

A psychiatric trainee's guide to the criminal courts

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This article provides a guide on the criminal justice system in England and Wales to assist psychiatrists who are asked to prepare reports on people subject to criminal proceedings. It describes which sections of the Mental Health Act 1983 are relevant at different stages of the criminal justice process.

No matter how serious, all criminal cases begin in the magistrates' court. At the first appearance in the magistrates' court, it is noted what category the alleged offence pertains to. There are three categories:

1. **Summary only:** These are dealt with by the magistrates' courts only, for example public order offences (breach of the peace, insulting behaviour, common assault) and most driving offences
2. **Triable either way:** These can be dealt with in the magistrates' or the crown courts. They make up more than two thirds of all offences and will include drug-related offences and domestic burglary. The magistrates' court can commit the case to the crown court by declining jurisdiction. Also, the defence can elect trial at the crown court
3. **Indictable only:** They are dealt with by the crown courts only and include robbery, grievous bodily harm and rape.

MAGISTRATES' COURTS

On the first appearance at the magistrates' court an application for bail may be made. If the defendant is thought by the court to be psychiatrically unwell, the application for bail is often denied. The defendant is usually then taken into custody for 7 days. During this time the defence will decide on a plea. This may take considerably longer than 7 days, the solicitors may be waiting for the papers from the Crown Prosecution Service or they may require more time to prepare the case. An adjournment can be requested by the defence or the prosecution.

Most magistrates dealing with convicted mentally disordered offenders (MDO) will ask for a pre-sentence probation report (PSR) and a psy-

chiatric report. PSRs used to be a 'statutory' requirement in most cases, but under the reforms introduced by the previous Home Secretary, it is no longer mandatory to request these reports.

It must be said that the probation service are usually efficient and produce their reports at speed. The same cannot be said for psychiatric reports. The initial psychiatric report submitted by the prison medical officer is often limited because of the medical officer's psychiatric experience. Unfortunately long delays have been experienced because of the difficulty in obtaining an assessment from the defendant's catchment area consultant. Periods of up to 6 months delay are not unknown, during which time the defendant will usually continue to be remanded in custody.

DIVERSION FROM CUSTODY Section 35

If the defendant is remanded into custody and thought to be psychiatrically unwell, various options are available to the assessing psychiatrists. Section 35 of the Mental Health Act (MHA) 1983 can be recommended to the magistrates' or crown courts. A registered medical practitioner, preferably the one who will carry out the inpatient assessment and report to the court, can give written or oral evidence to the court stating that such an assessment is necessary and that a bed would be available within 7 days of any order being made. The accused person can then be remanded under this section for 28 days at a time and for 12 weeks in all.

Section 36

Section 36 is only available in a crown court and can only be made with the written or oral evidence of two registered medical practitioners. It

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is also only available to those defendants said to be suffering from mental illness or severe mental impairment. Those defendants suffering from psychopathic disorder or mild mental impairment are excluded under this section. The time limits noted under Section 35 also apply to this section. Unlike Section 35, this section cannot be used for defendants charged with murder.

Section 48

The third option available to the psychiatrists for defendants who are thought to be psychiatrically unwell and detained in custody is Section 48. This allows the removal of a defendant from

prison to hospital in order that they receive emergency treatment. Two registered medical practitioners, one of whom must be Section 12 approved, must give written evidence to the mental health unit at the Home Office that the defendant either suffers from mental illness or severe mental impairment and that he/she is in urgent need of medical treatment. Once a bed is identified and the mental health unit are satisfied with the level of security offered, a transfer warrant can be issued. This section has no time limit, ending when the defendant is either acquitted or, if found guilty, sentenced. The defendant may apply for a mental health review tribunal

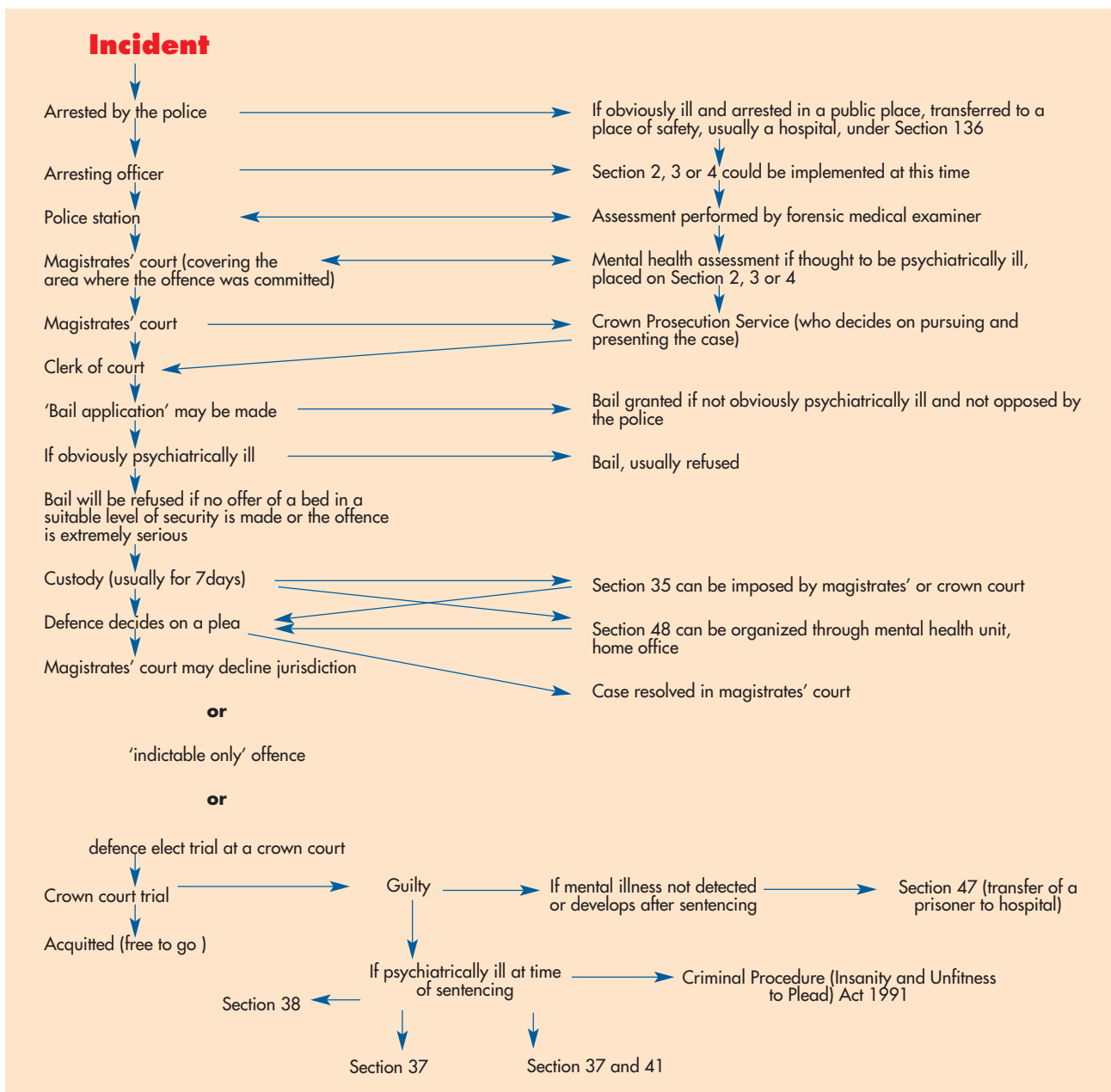


Figure 1. Flow diagram of the criminal justice procedure and how the Mental Health Act 1983 can intervene.

(MHRT) and, if his/her application is successful, he/she would be returned to prison.

SENTENCING OPTIONS (MAGISTRATES' COURT)

If the defendant is thought to be psychiatrically unwell at the time of sentence then a hospital order may be offered, under the provisions of Section 37 or 38 of the MHA 1983, by the catchment area psychiatric services or by the forensic psychiatric service. Two medical recommendations must be presented to the court, both from registered medical practitioners, one of whom must be approved under Section 12 of the MHA 1983. Section 12 recognizes certain doctors as having experience in the diagnosis and treatment of psychiatric conditions. A named hospital or trust must be specified before any such order can be made. If the defendant is thought to be psychiatrically unwell but not in need of inpatient treatment then a probation order with a condition of outpatient treatment may be suggested by the probation service after consultation with the appropriate psychiatric service.

Defendants have a right to trial at a magistrates' court for all offences other than 'indictable only' offences. If the defendant is alleged to have committed a grave offence then the magistrates' court will often decline jurisdiction and commit the case to the crown court. Alternatively, the defendant may elect trial at the crown court and therefore no plea will be entered at the magistrates' court. Many defendants choose trial by jury, which is only available at crown courts.

Section 38 of the MHA 1983, the Interim Hospital Order, can only be used post-conviction but pre-sentence. It allows a trial of treatment in hospital and it was hoped that it would be used to test the treatability of patients with personality disorder. Its maximum time limit was recently extended to 12 months. Once the assessment is complete, medical reports are submitted to court and the person is finally sentenced.

CROWN COURTS

Committing the case to the crown court invariably incurs a delay. Traditional committal proceedings have been replaced with a new administrative process which is intended to save time. The case has to be formally transferred on paper and until it is officially received by the crown court no action can be taken by that court. Unfortunately in this situation, if the defendant is mentally disordered, without the intervention of the prison medical officer, defence lawyer or

catchment area psychiatric service, the defendant can remain in prison by default.

For the case to be committed to the crown court the defendant must have elected trial at the crown court, or the magistrates' court must have declined jurisdiction, or the offence must be indictable only. The minimum delay involved in committing the case to crown court is approximately 4 weeks.

Hearings at crown courts have different purposes. The first hearing is usually a 'mention'. There may be further mentions but usually by this time, the court is in a position to hold a hearing for plea and directions. The directions are from the judge to try and resolve any problems causing delay. At the hearing for plea and directions the defendant has to be present in order to enter a plea. The defendant need not be present at a mention. If the defendant enters a guilty plea and is thought to be mentally disordered, then the judge will often request a PSR and a psychiatric report at that stage.

If the defendant enters a not guilty plea there is usually an adjournment to check on witness availability. There also needs to be liaison with the listing office to check court availability for a trial.

FITNESS TO PLEAD AND STAND TRIAL

The court hearing the case needs to decide if the defendant is fit to plead and stand trial. This issue may be raised by the defence, prosecution or the judge. The criteria for determining fitness to plead and stand trial are known as the Pritchard criteria [R vs Pritchard, 1836], and are as follows:

1. That the defendant understands the charge(s) against him/her
2. That he/she can distinguish between the consequence of a plea of guilty and not guilty
3. That he/she is able to give adequate instructions to his/her counsel
4. That he/she is able to challenge a juror (i.e. he/she knows that he/she should object to someone who knows him/her from being allowed to sit on the jury)
5. That he/she is able to follow the course of his/her trial and the evidence being given against him/her.

CRIMINAL PROCEDURE (INSANITY AND UNFITNESS TO PLEAD 1991)

If the issue of fitness to plead is formally raised then a jury is empanelled to hear the evidence for that matter alone. If the fitness issue is raised and it is decided that the defendant is unfit then a second jury is empanelled to hear a trial of the

facts. If they find that he/she committed the act the judge has a range of sentencing options under the Criminal Procedure (Insanity and Unfitness to Plead) Act 1991:

1. The defendant could be admitted to hospital as if detained under Section 37 of the MHA 1983, with or without a Section 41 restriction order, either with or without limit of time
2. A guardianship order under the MHA 1983 could be made
3. A supervision and treatment order equivalent to a probation order with a condition that he/she attend for psychiatric outpatient treatment
4. If most suitable he/she could be given an absolute discharge.

CRIMINAL TRIALS

If it is decided that the defendant is fit or the issue is never raised the case progresses in the normal way. It is not uncommon for the outcome of the trial to be decided on the first day. This may come about for various reasons:

1. There may be a change of plea by the defendant to guilty
2. The prosecution may offer to replace the original charge with a lesser charge which is acceptable to the defence
3. The defence may offer to plead guilty to a lesser charge
4. Prosecution witnesses fail to appear and the judge declines the prosecution request for an adjournment and discharges the case
5. The prosecution offers no evidence on the case which is duly dismissed.

SENTENCING OPTIONS (CROWN COURT)

If the trial proceeds and the defendant is found guilty he/she may be sentenced there and then or there may be a further adjournment for reports. During that adjournment, the defendant may be given bail. Often a PSR is requested in order to consider the effects of various sentencing options. Further reports may be required regarding conditions of residence in rehabilitation units or hostels.

If the offender is considered psychiatrically ill and detainable under Section 37 of the MHA 1983 and the offence was of serious violence towards a person (e.g. grievous bodily harm) or of a serious sexual nature (e.g. rape) the crown court would want to consider whether to impose a Section 41 restriction order. The restriction applies to the responsible medical officer (RMO), the consultant psychiatrist treating the patient, who would not be able to discharge the

patient, transfer him/her to another hospital or send him/her on leave without the prior permission of the Home Secretary.

Both magistrates' courts and crown courts have the power to make a Section 37 hospital order. If the conviction was made in the magistrates' court and a Section 37 is considered appropriate there is provision under Section 44 MHA 1983 to commit the case to a crown court solely for consideration of a restriction order which may only be made by a crown court. If a hospital has been identified the patient can be admitted there under Section 44 MHA 1983 for treatment pending the court's decision.

In order for a restriction order to be considered the judge must hear oral evidence from one psychiatrist who has assessed the patient. Ultimately it is the judge's decision. The doctors are only making recommendations to the court. When considering whether a restriction order is appropriate the court must be satisfied that it is necessary 'for the protection of the public from serious harm'. Psychiatrists are asked to consider the nature of the offence, the antecedents (previous criminal convictions of the offender), and the risk of him/her committing further offences if set at large.

Psychiatric reports can be requested by the defence or prosecution and also by magistrates. Judges can order reports from prison medical officers and endorse/encourage requests for psychiatric reports from the defence, but these must be paid for by the Legal Aid board, if they so agree.

THE CRIME (SENTENCES) ACT 1997

This act came into effect on 1 October 1997 and introduced amendments to the MHA 1983. The 'hospital and limitation directions' or 'hybrid order' was a power given to crown courts and could be attached to prison sentences imposed on MDOs. This order cannot be used where the offence would attract a mandatory life sentence.

Initially this power is restricted to offenders detainable under the category of psychopathic disorder. The Home Secretary can extend this to other categories of mental disorder. The MDO must be admitted to the named hospital within 28 days of the order being made. The offender may serve the whole of their sentence in hospital if this is recommended by the RMO. They could be returned to prison at any time during their sentence on the recommendation of the RMO and MHRT. Any subsequent treatment would need to be under Section 47 of the MHA 1983.

Section 47

If the defendant is convicted and given a custodial sentence there is provision under the MHA 1983 to allow his/her transfer to hospital. Section 47 allows for immediate transfer of a sentenced prisoner to hospital for psychiatric treatment.

If the patient applies to the MHRT while detained under Section 47 and it is decided that he/she is entitled to be discharged from hospital, then the MHRT informs the Home Secretary. The Home Secretary then has various options. These are:

- Return the patient to prison

KEY POINTS

- Criminal offences are divided into summary only, triable either way, and indictable only categories.
- Committal to crown courts and delays in the preparation of psychiatric reports considerably lengthen the criminal justice process.
- The Mental Health Act 1983 attempted to provide opportunities for the assessment and treatment of mentally disordered defendants and offenders at every stage of the criminal justice process.
- The criteria for fitness to plead and stand trial have remained unchanged since 1836.
- The Criminal Procedure (Insanity and Unfitness to Plead) Act 1991 allowed a much more flexible approach to psychiatric disposal than its 1964 predecessor.

- Allow the patient to remain in hospital on the recommendation of the MHRT even though the usual conditions required for detention under the MHA 1983 have not been met

- Exercise his/her power to release the patient on licence within the criminal justice system.

If he/she remains in hospital and continues to be detainable under the MHA 1983 at the time that he/she would normally have been released from prison then his/her further detention will be under a 'notional' Section 37 hospital order. A restriction order cannot be applied to such orders. This hospital order takes effect automatically following the end of the prison sentence. He/she has the same rights as other detained patients. He/she could apply to a MHRT for his/her discharge from hospital.

When the 1983 Mental Health Act was drafted, attempts were made to provide provisions for access to assessment and treatment of psychiatric illness at each stage of the Criminal Justice process. The Mental Health Act is currently being revised and particular attention is being paid to this part of the Act. **HM**

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Jones R (1997) *Mental Health Act Manual*. 5th edn. Sweet & Maxwell, London
R vs Pritchard [1836] 7C&P 303