



## **UNFITNESS TO PLEAD: AN ISSUES PAPER RESPONSE TO FURTHER QUESTIONS**

This response form is provided for consultees' convenience in responding to our Issues Paper on unfitness to plead.

The Issues Paper is available free of charge on our website at:  
<http://lawcommission.justice.gov.uk/areas/unfitness-to-plead.htm>.

The response form includes the text of the questions in Part 9 of the Issues Paper, with checkboxes for answers and space for comments. You do not have to respond to every question. Comments are not limited in length (the box will expand, if necessary, as you type).

Each question gives a reference to the paragraph of the Issues Paper at which the question is asked. Please consider the surrounding discussion before responding.

***To submit your answers, please send the file as a copy, using the submit icon (which appears as an envelope) at the top of the form. Alternatively, save the form using the icon at the top of the form and manually attach it to an email.*** We do recommend that you retain a copy of your response for your records.

We invite responses until **25 July 2014**.

Please return this form:

by email to: [fitnesstoplead@lawcommission.gsi.gov.uk](mailto:fitnesstoplead@lawcommission.gsi.gov.uk) or

by post to: Miranda Bevan, Law Commission, 1st Floor, Tower,  
Post Point 1.52, 52 Queen Anne's Gate, London  
SW1H 9AG

Tel: 020 3334 2743

We are happy to accept responses in any form – but we would prefer, if possible, to receive emails attaching this pre-prepared response form.

### **Freedom of information statement**

We may publish or disclose information you provide us in response to this consultation, including personal information. For example, we may publish an extract of your response in Law Commission publications, or publish the response in its entirety. We may also be required to disclose the information, such as in accordance with the Freedom of Information Act 2000.

If you want information that you provide to be treated as confidential please contact us first, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic disclaimer generated by your IT system will not be regarded as binding on the Law Commission.

The Law Commission will process your personal data in accordance with the Data Protection Act 1998.

## YOUR DETAILS

Name of respondent:

Type:

Postal address:

Telephone:

Email:

Confidentiality:

**Please read the Freedom of Information statement above before checking this box.**

*I wish to keep this response confidential.*

*Please explain why you regard the information as confidential:*

**PART 2: THE LEGAL TEST**

**Further Question 1** Do consultees agree that a reformed legal test for fitness to plead should incorporate a consideration of both decision-making capacity and the capacity for effective participation? (2.33)

Yes:	No:	Other:
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**Further Question 2** Do consultees consider that an effective participation test, framed around the *John M* criteria (set out at paragraph 2.3 above), with an additional decision-making capacity limb, represents the most appropriate formulation for such a combined legal test? Or do consultees favour another of the formulations set out at paragraph 2.28 above and, if so, why? (2.34)

Yes:	No:	Other:
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**Further Question 3** Do consultees consider that incorporating an exhaustive list of decisions for which the defendant requires capacity into a reformed legal test for unfitness to plead would assist in maintaining the threshold for unfitness at a suitable level? (2.42)

Agree:	Disagree:	Other:
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**Further Question 4** Do consultees consider that a reformed test should explicitly refer to a “satisfactory” or “sufficient” level of capacity for effective participation?  
(2.43)

Yes:	No:	Other:
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**Further Question 5** Do consultees agree that a diagnostic threshold would be unlikely to assist in maintaining the threshold of unfitness at a suitable level?  
(2.44)

Yes:	No:	Other:
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**Further Question 6** Do consultees think that it would be helpful to have a statutory presumption that all defendants are fit to be tried until the contrary is proved? (2.46)

Yes:	No:	Other:
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**Further Question 7** Do consultees agree that a finding that a person lacks capacity shall remain valid unless and until the contrary is established on the basis of the evidence of two suitably qualified experts? (2.48)

Yes:	No:	Other:
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**Further Question 8** Do consultees agree that disaggregation of capacity to plead and capacity for trial is undesirable? (2.59)

Yes:	No:	Other:
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**Further Question 9** Do consultees consider that making the test one of capacity for effective participation “in determination of the allegation(s) faced” would introduce a desirable element of context into the assessment? (2.68)

Yes:	No:	Other:
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**Further Question 10** Do consultees agree that the United Kingdom's obligations under the UNCRPD and the ECHR can properly be accommodated in the manner outlined in paragraphs 2.80 to 2.82? (2.83)

Yes:	No:	Other:
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**Further Question 11** Do consultees agree that the difficulties surrounding unrepresented defendants cannot be addressed by amendment to the legal test itself? (2.88)

Yes:	No:	Other:
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**PART 3: SPECIAL MEASURES**

**Further Question 12** Do consultees consider it desirable and practicable for defendants to have a statutory entitlement to the support of a registered intermediary, for as much of the proceedings, including pre and post trial, as is required, where the court is of the view that such assistance is necessary to ensure that the defendant receives a fair trial? (3.22)

Agree:	Disagree:	Other:
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**PART 4: ASSESSING THE CAPACITY OF THE ACCUSED**

**Further Question 13** Do consultees agree that in any reformed unfitness test it will be unnecessary for the requirement for two registered medical practitioners, one duly approved under section 12, to remain? (4.22)

Agree:	Disagree:	Other:
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**Further Question 14** Do consultees agree that the evidence of two expert witnesses, competent to address the defendant's particular condition, should be the minimum requirement for a finding of lack of capacity? (4.24)

Agree:	Disagree:	Other:
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**Further Question 15** Do consultees consider that there is any alternative appropriate mechanism to address the difficulty presented by a defendant whose capacity is in doubt, but who refuses expert assessment? (4.27)

Agree:	Disagree:	Other:
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**PART 5: PROCEDURE FOR THE UNFIT ACCUSED**

**Further Question 16** Do consultees consider that, following a finding that the defendant lacks capacity, there should be a power to delay the determination of facts procedure for a maximum six month period, on the agreement of two competent experts, to allow the accused to regain capacity and be tried in the usual way? (5.24)

Yes:	No:	Other:
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**Further Question 17** Do consultees consider that it would be appropriate to extend the maximum period of a section 36 MHA 1983 remand to hospital for treatment to 24 weeks in these circumstances? (5.25)

Yes:	No:	Other:
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**Further Question 18** Do consultees consider that the determination of facts procedure for the accused who lacks capacity should be made discretionary following the finding of unfitness, to allow for discontinuance of the proceedings, and diversion out of the criminal justice system into health or related services in appropriate cases? (5.33)

Yes:	No:	Other:
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**Further Question 19** Do consultees consider that public protection concerns arising in relation to an acquitted, but dangerous, unfit defendant could be adequately met by the use of civil powers under section 3 or 7 MHA 1983? (5.44)

Yes:	No:	Other:
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**Further Question 20** I Do consultees consider that on a determination of the facts, any defence should be left to the jury, after discussion with the advocates, where there is evidence on which a jury properly directed might reasonably find the defence made out or the essential element of the offence unproven? (5.50)

Yes:	No:	Other:
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**Further Question 21** Do consultees consider that the special verdict should be made available to the jury on their initial consideration of the facts? (5.54)

Yes:	No:	Other:
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**Further Question 22** Do consultees agree that it is not necessary for the judge to retain the discretion, in cases of exceptional prejudice, to order a second stage process for the consideration of the special verdict, in the manner envisaged in Provisional Proposal 9? (5.56)

Yes:	No:	Other:
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**Further Question 23** Do consultees consider that the determination of facts in relation to a defendant found to lack capacity could be dealt with by a judge sitting without a jury? (5.60)

Yes:	No:	Other:
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**Further Question 24** Do consultees agree that a representative, appointed by the court to put the case for the defence, should be entitled to act contrary to the defendant's identified will and preferences, where the representative considers that to do so is necessary in the defendant's best interests? (5.64)

Yes:	No:	Other:
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**PART 6: DISPOSALS**

**Further Question 25** Do consultees consider that the requirement for the supervising officer to be willing to undertake supervision of an unfit accused poses such problems in practice that it needs to be amended? (6.14)

Yes:	No:	Other:
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**Further Question 26** Do consultees consider that it would be appropriate and effective to expand the power of supervision orders under section 5 of the CP(I)A to include recall of a supervised person to hospital, as available under section 17E-F of the MHA 1983? (6.21)

Yes:	No:	Other:
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**Further Question 27** Do consultees consider that there are any other enhancements of the powers available under supervision orders which would be beneficial? (6.22)

Yes:	No:	Other:
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**PART 7: REMISSION AND APPEALS**

**Further Question 28** Do consultees agree that the power of the Crown to remit a recovered defendant for trial should be statutorily extended to cover all defendants found to have done the act or made the omission? (7.34)

Yes:	No:	Other:
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**Further Question 29** Do consultees consider that the power to remit an accused for trial should only be exercisable by the Crown where the judge has ruled, following the section 4A hearing, that it is in the public interest for remission to be available should the defendant regain capacity? (7.35)

Yes:	No:	Other:
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**Further Question 30** Do consultees agree that the Crown's power to remit defendants for trial upon their recovery should not be limited in time? (7.38)

Yes:	No:	Other:
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**Further Question 31** Do consultees agree that where there has been a finding that a defendant had “done the act or made the omission,” he or she should be entitled to request remission for trial on regaining capacity, where recovery is confirmed by the opinions of two experts competent to address the defendant’s particular condition? (7.43)

Yes:	No:	Other:
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**Further Question 32** Do consultees consider that the rights of appeal vested in the unfit defendant should be exercisable by his or her legal representatives? (7.48)

Yes:	No:	Other:
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**PART 8: UNFITNESS TO PLEAD IN THE MAGISTRATES' AND YOUTH COURTS**

**Further Question 33** Do consultees agree that it would be unnecessary for capacity determinations and fact-finding hearings to be reserved to district judges? If not, why not? (8.68)

Yes:	No:	Other:
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**Further Question 34** Do consultees consider that, where the defendant's capacity is in doubt, it would be preferable for his or her capacity to be determined in the magistrates' court, and, if the defendant is found to lack capacity, that all further proceedings against him or her should remain in that court? (8.76)

Yes:	No:	Other:
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**Further Question 35 (in the alternative)** Do consultees alternatively consider that such a case should be sent to the Crown Court for determination of capacity and, if the defendant is found to lack capacity, that all further proceedings against him or her should remain in that court? (8.77)

Yes:	No:	Other:
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**Further Question 36** Do consultees agree that capacity procedures in the summary courts should be applicable for all criminal offences? (8.83)

Agree:	Disagree:	Other:
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**Further Question 37** For non-imprisonable offences, do consultees agree that the available disposals should be limited to a supervision order and an absolute discharge? (8.84)

Agree:	Disagree:	Other:
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**Further Question 38** Do consultees agree that a legal test which has regard to “the determination of the allegation(s) faced” would allow sufficient effect to be given to the accessible and more straightforward nature of summary proceedings? (8.87)

Yes:	No:	Other:
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**Further Question 39** Do consultees consider that there are any adjustments to the test, or the procedure, for defendants lacking capacity that would materially improve the prospects of the court identifying those adults with capacity issues? (8.92)

Agree:	Disagree:	Other:
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**Further Question 40** Do consultees agree that it is appropriate to have the same evidential requirement in the summary courts as in the Crown Court? (8.96)

Yes:	No:	Other:
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**Further Question 41** Regardless of the position in the Crown Court, do consultees agree that, in the summary courts, the tribunal should have a discretion whether to proceed to the determination of facts hearing following a finding that the defendant lacks capacity? (8.102)

Agree:	Disagree:	Other:
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**Further Question 42** Do consultees agree that in reaching its determination on the facts, the tribunal in the summary courts should be able to reach a special determination of acquittal because of mental disorder existing at the time of the offence? (8.110)

Yes:	No:	Other:
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**Further Question 43** Do consultees agree that there should be mandatory specialist training on issues relevant to trying youths, for all legal practitioners and members of the judiciary engaged in cases involving young defendants? (8.114)

Yes:	No:	Other:
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**Further Question 44** Do consultees consider it appropriate for there to be initial screening for mental health issues for all defendants under 14 years of age, to be conducted by mental health professionals?. (8.119)

Yes:	No:	Other:
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**Further Question 45** Do consultees agree that the provisional reformed test proposed for the Crown Court at paragraph 2.34 above is suitable for application to young defendants without adjustment? (8.126)

Yes:	No:	Other:
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**Further Question 46** Do consultees agree that the summary courts should have the power to commit a defendant to the Crown Court for the imposition of a restriction order, but should not have the power to impose one themselves? (8.130)

Yes:	No:	Other:
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1.1 **Further Question 47** Do consultees agree that the following disposals should be available to the magistrates' court on a finding that the defendant has "done the act or made the omission," or where a special determination has been arrived at:

- (a) a hospital order (without restriction);
- (b) a supervision order;
- (c) an absolute discharge? (8.135)

Yes:	No:	Other:
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**Further Question 48** Do consultees consider that the non-penal requirements of a youth rehabilitation order should be available as part of a youth supervision order, following a finding that a young person has “done the act or made the omission,” or where a special determination has been arrived at? (8.138)

Agree:	Disagree:	Other:
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**Further Question 49** Do consultees agree that a defendant against whom there has been a finding in the magistrates’ or youth court that he or she had “done the act or made the omission,” should be entitled to request remission for trial upon regaining capacity, where recovery is confirmed by the opinion of two experts competent to address the defendant’s particular condition? (8.140)

Yes:	No:	Other:
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**Further Question 50** Do consultees agree that a new right of appeal should be created from any determination or disposal imposed under a reformed capacity procedure, which would mirror the right to appeal against conviction or sentence under section 108 Magistrates’ Courts Act 1980? (8.143)

Agree:	Disagree:	Other:
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**OTHER COMMENTS**

Please enter any comments or suggestions that do not relate to our specific questions below: