unfit to be tried.

The 1964 Act

3. The 1964 Act makes provision in England and Wales for persons who are found unfit to be tried, or not guilty by reason of insanity ("the special verdict"), in respect of criminal charges. Its principal feature is that in any case where an accused person is found unfit to be tried, or not guilty by reason of insanity, the court must order that he shall be detained in such hospital as may be specified by the Home Secretary, where he will be treated as though he had been made subject to a hospital order and to a restriction order without limit of time.

Principal Changes

4. The main changes introduced by the 1991 Act are:

(*a*) **a trial of the facts**: where an accused person has been found unfit to be tried, there will now be provision for there to be a "trial of the facts" to determine whether the jury is satisfied beyond reasonable doubt that the accused did the act or made the omission charged against him (thus reducing the possibility of a person being made subject to the court's powers in respect of an act or omission which, as a matter of fact, he or she did not commit or make).

(*b*) **a wider range of disposals**: where the accused has been found unfit to be tried (and, following a trial of the facts, to have done the act or made the omission charged against him) or not guilty by reason of insanity, the court will now be able to choose between a range of disposal options;

(*c*) **medical evidence**: under **Section 1** of the 1991 Act a jury is not to return a verdict of not guilty by reason of insanity under the Trial of Lunatics Act 1883 except on the evidence of two or more medical practitioners, at least one of whom is duly approved by the Secretary of State under the Mental Health Act 1983. Similar evidence is required before a finding that an accused is unfit to be tried.

Diversion

5. It is Government policy that, wherever possible, mentally disordered persons who become involved in the criminal justice system should receive care and treatment from the health and social services. The Government therefore attaches great importance to close co-operation between the health and social services and the criminal justice system to identify such persons promptly and divert them from the criminal justice system wherever possible. Home Office Circular (66/90), issued on 3 September 1990, provided guidance on such an approach.

Remand to hospital

6. In cases where a prosecution is brought against a person who it is thought may be unfit to be tried the Crown Court may, before reaching a decision on his fitness, wish to consider the use of its power under section 36 of the Mental Health Act 1983 to remand an accused person to hospital for treatment. It will be necessary for the requirements of section 36 to be met before making such a remand; but having regard to the needs of individual cases, courts may wish to consider whether the treatment provided by virtue of a section 36 remand for treatment might result in the accused person becoming fit for trial, thereby reducing the likelihood of having to find him unfit to be tried.

The trial of the facts

7. The following paragraphs offer guidance on the trial of the facts. The detailed provisions are set out in **Section 2** of the 1991 Act, which substitutes new provisions for section 4 of the 1964 Act.

8. The question of fitness to be tried should normally be determined by a jury as soon as it arises, although the court retains its power to postpone consideration of the question of fitness until any time before the opening of the case for the defence (new **Section 4(2)**). This power provides the opportunity for the case for the prosecution to be tested and, if there is insufficient evidence for the jury to reach a finding of guilt, the accused may be acquitted without any need to consider the issue of fitness to be tried, and without any finding of mental disability being recorded against him. This provision also enables the court to consider the accused's intent (*mens rea*), a matter which it is not intended should be taken account of during the trial of the facts.

9. If a jury determines that the accused is unfit to be tried, the court is then required to conduct a "trial of the facts". This requires a jury to inquire into the circumstances of the case and determine whether it is satisfied that the accused did the act or made the omission charged. The jury is required to examine the evidence, if any, already given, together with any further evidence adduced by the prosecution and the defence (new **Section 4A(2)**). The test in regard to the burden of proof should be consistent with other criminal proceedings (beyond reasonable doubt). If the jury is satisfied that the person did the act or made the omission charged they should make a finding to that effect: such a finding is not the equivalent of a conviction. If the jury is not so satisfied then a verdict of acquittal should be returned: this would have the same status as an acquittal in any other criminal proceedings. An acquitted person will not, therefore, be subject to any of the disposal options specified in the 1991 Act.

Juries

10. If the question of fitness to be tried falls to be determined when the accused person first appears in court, and the jury decides that the accused is fit to be tried, the case should proceed to trial in the normal way. The accused should then be tried by a different jury from the one which decided the question of fitness (new **section 4(5)(a)**).

11. If the accused is found unfit to be tried on his first appearance

in court, the case should proceed to a trial of the facts. This should be determined by a jury separate from the one which found the accused unfit to be tried (new **section 4A(5)(a)**). But where the question of unfitness arises in the course of the trial, the court will have to consider whether a separate jury should be empanelled to decide that question. Any ensuing trial of the facts is to be determined by the jury by whom the accused was already being tried (new **section 4A(5)(b)**). This take into account the fact that that jury may already have heard evidence relevant to the trial of the facts. Further, bearing in mind that a trial of the facts is not a full trial, to require a fresh jury for that purpose would involve additional time and expense which might be unwarranted in the circumstances.

12. Under the new **Section 4(6)**, a jury cannot return a finding of unfitness to be tried except on the written or oral evidence of two or more registered medical practitioners, at least one of whom is duly approved by the Secretary of State under the Mental Health Act 1983.

Legal Representation

13. Where an accused person is found unfit to be tried he should always be legally represented during the trial of the facts. There may be cases where the accused, because of his mental disorder repudiates his legal representative prior to, or during the trial of the facts. The court should appoint, to put the case for the accused, a person whom the court considers may properly be entrusted to pursue the accused's interests (new **section 4A(2)(b)**). This may be a person who has previously represented the accused (possibly even one whom the accused has sought to repudiate) or any other person whom the court considers appropriate, for example a solicitor known to the court to have experience in such matters.

Power to remit for trial

14. If on a trial of the facts, the accused is found to have done the act or made the omission charged, and admission to hospital with restrictions is directed, the Secretary of State will retain the power to remit the accused to stand trial, if he is still detained in hospital and should he subsequently become fit to be tried (**Paragraph 4 of Schedule 1**). Under the provisions of **paragraph 4(1)(a) of Schedule 1** the Secretary of State may, if appropriate, now remit the person for trial direct from hospital to the court of trial. This is likely to be appropriate in cases where the accused is detained in hospital and where return to prison is likely to be deleterious to his health.

Disposal options

15. Under the 1964 Act the court has been required, following a finding that the accused was unfit to plead or not guilty by reason of insanity, to order his detention in such hospital as the Secretary of State might direct, as though he were subject to a restriction order under section 41 of the Mental Health Act 1983 without limit of time. The court will still be required to do this when the offence charged is one for which the sentence is fixed by law (*i.e.* murder), but otherwise the court will have a power to order such detention with or without

such a restriction (whether without limitation of time or for a specified period). In addition, however, the court is given the option under the 1991 Act to make a different disposal in a case where it thinks this appropriate. The new disposal options are set out in **Section 3** of the 1991 Act, which substitutes a new section for section 5 of the 1964 Act. They will apply in the circumstances described in paragraph 4(*b*) of this circular.

16. The court will now be able to choose between the following disposals (details of which are set out in paragraph 17):

(*a*) an order (an "admission order") that the accused should be admitted to such hospital as may be specified by the Secretary of State. The court may also direct that the accused be treated as though subject to a restriction order without limit of time or for a specified period. The present mandatory hospital disposal, as though subject to a restriction order without limitation of time, is retained where the offence charged is **murder**;

(*b*) a guardianship order under the provisions of section 37 of the Mental Health Act 1983;

(*c*) a supervision and treatment order, requiring the accused to co-operate with supervision by a social worker or a probation officer for a period of not more than two years and with treatment (for all or part of that period) by a registered medical practitioner; or

(*d*) an order for the absolute discharge of the accused.

17. The following paragraphs provide further information in regard to these orders.

a. *Admission orders*

i. On the basis of the medical evidence already presented to determine unfitness or insanity, the court may decide that the accused requires compulsory hospital treatment. The provisions relating to admission orders are set out in **Schedule 1**. Where a court makes an admission order, the Secretary of State must (as at present in the case of a Crown Court) specify the hospital in which the person will be detained within two calendar months of the date of the order. **Paragraph 1(2)** of Schedule 1 provides that the court may also give directions for the conveyance of the person to a "place of safety" and for his detention there pending his admission to hospital. Under **paragraph 1(3)**, where a person is admitted within the two month period to the hospital specified by the Secretary of State, the admission order shall be sufficient authority to detain him as if he were the subject of a hospital order and, where the court so directs, a restriction order under the Mental Health Act 1983.

Directions as to restriction

ii. Under **paragraph 2(1)(b)** of Schedule 1, the court, when making an admission order in respect of a person, may also direct that that person be treated for the purposes of the Mental Health Act 1983 as if a restriction order had been made under section 41 of the

Mental Health Act 1983 either without limitation of time or for such period as may be specified by the court. Section 41 states, inter alia, that a restriction order may be imposed **where it appears to the court to be necessary for the protection of the public from serious harm**. In reaching its view, the court must take into account the nature of the offence, the antecedents of the offender, and the risk of his committing further offences if set at large. Where the offence is murder the court must make such a direction without limitation of time.

b. *Guardianship orders*

iii. The provisions of section 37 of the Mental Health Act 1983 relating to guardianship orders are adapted by section 5(2) of the 1991 Act for the purpose of making guardianship orders under the 1991 Act. The purpose of guardianship is primarily to ensure that the offender receives care and protection rather than medical treatment. The guardian has powers to require the offender to attend for medical treatment but cannot give consent to treatment, nor enforce it against the patient's wishes. Further information relating to guardianship orders is set out in HO circular 66/90 (paragraph 8(iv)(c)).

c. *Supervision and treatment orders*

iv. The detailed provisions relating to the making, effecting, amending and revoking of such orders are set out in **Schedule 2**. Although the supervision and treatment order is a new form of order provided specifically for the purposes of the 1991 Act, it is modelled along existing statutory provisions, namely sections 2 and 3 of the Powers of Criminal Courts Act 1973 which provide for probation orders with a condition of psychiatric treatment (section 2 will be substituted by a new section 2, and section 3 will be replaced by a new Schedule 1A, when sections 8 and 9 of, and Part II of Schedule 1 to, the Criminal Justice Act 1991 come into force).

v. The order is not a punitive measure; its purpose is to benefit the accused. In the generality of cases, it is envisaged that it will be used where the court is satisfied that release into the community will not pose an unacceptable risk to the safety of the public – for example, in the case of a mentally disordered person who will be able to live independently with the help and support of health and social services, and who has been charged with a relatively minor offence. The aim will be to ensure that such persons receive medical treatment either as in-patients for a short period or as out-patients, and receive social support to help them to lead settled lives. In many cases it is likely to be appropriate for social supervision to be provided by social workers, who should be nominated by the social services department concerned. It may be, however, that in some cases supervision by probation officers will be preferable. This is for the court to decide after taking advice from medical practitioners and consultation with the appropriate social service or probation service (see vii below). The agency responsible for

discharging the order will have a supportive role. The duties which will be undertaken will depend on the individual circumstances of each case. However, in general, the supervising officer will be expected to liaise, as appropriate, with the medical and nursing services and to help the accused cope in the community. Such steps might include finding suitable accommodation, ensuring that the person is kept reasonably occupied, and dealing with day-to-day problems which might arise.

vi. Before making an order the court should seek to satisfy itself as far as possible that the accused is likely to cooperate with the supervision and treatment. But in the final analysis the order should not be conditional on the willingness of the accused to comply since in many cases he might be unable to give meaningful consent because of his mental condition. However, should the accused refuse to cooperate with his supervision or treatment, penal sanctions will not apply. The court will have no power to enforce the order or otherwise intervene in cases of non-compliance. It will be for the accused's medical and social supervisors to decide on the appropriate action: if they believe that compulsory medical treatment is necessary it will have to be under the relevant provisions of Part II of the Mental Health Act 1983. In cases where supervisors believe the accused poses a risk to others, but does not meet the requirements for detention under the civil powers, they should act in the same way as they would in respect of any other person in this position. This will involve liaising closely with the police to ensure they are aware of any concern about possible danger to others.

vii. The order will require the accused to be under the supervision of a social worker or a probation officer for a period to be specified in the order, not exceeding two years. Before making the order the court should be satisfied on the written or oral evidence of two or more registered medical practitioners, at least one of whom is duly approved by the Secretary of State under the Mental Health Act 1983, that the medical condition of the accused is such as requires and may be susceptible to treatment but is not such as to warrant the making of either an admission order or a guardianship order. The court should not make a supervision and treatment order unless it is satisfied that the proposed supervising officer is willing to undertake the supervision. The proposed supervising officer will clearly need to have regard to the feasibility of what is proposed, and may wish to express a view to the court, orally or in writing. The court must also be satisfied that arrangements have been made for the intended treatment. The order will include a requirement that the supervised person is to undergo, during the whole of the period specified in the order or during such part of that period as may be so specified, treatment by, or under the direction of a registered medical practitioner. The treatment required by the order must be one of the following: treatment as a resident patient in a hospital or mental nursing home; treatment as a non-resident patient at such institution or place as may be specified in the order; and treatment by or under the direction of

such registered medical practitioner as may be specified in the order.

viii. Where, on application of the supervised person or the supervising officer, it appears to a magistrates' court acting for the petty sessions area concerned that having regard to circumstances which have arisen since the order was made, it would be in the interests of the health and welfare of the supervised person that the order should be revoked, the court may revoke the order.

d. *Absolute discharge*

ix. Under the new **Section 5(2)(b)(iii)** the court will have the option, in appropriate cases, of making an order for the accused's absolute discharge. This might be considered, for example, where the alleged offence was trivial and the accused clearly does not require treatment and supervision in the community.

Appeals

18. **Section 4** of the 1991 Act amends the Criminal Appeal Act 1968 so as to make, with respect to appeals to the Court of Appeal, provision corresponding to that made in sections 1 to 3 of the 1991 Act.

19. Under section 17 of the Criminal Appeal Act 1968, where a person has been found unfit to be tried, the Secretary of State has the power, if he thinks fit, to refer the case to the Court of Appeal where the case is treated for all purposes as an appeal.

Enquiries

20. Enquiries about this circular should be addressed to Mr N Jordan, C3 Division, Home Office (071-273 3021) or to Mr N Shanks, C3 Division, Home Office (071-273 3118).

Yours faithfully

ROBERT BAXTER

C3 Division

ANNEX A

CRIMINAL PROCEDURE (INSANITY AND UNFITNESS TO PLEAD) ACT 1991

[The text of this Act is reproduced in Appendix A ante, pp. A 229–A 247]

ANNEX B

CRIMINAL PROCEDURE (INSANITY AND UNFITNESS TO PLEAD) ACT 1991: NOTES ON SECTIONS

SECTION 1: SPECIAL VERDICT OF NOT GUILTY BY REASON OF INSANITY

1. **Section 1** provides that a jury is not to return a verdict of not guilty by reason of insanity under the Trial of Lunatics Act 1883 except on the evidence of two or more medical practitioners, at least one of whom is approved by the Secretary of State as having special experience in the field of mental disorder as defined under the Mental Health Act 1983. (Under the previous law, there was no requirement for the court to consider psychiatric or other medical evidence.)

SECTION 2: FINDING OF UNFITNESS TO PLEAD AND THE TRIAL OF THE FACTS

2. **Subsection (1) of the new section 4** provides that this section is to apply where, at the trial, the question arises whether the accused is fit to be tried.

3. **Subsection (2)** enables the court, if it considers that it is expedient to do so, and in the interests of the accused, to postpone consideration of the question of fitness to be tried until any time up to the opening of the case for the defence.

4. **Subsection (3)** provides that if the jury returns a verdict of acquittal before the question of fitness to be tried falls to be determined, that question shall not be determined.

5. **Subsection (4)** provides that, subject to the above-mentioned subsections (2) and (3), the question of fitness to be tried is to be determined as soon as it arises.

6. **Subsection (5)** requires that the question of fitness to be tried should be determined by a jury; and that if it falls to be determined on arraignment and the trial proceeds, the accused should be tried by a jury other than the one which determined the question of fitness. However, where the question falls to be determined in the course of the trial, it is determined by a separate jury or by the jury by whom the accused is being tried, as the court may direct.

7. **Subsection (6)** requires that the jury should not determine the question of fitness to be tried except on the written or oral evidence of two or more medical practitioners, at least one of whom is approved by the Secretary of State as having special experience in the field of mental disorder.

8. **Subsection (1) of the new Section 4A** provides that this section is to apply where the accused is found unfit to be tried.

9. **Subsection (2) of the new Section 4A** provides that in such circumstances the trial should not then proceed, or further proceed, but that a jury is to determine whether they are satisfied on the count or counts on which the accused was to be or was being tried, that he did the act or made the omission charged against him as the offence. There is provision for a person to be appointed by the court to put the case for the defence.

10. **Subsection (3) of the new Section 4A** requires that if the jury is satisfied that the accused did the act or made the omission charged they should make a finding accordingly. **Subsection (4)** provides that if they are not so satisfied they should return a verdict of acquittal.

11. **Subsection (5) of the new Section 4A** provides that a determination under subsection (2) of the new Section 4A shall be made either by a different jury from the one which determined the question of fitness to be tried, or by the jury by whom the accused was being tried, depending on the stage of proceedings.

SECTION 3: DISPOSAL OPTIONS

12. Subsection (1) of the new section 5 provides that this section is to apply where the accused is found not guilty by reason of insanity, or is found unfit to be tried and the jury are satisfied that the accused did the act or made the omission charged.

13. **Subsection (2)** provides for the court to make one of a number of orders. Under **subsection (2)(a)** the court may make an order (an admission order) directing that the accused should be admitted to such hospital as may be specified by the Secretary of State.

14. **Subsection (2)(b)** provides for further options, namely a guardianship order within the meaning of the Mental Health Act 1983, a supervision and treatment order within the meaning of Schedule 2, or an order for absolute discharge.

15. **Subsection (3)** provides that the further options under subsection (2)(b) are not to be available where the alleged offence is one for which the sentence is fixed by law. It is considered right to preserve the present mandatory hospital disposal, with restrictions, where the alleged offence is that of murder.

SECTION 4: CRIMINAL APPEAL ACT 1968

16. **Section 4** amends the Criminal Appeal Act 1968 ("the 1968 Act") so as to make, with respect to appeals to the Court of Appeal, provision corresponding to that made in Sections 1 to 3 of the Act.

17. **Section 4(1)** substitutes section 6 of the 1968 Act. The new **section 6(1)** applies where, on appeal against conviction, the Court of Appeal are of the opinion either that the proper verdict would have been one of not guilty by reason of insanity, or that the case is not one where there should have been a verdict of acquittal, but there should have been a finding that the accused was unfit to be tried, and that he did the act or made the omission charged against him.

18. **Subsection (2)** provides that in such circumstances, except where under section 6(3) the offence to which the appeal relates is an offence for which the sentence is fixed by law, the Court of Appeal should make one of the disposals from the range of options described in Section 3 of the Act.

19. **Subsection (3)** contains the limitation on the court's power where the alleged offence is one for which the sentence is fixed by law.

20. **Section 4(2)** substitutes section 14 of the 1968 Act in a similar manner. The new **section 14(1)** applies where the Court of Appeal are of the opinion that the case is not one where there should have been a verdict of acquittal, but that there should have been a finding that the accused was unfit to be tried and that he did the act or made the omission charged. **Subsection (2)** provides that in such circumstances, subject to subsection (3) (which again limits the court's power where the alleged offence is one for which the sentence is fixed by law) the Court of Appeal is again to make one of the disposals from the specified range of options.

21. **The new Section 14A** restates the existing position under the 1968 Act with appropriate modifications to ensure first that in forming its opinion on the accused's mental condition the court must take into account medical evidence from two or more medical practitioners, at least one of whom is approved by the Secretary of State as having special experience in the field of mental disorder, and secondly that the court's order is made in accordance with the provisions for hospital admission orders in Schedule 1.

SECTION 5: ORDERS UNDER THE 1964 AND 1968 ACTS

22. **Section 5(1)** provides that the provisions of **Schedule 1** to the Act are to apply in relation to hospital admission orders made by the Crown Court or the Court of Appeal. At present, under the 1964 Act, a hospital order is automatically accompanied by restrictions. Under the new provisions, the court will still have the power to make a restriction order under section 41 of the Mental Health Act 1983, and must do so if the alleged offence is one for which the sentence is fixed by law. But it will also now have the power to make an admission order without restrictions. **Schedule 1** provides that, when the court makes an admission order, there is a period of two months (or, in the case of an order for assessment, seven days) in which the Secretary of State is to specify a hospital and the accused be admitted to that hospital. **Schedule 1** also provides that if, while the patient is detained in hospital with restrictions, and the Secretary of State is satisfied that he can properly be tried, he may remit the person for trial: **paragraph 4(1)(a) of Schedule 1** provides that, among other options, the Secretary of State can now remit the person for trial direct to the court.

23. **Section 5(2)** adapts the provisions of section 37 of the Mental Health Act 1983 so as to enable guardianship orders to be made under that section by virtue of the provisions of the Act relating to disposals.

24. **Section 5(3)**, provides that supervision and treatment orders are to be made in accordance with **Schedule 2**. **Part I of Schedule 2** defines what is meant by supervision and treatment orders. **Part II** specifies the

circumstances in which such an order may be made, and the obligatory requirements as to medical treatment. **Part III** sets out the circumstances in which such an order may be revoked or amended. Supervision and treatment orders shall be modelled along existing statutory provisions, namely those relating to psychiatric probation orders under the Powers of the Criminal Courts Act 1973, as amended by the Criminal Justice Act 1991. The primary purpose of the supervision and treatment order will be to ensure that the person concerned receives medical treatment on a voluntary basis either as an in-patient for a short period, or as an out-patient, and social support to help keep within the law.

25. **Section 5(4)** applies the provisions of the Powers of the Criminal Courts Act 1973 (as amended by the Criminal Justice Act) to orders for absolute discharge made under this Act.

SECTION 6: DEFINITION OF TERMS

26. **Section 6** contains interpretation provisions including definitions of what is meant by the 1964, 1968, and 1983 Acts, and the term "duly approved".

SECTION 7: MINOR AND CONSEQUENTIAL AMENDMENTS

27. **Section 7 and Schedule 3** provide for minor and consequential amendments including, in particular, amendments to the 1968 Act to provide for an appeal against a finding in the "trial of the facts" that the accused did the act or made the omission charged.

SECTION 8: TRANSITIONAL PROVISIONS

28. **Section 8** makes transitional and, together with **Schedule 4**, repeal provisions.

SECTION 9: TITLE

29. **Section 9** states the short title, provides that the Act is to come into force on such day as the Secretary of State may by order appoint and extends the Act's provisions to England and Wales only.