



**Law
Commission**
Reforming the law

Unfitness to Plead Analysis of Responses

10 April 2013

UNFITNESS TO PLEAD

ANALYSIS OF RESPONSES

This document analyses the responses to the Law Commission's Consultation Paper, Unfitness to Plead (Law Commission Consultation Paper No 197, 2010). Details of the project, as well as the responses in full, can be found at <http://lawcommission.justice.gov.uk/areas/unfitness-to-plead.htm>. We anticipate that the next publication relating to this project will be a report in 2014.

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ANALYSIS OF RESPONSES TO “UNFITNESS TO PLEAD” LAW COMMISSION CONSULTATION PAPER 197

GENERAL COMMENTS

- 1.1 There were 55 responses.¹ They came from the judiciary, legal practitioners, academics, psychiatrists, psychologists and criminal justice practitioners, NGOs, and special interest groups. A list of respondents appears at the end of this analysis.
- 1.2 There were many positive comments about the quality of the CP:
- (1) “detailed and thought-provoking” (Bar Council/CBA);²
 - (2) “may I begin by saying it was a real pleasure to read your research, analysis and proposals. It was thoroughly engaging – and you can’t always say that about a CP” (HHJ Wendy Joseph QC);
 - (3) “I would like to congratulate you and your team on a most impressive piece of work. You have done an excellent job in bringing together what is, to my mind anyway, a complex and problematic area of law” (Professor Jill Peay);
 - (4) “a fascinating read, well worth exploring, and raising a huge array of troubling questions” (Nicola Padfield);
 - (5) “the paper is well written, so that I managed to understand a number of complex legal issues that are beyond my expertise” (Professor Rob Poole, Professor of Mental Health and consultant psychiatrist);
 - (6) “readable and highly informative” (Broadmoor psychiatrists);³
 - (7) “we should like to express our gratitude for the careful exposition of the difficult problems which this topic raises” (Council of HM Circuit Judges).
- 1.3 As a general comment, the Council of HM Circuit Judges noted that they had seen an increase in the number of cases in which the issue of unfitness to plead is raised. They added, “This does not mean that there has been the same increase in the number of cases in which the issue is pursued. In many cases, a psychiatric report will be obtained which makes it clear that there is no such issue.”

¹ This analysis addresses only responses sent to the Law Commission. Articles published commenting on CP 197 will of course be taken into account, but they are not included in this analysis.

² The Law Reform Committee of the Bar Council, and the Criminal Bar Association.

³ The response by the Broadmoor psychiatrists was contributed to by 18 people, comprising 14 consultant forensic psychiatrists, the Director of Just for Kids Law, Mental Health Act Office Managers, and the Clinical Director of Broadmoor.

- 1.4 Victim Support would have liked to see more emphasis on the victims' perspective:

We are nevertheless concerned that the current consultation paper fails to take full account of the needs that victims do have in relation to the process. We hope it will not be considered a frivolous point to observe that, other than in reference to the Domestic Violence, Crime and Victims Act 2004, the word "victim" appears no more than 11 times in the course of a 125,900-word document. We wholly agree with the statement on p 42 that, "It is tempting to think that the unfairness only exists in relation to defendants but in fact, if justice is not done, then the criminal justice system is brought into disrepute and this is unfair to witnesses, victims of crimes and the public at large". It is disappointing, however, that this observation should appear merely as a footnote.

THE PRINCIPAL POINTS ARISING OUT OF THE RESPONSES

- 1.5 There was agreement on the whole as to the following:

- (1) There should be a presumption that everyone is fit to plead and stand trial. This is for the benefit of victims, defendants and the public at large.
- (2) The current legal test for fitness to plead is not adequate. It is particularly inadequate as regards young defendants.
- (3) A person should only be found unfit to plead and stand trial if he or she cannot participate effectively in the proceedings (including the making of decisions) even with assistance (special measures); "any measure which would facilitate that capacity should be taken into account when assessing whether the accused has such capacity" (Council of HM Circuit Judges).
- (4) The same test should apply in the magistrates' courts and in the Crown Court. The development of an appropriate legal test, procedure (and disposals) applicable to youth courts is especially important.
- (5) That whatever tools, tests or assessments the experts rely on in order to produce their reports on an accused's fitness, the test enshrined in law should be the legal standard to be applied, not the psychiatric/psychological test. The decision as to fitness should remain that of the court.
- (6) The relevant experts need not be psychiatrists.
- (7) Obtaining a psychiatrist's report swiftly, and funding to obtain one, is difficult.
- (8) Once there has been a finding of unfitness a fact-finding procedure should follow, in both the magistrates' courts and in the Crown Court, though some thought that, in the magistrates' courts, it should be for the court to decide whether this took place rather than it being mandatory.

- (9) The disposals should be the same in the magistrates' courts and in the Crown Court, with the possible exception of the power to make a restriction order.
- (10) It is important to appreciate that a finding of unfitness, coupled with a finding that D has done the act (or whatever replaces it), is not a final finding or disposal but an interim step. A person who has been found unfit to plead and to stand trial may subsequently become fit to plead and to stand trial.
- (11) The routes by which a case can be brought back to court and/or remitted for trial, and by which a finding of unfitness can be replaced by a finding of fitness, need to be reformed. This extends to the question of who should decide that an appeal is appropriate, where the accused has been found unfit to plead and to stand trial.
- (12) The available disposals are not adequate. They are particularly inadequate as regards young offenders.
- (13) If reform leads to increased numbers of people being found unfit to plead and stand trial, or needing to be assessed for fitness to plead, as some respondents fear, then the resource implications are worrying.
- (14) There is ignorance, on the part of some legal and medical practitioners, about the law, court powers, and procedure on fitness to plead. Education would be beneficial.

1.6 There was not agreement about the following:

- (1) the content of the proposed legal test for fitness to plead and to stand trial;
- (2) what kind of competence is under consideration (foundational competence, decision-making competence, or ability to participate effectively in proceedings);
- (3) whether there should be a defined psychiatric, standardised test of fitness to plead and to stand trial;
- (4) that there should be a two-stage procedure;
- (5) what is to be done about proof of mens rea in the reformed section 4A hearing;⁴

⁴ A section 4A hearing follows after an accused has been found unfit to plead under section 4 of the Criminal Procedure (Insanity) Act 1964 (as amended). The aim of this "trial of the facts" is to ascertain whether or not the accused "did the act or made the omission" with which he or she is charged. In the CP, we invited consultees' views on whether the present section 4A hearing should be replaced with a procedure "whereby the prosecution is obliged to prove that the accused did the act or made the omission charged and that there are no grounds for an acquittal": see para 6.140 of CP 197.

- (6) whether a possible outcome of the section 4A hearing should include what would be, following a trial, a special verdict of acquitted by reason of mental disorder;
- (7) whether a reformed section 4A hearing should be held jointly with the trial of co-accused.

COMMENTS ON THE PROPOSALS AND QUESTIONS

A NEW LEGAL TEST

PROPOSAL 1

- 1.7 The current *Pritchard* test should be replaced and there should be a new legal test which assesses whether the accused has decision-making capacity for trial. This test should take into account all the requirements for meaningful participation in the criminal proceedings.

[para 3.41]⁵

The Pritchard test should be replaced

- 1.8 It is helpful to break down proposal 1 into distinct elements. Taking, first, the statement that the current *Pritchard* test should be replaced, almost all consultees agreed. Representative comments are:

The first issue is whether the present test permits sufficiently of the active participation of an accused who is suffering from a disability. We agree that the present *Pritchard* test does not ... (Council of HM Circuit Judges);

and:

No one could disagree that the *Pritchard* test is neither properly understood nor properly applied by very many psychiatrists. It is vague, clumsy and does not serve its purpose. I repeatedly have to order supplementary psychiatric reports because the first does not address the relevant criteria. Clearly the test needs to be changed. (HHJ Wendy Joseph QC)

- 1.9 There was also agreement, implicit or explicit, from:

legal practitioners (the Justices' Clerks' Society,⁶ Carolyn Taylor, the Law Society),⁷ academics (Professor Ronnie Mackay, Helen Howard, Professor Richard Bonnie, Dr Arlie Loughnan, Nicola Padfield);

mental health specialists (Dr Lorna Duggan (Consultant Forensic Psychiatrist in Developmental Disabilities working in the independent

⁵ Of CP 197.

⁶ "JCS".

⁷ The Law Society response represented the views of the members of its specialist Criminal Law, and Mental Health and Disability Committees.

sector in medium and low security (both adults and children), Dr Kari Carstairs (clinical psychologist), Karina Hepworth (senior nurse specialist, learning disabilities on a youth offending team), Professor Rob Poole, Compass Psycare (a psychiatric assessment and supervision service), the Nottinghamshire Healthcare NHS Trust,⁸ Graham Rogers (consultant educational and child psychologist), Dr Eileen Vizard (consultant child and adolescent psychiatrist), the Royal College of Psychiatrists⁹; and

specialist groups (the Centre for Mental Health, Just for Kids Law, Sense, the Prison Reform Trust,¹⁰ Victim Support, Mind, Kids Company). Kids Company were “delighted that the Law Commission has sought to bring about reform in this particular area of criminal law, and we, in line with the consensus, agree this has been long overdue”.

- 1.10 Dr Loughnan wrote that the current law test “is piecemeal in structure and overly restrictive”. She noted also that Professor Mackay had concluded that an accused will be fit to plead even if he or she has “only a ‘rudimentary’ understanding of the trial process” because some features common to mental illness do not come into play in the *Pritchard* test. She wrote, “what is currently meant to be a protection for defendants with mental illness and intellectual and other impairments is failing to function as such”.
- 1.11 Some respondents referred to the narrowness of the *Pritchard* criteria. For example, the Nottinghamshire NHS Trust thought that the “breadth of important impairments is not well-detected by applying the *Pritchard* criteria” and Kids Company’s view was that the *Pritchard* test overlooks the accused’s actual capacity.
- 1.12 The Bar Council/CBA response was more cautious. While stating that “doing nothing is not an option”, they could not point to cases where they thought the *Pritchard* test had led to injustice.
- 1.13 The Edenfield Centre (an Adult Forensic Secure service) sent in a group response, and the majority of consultants contributing to that response were opposed to the proposed change: “Some were of the view that the case for abandoning the *Pritchard* test and replacing it with a capacity test is not made. The *Pritchard* test is usually interpreted in a cognitive way and sets a high threshold but this seems reasonable. ... Ultimately, the *Pritchard* test lends itself to a sufficient level of interpretation and utility”.

⁸ A joint response from consultant forensic psychiatrists, specialist registrars and an associate specialist.

⁹ “RCP”.

¹⁰ “PRT”.

- 1.14 Part of the response of the British Psychological Society¹¹ appears to support this view. The Society thought that a modern assessment of cognitive processes does include the impact of emotion, whereas the CP stated that the *Pritchard* test “places a disproportionate emphasis on cognitive ability, and does not take any or sufficient account of factors such as emotion or volition”.¹² By contrast, the Society’s view was that *Pritchard* implicitly requires decision-making capacity and “does not require an explanation of the reasons for any deficit”, and that “this is appropriate for a legal test”.

What should replace the *Pritchard* test?

- 1.15 The second element of proposal 1 is what should replace the *Pritchard* test. We provisionally proposed a new legal test which assesses whether the accused has decision-making capacity for trial and which also takes into account all the requirements for meaningful participation in the criminal proceedings.
- 1.16 This proposal describes the framework of a potential reformed legal test, but does not spell out the content of such a test, or the threshold below which an accused would have to fall in order to be found “unfit”. In the CP, we outlined at paragraph 3.13 the following content of a reformed legal test, which drew on the Mental Capacity Act 2005:

We provisionally propose that an accused should be found to lack capacity if he or she is unable:¹³

- (1) to understand the information relevant to the decision that he or she will have to make in the course of his or her trial,
- (2) to retain that information,
- (3) to use or weigh that information as part of [the] decision-making process, or
- (4) to communicate his or her decisions.

What is meant by “decision-making capacity”

- 1.17 Just for Kids Law thought that “effective participation” is a preferable label to “decision-making capacity” because it is more expansive, and reflects the terminology used in interpretation of the European Convention on Human Rights. Dr Tim Rogers was concerned that “decision-making capacity” was not a broad enough term to cover all relevant aspects, such as the effect a mental disorder of an accused can have on a jury’s perception of him or her. HHJ Wendy Joseph QC thought that the label was less important than what the test covers, which should be both decision-making capacity and capacity to participate in proceedings. In light of consultees’ comments, it is evidently important to clarify more precisely in our final recommendations what is included within the concept of “decision-making capacity”.

¹¹ “BPS”.

¹² Para 3.23 of CP 197.

¹³ Footnotes omitted.

1.18 Professor Bonnie, with whom Professor Mackay agreed,¹⁴ thought that there are two, conceptually distinct, levels of competence with which the test should be concerned. The primary level is what he calls “foundational competence”, and is the capacity to understand the nature and potential consequences of the criminal proceedings and the capacity to instruct legal advisors. If the accused lacks either of these, he argues, there is no need, logically or practically, to consider whether he or she also lacks decision-making capacity in other senses. As Professor Mackay put it, “If a defendant lacks the abilities required to understand the proceedings and assist counsel he will be adjudged unfit to plead without the need to make any enquiries as to his ‘decisional competence’”.

1.19 By understanding of the process Professor Bonnie means “both factual and rational understanding, as described by the *Dusky*¹⁵ test in the USA”. He went on:

To give a simple example, an accused with grandiose delusions may believe that the criminal proceedings are being carried out by the authorities at God’s command and for his or her benefit and may not therefore have a rational understanding of his or her own legal jeopardy.

1.20 As regards the capacity to instruct legal advisors, he explained that it “refers both to a factual understanding of the role and obligations of counsel¹⁶ as well as the ability to act rationally on that understanding in one’s own case.” He illustrates the point with an example: “an accused with paranoid delusions may regard his or her lawyer (or any lawyer) as being complicit in a conspiracy against him or her and may be so distrustful and guarded as to impede satisfactory interaction with the attorney”.

1.21 It is not adequate, Professor Bonnie argued, to treat these two capacities as being swept up in the decision-making capacity described in the CP. Professor Mackay also argued that the concept of “competence to assist counsel” is not the same as and does “not encompass the ability to make decisions that may be confronted in the case”.¹⁷ Professor Bonnie wrote:

In both of the cases I just described ... it is conceivable (both logically and clinically) that an accused who lacks a rational understanding of the proceedings or the role of counsel would have the requisite decisional capacity. In the case of the accused with grandiose delusions, for example, those delusions might not affect either his ability to understand the consequences of any particular decision or his ability to rationally evaluate the advantages and disadvantages of each decision on its own terms because the accused believes that God will ordain the outcome of the case in his favor regardless of

¹⁴ Professor Mackay’s views were published as “Unfitness to Plead – Some Observations of the Law Commission’s Consultation Paper” [2011] 6 *Criminal Law Review* 433.

¹⁵ *Dusky v United States* 362 US 402 (1960).

¹⁶ By which he means those who advise the accused pre-trial and those who represent the accused at trial.

¹⁷ Citing R Bonnie, “The Competence of Criminal Defendants: A Theoretical Reformulation” (1992) 10 *Behavioural Sciences and the Law* 291, 294. See especially para 3.13 of CP 197, cited at para 1.76 below.

what he does. Similarly, the paranoid delusions of the accused may lead him or her to refuse to communicate with his lawyer before any decisions bearing on the defence or disposition of the case are contemplated, and the delusions themselves might not actually bear on the substance of the particular charges.

1.22 The approach advocated by Professors Bonnie and Mackay has been followed in Jersey in the case of *A-G v O'Driscoll*,¹⁸ but not in the English jurisdiction. Professor Mackay commends the test adopted in Jersey which separates out “foundational competence” from “decisional competence”. He cites the Jersey case of *Harding*¹⁹ as illustrating what an absence of decisional competence might be. The accused was found unfit to plead. Although she was able to understand the nature of the proceedings and the charges, and to give evidence in her defence,²⁰ she was not consistently able to make decisions rationally, due to her mental disorder. The court noted that it was concerned with her ability to participate effectively in the trial and that she would not be able to do so. Professor Mackay commented that under the *Pritchard* criteria, the accused would probably have been found fit to stand trial. He recommends reform to clarify the *Pritchard* criteria and supplement them with a new limb on decisional competence.

1.23 Professor Bonnie recommends a legal test which has many points in common with suggestions for the content of an appropriate legal test made by other respondents (see paragraphs 1.27 and following below). He wrote:

Building on the language of section 3 of the Mental Capacity Act 2005, and adapting it to the setting of criminal adjudication, we provisionally propose that an accused should be found to lack the requisite capacity if he or she is unable:

(1) to understand, both factually and rationally, the nature and consequences of the criminal proceedings, the role of counsel and his or her own legal jeopardy,

(2) to communicate rationally with counsel and provide assistance in his or her own defence [needed to allow counsel to carry out his or her own responsibilities],²¹

(3) to understand and retain information relevant to decisions that he or she is expected to make in the course of the proceedings,²²

¹⁸ [2003] Jersey Law Review 390. This case is cited in CP 197, but not discussed which Professor Mackay describes as “odd”.

¹⁹ [2009] JRC 198, [2009] Jersey Law Review Note 52.

²⁰ Thus satisfying three of the criteria identified in *O'Driscoll*.

²¹ The bracketed language strikes me as useful but not necessary. (footnote in the original)

(4) to rationally consider and weigh information bearing on decisions that he or she is expected to make,²³ or

(5) to communicate his or her decisions to counsel or the court.

- 1.24 The Bar Council/CBA queried whether it was appropriate to import “a requirement that D must be able to understand the *normative dimension* of a trial that aims to determine issues of ‘guilt’ and ‘wrongdoing’”.²⁴ They had “serious reservations about attempting to formulate proposals for reform on the basis of contentious and complex theoretical constructs in relation to the function of a criminal trial”.
- 1.25 The JCS also emphasised the importance of capturing all the relevant facets of “decision-making capacity”: “The Society would be concerned if the phrase ... was not sufficiently well defined to include, for example, the capacity to understand facts, to make representations and to challenge where necessary”.

Pritchard +

- 1.26 Carolyn Taylor and Professor Mackay described their preferred test in terms of using the *Pritchard* test but with additions.
- 1.27 HM Council of Circuit Judges and three practitioner respondents (Carolyn Taylor, the Bar Council/CBA and the Law Society) commended the guidance in *M (John)*.²⁵ Under that test the accused must be able to do all of the following:
- (1) understand the charges,
 - (2) decide whether to plead guilty or not,
 - (3) exercise the right to challenge jurors,
 - (4) instruct solicitors and counsel,
 - (5) follow the course of proceedings, and
 - (6) give evidence in his or her own defence.

²² I have chosen this formulation to highlight an issue for the Commission to consider. See also Comment 13 below. Many decisions need to be made during the course of a criminal proceeding. Only a few of them must be made personally by the accused. The extent to which the accused becomes personally involved in other decisions depends on many factors, including his or her interest and intellectual ability. Even in those situations where the accused is expected to make certain decisions, he or she might decide to follow the attorney’s advice without undertaking independent deliberation. A capacity determination is inescapably contextualized. (footnote in the original)

²³ The category of decisions that the accused is “expected to make” may include a decision to defer to counsel’s judgment or advice without making an independent decision. (footnote in the original)

²⁴ Emphasis in the original.

²⁵ [2003] EWCA Crim 3452, [2003] All ER (D) 199. See para 2.52 and following in CP 197.

- 1.28 The addition of the last element in that list was thought especially important,²⁶ but the JCS thought the reference to the ability to challenge a juror was not particularly useful. The Bar Council/CBA suggested adding criteria from *M (John)* into the Bench Book guidance.²⁷
- 1.29 HHJ Wendy Joseph QC would add that “to be tried fairly, an accused would (as a very minimum) have to be able to ... describe his state of mind at the time ... [and] ... understand advice re the advantages/disadvantages of giving/calling evidence”.
- 1.30 The Bar Council/CBA suggested adding to the *Pritchard* test “any other relevant factor”.²⁸ They added that “one test might be that if the defendant’s disability/condition cannot be satisfactorily accommodated by way of special measures (with the consequence that his/her trial would be likely to be unfair) then the defendant lacks the necessary capacity to participate in the trial”.
- 1.31 Just for Kids Law referred to the Grisso criteria.²⁹ They note that these criteria provide a “conceptual framework for competence in juveniles based on legal and psychological definitions of competence” and are grouped into four “stages”:
- (1) understanding charges and potential consequences;
 - (2) understanding the trial process;
 - (3) capacity to participate with attorney in a defense;
 - (4) potential for courtroom participation.³⁰

Emphasis on the ability to participate in proceedings

- 1.32 Possibly as a result of the way the proposal was phrased, some respondents sought to emphasise the need for the accused to have the ability to participate in the proceedings as well to have the requisite decision-making capacity. (See the responses of the JCS, the Law Society, Nottinghamshire Healthcare NHS Trust, the National Steering Group with Responsibility for Health Policy on Offenders

²⁶ The Council of HM Circuit Judges noted that it could not have featured in the *Pritchard* test as an accused was not then permitted to give evidence in his or her defence.

²⁷ The Crown Court Bench Book is a “point of reference” for judges when preparing their directions to the jury in a Crown Court trial: see <http://www.judiciary.gov.uk/publications-and-reports/judicial-college/Pre+2011/crown-court-bench-book-directing-the-jury> (last visited 3 April 2013). Note that the question of fitness to be tried under section 4 is determined by the court without a jury, while the trial of the facts under section 4A is determined by a jury.

²⁸ As per the Scottish provisions: s 53F(2)(b) of the Criminal Procedure (Scotland) Act 1995.

²⁹ Just for Kids Law supplied the Grisso criteria with their response, developed by Professor Thomas Grisso (Professor of Psychiatry and Director of Psychology at the University of Massachusetts Medical School) from work by McGarry and associates (Laboratory of Community Psychiatry 1973). See T Grisso, “What We Know About Youths’ Capacities as Trial Defendants” in T Grisso and R G Schwartz (eds) *Youth on Trial: A Developmental Perspective on Juvenile Justice* (2000) p 139, 142.

³⁰ See Appendix I of the response of Just for Kids Law, available here: <http://lawcommission.justice.gov.uk/areas/unfitness-to-plead.htm> (last visited 3 April 2013).

with Learning Disability,³¹ the PRT, Just for Kids Law, Dr Kari Carstairs.)³² Additionally, some consultees noted that it is the ability to participate in the whole proceedings – including pre-trial and sentencing – and not just the trial that matters.

- 1.33 The PRT welcomed the emphasis on the need to take into account “all the requirements for meaningful participation”, compliance with article 6 of the European Convention on Human Rights, and referred also to the *Beijing Rules* (applicable to young alleged offenders).³³
- 1.34 The Nottinghamshire NHS Trust thought that in practice, experts did take account of the ability to participate, but “a structured [legal] framework” is lacking.

WHAT PARTICIPATING IN PROCEEDINGS ENTAILS

- 1.35 Graham Rogers (a psychologist) went into some detail about the fundamental difficulty of participating in proceedings where a person does not have the literacy skills to be able to read the evidence against him or her. With regards to the idea that counsel could read the evidence out to the accused, he commented sceptically: “fine, assuming that the defendant has the concentration, attention and memory skills to be able to listen and take in all the information, and then be able to make sense of it all, as opposed to being confused by it.”
- 1.36 Sense³⁴ was concerned that the CP had not adequately taken account of the situation of a person who had capacity to make decisions, but, due to difficulties in communicating, lacked the ability to participate in proceedings and gave vivid examples. These examples are worth reading in full as they depict a scenario which has more subtle difficulties than the more usual cases. They acknowledge the connection with the question of what special measures can be provided, and at what point in the legal assessment of fitness the special measures should be taken into account (see proposal 5 below).
- 1.37 Dr Eileen Vizard, the PRT, and Just for Kids Law emphasised the need for young defendants to be able to participate in proceedings and for that to be reflected adequately in the legal test.

Presumption of capacity

- 1.38 Some respondents (the Crown Prosecution Service,³⁵ the Law Society, the RCP, Professor Don Grubin) thought there should be an explicit presumption that a person has the capacity to plead and to stand trial. The National Autistic Society would also endorse this starting point.

³¹ “National Steering Group”.

³² Emphasis on effective participation may require a court to take a view of the accused’s competence which extends beyond the first day listed for trial: Professor Mackay drew attention to *AG v Harding* in which the court held “We are concerned not with a snap shot in time but with the capacity of the defendant to participate effectively in her trial, ie in the whole course of the trial likely to span a number of days”. See [2009] JRC 198 at [39].

³³ United Nations Standard Minimum Rules on the Administration of Juvenile Justice.

³⁴ Sense is a national charity that supports and campaigns for children and adults who are deafblind.

³⁵ “CPS”.

The test should be capacity-based, not diagnosis-based

- 1.39 The Centre for Mental Health wrote that the test should be “focused on an individual’s abilities and ... not determined solely by reference to that individual’s mental health diagnosis”. In other words, it should not be sufficient, for a person to be found unfit to plead, for that person to have a mental disorder: a person with, for example, bipolar disorder, may well be capable of standing trial. The National Steering Group and the BPS made the same point.
- 1.40 HHJ Wendy Joseph QC, by contrast, was concerned that, freed from any diagnosis or specified disorder, the concept of a person whose “decision-making capacity” was impaired would be impracticably wide.³⁶ She wrote:

Of course I agree in principle that anyone who can’t have a fair trial should not be tried, but there are a myriad of ways in which a trial can shift across the barrier of “fair/unfair”, some of which are in the court’s power eg special measures, and other of which are not eg whether a borderline defendant is having a good or bad day.

- 1.41 Two other respondents also queried the lack of connection between the incapacity and any underlying physical or mental disorder. Helen Howard asked:

Might such a provision [as per proposal 1] allow an individual claiming stress, crippling shyness, overwhelming tiredness, nervousness, or poor social background to escape a full trial? ... It may be worth adding the phrase to the legal test “an individual will lack decision-making capacity if, *due to mental or physical illness, whether temporary or permanent*, he is unable ...”³⁷

The RCP, similarly, thought the test should require the presence of a mental disorder.³⁸

Relationship to the Mental Capacity Act 2005 test

- 1.42 Just for Kids Law cross-referred the Mental Capacity Act 2005-based test described at 3.13 of CP 197 with the need for the ability to participate effectively to be incorporated fully and said the proposed test should include the capacities:

to make decisions for him or herself,

to understand the charges and potential consequences,

to understand the trial process,

to have the capacity to participate with his or her legal team in a defence, and

to have the ability for participation during court hearings.

³⁶ Her comments on the possible impact of the proposals are included below.

³⁷ Emphasis in the original.

³⁸ This is not to be confused with any equation of mental illness or learning disabilities with unfitness to plead. See the comment of the Council of HM Circuit Judges at para 1.360 below.

1.43 Mind thought the test for fitness “should follow as closely as possible the test for capacity set out in section 1(3) of the Mental Capacity Act 2005”. The BPS, similarly, wanted to see the fitness to plead test “brought into line with the principles underlying the ... Mental Capacity Act”. Karina Hepworth (a Youth Offending Team³⁹ worker) gave an example of a case she had dealt with concerning a young woman who lived in a home for “people with learning disabilities and challenging behaviour” who was the subject of a referral order. She was expected to comply with the referral order, but the YOT worker doubted she had the capacity to do so. The young woman had been assessed as fit to plead, but the YOT worker felt that the disparity between the test of capacity under the MCA and the test of fitness had been a problem “and had resulted in [the accused] going through a process she had little understanding of”.

1.44 The Broadmoor psychiatrists proposed a test which was much closer to the MCA test:

If a defendant appears to be unfit to plead and lack capacity to make relevant decisions, then a psychiatrist could be instructed to assess.

Two-stage Test

Is there an impairment of, or disturbance in the functioning of a person’s mind or brain? If so:

Is the impairment or disturbance sufficient that the person lacks the capacity to make a particular decision?

If the first stage of the test of capacity is met, the second test requires the individual to show that the impairment or disturbance [of] brain or mind prevents them from being able to make the decision in question at that time.

1.45 The Edenfield Centre, by contrast, was not enthusiastic about the MCA test forming the basis of a fitness to plead test:

The capacity test in MCA ... is relatively new in its current form. The threshold could be set too low. The expertise demanded by knowledge of the *Pritchard* test will be lost: there is a risk that psychiatrists will not re-contextualise the MCA capacity test for the criminal context.

1.46 Additionally, the authors of the Edenfield Centre response noted that as a trial is “a dynamic process with multiple decisions” to be made, “the Capacity Act [could be] difficult to apply to a trial as a whole”, whereas “the *Pritchard* criteria are well placed to break down this complex process into broad categories of understanding that are practical to assess”. Professor Rob Poole noted that “the elements of mental capacity in the [Mental Capacity Act] do not necessarily correspond to the psychological processes involved in decision-making”, though he agreed that a capacity-based approach would be an improvement on the *Pritchard* test.

³⁹ “YOT”.

1.47 Victim Support responded specifically to the examples 3A – 3F in Part 3 of the CP. They were unconvinced that the examples 3B (severe depression) and 3F (autism) demonstrated insufficient decision-making capacity. The Bar Council/CBA response would not support a finding of unfitness in examples 3B and 3E (OCD). Victim Support thought 3E was “borderline”.

1.48 In this context, it is worth noting the concern of Professor Rob Poole

over the somewhat throwaway reference on page 62 to people with personality disorder lacking capacity with respect to criminal proceedings, and other references elsewhere to adult attention deficit hyperactivity disorder and Asperger’s syndrome. This point is not really expanded or justified ... In some cases there is controversy within psychiatry as to the validity of the clinical construct (ie whether these conditions actually amount to syndromes or whether they are simply worrying behaviours).

1.49 On the MCA test, the RCP wrote,

the Mental Capacity Act in operation has exposed pragmatic problems with the legal definition of capacity, partly because the elements do not necessarily reflect the actual mechanisms by which people make decisions and partly because there is still a judgment to be made about the threshold for declaring someone to lack capacity. It is hard also to deal with suggestibility in this framework, which may have particular relevance for matters before a court.

The forensic faculty of the RCP, however, thought it an advantage of the civil law that there is no standardised psychiatric test for the capacity test under the MCA 2005.

PROVISIONAL PROPOSAL 2

1.50 A new decision-making capacity test should not require that any decision the accused makes be rational or wise.

[para 3.57]

1.51 Twenty consultees agreed with this proposal; some added caveats or further suggestions. Kids Company wrote that “the CP has correctly identified the balancing act: the relevant test needs to be robust but also to allow for seemingly irrational or unwise decisions”. They referred to a brief online discussion of rationality in this context at <http://plato.stanford.edu/entries/decision-capacity/#Rat>; Dr Jillian Craigie also referred to this resource in her comments on work on the insanity defence.

1.52 Dr Jillian Craigie thought that the Law Commission’s understanding of rationality was based on the content of decisions, and that is consistent “with the understanding of the term most widely adopted in discussions of mental capacity in English law”. However, she pointed out that “the dominant use of the term in psychology and philosophy [is] ... to refer to both the process and the content of decisions”, and that although the Law Commission’s use of the term is justifiable, it should be explicit about the meaning it attached to the word “rational”.

Professor Bonnie thought that the distinction between a decision that is rational and a decision that is rationally made is easily appreciated and that the Commission did not need to avoid the use of the word “rational”. He thought that the word is used to refer to the process of decision-making, not content. He wrote:

I think that the Commission has been overly cautious: the distinction between deficits in the rationality of the reasoning process and the rationality of the outcome is sufficiently straightforward that it can be stated clearly in the test ... rather than avoiding the term “rational” altogether due to fear that it will be misunderstood.

- 1.53 Consultees regarded autonomy as an important principle to respect, and, as noted above, thought that the starting point must be a presumption of capacity to stand trial. These views are reflected in the acceptance that an adult should be free to make bad decisions, and that fitness to stand trial does not correspond to an ability to act in one’s own best interests.⁴⁰ The limit is reached, for some consultees, when the accused is suffering from delusions which affect his or her decision-making capacity (HHJ Wendy Joseph QC). On that issue, the Bar Council/CBA did not agree with the Commission’s criticisms⁴¹ of *Erskine*,⁴² *Diamond*,⁴³ and *Moyle*.⁴⁴
- 1.54 Professor Mackay, agreeing with the Commission, noted that the ability to make rational decisions is what matters “rather than the need for the decision itself to be rational”. He added that this is clear in the legal test which applies in Jersey.
- 1.55 Some consultees suggested that apparently irrational or unwise decisions should trigger an assessment of fitness even if they do not equate to unfitness to stand trial (Victim Support, HM Council of Circuit Judges, Helen Howard).
- 1.56 The PRT and the National Steering Group thought an accused should be properly supported (namely, professionally supported) in his or her decision-making. The PRT referred to professional guidance for assessing best-interest decision-making⁴⁵ and for assessing capacity.⁴⁶

Children

- 1.57 Dr Eileen Vizard agreed with this proposal as regards adults, but pointed out that the situation is very different as regards children. Their “natural developmental immaturity means that their brains are not yet fully developed” and children and

⁴⁰ With reference to *Robertson* [1968] 1 WLR 1767 and *M (John)* [2003] EWCA Crim 3452, [2003] All ER (D) 199.

⁴¹ In Part 2 of CP 197.

⁴² [2009] EWCA Crim 1425, [2010] 1 WLR 183.

⁴³ [2008] EWCA Crim 923, [2008] All ER (D) 401.

⁴⁴ [2008] EWCA Crim 3059, [2008] All ER (D) 205.

⁴⁵ <http://www.bpsshop.org.uk/Best-Interests-Guidance-on-adults-who-lack-capacity-to-make-decisions-for-themselves-England-and-Wales-P708.aspx> (last visited 21 March 2013).

⁴⁶ <http://www.bpsshop.org.uk/Assessment-of-Capacity-in-Adults-Interim-Guidance-for-Psychologists-P712.aspx> (last visited 21 March 2013). The BPS described this guidance as taking “a very functional approach to the assessment of fitness”.

adolescents do not necessarily have the capacity to make sensible decisions. The Children Act 1989 provides for children to be protected from the consequences of their own inability to make sensible decisions in some respects, and she argued that the same principle should apply to decisions as regards participation in the criminal process.

Reservations

- 1.58 Dr Tim Rogers was uncomfortable with this proposal. He wrote, “Watching patients make irrational or unwise decisions at court has in my experience been one of the most difficult aspects of providing expert evidence ...”. He would emphasise “why” decisions are irrational or unwise, not whether they are, and believes that “the overriding principle of any amended functional test should be that an individual subjected to the new provisions must also be suffering from a mental disorder within its meaning in the Act”. This approach would be at odds with the views set out at paragraph 1.39 above that the emphasis should be on lack of capacity not diagnosis. Nicola Padfield was also troubled by the cases referred to in the CP where an accused was found fit to plead but the condition from which he suffered clearly affected his decision-making ability.⁴⁷

PROVISIONAL PROPOSAL 3

- 1.59 The legal test should be a revised single test which assesses the decision-making capacity of the accused by reference to the entire spectrum of trial decisions he or she might be required to make. Under this test an accused would be found to have or to lack decision-making capacity for the criminal proceedings.

[para 3.99]

- 1.60 As we stated in the CP:

It would seem to us that the potential problems in having a traditional unitary construct (like the *Pritchard* test ...) can in part be overcome by setting parameters for the required standard of decision-making capacity which are sufficiently wide to encompass a number of scenarios presented by the entire spectrum of trial decisions. We believe that within a revised unitary construct, the capacity of the accused to make a range of decisions relevant to the trial can be assessed and this may enable us to ascertain what a particular accused can and cannot do. However, we believe that an accused should not stand trial unless he or she has the decision-making capacity which would allow for participation in all its aspects. This should be the basis of the legal test.⁴⁸

and:

Broadly speaking, the issue is how we can establish a legal test which covers all the decisions which are likely to arise in the context

⁴⁷ See *Erskine* [2009] EWCA Crim 1425, [2010] 1 WLR 183, discussed at para 2.75 and following of CP 197; *Murray* [2008] EWCA Crim 1792, discussed at para 2.80 and following of CP 197; and others.

⁴⁸ Para 3.98 in CP 197.

of a trial and which accommodates the wide spectrum of difficulties likely to be encountered without the result of that test being unduly limiting for particular defendants who may be able to make some decisions but not others.⁴⁹

- 1.61 The issue here is whether the test should be a single assessment⁵⁰ of the accused's capacity in relation to all the decisions which it was likely he or she would be required to make in the course of the proceedings, or a "disaggregated" one, which "would involve breaking down the trial into particular sections for which decision-making capacity would be required".⁵¹
- 1.62 Thus the question is, in part, whether the same test should be applied irrespective of the gravity of the charge, of the complexity of the proceedings, and of the plea which seems likely (a higher degree of capacity being required where the accused was likely to plead not guilty than where he or she was likely to plead guilty).

Agreed

- 1.63 Seventeen consultees clearly agreed with this proposal. They were: HM Council of Circuit Judges, the JCS, the Law Society, Professor Bonnie, Dr Duggan, Dr Vizard, the PRT, Dr Ernest Galton (consultant forensic psychiatrist in adolescent developmental disabilities), Professor Rob Poole, Dr Carstairs, Compass Psycare, the National Steering Group, Just for Kids Law, Sense, Victim Support, Mind and Kids Company.
- 1.64 Reasons given for supporting the proposal were: that it is simpler than a disaggregated test (JCS, Dr Andrew Bickle (consultant forensic psychiatrist), Victim Support, Dr Ernest Galton), more practical (Professor Bonnie, Council of HM Circuit Judges, Dr Andrew Bickle, Kids Company) and less likely to lead to delay (Victim Support and Kids Company).

Reservations and ambivalent responses

- 1.65 Professor Bonnie acknowledged the principle that it is necessary to have a disaggregated approach in order to assess capacity in a way which is specific to the decision facing the individual, but thought it could be given effect in a unitary test. That said, despite supporting the unitary test, he thought there was one category of decisions which should be disaggregated, namely "those that arise in connection with waiver of counsel and self-representation by an accused". He thought that it was a mistake to see cases in which the issue might arise as peripheral, and that more exploration was needed of the "legal rules that govern the allocation of decision-making prerogatives between the accused and counsel". Professor Bonnie offered to discuss these issues further with the Commission.

⁴⁹ Part 3, n 20.

⁵⁰ Note that the British Psychological Society did not see the *Pritchard* test as a unitary test but as an aggregated test.

⁵¹ Para 3.64 of CP 197.

- 1.66 Dr Andrew Bickle would propose retaining a unitary test but requiring the experts to “agree on impairment of at least one stated capacity”.
- 1.67 Dr Tim Rogers accepted our rejection of a disaggregated test, but thought there would need to be “greater ‘structuring’ of the way in which the experts approach the single capacity test”.
- 1.68 Some answers were ambivalent. Helen Howard noted that assessing a person against the full range of decisions makes sense, but “some trials will be more straightforward than others”. The threshold for capacity will be important in this context and “much will hinge on how the proposed psychiatric test is drafted and applied”.
- 1.69 The Nottinghamshire NHS Trust group was divided. They welcomed the idea that all the potential decisions an accused might face could be set down in advance, and would hope to see that reflected in instructions provided to experts by lawyers (“the current quality of instructions is often very poor” – the RCP thought this too),⁵² but thought the impact of doing something along these lines had been “grossly underestimated”. In a similar vein, Dr Tim Rogers was happy with the rejection of a disaggregated test, but thought that if a unitary test is pursued then “there needs to be some greater ‘structuring’ of the way in which experts approach the single capacity test”. Experts need more guidance than they currently receive, and “this may be considered simply a training issue for experts, but I believe it is in the interest of courts and defendant not to leave it at that”.
- 1.70 Broadmoor psychiatrists were also divided. On the one hand, they could see that a completely disaggregated approach “could be potentially unworkable”, but on the other hand they thought that a unitary test “still potentially fails to distinguish the separate questions of fitness to plead, fitness to stand trial and fitness to give evidence”. As psychiatrists, they could see it would be valid to distinguish between being fit to plead and being fit to stand trial.
- 1.71 The RCP commented that in practice “most forensic psychiatrists would recognise situations where defendants could be considered fit to plead where they intend entering a guilty plea but would not be fit to plead in a contested trial ...”. This experience is echoed by that of Charles de Lacy (a clinical nurse specialist):

It provides a practical way of closing some cases, where the defendant clearly understands the options when explained by counsel, but may simply be unable to cope with a trial process due to the nature of the illness, even with special measures. It enables the defendant to draw a line under proceedings, and not face the possibility of a future trial. I note from time to time both judges and

⁵² The RCP wrote: “We think the Commission could take confidence that if these capacities [ie the capacities required for the legal test] are set out in instructions, they would be answered by experts” and “For example, Bickle and Stankard (2008) in a study of defendants potentially liable to a statutory assumption of dangerousness under the Criminal Justice Act 2003 found that only 6% of instructions (sent mostly by defence solicitors) directed the psychiatrist to the relevant provisions and in fact nearly four fifths made no reference to dangerousness or risk at all”.

special experts are content with this approach. I would therefore suggest that this option should not be excluded.

- 1.72 Mind added that a unitary test, though preferable to a disaggregated test, would have to be flexible enough to take into account the possibility that the defendant might not have the capacity to fully participate in a certain stage of the criminal proceedings at a later date, for example if a particularly complex cross-examination were to take place or if a complicated area of law were to be argued.⁵³
- 1.73 HM Council of Circuit Judges thought it unclear what was meant by “the whole spectrum of trial decisions”. They note that counsel is required to advise on the plea to be entered and whether the accused should give evidence “but in respect of only these two issues it is specified that the accused must make the decision. These must therefore be the minimum criteria. An accused must have capacity in relation to those matters”.
- 1.74 Three respondents (PRT, National Steering Group, Just for Kids Law) emphasised the need for the accused to be able to participate effectively in the proceedings, in case that is not included in “the entire spectrum of trial decisions that he or she might be expected to make”.
- 1.75 Dr Ernest Gralton would wish to see a test which allowed all the “multiple factors that are going to affect an individual’s overall ability to engage in the legal process” to be taken into account. The response of the National Autistic Society was to similar effect: the Society was concerned at the prospect of a single construct of decision-making being devised to cover all defendants, and that the specific needs and capacities of the “highly heterogeneous group” of people with autistic disorders would not be properly assessed.
- 1.76 Victim Support was concerned that the test in the CP set the threshold too high and would welcome “more clarity around the level of decision-making capacity required”. They referred to one of the examples given in the CP (see Example 3E following para 3.19) and commented that “a defendant with obsessive compulsive disorder may not indicate a lack of capacity. OCD is a manageable condition; with appropriate medical intervention, it may be possible for all but the most severe sufferers to participate effectively”. They noted that “different levels of capacity (or different points along the continuum) are required for each of the four heads of the proposed test”. The four heads referred to are those set out at para 3.13 of the CP:
- (1) to understand the information relevant to the decisions that he or she will have to make in the course of his or her trial,
 - (2) to retain that information,
 - (3) to use or weigh that information as part of decision making process, or

⁵³ On this, see para 1.79 and following below.

(4) to communicate his or her decisions.

- 1.77 Their view was that “the ability to understand and use or weigh information ((1) and (3)) are both significantly more determinative of a defendant’s capacity than (2) and (4), and less susceptible to corrective intervention by his legal representatives” and that (1) and (3) should “carry a lower threshold” than (2) and (4), and that these key thresholds needed to be explored in more detail.
- 1.78 The RCP and Professor Don Grubin would like to see the applicable standard of proof made explicit.

PROVISIONAL PROPOSAL 4

- 1.79 In determining the defendant’s decision-making capacity, it would be incumbent on the judge to take account of the complexity of the particular proceedings and gravity of the outcome. In particular the judge should take account of how important any disability is likely to be in the context of the decision the accused must make in the context of trial which the accused faces.

[para 3.101]

- 1.80 In other words, the threshold of unfitness should vary according to the complexity of the likely decisions the accused will face.
- 1.81 Provisional proposal 4 was offered as an alternative to provisional proposal 3,⁵⁴ some respondents read them as complementary.
- 1.82 This proposal inevitably has to distinguish between decision-making capacity and the ability to participate in proceedings. As Sense approached the issue, they agreed with the proposal as it related to the ability to access proceedings. They suggested that a deafblind person may have the ability to access simple proceedings where there was CCTV evidence, but not proceedings which involved complex language and evidence. Proposal 5 below suggests taking account of the accused’s actual ability to participate in proceedings if assisted by special measures.
- 1.83 Those who supported proposal 3 and rejected provisional proposal 4 were: the JCS, HM Council of Circuit Judges, Dr Ernest Gralton, Dr Andrew Bickle, Dr Lorna Duggan, Compass Psycare, Just for Kids Law, PRT, and Victim Support.
- 1.84 The Centre for Mental Health rejected proposal 4 without explicitly commenting on proposal 3. The Bar Council/CBA did not agree with a disaggregated test, and accordingly rejected proposal 4, but thought that proposal 3 was a disaggregated test “in all but name”.
- 1.85 Those who expressed support for both 3 and 4 were: the Law Society, Dr Carstairs, Dr Loughnan, Professor Poole, Dr Vizard, Sense, and Kids Company. Dr Loughnan found “the idea of an open-textured requirement for fitness to plead intuitively attractive in that it grounds the decision about unfitness in all the

⁵⁴ Para 3.11 of CP 197.

circumstances of the case”. However, she continued, “it would only work if the flexible standard cannot fall too low, and if changes to the law are backed up with fulsome training for legal professionals about what is required for full decision-making capacity”. Dr Carstairs gave the example of advising as regards defendants in complex fraud cases, which made quite different demands on the accused as compared with cases where the issue was whether D took part in a burglary.

Mixed responses

- 1.86 Some of the consultees (Charles de Lacy, Dr Rix, the BPS) thought there were arguments that could be made in support of both proposal 3 and proposal 4, and did not reach a clear conclusion. Charles de Lacy thought the degree of discretion included in a disaggregated test was a positive thing, but it would allow a judge to be drawn too far into assessment. The BPS acknowledged that an “all or nothing” approach is more convenient, but thought that a “match” between a person’s capacities and “the task in hand” was important.
- 1.87 Dr Keith Rix could see “the difficulties with regard to proportionality” but also approved of Lord Donaldson’s view, expressed in a different context, that “the graver the consequences of the decision, the commensurately greater the level of competence required to take the decision”.⁵⁵ He wondered whether the problem could be addressed by requiring a criminal standard of proof.
- 1.88 Mind thought it important that fitness is reassessed as the trial progresses (on which, see paragraph 1.128 below). They described the idea that capacity is a straightforward yes or no issue as a “misperception” but supported a unitary test; they stated that such a test would have to be flexible, and that proportionality “should be included in the assessment”.

Arguments against proposal 4

- 1.89 Reasons for opposing the proposal were:
- it would result in injustice to defendants and victims;
 - the difficulty of knowing what decisions the accused would be facing;
 - the serious practical difficulties it would entail;
 - it would embroil the judge in micro-management of the case;
 - it would lead to the wrong conclusion about a person’s fitness;
 - it would inhibit the professional judgment of counsel;
 - it would make different results in parallel criminal proceedings for the one accused more likely;
 - it would entail the judge being informed of matters which are legally privileged.

⁵⁵ *Re T* [1993] Fam 95, [1992] 4 All ER 649.

- 1.90 The Centre for Mental Health was particularly concerned about the differing perceptions of what a “grave” offence might be: if capacity was assessed by reference to the possible or likely length of a custodial sentence, then the gravity of offences which could attract a short sentence might be underestimated.
- 1.91 HM Council of Circuit Judges commented in particular that it would not be practicable to distinguish between fitness to plead and fitness to stand trial (which is not the same as ability to participate in the proceedings). They favoured as simple and as practical an approach as possible which “can only be obtained by applying a uniform test to both issues”.
- 1.92 Victim Support wrote that a capacity test which assessed the accused’s capacity to understand complex legal points could result in unfairness because victims and other witnesses are exposed to similar risks as regards reputation, and they have no legal advocate or safeguard to ensure that they understand the risks they face.
- 1.93 HHJ Tim Lamb QC thought the idea impractical, first because different legal practitioners in a case “will each have different views about the nature of the issues”, and secondly, because the defence representatives might not wish to reveal relevant evidence to the prosecution or the court before the trial. (A similar point is made by HM Council of Circuit Judges.)

Arguments in favour of proposal 4

- 1.94 Conversely, HHJ Wendy Joseph QC thought it “pretty obvious that a person with a particular set of mental health problems may be perfectly able to make appropriate decisions and participate effectively in a 2 day case where his defence is alibi, whilst being quite unable to do the same in a multi-handed 6 week case where his defence is ‘I didn’t have the appropriate mental state’.” However, she thought it followed from this that the expert reports would have to be more detailed, and that would require public resources which are not available.
- 1.95 HHJ Wendy Joseph QC suggested the possibility of assessing fitness to plead only in cases where it appeared to be an issue and the case was one where public safety was at risk.
- 1.96 Dr Arlie Loughnan’s response indicated support for a flexible test: “the standard to be applied in determining unfitness should thus depend on the seriousness and complexity of the charges, the relationship between the defendant and his or her lawyers and the communication skills of his or her lawyers, among other factors”. She cites the work of Ian Freckleton in support of her opinion, in particular his view that “this is how forensic clinicians make determinations of fitness in practice”.⁵⁶

⁵⁶ I Freckleton, “Rationality and Flexibility in Assessment of Fitness to Stand Trial” (1996) 19(1) *International Journal of Law and Psychiatry* 39, 48.

- 1.97 Nicola Padfield noted that a person’s level of fitness “may vary according to the complexity of the case”, and referred to the study by Rogers of interviews of senior criminal barristers conducted by a forensic psychiatrist in support.⁵⁷
- 1.98 Broadmoor psychiatrists expressed support for the idea of proportionality, as did the BPS, who thought it would be in keeping with the MCA-style of the proposals.
- 1.99 The RCP supported the approach in proposal 4 “on balance” but accepted that it could be “unduly complex” and therefore rejected it on pragmatic grounds.

THE ROLE OF SPECIAL MEASURES

PROVISIONAL PROPOSAL 5

- 1.100 Decision-making capacity should be assessed with a view to ascertaining whether a defendant could undergo a trial or plead guilty with the assistance of special measures and where any other reasonable adjustments have been made.

Question 1

- 1.101 Do consultees agree that we should aim to construct a scheme which allows courts to operate a continuum whereby those accused who do not have decision-making capacity will be subject to the section 4A hearing⁵⁸ and those defendants with decision-making capacity should be subject to a trial with or without special measures depending on the level of assistance which they need?

[para 4.27]

- 1.102 Part of the purpose of this proposal was to bring consideration of special measures explicitly within the assessment of an accused’s decision-making capacity (under the reformed test we provisionally proposed). We stated that “the role of special measures is not considered” under the current *Pritchard* test.⁵⁹ The Bar Council/CBA disagreed with this statement and wrote that in *Dyson*⁶⁰ and *Pritchard* the judges “*did* consider measures that we would now describe as special measures”.⁶¹ Several respondents commented that the current practice is to apply *Pritchard* criteria in conjunction with assessment of measures to help the accused participate.
- 1.103 Decision-making capacity and ability to participate in proceedings may be distinguished, though there is an area of overlap. The reformed fitness test provisionally proposed in the CP is a test of decision-making capacity “informed by the principle of effective participation”,⁶² it aims to cover both bases. Special

⁵⁷ T P Rogers and others, “Reformulating the Law on Fitness to Plead: a Qualitative Study” (2009) 20(6) *Journal of Forensic Psychiatry and Psychology* 815, referred to at para 2.61 of CP 197.

⁵⁸ As it exists at present (see Part 1 above) or as amended under our provisional proposals (see Part 6 below). (footnote in the original)

⁵⁹ Para 4.25 of CP 197.

⁶⁰ (1831) 7 C & P 305.

⁶¹ Emphasis in the original.

⁶² Para 3.12 of CP 197.

measures are usually thought of in terms of the accused's ability to participate in proceedings rather than of his or her ability to make decisions, though some special measures can help an accused make decisions, for example on how to instruct counsel. It may be helpful to bear these distinctions and overlaps in mind when considering the responses to this proposal and this question.

- 1.104 The JCS picked up on this complication. They wrote that a disaggregated test had been rejected in the CP, and that if such a test were adopted, they “could see merit in the suggestion that the availability of special measures might have a beneficial impact on the capacity of the accused to participate in certain aspects of the trial”, whereas the unitary test proposed in the CP made the assessment of the impact of special measures less straightforward. In other words, if the test distinguished between decision-making capacity and capacity to participate, then it might be easy to see in some cases that special measures would help with the latter though not the former, and the accused's overall ability could be assessed in that light. JCS supported the use of special measures “for defendants found to have the necessary decision-making capacity but who require assistance properly to present evidence in the trial”.
- 1.105 The Law Society thought a distinction should be drawn between ability to participate in proceedings, to which special measures may well be relevant, and decision-making capacity, which special measures will not alleviate. The decision as to fitness “should be decided on a yes or no basis”. They thus reject the idea of a continuum. Dr Duggan's response was similar. Although the Law Society supported the availability of special measures, it thought that there was a risk that the issue of capacity to participate would be glossed over if applied in the terms of proposal 5.

Support for provisional proposal 5

- 1.106 General support was given by members of the judiciary (HHJ Tim Lamb QC, the District Judges, HM Council of Circuit Judges) mental health practitioners and representative groups (Professor Rob Poole, Compass Psycare, the RCP, Dr Eileen Vizard, the Centre for Mental Health, Sense, Victim Support, Kids Company). Dr Keith Rix wrote, “It is not enough to conclude that a person is unfit to plead and stand their trial. A report in such a case needs to take into account what the effect would be of these existing special measures”. Kids Company thought that reform which did not include special measures as part of the test would be counter-productive.
- 1.107 The CPS and Dr Keith Rix both referred to aligning the assessment of fitness with the test in section 1(3) of the Mental Capacity Act 2005: “A person is not to be treated as unable to make a decision unless all practicable steps to help him to do so have been taken without success”. HM Council of Circuit Judges took the same approach, consistent with that of the CP: “In our view, if the aim of the new decision-making test is to ascertain that the accused has the capacity to make decisions so as to participate in the trial process, it must follow that any measure which would facilitate that capacity should be taken into account when assessing whether the accused has such capacity”. HHJ Wendy Joseph QC took a similar view.
- 1.108 The CPS referred also to para III.30 of the Consolidated Practice Direction, as did Carolyn Taylor, which states that all possible steps should be taken to assist a

vulnerable defendant to understand and participate in proceedings. Carolyn Taylor referred also to *R v SH*⁶³ in which, as an aside, the court expressed views on measures to assist an accused with an IQ of 58. She thought the availability of special measures was “a valid consideration but only in appropriate cases” and agreed with a “continuum” scheme.

- 1.109 There was support for the use of special measures as a matter of principle. For example, the National Steering Group wrote, “it is a clear responsibility of the legal system to treat each individual appropriately according to their specific needs”. As regards intermediaries, the Group saw the use of intermediaries as a minimum requirement.
- 1.110 Particular needs may need particular approaches: the National Steering Group referred to the applicability of the principles of the Disability Discrimination Act in this context and stated that “defendants with a learning disability should always be considered vulnerable and the Criminal Justice System should respond accordingly”.
- 1.111 HM Council of Circuit Judges commented, with regard to special measures, that they “need to cover all aspects of the trial process and not merely the giving of evidence by an accused”. JCS and the RCP were of the same view. The judges continued, “If special measures remain only to assist the accused in giving evidence, it is unlikely that they would have an acceptable level of impact”. The CPS wanted to see special measures being used prior to trial to help with preparation for trial. They wrote: “This may include the use of an intermediary to help the defendant to understand the case against him, to give his own side of the story as his proof of evidence is drawn up and to speak to his lawyers”. The National Steering Group, similarly, thought specialist support should be available at all stages (they suggest appropriate adults in police stations as well as support at court), and that defence representatives “should also have basic skills” for communicating effectively with people with a learning disability.
- 1.112 The Edenfield Centre could see “a clear continuum among defendants with regard to all the elements of mental and cognitive competence required to engage meaningfully with a trial”.

A finding of unfitness leading to no trial should be the last resort⁶⁴

- 1.113 Some respondents mentioned how the provision of special measures, of various kinds, can promote the ultimate preferred goal of holding a trial. For example, HM Council of Circuit Judges argued⁶³ that applying special measures to all aspects of the trial (not just the giving of evidence) “would lead to it being more likely that an accused would be found fit to plead” which is in itself a desirable outcome. The CPS would like to see expert reports on fitness to plead address the question of how the accused’s capacity to participate could be maximised.
- 1.114 Several respondents felt that a finding of unfitness followed by a trial of the facts (or reformed procedure) should be a last resort (see, for example, the RCP,

⁶³ [2003] EWCA Crim 1208, [2003] All ER (D) 436 (Mar). It was applied in *C v Sevenoaks Youth Court* [2009] EWHC 3088, [2010] 1 All ER 735.

⁶⁴ See also para 1.355 and following (below) on Impact.

Victim Support, Professor Grubin, Mind). Their reasons were the promotion of justice, but also to give effect to a principle of inclusion (see, for example, the responses of Sense and of Mind). Victim Support wrote,

the fundamental difference between a trial and a s 4A hearing following a finding of disability is that in the latter, a defendant who is indeed responsible for the wrong done to the victim can neither formally admit guilt, nor be convicted of it in the normal way. We believe that this of such importance to victims that they have a considerable stake in ensuring that defendants are only directed away from the standard trial process when this is absolutely necessary in the interests of justice.

- 1.115 Support for this goal is echoed by the Bar Council/CBA in its response to the proposals about a reformed section 4A hearing:

Even if one assumes that problems associated with the current section 4A hearing are as many, and as significant, as the Commission believes them to be, this merely reinforces the desirability of ensuring that hearings under s 4A are kept to a minimum and that it is in everyone's interest (particularly the accused's) for the accused to have his/her case tried in the ordinary way, even if that means bespoke special measures being devised and implemented by the court to address (if possible) the accused's disability(ies).

Concerns

- 1.116 Many respondents supported the use of special measures but expressed concern about resources and the likely availability of appropriate special measures. There was scepticism as to whether resources would be made available for special measures, despite endorsement by the Bradley report (eg HHJ Tim Lamb QC).
- 1.117 The PRT agreed in principle but emphasised that "the availability and scope of special measures and reasonable adjustments must first be determined". They made the persuasive point that if the availability of such measures is going to affect an accused's fitness to plead – in other words, whether he or she is going to face a trial – then entitlement to such measures must be a legal entitlement, and "equivalent to that afforded the Crown". Even section 104 of the Coroners and Justice Act 2009 (still not in force) does not go that far as it deals only with the issue of defendants giving oral evidence. Further, as Just for Kids Law also wrote, the responsibility for securing and paying for the measures needed should lie on the court, not the accused (or his or her representatives), and the fee levels should be no less than would be paid for a prosecution expert.
- 1.118 Just for Kids Law gave an example of a case in which they had faced arbitrary decision-making, in their view, by the Legal Services Commission in refusing to pay for an expert for whom it had been willing to pay in other cases.
- 1.119 Several respondents noted that the research base to guide courts and experts as to the efficacy of different possible special measures does not necessarily exist yet.

Reservations

- 1.120 Other concerns indicated less support for the promotion of special measures.
- 1.121 Helen Howard thought there was a danger that an accused who lacks capacity might be “pushed” into a trial “in which he is dependent on the special measures being adequately resourced”. (A similar concern to that of the PRT – see above.) She suggested that the special measures be kept separate from the legal and psychiatric tests of fitness.
- 1.122 Victim Support noted also that special measures “bring their own dangers, especially those of inconsistent making and granting of applications”. They thought more training and education would be required and desirable.
- 1.123 The only special measure which consultees mentioned as possibly not being suitable for an accused – but which is suitable for a witness – was that of pre-recorded evidence in chief. HHJ Wendy Joseph QC made this point. Other consultees, by contrast, thought this measure could be of assistance for defendants with particular difficulties.
- 1.124 The CPS thought that medical evidence should not be the sole evidence relied on in the determination of capacity.⁶⁵
- 1.125 The South Eastern Circuit pointed out that counsel should not, in their view, be part of the assessment of fitness, ie should not be asked for his or her views on the ability of the accused to provide instructions and so on.
- 1.126 The Bar Council/CBA feared (a) that applications for a finding of fitness would become routine, and (b) that an application for special measures would come to form part of a fitness hearing.
- 1.127 Professor Mackay wrote that while it was “commendable” to incorporate the availability of special measures into the new legal test of fitness, he thought the Commission’s discussion overlooked the fact that the reason for some defendants to fail a reformed test of fitness was “that such defendants are likely to be ‘foundationally’ unfit to plead”. Professor Mackay also thought the Commission’s proposals defective in that they required a consideration of both decision-making capacity and capacity to communicate with counsel in all cases, and this “seems overly complex and cumbersome”.

Additional suggestions

- 1.128 Just for Kids Law made the point that an assessment of what measures an accused may need “can only ever be theoretical”, and “the reality of proceedings may prove otherwise”. Three respondents (PRT, Mind and Just for Kids Law) thought that the accused’s ability to participate should be kept under review and a procedure for halting the trial, in the event that the accused becomes incapable, should be provided. With regards to child defendants, Just for Kids Law also thought there should be a Guardian or Litigation Friend available to the accused, as in the civil system (on which, see paragraph 1.148 and following below).

⁶⁵ The CPS referred to *CPS v P* [2007] EWHC 946 (Admin), [2008] 1 WLR 1005 and *R (Ferris) v DPP* [2004] EWHC 1221 (Admin) and a recent unreported case in support.

PROVISIONAL PROPOSAL 6

- 1.129 Where a defendant who is subject to a trial has a mental disorder or other impairment and wishes to give evidence then expert evidence on the general effect of that mental disorder or impairment should be admissible.

[para 4.31]

- 1.130 Twenty-two respondents agreed with, or had no objection to, this proposal. Several added caveats or additional comments.
- 1.131 Just for Kids Law commented that this is happening already, “usually through an admission or submission of extracts of an expert report rather than relying on live evidence”.
- 1.132 This proposal was particularly relevant to deafblind people, and Sense gave examples of situations in which such evidence would be instructive to the court.
- 1.133 The National Steering Group thought “background for legal professionals would be very useful”. Kids Company referred to a case it had conducted in which expert advice would have been helpful generally to the legal professionals involved in the case.
- 1.134 Relevant evidence would not necessarily be solely from psychiatrists (Professor Mackay).
- 1.135 The RCP thought that if an accused with a mental disorder chooses not to be legally represented but to defend him or herself, then expert evidence should be admitted on the effect of the mental disorder on the accused’s ability to conduct that defence. Mind referred specifically to evidence as to the effect on a person’s demeanour when giving evidence.⁶⁶
- 1.136 Compass Psycare thought the responsibility for calling the expert(s) should lie on the judge.

Concerns

- 1.137 Some thought that there may be conflicting evidence from experts on the effect of a disorder or impairment, and this will distract from the central issues of the trial (HM Council of Circuit Judges, PRT and the National Steering Group). The PRT thought there was a risk of prejudice being created, either for or against the accused.
- 1.138 There was a concern that such expert evidence might be counter-productive (Mind). Mind were concerned about prejudice arising from an admission of a mental illness by the accused, and suggested mental health awareness training for the judiciary and other court staff.
- 1.139 HHJ Wendy Joseph QC feared this proposal would lead to longer court hearings and more delays.

⁶⁶ The Law Commission noted in its CP on hearsay in criminal proceedings that there is often a view that a person’s demeanour when giving evidence is probative, but that research shows this to be at least doubtful: Evidence in Criminal Proceedings: Hearsay and Related Topics (1995) Law Commission Consultation Paper No 138 at para 6.22 and following.

- 1.140 Lastly, there was a concern that the expert evidence would be about the general effect rather than the specific impact in the case before the court. Professor Rob Poole thought there are “real problems with disconnecting expert evidence in [cases where the accused has personality disorder, ADHD, or Asperger’s syndrome] from the specifics of the individual concerned”.

Question 2

- 1.141 Can consultees think of other changes to evidence or procedure which would render participation in the trial process more effective for defendants who have decision-making capacity but due to a mental disorder or other impairment require additional assistance to participate?

[para 4.31]

- 1.142 Most responses to this question approached it in terms of what additional special measures might be beneficial. In that context, the same reservation that consultees expressed in relation to the discussion of special measures in response to proposal 5 above⁶⁷ is relevant, namely whether the necessary resources would in fact be made available.
- 1.143 HM Council of Circuit Judges referred to the potential benefits of increased informality, as did the Edenfield Centre, and the use of live link. The Edenfield Centre also suggested that video links would allow medication to be given, as needed, to improve concentration or reduce distress during the course of the proceedings.
- 1.144 Sense made several suggestions about provisions that might be needed for deafblind people, and wrote that deafblind people would need individual solutions proposed by someone who was suitably qualified.⁶⁸
- 1.145 The National Autistic Society referred to the possibility of “reducing the level of extraneous factors” such as by using video link and other visual means of communication (as opposed to auditory means).
- 1.146 Some respondents (for example the RCP and Sense) emphasised the need for the person making the assessment to be expert in the kind of impairment or disability which the accused has. The RCP noted instances of psychiatrists finding people unfit to plead when a psychiatrist with more experience and knowledge of learning disabilities would have found the individuals fit to plead. The RCP gave details in their response of the kinds of factors which might be overlooked in the case of a person with learning disability or autism when the expert does not have ongoing clinical care or recent experience in the relevant field.
- 1.147 The District Judges referred to measures available to witnesses (video link, intermediary and appropriate aids to communication).

⁶⁷ See para 1.116 above.

⁶⁸ They pointed out that, “The uniqueness of deafblindness as a disability has been recognised by the government in statutory guidance issued under section 7 of the Local Authority Social Services Act 1970.”

Someone to assist in court

- 1.148 Five consultees⁶⁹ suggested that the accused should have someone sitting in court with him or her to explain what is happening. The JCS referred to the possibility of an intermediary (though the statutory provision allowing for this⁷⁰ is yet to be implemented) and suggested that the role of the intermediary could usefully go beyond that set out in the legislation, to include assisting the accused in communication with his or her legal representative. This suggestion has much in common with the proposal of an Independent Mental Health Advocate, put forward by Mind.
- 1.149 Dr Vizard suggested an intermediary trained in mental health should assist a defendant, and that a child defendant should always have an intermediary trained in mental health and child development. Kids Company thought an independent advocate would be useful for a child or young person. Mind expanded on the idea of an independent advocate:
- (1) A particularly appropriate special measure would be the assistance of a mental health advocate with expertise in forensic work. For patients detained under the MHA, conditionally discharged, subject to guardianship or subject to community treatment orders, there is now statutory provision of Independent Mental Health Advocates (IMHAs) (section 130). The role of the advocate is set out in the legislation and includes giving help to the patient in order to understand the provisions of the Act by which he is detained. It extends to assisting the patient to obtain information about, and understand any rights that may be exercised under, the Act.
 - (2) It has become more common practice for IMHAs to accompany a patient (at the patient's request) to the First Tier (Mental Health) Tribunal for a review of detention. Mind's experience is that the presence of an advocate can empower and facilitate participation of the patient in the hearing and increases the patient's understanding of the legal processes. Currently, there is no provision in the Tribunal Procedure Rules 2008 to provide guidance on the role of the IMHA at such hearings. A recent consultation was conducted by Judge Neville Chamberlain with a view to provision of a guidance note on the role of the IMHA at hearings. It appears, therefore, to be accepted that the IMHA can have a valuable role in promoting participation and understanding of the patient at his or her hearing.

⁶⁹ Dr Duggan, Mind, JCS, Dr Vizard, and the Bar Council/CBA.

⁷⁰ Section 33BA of the Youth Justice and Criminal Evidence Act 1999.

- (3) Within a criminal trial there will clearly be different considerations but Mind would propose the use of independent advocates or intermediaries as a special measure to facilitate participation of the defendant in the trial process. An advocate can assist a defendant in understanding the information given by his or her criminal defence lawyer and in understanding the trial process and what is required of him or her. We are aware of cases where an independent advocate will attend meetings with criminal defence solicitors to help the defendant understand advice given, ensure that the defendant's communication needs and disabilities are known to the criminal defence counsel and ensure that any questions which the defendant may have are answered. The same advocate will then accompany the defendant to court.
- 1.150 A variant on this idea came from the Bar Council/CBA who suggested that an expert such as a psychiatrist or psychologist could be present in court to assist the court and the defendant. They referred to the trial of *George* in August 1998 where a psychologist sat with the accused in the dock.⁷¹

Attention to language and manner of conducting the proceedings

- 1.151 Carolyn Taylor thought there is a need to review legal language, perhaps in conjunction with the Plain English Campaign, "so there is an alternative recognised 'script' that can be used in these cases to ensure the D does understand 'what is happening' throughout his trial (PD para III.30.11)." She writes,

The opening of all criminal cases is in my view alienating as the words read out by the clerk of the court namely, "You are charged on an indictment containing x counts" has regularly resulted in my clients telling me they do not understand what the words indictment or count mean! Not to understand the start of their trial is wholly inadequate.

- 1.152 The Law Society made the same point and added that it is not just a matter of adjusting terminology to address the particular cognitive impairments but the nature of the questioning also.
- 1.153 The Edenfield Centre suggested that "individuals with learning difficulty may benefit from repetition or the provision of alternative means of presenting evidence other than the spoken word such as written or audio visual methods".
- 1.154 Kids Company referred to <http://www.sentencetrouble.info/resources> - a leaflet on communication needs of young people for those who work with young offenders.

Special courts and/or training and/or guidance

- 1.155 The Edenfield Centre, Victim Support and Mind suggested specially trained judges and barristers. The RCP thought it "most important" that judges and lawyers should "have had guidance on how to proceed with a person of a particular impairment".

⁷¹ This is an unreported first instance decision.

- 1.156 In a similar vein, Dr Tim Rogers suggested mental health courts would be beneficial because the judges and practitioners in those courts would then be familiar with the kinds of issues arising.

Addressing the issue early in proceedings

- 1.157 Mind thought the issue of capacity to stand trial should be addressed as early as possible. They also suggested a code of practice “to consolidate the existing relevant principles, take into account any new legal principles and address medical knowledge and practice”.
- 1.158 This was a feature picked out also by the CPS, who noted that a duty already exists to address the real issues early on, referring to the overriding objective of the Criminal Procedure Rules, in particular rules 3.2(2)(a) (early identification of issues) and 3.2(2)(e) (ensuring that evidence is presented in the shortest and clearest way). This suggests that the real difficulty lies in practical application of the rules.

Expert recommendations relating to the individual

- 1.159 The Edenfield Centre referred to tailoring recommendations to the individual’s mental disorder and gave the example of a person with persecutory delusional beliefs regarding video equipment, and noted that in such a case “addressing court using a video link would be inappropriate”. Graham Rogers (a psychologist) suggested a brief IQ test and a reading test (of the accused).
- 1.160 Two respondents (RCP, CPS) emphasised the need for the expert making the assessment of fitness to make proposals as to what will help the particular accused. The CPS wrote that the expert report should cover:

an opinion on whether special measures would increase capacity or participation in the trial, and if so, which special measures are necessary;

how the trial process could be adapted to maximise effective participation, for example recommendations on appropriate language and cross examination techniques, frequent breaks and taking time to explain proceedings to the defendant;

whether there is a reasonable prospect that treatment would increase capacity or render a defendant fit to participate in his trial.

- 1.161 Graham Rogers cautioned against assuming that a psychiatrist or psychologist would be able to provide appropriate advice if he or she did not have forensic experience:

Saying a person needs more time or more breaks does not really help. All this does is slow down the inevitable; it is the defendant’s understanding and the ability to develop this within the context of court that is required; and psychiatrists and many others do not have the skills to adequately advise in this area.

In this case, it is being proposed that those with no experience of developing and working with such systems advise the courts. Do

such professionals understand how the teaching and learning history of an individual affects future support and the challenges that will present?

Use of existing court powers

- 1.162 The CPS suggested that the court should consider using its powers under the 1983 Act to remand a person in hospital for treatment prior to trial: see section 36⁷² and section 38.⁷³ Dr Tim Rogers also suggested that a feature of hospital treatment for someone who has been found unfit to plead could be “restoration of competence” to stand trial, as in the US.

ASSESSING THE CAPACITY OF THE ACCUSED

PROVISIONAL PROPOSAL 7

- 1.163 A defined psychiatric test to assess decision-making capacity should be developed and this should accompany the legal test as to decision-making capacity.

[para 5.17]

- 1.164 Opinion on various aspects of this proposal was divided.

The importance of the legal test

- 1.165 Some respondents (HM Council of Circuit Judges, HHJ Wendy Joseph QC, the Bar Council/CBA, Helen Howard) emphasised that the decision as to fitness must be one for the court, or that the test of fitness should be a legal test (the Law Society). The Bar Council/CBA were concerned about what scope there would be for judicial input into a capacity test of an accused.
- 1.166 The Law Society would want to see a legal test which was not “overly complex”, as, it said, “some clinicians appear to have difficulty in applying the relatively straightforward test of capacity set out in sections 2 and 3 of the Mental Capacity Act 2005”. Dr Tim Rogers thought that improving the legal test would reduce inconsistency between expert assessments and be beneficial, as he explained:

it is right that reform of the procedures should seek to reduce inconsistency of assessment by psychiatrists. It is my belief that, in the presence of an inadequate legal test, clinicians often make decisions about whether or not they believe a person can fairly stand trial without referring to the law in advance. They then “hang their hat” on an element of the *Pritchard* test (if they mention it at all) in trying to justify that opinion (rather than the other way around). Revising the test must go a long way towards remedying this, particularly if the relevant areas of ‘decision making capacity’ are explicitly set out.

⁷² This is an alternative to a remand in custody. It is a power available to the Crown Court, not the magistrates’ courts.

⁷³ This is a power to make an interim hospital order. The Crown Court can make such an order where there has been a special verdict of insanity or a finding that D was unfit but had “done the act” following a s 4A hearing. Both the Crown Court and the magistrates’ court can make such an order following conviction.

Benefit of a standardised test

- 1.167 The principal benefit identified by consultees was increased objectivity and greater consistency across psychiatric assessments. (See, for example, the response of Dr Tim Rogers.)⁷⁴
- 1.168 The JCS would support the development of such a test.
- 1.169 Victim Support thought a legal test accompanied by a psychiatric test would command more public support than a legal test on its own.
- 1.170 Dr Keith Rix agreed with the proposal and recommended that psychiatrists “be asked to operationalise” the legal test in *A-G v O’Driscoll*⁷⁵ as a psychiatric test.
- 1.171 The Centre for Mental Health could see potential benefits of a standard psychiatric test, but sounded a warning note: they would wish to see “more evidence of how it would operate in practice and whether it would allow for sufficient flexibility”.

Doubts about the possibility of a validated, standardised test

- 1.172 Respondents differed on whether they thought it would be possible to produce a validated, standardised test at all. HHJ Wendy Joseph QC commented that she had some difficulty imagining such a test. HHJ Tim Lamb QC noted that the accused will not always co-operate with any kind of assessment.
- 1.173 Professor Poole emphasised the difference between a test and a clinical judgment assisted by an instrument, and added, “In any case the ‘test’ that is being proposed for use is still under development, and has not been published. It is highly unlikely that any such instrument would be sufficiently psychometrically robust as to be reliable as a primary assessment in the full range of circumstances where decision making capacity is an issue. Even X-rays or blood tests in general medicine require significant interpretation; psychometric instruments can only ever be adjunctive to clinical judgement in psychiatry.” Professor Grubin noted that evaluations under the MCA do not rely on any standardised psychiatric test, and an assessment of fitness to plead did not seem to him to be different in nature. The RCP noted also that there is no standardised test under the MCA, and they thought that to be an advantage.
- 1.174 Compass Psycare, on the other hand, referred to the “well validated” MacCAT-CA test⁷⁶ and a “well validated but less researched tool” ECST-R,⁷⁷ and suggested that they should be modified and tried on the English system. Dr Tim Rogers thought a standardised test was a good idea, and the MacCAT-FP test

⁷⁴ See para 1.174 below.

⁷⁵ [2003] Jersey Law Reports 390. It is set out at the end of this analysis.

⁷⁶ Note: MacCAT FP = MacArthur Competence Assessment Tool-Fitness to Plead; MacCAT-CA = MacArthur Competence Assessment Tool-Criminal Adjudication. MacCAT-TA might be a misprint of MacCAT-CA. For an analysis of the MacCAT-CA see D A Pinals and others, “Practical Application of the MacArthur Competence Assessment Tool-Criminal Adjudication (MacCAT-CA) in a Public Sector Forensic Setting” (2006) 34(2) *Journal of the American Academy of Psychiatry Law* 179.

⁷⁷ The Evaluation of Competency to Stand Trial-Revised, which is intended for use with adults facing charges in criminal courts.

“whilst limited, remains a good and broad test of competency based upon sound research”. He doubted, though, that any instrument would be much used in practice. (He gives reasons for his doubts.) Graham Rogers, however, thought the MacCAT-TA test “somewhat subjective”. He noted also that it only addresses one type of “fitness issue” – that of learning disability. Professor Grubin similarly thought a test would give “an illusion of scientific validity”, and the forensic faculty of the RCP thought that a standardised test could “give a false idea of scientific validity”.

- 1.175 The absence of any proposed psychiatric test in the CP made some respondents nervous about commenting on it (see the responses of HM Council of Circuit Judges, Kids Company and the Bar Council/CBA). The Bar Council/CBA and the Nottinghamshire NHS Trust thought that the publication of the CP was premature, in the absence of a test to put before consultees.

Doubts about the status of a standardised psychiatric test

- 1.176 Professor Mackay raised the question of what the legal status would or should be of a standardised psychiatric test. He did not think it clear from the CP whether the psychiatric test would be part of a new statute, alongside the legal test, but thought that if that were the case, then problems would arise of keeping the psychiatric test up to date with medical developments.

Uncertainty that a defined test would be beneficial

- 1.177 The psychiatrists from Broadmoor were “unconvinced that a tool would be any better (in terms of reliability or validity) than a thorough clinical assessment”. The RCP thought there were several cogent arguments against a defined psychiatric test, and that such a test would be unnecessary. For example, they thought that each case required individual assessment and not having a standardised test would leave psychiatrists free “to tailor their professionalism to each individual unique case”.
- 1.178 Professor Mackay queried whether a standardised test would in fact lead to consistency of assessments: “the research into the use of such instruments is not encouraging. Also, no single instrument seems to have achieved a ‘gold standard’ status. Of course that may change when the work of Dr Blackwood and his colleagues in formulating such an instrument for the Commission is complete.”⁷⁸
- 1.179 Those at the Nottinghamshire Healthcare NHS Trust were divided: some thought a defined test would be too restrictive, others that it would be beneficial to have an “objective” test. Sense was concerned that a standardised test would overlook ability to access a trial, which is of particular importance to a person who is deafblind.
- 1.180 The Bar Council/CBA thought that if there were a test, it should be a tool only, with the determination of fitness (capacity) left clearly to the court.
- 1.181 The RCP was concerned that a standardised test would not keep up with developing psychiatric thinking.

⁷⁸ Footnotes omitted.

- 1.182 The RCP view, generally, was that if the law is clear, not too complex, and clearly explained to the relevant experts, and if the experts are carefully chosen and properly trained, then they can apply it without being trammelled by a standardised expert test.

Should not be mandatory

- 1.183 Several respondents (such as the Edenfield Centre, Professor Poole, Dr Duggan, Professor Grubin, Broadmoor psychiatrists, and Mind) thought that an instrument could help clinical judgment, but opposed mandatory use of an expert test. For example, Professor Poole wrote, “I would strongly recommend *against* the mandatory use of an instrument of this sort”.⁷⁹ Dr Duggan thought the proposal “could make the assessment formulaic”. The Broadmoor psychiatrists noted that “no decisions or diagnoses in psychiatry are made on the basis of a single tool or test” and that adopting a recognised “test” “can in some situations lend an air of unmerited respectability to an inadequate assessment”. Even one of the authors of the Mac-CAT tool, Professor Bonnie, “would be reluctant to *prescribe* use of such an instrument”.⁸⁰

Part of an assessment, but not the whole of it

- 1.184 Similarly, some respondents (PRT, Just for Kids Law, the National Steering Group, the Law Society, Charles de Lacy) were content to see a defined expert test as part of an assessment but not as the sole means of assessment. Several respondents would expect to see it accompanied by a clinical interview, resulting in a clinical opinion presented to the court. The Law Society and the CPS pointed out that the legal test of fitness “may also be informed by ordinary evidence”, and Helen Howard hoped that evidence from outside the realm of psychiatry would be allowed where it would be helpful. The Bar Council/CBA thought the value of such a test, if one could be developed, would lie in the information it would make available to the court.

Not solely a psychiatric test

- 1.185 There was widespread disagreement with the view that the test should be a psychiatric test. Several respondents from different backgrounds (HM Council of Circuit Judges, Carolyn Taylor, the Law Society, Professor Bonnie, Professor Mackay, Helen Howard, Linda Monaci, RCP, Karina Hepworth, Dr Carstairs, Broadmoor psychiatrists, the BPS, Just for Kids Law, Graham Rogers) made this point. It may be summed up by the RCP: “the important issue is that the training and expertise of the individual expert makes them competent for the task”.
- 1.186 A psychologist’s expertise may well be more appropriate in this context (see the responses of Dr Carstairs and Linda Monaci for developed arguments) or, for some defendants, a different kind of expertise (see the responses of Helen Howard, Dr Duggan, the National Autistic Society and Sense). The BPS referred to Guidance for Psychologists produced in the wake of the MCA⁸¹ which could be instructive in the criminal context. Professor Bonnie thought that the majority of

⁷⁹ Emphasis in the original.

⁸⁰ Emphasis added.

⁸¹ See nn 45 and 46 above.

assessments of capacity to stand trial in the US are currently performed by psychologists and “medical expertise is not required for the routine case”.

- 1.187 Graham Rogers made the following point about psychiatrists, though he emphasised that “the aim of this response is not to criticise psychiatrists, but to raise awareness that they are not a panacea to the difficulties highlighted”:

They work primarily in hospital and clinic settings, and not in the community. Hence, in my experience they tend to rate people according to their own experience and the population they deal with, and not the wider community. Hence, as psychiatrists tend to see only the most complex, this proposal would mean a dramatic reduction in those being able to claim that they were, for whatever reason, “unfit to plead”.

Hence, in talking in the past with Professors David Cooke (2009) and Jane Ireland, both have independently said that the background and experience of the expert determines, for example, the nature of the outcome from a risk assessment. Professor Ireland in November 2010 said that due to her experiences (Ashworth Hospital, Liverpool), she tends to see risk at “every opportunity”. It is in the nature of the population at the hospital that this is the case.

One therefore needs to consider the typical training and day-to-day experience of the psychiatrist in order to understand how they are likely to behave when assessing for the courts. It is the same issue that affect all experts, including myself.

Experience and its limitations:

Psychiatrists are trained as general doctors first, before specialising.

This training does not necessarily cover the idiosyncrasies of childhood systems necessary to determine and declare a person as learning disabled. One could argue that it is the learning disabled who are most likely to struggle in terms of “fitness”.

Hence, medics are not trained to understand “Statementing”, (Education Act, 1996) or how those with behavioural problems at schools invariably have learning disabilities as well.

Nor are they trained in how the “statementing process” has altered, so that fewer children are being Statemented, not because there are fewer children needing the statement, but because the money is being delegated into schools and so schools are not asking for the statementing process, because a ‘statement’ would have the effect of enabling the local authority to tell the school how to spend their Special Needs money!

Hence, even if a psychiatrist did have a basic understanding of “statementing”, the way this works is outside of their training and experience. This will, and does influence their opinion.

As the history of a learning disability is one of the three central criteria used to say if the person is learning disabled according to NHS criteria or not, and to the court system, then a detailed understanding is necessary.

The point being, (all) professionals training and experience may distort the evidence and their assessment, due to the restrictions in their basic professional training.

- 1.188 Helen Howard advised that although the expert opinions of two medical practitioners may be necessary, which she accepted, other non-medical evidence may be relevant and should not be excluded.
- 1.189 Just for Kids Law pointed out that the requirement for two medical practitioners will lead to an increase in cost. They gave the example of a young man on the autistic spectrum, who had a report from a social worker and from a psychologist (a leading expert on autism), both of whom said that he was not, in their view, fit to plead and stand trial, but that neither of their reports satisfied the section 12 requirement,⁸² and so additional reports were needed, at additional cost and causing delay. They would want to see a Code of Practice underlying an expert test, providing guidance as to the assessment of “effective participation”.
- 1.190 Graham Rogers would welcome a multi-professional approach but wondered whether the political will exists to make such a process happen. Dr Carstairs feared that there would simply not be enough experts available for cases to proceed within reasonable timescales. The RCP was concerned about the possibility of increased demand.
- 1.191 Dr Vizard strongly supported this proposal, but would want to see any test applicable to juveniles “rooted in the scientific evidence on child development”. The Broadmoor psychiatrists would want to see an assessment of cognitive functioning for all defendants under 18 – in contrast with those consultees who wrote that the emphasis should be on capacity rather than age.⁸³ With regards to deafblind people, Sense was “gravely concerned” about psychiatrists being seen as the appropriate experts, and thought that evidence would be needed from “a deafblind expert”. The National Autistic Society also emphasised the need to have an expert appropriate to the alleged condition of the defendant.
- 1.192 Kids Company and Mind were the only respondents to say explicitly that they would want to see the expert test carried out by two medical practitioners (Kids Company preferred one psychiatrist and another medical practitioner). Mind stated that the requirement for two medical practitioners “provides protection for the defendant”. The Bar Council/CBA could “see merit” in retaining the requirement for medical evidence “in order to satisfy article 5 of the ECHR and that the court is able to make a proper determination in the light of expert medical/psychiatric opinion”.

⁸² The s 12 requirement is the requirement in the 1983 Act for at least one of the experts to be approved by the Secretary of State as having special experience in the diagnosis or treatment of mental disorder.

⁸³ See para 1.312 and following below.

Risks of allowing evidence from non-psychiatrists

- 1.193 The Nottinghamshire Healthcare NHS Trust was concerned that relaxing the specification as to the kind of expert evidence which would inform the court's decision could allow evidence from untrained people. This concern "appeared to arise from their experience of the quality of assessments and advice from court diversion schemes where there is no psychiatry or psychology input". The Trust was also perturbed that the accused might be coached by a lawyer to pass tests. Professor Bonnie emphasised that, whatever the field of expertise of the expert, he or she must have "specialised training and experience in conducting forensic assessments".

Risk of involving counsel in the assessment

- 1.194 The South Eastern Circuit warned against counsel being expected to contribute to the assessment of the accused.

PROVISIONAL PROPOSALS 8, 9, 10 AND 11

8: The present section 4A hearing⁸⁴ should be replaced with a procedure whereby the prosecution is obliged to prove that the accused did the act or made the omission charged and that there are no grounds for acquittal.

9: If the accused is acquitted provision should be made for a judge to hold a further hearing to determine whether or not the acquittal is because of mental disorder existing at the time of the offence.

[Para 6.140]

10: The further hearing should be held at the discretion of the judge on the application of any party or the representative of any party to the proceedings.

11: The special verdict should be determined by the jury on such evidence as has been heard or on any further evidence as is called.

[Para 6.152]

Option 5

Replace the section 4A hearing with a procedure whereby the prosecution is obliged to prove all elements of the offence. However, if the accused is acquitted there would be scope for a further hearing to determine whether or not the acquittal is on the basis of mental disorder existing at the time of the offence. If there is such a qualified acquittal, then the accused is subject to the disposal of the court.

[Para 6.9]

⁸⁴ See n 4 above.

- 1.195 Option 5 incorporated provisional proposal 8, and so responses showing support for either of those have been treated as favouring the one outcome.⁸⁵
- 1.196 Overall, there was support for provisional proposal 8, and for option 5 as compared with the other options, but respondents did not support the two-stage procedure and thus rejected provisional proposal 9. In that sense, option 5 was not uniformly accepted.
- 1.197 Support for option 5 was expressed by: Dr Loughnan and Professor Mackay, Professor Poole, Dr Duggan, Kids Company, the JCS, the South Eastern Circuit, the Law Society, Professors Poole and Mackay, Kids Company, Dr Loughnan, Dr Duggan and Dr Vizard.
- 1.198 The South Eastern Circuit supported option 5 because
- under the current system, no consideration is given to any possible defences. There may be a limited number of cases where a genuine defence such as self defence is currently unavailable. This is unsatisfactory as a defendant who may not have acted unlawfully will be detained for treatment once a jury finds that he “did the act”.
- 1.199 They gave the following example of how they saw a reformed procedure working:
- ... A section 4A hearing should bear closer resemblance to a ‘normal’ jury trial, namely it should seek to establish:
- Whether the accused did the act - ie that the correct person has been identified (the person who is on trial was responsible for the offence alleged against him).
- If he did the act, whether his actions were unlawful ie not in self defence. Plainly, if the accused was or may have been acting in self defence, he is entitled to be acquitted as he would be in a ‘normal’ jury trial.
- However, there may be cases where the defendant would not have acted as he did but for his mental problems.
- I envisage three stages in a simple stabbing case for example:
- (i) Did the defendant stab the victim?
 - (ii) If so, might he have been acting in lawful self defence?
 - (iii) Did his mental capacity or condition cause him to act in the way he did? If so, he should be detained for treatment to protect the public from further offending.

⁸⁵ Those in favour of proposal 8 were: HHJ Gilbert QC, Professor Peay, Dr Loughnan, Professor Poole, Dr Duggan, Dr Vizard, Just for Kids Law, PRT, Mind, and Kids Company.

... The result is that a jury would resolve stages one and two, whereas a judge would resolve stage three. If stage three was resolved by the judge, he would have to interpret the jury's decision as a "special verdict" or a "qualified acquittal" and deal with the accused accordingly. It may be preferable if the same tribunal of fact decided all issues, especially in circumstances where the determination of the final issue would lead to the detention of the accused. In many cases there may be no reason for leaving stage (iii) to the judge to determine.

However, in some circumstances, it may be inappropriate for a jury to hear the medical evidence ...⁸⁶

- 1.200 Carolyn Taylor preferred option 5, but thought that the Commission's suggestion that "as long as there is a sufficient evidential basis to raise the defence or partial defence then the representative of the accused can do so if he or she thinks that it is in the accused's best interest"⁸⁷ is too narrow a test and the advocate should be able to put forward any reasonable defence. The Law Society was of the same view. The Law Society supported proposals 9, 10 and 11.
- 1.201 Victim Support agreed with option 5, but noted that greater public education would be needed, as a section 4A hearing is less understood by the public than a trial.
- 1.202 Kids Company thought that separate procedures would be beneficial because "in fact procedurally the two questions would conflict with each other, if they were to be thought about concurrently. Evidentially, having a jury would also be problematic, as it could lead to risk of prejudice from evidence given by the medical practitioners in relation to unfitness. The two stage approach suggested provides a role for the jury to effectively signpost possible issues and whilst also offering the accused a route to acquittal because of mental disorder". HHJ Gilbert QC, on the other hand, referred to a case he had tried where the jury had clearly been able to cope with psychiatric evidence which was only relevant if they found that the accused had in fact killed the deceased. (The Crown failed to prove that he had.)

Agreement with reservations

- 1.203 Those who agreed with option 5 but with amendments or reservations were: HM Council of Circuit Judges, The Legal Committee of the Council of District Judges, Professor Poole, and the RCP. The RCP supported option 5, but one member commented, "The CP does not explore the effect of the Mental Health Act on the overall process of finding on unfitness to plead. In addition, the consultation does not explore how the issues of criminogenic behaviour are approached in other jurisdictions ie Europe and the USA in particular".
- 1.204 Professor Poole was not convinced that the distinction between the new verdicts proposed and a conviction was very meaningful. He also thought the proposals

⁸⁶ They referred here to paras 6.142 to 6.151 of CP 197 and provisional proposals 10 and 11.

⁸⁷ Para 6.23 of CP 197.

were complex and, by implication, disproportionately complex for the simpler cases.

Questions 3 and 4

3: Do consultees agree that we have correctly identified the options for reform in relation to the section 4A hearing? If not, what other options for reform would consultees propose?

4: If consultees do not agree that option 5 is the best option for reform, would they agree with any other option?

[Para 6.153]

The further hearing: proposal 9 not supported

- 1.205 Some respondents expressed support for option 5 but without the two-stage hearing (in other words, rejecting proposal 9) and others rejected option 5 because they did not support the two-stage hearing. Their objections to proposal 5 are explored here. Objections were both practical and principled.
- 1.206 HM Council of Circuit Judges wrote that option 5 is to be preferred, but the two-stage test is cumbersome. Further, they pointed out that it would probably cause additional anxiety to the accused. Mind thought that the relevance of the mental disorder of the accused could be determined in the single hearing, and, like the judges, was concerned about the effect of a further hearing on the accused. HHJ Gilbert QC also did not favour having a further hearing, and the Bar Council/CBA was not convinced of the benefit of a further hearing. Just for Kids Law was also not in favour of proposal 9.
- 1.207 The District Judges were not convinced of the need for the further hearing. They thought that the Scottish procedure merited further consideration.⁸⁸
- 1.208 Professor Peay, although broadly supportive of the proposals in general, was concerned about the prospect of a second hearing resulting in a special verdict of acquittal qualified by reason of mental disorder on two grounds. First, she thought such a verdict would “discriminate unjustly between cases where the prosecution fails to prove intent in an ordered accused, and those where the failure arises in cases of those with mental disorder”. The second ground is pragmatic, in that the same ultimate result can be reached by a finding of unfitness coupled with detention (if appropriate within the terms of the 1983 Act) under the civil powers.
- 1.209 The PRT wrote:
- While appreciating that PP9 would provide the opportunity to consider an appropriate disposal under the Mental Health Act – which may, for example, include much needed treatment or protection for the individual accused, and society at large, by means of a hospital order – PRT’s concern is that a so-called acquittal can result in the discretionary re-opening of the hearing.

⁸⁸ The Scottish procedure is described at paras 6.112 and following of the CP.

In principle, we understand why such a procedure might be necessary, and appreciate the inherent complexities pertaining to such a procedure, but wonder if a different framing of the outcome for an accused acquitted because there is no evidence of fault, would be beneficial.

- 1.210 The CPS did not support option 5. They approved of the approach in *Antoine*⁸⁹ and thought it “inappropriate to allow a defence to be raised on the instructions or evidence of a person found unfit to plead”. They saw option 5 as creating a hearing where the prosecution would put their case in exactly the same way as in a full trial but without the possibility of a conviction. Part of their objection was founded on the perception of the verdicts that could result as the final word whereas, they argued, a finding that a person is unfit to plead, and associated disposal, should be understood as a holding position. On this, see paragraph 1.331 below.
- 1.211 HHJ Tim Lamb QC raised the point that proposal 9 would lead to a point where the court could order the detention of an accused in hospital, based on judicial assessment of the accused’s state of mind at two points in time, whereas “a power to detain the dangerous, mentally disordered, acquitted, accused already exists” in the civil provisions in the 1983 Act.⁹⁰ He referred to the statement at paragraph 6.148 of CP 197 “The provision for a qualified acquittal, however, ensures that the public can be protected from an accused who may be dangerous” and comments that a psychiatrist is better placed to make an assessment of dangerousness than the judge. He suggested that, instead of the hearing envisaged in proposal 9, at the end of the section 4A hearing the judge could seek the view of a psychiatrist (a “psychiatric Assessor”) as to whether the accused should be sectioned under section 3 of the 1983 Act; or that the exercise of the power to detain under section 37 should depend upon the view of psychiatrists as to whether detention under section 3 was more appropriate.
- 1.212 The Bar Council/CBA thought that “at first sight option 5 (and its underlying reasoning) has much to commend it” but also wrote that they were “not yet persuaded that option 5 is needed or desirable”, and pointed out, in addition to the impact of a further hearing on the public purse and court time, that what was proposed was very close to a trial but that any acquittal would be a “Pyrrhic victory” for the accused because the acquittal would be qualified and could still be detained.
- 1.213 The Bar Council/CBA also argued that if part of the purpose of what they called the “unfitness to plead regime” is to alert the authorities to the need of a vulnerable person and/or the need of the public for protection, then those needs should be responded to regardless of whether D did what is alleged. They further argued that this might be easier if the unfitness to plead regime “was confined to a narrow band of cases where D’s disability is profound/evident”, but that if the band of cases which could fall into this category is wide, then it would not be so easy to address those risks.

⁸⁹ [2000] UKHL 20, discussed in Part 6 of CP 197.

⁹⁰ He refers specifically to s 3 of the 1983 Act.

- 1.214 The Bar Council/CBA also wrote that a person who cannot participate effectively in a trial may not be able to participate effectively in the hearings proposed in the CP “despite the protections woven into the procedure under option 5”. They illustrate the argument with reference to cases where the material facts or answers are within the mind or knowledge of the accused and cannot be communicated to the representative.

Alternative suggestion

- 1.215 HHJ Gilbert QC stated that “the narrow definition of ‘act’ in section 4A [in *Antoine*] does not accord well with the complexities of the offences which come before the courts”. He gives several examples of common offences where this issue arises. (HM Council of Circuit judges made the same point.) One such example was:

Suppose A and B are each charged with arson, reckless as to whether life would be endangered, in circumstances where each has set light to scrap paper in a wastebasket in his own flat, and which got out of control and then spread to the flat next door. The prosecution cannot prove any crime against either A or B (it was after all in each case his own paper in his own wastepaper basket) unless it can prove that he had the requisite intent or the appropriate measure of recklessness. If it would have to prove that against A, who is fit to plead, why should it not have to do so against B, who is not?

- 1.216 HHJ Gilbert QC and HM Council of Circuit Judges noted that the person under a disability must have the same protection as one who is not. HM Council of Circuit Judges went on to note also that protection of the public requires it to be possible to take steps where the accused’s mental state [mens rea] resulted from his or her mental disorder.

- 1.217 HHJ Gilbert QC stated that “it is objectionable for a rule of law to deprive a defendant, albeit one unfit to plead, of the protection afforded all citizens by the principle that a deprivation of liberty consequent on criminal conduct only occurs if the prosecution has proved all the requisite elements of an offence”. This leads him to the conclusion that a reformed procedure “must reflect the usual incidence of the burden of proof” and so the prosecution must prove “(a) that the offence was committed by the defendant and (b) that no grounds existed for an acquittal save those arising from a mental disorder”. The court (by which he means the jury) could then distinguish between three situations:

(a) offences which *would* have been proved against the defendant had he not been suffering from a mental disorder (eg arson where the subjective criterion prevents him appreciating the consequences of his acts);

(b) offences which *would* have been proved against the defendant whether or not he was suffering from a mental disorder (ie he may be unfit to plead, but his mental disorder did not affect either his actions or intentions at the time of the offence”) ...;

(c) offences which *would not* have been proved against the defendant in either case eg offences of alleged violence where the prosecution have failed to show an unlawful act, or sexual cases where evidence

shows that the prosecution would have failed to establish an absence of reasonable belief”.⁹¹

The judge was confident, based on his experience, that juries would be able to address these issues fairly.

- 1.218 HM Council of Circuit Judges suggest an equivalent to (a): that the jury should be able to return a finding “that there are no grounds for an acquittal which are not connected with his mental disorder or learning disability”, and that this conclusion should be open to a jury without a further hearing. The suggestion of the South Eastern Circuit was similar (see paragraph 1.198 above).

Support for other options

- 1.219 Just for Kids Law preferred option 4.
- 1.220 Compass Psycare disagreed with option 5 and preferred option 3, meaning that they thought that once there has been a finding of unfitness, the trial should proceed but with the accused’s interests presented by a legal representative appointed by the court. They believe that the Scottish model is “punitive and discriminatory by abolishing acquittal” and because under it the accused acquires a criminal record without, as they see it, any chance to challenge it. They would abolish the section 4A hearing completely and focus on a hearing to determine competence (by jury). If there was a finding of incompetence the accused “should be sent to a psychiatric hospital for treatment for restoration of capacity, regardless of how long it takes”. They anticipated that in the vast majority of cases the accused would regain competence, and the trial could then proceed. They noted that if capacity cannot be restored, then the accused could be detained indefinitely, but thought that such cases would be rare. Compass Psycare wrote:

Considering that insanity acquittees are always remanded to hospital for life (or till cured)⁹² what is the point of acquittal? ... The matter as we see it is simple. Criminal trial is a two-stage process. We can’t reach the second stage (of determination of guilt – by jury, judge or whatever) unless the first stage is cleared (capacity to stand trial). Why make it so complicated?

Applicability of article 6

- 1.221 One of the points made in the CP was that article 6 of the ECHR does not apply to a section 4A hearing, and that this has been the subject of criticism.
- 1.222 Just for Kids Law picked up this comment, and added:

We would include within this the protection under article 6 of the European Convention on Human Rights as is stated within the consultation paper.

⁹¹ Emphasis in the original.

⁹² This is not the case: see the Law Commission publication, *Insanity and Automatism: A Scoping Paper* (2012) paras 2.104 to 2.134.

We believe the argument of loss of freedom (ie a potential hospital order) should entitle a defendant to protection under article 6. This would entitle defence representatives to raise defences that are apparent on the papers ie self-defence, duress and others that are currently not available to an unfit defendant.

Article 6 protection would also give the defendant the same protection as “fit” defendants with regards to admission of hearsay and other available protections.

1.223 The PRT stated that it was “pleased to note that in reforming the present section 4A hearing ... the rights of the accused would be protected under article 6”, Mind hoped that article 6 protection would result from reform, and Kids Company gave the protection afforded the accused by article 6 as a reason for preferring option 5.

1.224 In the CP we stated that our preferred provisional proposal, option 5, would be “to all intents and purposes akin to a formal charge” and we thought that would “justify the application of article 6”.⁹³ Professor Mackay was not convinced option 5 would give adequate article 6 protection.

Question 5 (alternative verdicts)

1.225 Should a jury be able to find that an unfit accused has done the act and that there are no grounds for acquittal in relation to an act other than that specifically charged?

[para 6.159]

1.226 This question was answered in the affirmative by the South Eastern Circuit, HM Council of Circuit Judges, the Law Society, HHJ Tim Lamb QC, the JCS, Professor Poole, Dr Duggan, Dr Vizard, the RCP, Just for Kids Law, and the National Autistic Society.

1.227 The Legal Committee of the Council of District Judges pointed out that alternative verdicts are only available in the magistrates’ courts in a limited range of circumstances, and so such a reform would be fundamental in those courts.

1.228 The Bar Council/CBA thought that the indictment should include alternative charges, and “routes to verdict” could be useful, but they thought that a question to be answered positively (by a jury) was preferable to one to be answered negatively; the finding of “no grounds for acquittal” was potentially confusing.

1.229 The CPS answered this question in the negative; they could not envisage any circumstances in which it would be useful. This view contrasts with that of the Law Society who thought it could be relevant in relation to a charge of murder reduced to manslaughter due to diminished responsibility, though they acknowledged that there might be no impact on other kinds of cases. The JCS thought it would be of limited impact.

⁹³ Para 6.54 of CP 197; see also para 6.134.

- 1.230 Kids Company answered this question in the negative: they would wish to see a separate hearing for each act in respect of which there could be a finding against the accused.
- 1.231 Professor Mackay described this proposal as “an interesting way of getting round the problem that DR [diminished responsibility] is unavailable in the ‘trial of the facts’”. He thought, however, that there could be complications following from the varying burden of proof, and also that there could be an unwelcome consequence for disposals available where a defence of diminished responsibility succeeded.

PROVISIONAL PROPOSAL 12

- 1.232 Where the Secretary of State has referred a case back to court pursuant to the accused being detained under a hospital order with a section 41 restriction order and it thereafter becomes clear beyond doubt (and the medical evidence confirms) that the accused is still unfit to plead, the court should be able to reverse the decision to remit the case.

[para 7.21]

- 1.233 Thirteen respondents addressed the proposal and they all either agreed or stated that they had no objection to it. These were the JCS, HM Council of Circuit Judges, the South Eastern Circuit, the Law Society, Professor Mackay, Professor Poole, Dr Duggan, Dr Vizard, Charles de Lacy, Nicola Padfield, Just for Kids Law, the PRT, and Victim Support.
- 1.234 Master Venne (then Registrar of Criminal Appeals) suggested that consideration be given to “whether any attendant rights of appeal need to be created and, if so, by whom such rights may be exercised”.
- 1.235 Compass Psycare thought that if their suggestion was adopted then this issue would not arise.
- 1.236 The CPS suggested that there should be a procedure for determining fitness, when a case is remitted to the court, “that mirrors the original procedure for determining unfitness”, so that the decision as to whether the accused is fit is that of the court, not the clinician. If this suggestion were adopted, that would be a different way of solving the problem behind proposal 12.
- 1.237 The CPS also drew attention to the fact that the legislation “is silent as to whether a person can be prosecuted if he becomes fit to plead after he has been the subject of a hospital order (without a restriction order), a supervision order or an absolute discharge made after a section 4A hearing”.

Related consideration: is a finding of unfitness a “holding position”?

- 1.238 There was an assumption in the CP that remittal for trial in the context of unfitness to plead is only available where a hospital order with restriction order had been made. It may, however, be that, no matter what the disposal, if a person who had been found unfit to plead subsequently became fit, then he or she could be remitted for trial. Such an approach would chime with the goal of having a trial wherever possible (see views of, eg, Victim Support and others,

above) and with the views of those who favoured restoring fitness to stand trial through treatment where possible (see the Nottinghamshire Healthcare NHS Trust).

- 1.239 That assumption may merely be the reflection of the practical realities: if the individual is subject to a restriction order, then the state (ie the clinicians) will be aware when he or she becomes well, whereas if he or she is not detained, the state will simply not know. Professor Mackay explained the situation as follows:

The rationale for limiting remission to section 41 disposals is as follows. Originally all unfitness to plead (and insanity) cases resulted in the equivalent of a section 41 disposal. This meant that C3 Division of the Home Office, now the MoJ, had jurisdiction in all such cases and was notified of them all. When flexibility of disposal was introduced this ceased to be true. The MoJ only has jurisdiction and is notified of those cases which result in restriction orders. In all other cases they have no locus standi which means in turn that for all practical purposes remission cannot be made in such cases. However, there seems to be nothing in principle to prevent the CPS from mounting a trial in non-restriction order cases once the unfit D has recovered, if it considers that this is in the public interest. As I understand it the CPS has an internal Circular to this effect or did have.

- 1.240 Professor Grubin commented that in his research he found that “the number of cases returned for trial increased five-fold when Leon Brittan, then the Home Secretary,⁹⁴ said that being unfit to plead was a postponement of a trial, not a substitute for one”. Professor Grubin suggested that the court which dealt with the person at the time of the finding of unfitness and disposal could indicate at that stage whether the public interest would be likely to require the individual to be remitted for trial if he or she became fit to stand trial. The RCP made a similar suggestion.

Related suggestion: more use of remand powers

- 1.241 It may be that the powers of the court to remand an accused for treatment, which could have the ultimate result that a trial proceeds, are not widely known or used. See the CPS response to Q2 above.

PROVISIONAL PROPOSAL 13

- 1.242 In the event of a referral back to court by the Secretary of State and where the accused is found to be unfit to plead, there should not be any need to have a further hearing on the issue of whether the accused did the act. This is subject to the proviso that the court considers it to be in the interests of justice.

[para 7.21]

- 1.243 Provisional proposal 13 fits with provisional proposal 12 in that a consequence of reversing the decision to remit the case would then be that there would not have

⁹⁴ Which was 1983 to 1985.

to be another section 4A hearing for a disposal to be ordered (unlike under the present law).⁹⁵

- 1.244 Twelve respondents addressed the proposal and they all either agreed or had no objection to it. These were the JCS, Master Venne, HM Council of Circuit Judges, the South Eastern Circuit, the Law Society, Professor Mackay, Professor Poole, Dr Duggan, Just for Kids Law, the RCP, the PRT, and Victim Support.
- 1.245 Master Venne (then Registrar of Criminal Appeals) thought this was an “eminently sensible” proposal, and noted that the existing right of appeal (see section 15 of the Criminal Appeals Act 1968) would be applicable to any second finding of unfitness, but warned against the creation of a second right of appeal against the original finding on the trial of the facts.

PROVISIONAL PROPOSAL 14

- 1.246 In circumstances where a finding under section 4A is quashed and there has been no challenge to a finding in relation to section 4 (that the accused is under a disability) there should be a power for the Court of Appeal in appropriate circumstances to order a re-hearing under section 4A.

[para 7.59]

- 1.247 This lacuna in the court’s powers has been noted in *Norman*,⁹⁶ *MB*⁹⁷ and, since the publication of CP 197, also in *McKenzie*⁹⁸ and *B*.⁹⁹
- 1.248 Fourteen respondents addressed the proposal and they all either agreed or had no objection to it. They were the JCS, Master Venne, HM Council of Circuit Judges, the Law Society, Professor Mackay, Professor Poole, Dr Duggan, Dr Vizard, Nicola Padfield, the RCP, Just for Kids Law, the PRT, Victim Support, and Kids Company.
- 1.249 Master Venne described it as “vital” that the Court of Appeal should have such power.

Question 6:

- 1.250 Are there circumstances in which an accused person who is found to have done the act and in respect of whom there are no grounds for an acquittal should be able to request remission for trial?

[para 7.26]

- 1.251 The consultees who answered this question affirmatively were the JCS, HHJ Tim Lamb QC, HM Council of Circuit Judges, the Law Society, the Bar Council/CBA, Professor Mackay, Just for Kids Law, the National Autistic Society. Most of these

⁹⁵ See the case of *R (Ferris) v DPP* [2004] EWHC 1221 (Admin).

⁹⁶ [2008] EWCA Crim 1810, [2009] 1 Cr App R 13.

⁹⁷ [2010] EWCA Crim 1684, [2011] Mental Health Law Reports 163.

⁹⁸ [2011] EWCA Crim 1550, [2011] 1 WLR 2807.

⁹⁹ [2012] EWCA Crim 1799, [2012] Mental Health Law Reports 310.

respondents thought the situation would only arise rarely.¹⁰⁰ The CPS thought that their suggestion for there to be a procedure for the court to establish fitness¹⁰¹ would make it possible for a person who has been found unfit to plead to bring the matter back to court, for fitness to be reassessed and, if he or she is found fit, to remit the case for trial.

- 1.252 Four examples were provided by consultees of circumstances in which a right to request remission might be appropriate. HHJ Tim Lamb QC gave the following situation:

Suppose that D1 is indicted with D2 and D3 on two counts:

Ct 1: conspiracy to supply Class A drug, all three defendants; Ct 2: D1 alone, possession Class A drug with intent to supply. D1 is found unfit for such a complicated trial. The trial against D2 and D3 goes ahead and collapses. D1 may have the capacity to fight a simple possession case and thereby avoid the risk of a section 37 order.

- 1.253 Three respondents referred to situations in which new evidence comes to light. The District Judges thought there was force in the arguments against the accused having the right to request remission for trial, but accepted that there could be very limited grounds where it would be appropriate. The arguments against a right to request remission for trial centred on the likely lapse of time between the original findings, which would have required “all elements of the offence to be proved and all potential defences considered”, a subsequent hearing and the likely difficulty of finding witnesses and those witnesses being able to recall the events.
- 1.254 The Bar Council/CBA response referred to the possibility of information coming available which was not available at the time of the section 4A hearing, such as where the accused recovers and is able to provide information.
- 1.255 Professor Mackay gave an illustration of a person charged with a sexual offence, who is unfit by reason of a subsequent accident but who recovers: “In such a case should D not be permitted to try to clear his name?”
- 1.256 Professor Mackay also commented that there is a “general worry that in some cases where a severely mentally impaired D is charged with an offence the section 4A hearing becomes a matter of form rather than of substance and that the police may not thoroughly investigate such a case”.
- 1.257 The Bar Council/CBA thought it might be appropriate to impose a time limit, or to restrict the circumstances in which the right could be exercised. They also raised the issue of whether the court’s powers of disposal might need amending in the event of a subsequent conviction (such as where D had been hospitalised for many months).

¹⁰⁰ Some of the consultees found the question, or the sequence of circumstances in which the question would arise, confusing, and their responses are not included here.

¹⁰¹ See para 1.236 above.

- 1.258 The South Eastern Circuit referred to the connections with the policy behind provisional proposals 12 and 13. Underlying those proposals is the awareness that evidence was heard, covering all elements of the offence, and a conclusion reached by the jury, which was adverse to the individual. If the individual wishes to challenge that conclusion, then that “would amount to an appeal against the finding and a re-run of the issues in front of a different jury”.
- 1.259 Professor Poole was “on balance” against this suggestion.
- 1.260 The RCP thought that people would be unlikely to make use of this possibility. Their reasoning was as follows. The Secretary of State only exercises the power to remit in the most serious of cases, namely ones which, if a conviction results, are likely to lead to lengthy prison sentences or indeterminate sentences. The chances of a person being released from hospital following conviction are lower than following a section 5 disposal, so the individual is unlikely to want to bring the matter back to court. This response overlooks the possibility of a person against whom a finding of fact has been made wanting to exercise this right in a less serious kind of case. As other respondents point out, a finding that a person has committed what would be a sexual offence, with a placing of the name on the Sex Offenders Register, is something that may be felt to be serious by the person concerned even if he or she is not detained for a lengthy period.
- 1.261 The CPS gave a comprehensive answer, highlighting a number of aspects of law and practice which need to be considered and made to work in concert.
- 1.262 Master Venne thought that consideration should be given to attendant appeal rights, and the question of who ought to exercise them.
- 1.263 HM Council of Circuit Judges raised the issue of an accused who had been found unfit being able to apply to have his or her name removed from the Sex Offenders Register, and commented that the absence of any procedure for such an application could be viewed as unjust.

JOINT TRIALS

Question 7

- 1.264 Should an accused who is found to be unfit to plead (or to lack decision-making capacity) be subject to the section 4A hearing in the same proceedings as co-defendants who are being tried?
- [para 7.44]**
- 1.265 Consultees were split on this issue.
- 1.266 Thirteen respondents thought it should be possible for the hearings to be held jointly, though the decision should be made on a case by case basis, and some respondents (such as Just for Kids Law) emphasised that it should probably be the exception rather than the rule. Those respondents who thought this possibility should be allowed for referred to the savings of time and cost in having one joint hearing, and the attendant reduced stress on witnesses as compared with repeated hearings. The JCS thought there would be “a risk of the appearance of unfairness” if there were separate hearings.

- 1.267 The CPS was one of the respondents in favour of the possibility of joint hearings. They thought that the usual rules which determine which charges and which defendants should be tried together should apply “so that in the majority of cases, there should be a single trial for those who are jointly indicted” because it would reduce distress and inconvenience to witnesses and is more efficient. They emphasised the court’s power to order severance “where there is a risk of injustice to any defendant”.
- 1.268 HM Council of Circuit Judges thought it could, in some cases, be helpful to the unfit accused to have a joint hearing as the evidence called in relation to the trial could provide the “objective” evidence of the unfit accused’s mental condition at the time of the alleged offence, which the accused himself or herself might not be able to do.
- 1.269 The Legal Committee for the Council of District Judges thought concerns about a joint trial would be “alleviated by the protective factors envisaged by the reformed section 4A”.
- 1.270 Six respondents answered “no”;¹⁰² in other words, there should be no power to order the section 4A hearing and the trial to proceed together.
- 1.271 The Law Society thought it would be too confusing and difficult for juries to be able to distinguish the types of findings that they would be required to make”. They also thought the possibility of joint hearings conflicted with Part III 30.4 of the Consolidated Criminal Practice Direction, as did Carolyn Taylor (a criminal solicitor). That paragraph reads:
- If a vulnerable defendant, especially one who is young, is to be tried jointly with one who is not, the court should consider at the plea and case management hearing, or at a case management hearing in the magistrates’ court, whether the vulnerable defendant should be tried on his own and should so order unless of the opinion that a joint trial would be in accordance with Part 1 of the Criminal Procedure Rules (the overriding objective) and the interests of justice. If a vulnerable defendant is tried jointly with one who is not, the court should consider whether any of the modifications set out in this direction should apply in the circumstances of the joint trial and, so far as practicable, make orders to give effect to any such modifications.
- 1.272 Carolyn Taylor added, “Para III.30.4 of the PD specifically states that there should not be a joint trial if it is contrary to the overriding objective of Part 1 of the CPRs and the interests of justice”. Her view is that there should never be joint hearings.
- 1.273 Kids Company provided an example of a vulnerable young person and some insight into the difficulties he faced being tried jointly with those who had allegedly influenced him (gang behaviour).

¹⁰² They were the National Steering Group, the Law Society, Carolyn Taylor, HHJ Tim Lamb QC, the PRT, and Dr Duggan.

- 1.274 Master Venne drew our attention to *MB*¹⁰³ which was decided after publication of the CP, in which “B subsequently successfully appealed the jury’s finding of fact against him on the basis that the trial of the facts should not have been conducted jointly with erstwhile co-accused being tried on indictment, notwithstanding his apparent interim recovery and remission for trial by the Secretary of State”. In that case the trial judge had originally directed that the case against MB (and another unfit defendant) should be heard separately from the prosecution against the fit defendants, but that decision was overturned by the Court of Appeal as regards MB and so the trial and the section 4A hearing had proceeded together.¹⁰⁴ The appeal by MB against the finding of fact reached in that joint hearing succeeded on the basis that a co-defendant (MB’s wife) based her defence on violence she alleged by MB against her – a cut-throat defence.

MAGISTRATES’ COURTS AND YOUTH COURTS

Question 8

- 1.275 Do consultees think that the capacity based test which we have proposed for trial on indictment should apply equally to proceedings which are triable summarily?

[para 8.37]

- 1.276 Almost all respondents who commented on the proposals and questions in Part 8 thought that the same principles should apply in the lower courts as in the Crown Court. Most said that the same test of unfitness should apply, and respondents’ concerns focused on the practical consequences of such a change. (For the exception, see below.) These included the JCS, the National Bench Chairmen’s Forum, the Legal Committee for the Council of District Judges, the South Eastern Circuit, Carolyn Taylor, the Law Society, the CPS, the Bar Council/CBA, Professor Mackay, the RCP, medical professionals (Dr Duggan, Professor Poole, Edenfield Centre, Compass Psycare, Dr Rogers, Dr Vizard), the National Steering Group, Just for Kids Law, the PRT, Victim Support, Kids Company, and the National Autistic Society. The Law Society said explicitly that “the lack of a test of unfitness to plead and a tailored procedure in summary proceedings has proved problematic in the experience of our members”.
- 1.277 Nicola Padfield thought that it was “difficult to assess the Law Commission’s proposals without much more detailed research on the current problems in practice”.
- 1.278 Just for Kids Law pointed out that a guilty plea in the magistrates’ courts is sometimes relied upon as evidence of fitness to plead, despite the different practical considerations that apply to defendants in the magistrates’ courts who might be unfit to stand trial.
- 1.279 The one respondent who answered question 8 in the negative was HHJ Tim Lamb QC. He thought that the proposed test was “far too complicated and time

¹⁰³ *MB* [2010] EWCA Crim 1684, [2011] Mental Health Law Reports 163.

¹⁰⁴ See *B* [2008] EWCA Crim 1799, [2012] Mental Health Law Reports 310.

consuming for summary proceedings”. The CPS thought expert reports on fitness could take the less formal nature of summary proceedings into account.

- 1.280 HM Council of Circuit Judges thought that consideration should be given to “providing that if a case raises an issue of unfitness to plead, it should be committed to the Crown Court for determination” because a hospital order is a serious deprivation of liberty. If, contrary to this suggestion, unfitness cases are to be dealt with in the magistrates’ courts, the judges would support a “comprehensive and logical regime which is essentially the same as that to be applied in the Crown Court”.
- 1.281 The District Judges thought that if unfitness was raised in the magistrates’ courts and a capacity-based test was introduced, then such cases should be reserved to the District Judges.
- 1.282 The CPS thought that expert reports applying a capacity-based test in the magistrates’ courts “should take into account the less formal nature of the magistrates’ court”.
- 1.283 The PRT thought that in relation to youth defendants the capacity based test should be along the lines of the *Gillick*¹⁰⁵ competence assessment “to regularise the protections afforded to children in the parallel jurisdictions of youth and civil/family courts”.
- 1.284 The National Bench Chairmen’s Forum made the following points:

The procedure currently in place provided by s 37 of the MHA 1983 is less than satisfactory. This is particularly the case in the Youth Court, where the issue of capacity is more common and the court has jurisdiction to hear more serious charges which in the case of an adult are tried in the Crown Court.

Within the magistrates’ courts, the lack of a formal procedure leads to difficulties in case management and the onus rests with defence practitioners, rather than the court, to raise the issue of the accused’s unfitness to plead. The defence practitioners’ overriding responsibility is to act in their client’s best interests. This decision will often be based upon offence type and the likely final disposal rather than the accused’s relative capacity. The introduction of a capacity based test would put more emphasis on the defendants’ ability to understand the trial process and give the court greater control of how the proceedings are to be conducted.

...

The current procedure is vague and can obstruct case management....

¹⁰⁵ *Gillick v West Norfolk and Wisbech AHA* [1986] AC 112.

In summary proceedings a higher proportion of accused appear before the court unrepresented. The introduction of a defined capacity test will ensure the development of appropriate case management directions and specific training. In such circumstances consideration should also be given to provide for the appointment of a legal representative to protect the interests of a defendant. In doing so, the overriding objective to deal with criminal cases justly would be advanced and a consistent approach will be achieved.

- 1.285 HM Council of Circuit Judges were supportive of the Bradley approach. This approach envisages a system in which accused people are diverted, meaning either that they are dealt with outside the criminal justice system or that they are given other help to tackle mental disorders pre-sentence, or as part of sentencing.
- 1.286 Several respondents linked their concern about the lack of any test of unfitness applicable in the magistrates' courts and youth courts to the reduced range of possible outcomes. As HM Council of Circuit Judges put it, "the result [of the available procedures under s 37 of the 1983 Act] is that there are likely to be defendants who should not be standing trial but without a trial would be unlikely to be offered any assistance. This approach is inappropriate."
- 1.287 So the judges think it is sometimes the case that a matter is pursued, even though it should not be, because there is no other way to secure the right outcome (a disposal involving treatment). Conversely, the CPS pointed to several examples of cases being dropped because there is no appropriate disposal. The CPS expressed concern about the consequent risk of further offences and danger to the public. Kids Company, similarly, referred to the chance to receive treatment earlier in the process which could result from reforms, leading to prevention of further offences and "a positive cost implication for the criminal justice budget".
- 1.288 The District Judges suggested making a supervision order available in the magistrates' courts, as it is in the Crown Court particularly as regards young defendants. The CPS thought the possible disposals should be the same in the Crown Court and in the magistrates' courts. (See further the section on reform of disposals below.)
- 1.289 One respondent (Professor Poole) expressed disappointment at the lack of clear proposals for summary courts in CP 197.
- 1.290 As to resources, several respondents pointed out that the numbers of people being found unfit to stand trial would increase if there were such a test and procedure in the magistrates' courts, and the numbers of people who had to be assessed would exceed the number found unfit, and there was concern at (a) the potential cost, (b) the potential for delay, and (c) whether the expertise would in fact be available. The South Eastern Circuit, however, thought costs would not necessarily increase as they anticipated that a District Judge would usually be assigned to cases where the question of fitness was raised.

1.291 One criminal practitioner (Carolyn Taylor) thought that access to medical expertise is better in magistrates' courts than in the Crown Court¹⁰⁶ because of the duty psychiatric scheme (akin to the Liaison and Diversion scheme, or a different name for the same scheme). Compass Psycare suggested contracting Court Clinics to NHS Trusts who could ensure that a defendant could receive a capacity assessment quickly.

1.292 HM Council of Circuit Judges commented:

Another criticism of the present system is the haphazard way in which the issue of unfitness is raised. The criticism of the lack of screening fails to take into account the effect of the gradual implementation of the recommendations in the Bradley Report. Although there is, at the moment, no nation-wide programme, there is increased awareness amongst Police, Probation Officers, Court officials and the judiciary of the incidence of mental disorder issues amongst defendants. Further they are involved in devising effective procedures to identify those accused of a criminal offence who are or may be suffering from mental disorders or learning disabilities or difficulties and, where appropriate divert them either from the criminal justice system or to appropriate agencies who can assist. This aspect may be of significance when considering the position in relation to cases being heard in the magistrates' courts".

Question 9

1.293 Do consultees think that if an accused lacks decision-making capacity there should be a mandatory fact-finding procedure in the magistrates' courts?

Question 10

1.294 If consultees think that there should be a mandatory fact-finding procedure, do they think it should be limited to consideration of the external elements of the offence or should it mirror our provisional proposals 8 and 9?

[para 8.37]

1.295 Almost all those who answered these questions thought that the procedure in the magistrates' courts should mirror that proposed for the Crown Court.

1.296 The CPS thought a statutory procedure for the magistrates' courts would be an improvement ("[it] would reduce the current confusion surrounding the use of the magistrates' courts powers under section 37(3) MHA 1983 and provide the same safeguard against compulsory detention and treatment in hospital that exists in the Crown Court" and "[it] would achieve clarity and certainty") but warned that it would "need to be drafted in a way that did not detract from the inherently simple and summary nature of justice in magistrates' courts". The JCS supported a procedure which would allow for facts to be established in a "transparently fair hearing", and for appropriate interventions to be ordered for public protection.

¹⁰⁶ Contrary to para 8.33 of CP 197.

- 1.297 Two respondents (CBA/ Bar Council, and the District Judges) thought that it should be in the court's discretion whether to proceed with a fact-finding procedure in the magistrates' courts. HHJ Tim Lamb QC answered question 9 in the negative.
- 1.298 It is important to note here that not all respondents agreed with the proposal as to what should happen in the Crown Court (see proposals 8 and 9), and therefore even if consultees agreed that the position in the magistrates' courts should mirror the position in the Crown Court it does not necessarily follow that they support a reformed section 4A hearing in the summary courts. See, for example, the response of the CPS, who did not support proposal 8 or 9, and that of the PRT who had concerns about proposal 9 in respect of both courts.

YOUTH COURTS

Question 11

- 1.299 Do the matters raised in questions 8, 9 and 10 merit equal consideration in relation to the procedure in the youth courts?

[para 8.68]

- 1.300 Nineteen respondents addressed this question, and eighteen of them answered, "Yes". The other (Association of Panel Members)¹⁰⁷ offered a fuller account of how they thought the criminal justice system should deal with children which did not directly address the question.
- 1.301 An important point made by more than one respondent was that youth courts hear more serious cases than magistrates' courts, because a charge which in the case of an adult would be heard in the Crown Court may, if the person charged is a youth, be heard in the youth court.
- 1.302 The National Bench Chairmen's Forum¹⁰⁸ emphasised that a suitable procedure for unfit youths in the youth courts would enhance the statutory objective of the youth justice system to prevent offending by children and young people.¹⁰⁹
- 1.303 Nicola Padfield thought that the treatment of children and young people in the criminal justice system is a matter of serious concern:

There are also some dreadful stories percolating up from the youth court: read *CPS v P* [2007] EWHC 946 (Admin). It beggars belief that the CPS appealed by way of case stated from the sensible decision of a District Judge to stay as an abuse of process criminal proceedings against a boy aged 11 with very significant problems.

¹⁰⁷ "AOPM". AOPM is a "membership organisation for the 5400 community volunteers supporting Youth Offending Teams".

¹⁰⁸ The National Bench Chairmen's Forum "provides a framework to support the 250 Chairs of Magistrates Benches in England and Wales".

¹⁰⁹ Crime and Disorder Act 1998, s 37.

Indeed, I wrote in *Archbold News*¹¹⁰ that it is disconcerting to think that criminal proceedings appear to have had priority over civil proceedings in this case: we are told that the local authority commenced care proceedings only on June 12, 2006, after these (criminal) proceedings had been stayed. Proceedings in respect of a full care order were due to start in April 2007. Surely civil proceedings under the Children Act 1989 should have been considered before the “sledge hammer” of a criminal prosecution, especially when one is dealing with a child with significant learning difficulties?

- 1.304 The CPS referred to anecdotal evidence of cases being stayed as an abuse of process because the youth lacks sufficient cognitive ability to participate in the trial, and to a greater extent than the CP stated. This would point to an adequate and suitable procedure being needed, for fair trials and for public protection.
- 1.305 The CPS response on this question was lengthy and deserves reading in full, as do the responses from Dr Vizard and from the AOPM.
- 1.306 Two respondents (District Judges and Dr Vizard) noted that an approach which took proper account of the mental condition of children and young people would “undoubtedly” increase the number of pre-trial hearings in the youth courts. Dr Vizard noted from her practice that when she and her colleagues do pre-sentence reports on youths “it is very likely that our cognitive testing and psychiatric evaluation will find that they are within the learning disability range and also that they have a range of psychiatric disorders” but that none of these matters will have been raised earlier in proceedings. Her view is that the law as it stands on unfitness to plead and juvenile defendants is itself unfit. Dr Duggan’s experience confirms this picture: “From my experience of special measures in youth courts a proportion of children are put through the trial process when they cannot effectively participate and there is a presumption that this is OK”.
- 1.307 The PRT thought that the developmental immaturity of children meant that additional safeguards should be put in place.
- 1.308 The Broadmoor psychiatrists expressed the view that, for all defendants under 18, “assessment of unfitness to plead should include an assessment of cognitive function”.
- 1.309 The AOPM was concerned that the proposals were

consistent with a process-driven, criminalising system of juvenile justice, with little or no focus towards effective outcomes for young people involved in low level crime; it does not allow an exit route from the criminal justice system for children suffering from a learning disability and retains the default of custodial sentencing as a remedy for breaches arising from offences committed by such children, that did not warrant custody in the first instance, eg ASBOs ... children are not guaranteed the same protection from conviction, enjoyed by adults.

¹¹⁰ See (2007) 5 *Archbold News* 3, 4.

The AOPM proposes an entirely different way of dealing with children who are currently classified as young offenders.

Question 12

- 1.310 How far, if at all, does the age of criminal responsibility factor into the issue of decision-making capacity in youth trials?

[para 8.69]

- 1.311 Sense saw a direct relationship between the two “because children who are born with a dual sensory impairment or who lose one or both senses at a young age develop at a much slower rate than sighted hearing children”. They concluded from this that a fixed age of criminal responsibility at 10 years “indirectly discriminates against deafblind children whose grasp of the concepts of right and wrong would generally be achieved at a later age”.
- 1.312 The JCS thought that “the court should be required to decide, on the basis of expert evidence, whether the accused, either adult or youth, has the capacity to make decisions” and “the factoring in of the age of criminal responsibility would risk obscuring the issue to be addressed”.
- 1.313 The CPS, similarly, saw chronological age as slightly beside the point: “The emotional maturity of the young person, IQ, disabilities, disorders, learning difficulties and difficulties in speech, communication and language play a greater role in determining decision making capacity than chronological age alone”. They noted that, “The CPS will already have considered chronological age when deciding whether the Full Code Test has been satisfied”. The BPS took a similar view: “Psychologists would recognise that there is variation in cognitive functions between people of the same age. Perhaps it would be appropriate to have a test of capacity rather than a simple estimate based upon age”.
- 1.314 The Edenfield Centre, on the other hand, suggested that there could be “an age limit below which all children could reasonably be assumed to be of a developmental level that would not be consistent with having capacity to participate in a trial”. In other words, whereas the concept of age of criminal responsibility is about whether a child should be held responsible, there could be a separate legal presumption about fitness to participate in proceedings.
- 1.315 The South Eastern Circuit was firmly of the view that the age of criminal responsibility should be kept quite separate from the issue of fitness to plead.
- 1.316 The Law Society, by contrast, thought that “the age of criminal responsibility is a very considerable factor in relation to the issue of decision-making capacity in youth trials”, and the Bar Council/CBA thought it a material consideration, especially in relation to the accused’s “developmental maturity”. HM Council of Circuit Judges also thought the issue of the age of criminal responsibility was highly relevant:

If the test is to be based on decision-making capacity, we consider it is relevant not only to consider the physical age of the child but also the ‘developmental age’ in which term we include the mental age. It must surely be wrong to deal with a youth who has lived for 14 years

but who has a mental age of 9 when the law would not allow the prosecution of a 9 year old. The mental age of the accused needs to be factored into consideration of his capacity.

- 1.317 The RCP argued that the age of criminal responsibility is clearly relevant to decision-making, but also to the future disposal of a young defendant, and that “there is a real need to re-introduce *doli incapax*”. Just for Kids Law thought it significant that “both neurobiological immaturity and psychological immaturity together impact the way that adolescents respond in or to situations”.
- 1.318 Raymond Arthur submitted a paper in which he proposed “the adoption of a welfare approach to child offending ... with respect to those who are prosecuted, ... entails recognising fully the range of difficulties that they are likely to face throughout the court process, and taking steps to address them”. He referred to work carried out by the PRT,¹¹¹ and others,¹¹² and to *Kunnath v The State*.¹¹³
- 1.319 The District Judges noted that the connection between the two issues lies in the fact that if the age of criminal responsibility is at 10 then the decision-making capacity of very young defendants will be a live question. The response of the National Bench Chairmen’s Forum developed this point:
- ...the accused’s age can be an important consideration when looking at unfitness to plead and the child’s level of understanding. We would suggest that for children aged 10 – 14 the question of whether they can understand and follow the proceedings is a relevant one. In rare cases, for example a youth is found to have a mental age below the age of 10; we would suggest a procedure should be introduced to establish their decision making capacity utilising expert evidence.
- 1.320 Compass Psycare would resist a “fixed line in the sand” and would favour what they called a “sliding scale” along *Gillick* lines for assessment of criminal responsibility.
- 1.321 The AOPM thought that applying the fitness to plead test still meant retaining “the thrust of government policy – to intervene as early and as positively as possible with young offenders”. The ultimate effect, in their view, is to continue “the catastrophic result of criminalising and incarceration of young people at unprecedented rates”. Broadmoor psychiatrists, similarly, were concerned about the low age of criminal responsibility in England and Wales, and thought that “any developments in the field of unfitness to plead should, as far as possible, aim to meet the needs of child defendants and facilitate the involvement of supportive agencies such as social services”.

¹¹¹ J Jacobson and J Talbot, *Vulnerable Defendants in the Criminal Courts: a Review of Provision for Adults and Children* (The Prison Reform Trust, 2009).

¹¹² N Hazel, A Hagell and L Brazier, *Young Offenders’ Perceptions of their Experiences in the Criminal Justice System* (Policy Research Bureau, 2002). See also *Time for a Fresh Start: The Report of the Independent Commission on Youth Crime and Antisocial Behaviour* (The Police Foundation, 2010) p 23

¹¹³ [1993] 1 WLR 1315.

- 1.322 The All Party Parliamentary Group for Children wrote to say that it “echo[ed] many of the Law Commission’s findings in relation to children under the age of 18” and that it recommends that the government review the age of criminal responsibility.
- 1.323 Professor Mackay’s view was that if “decisional competence” is introduced into a test of unfitness while the age of criminal responsibility remains at 10, then it is likely that more young offenders will be found unfit to plead. Dr Vizard, similarly, thought that if a test for fitness to plead was introduced into youth courts, “it will become apparent very quickly that all ten year olds are not fit to plead to the charges by dint of their perfectly natural developmental immaturity at that age”. A consequence, in her view, will be that there will be more evidence that the age of criminal responsibility needs to be raised.

DISPOSALS

- 1.324 The CP did not make a proposal or ask a question about the suitability of the range of disposals following a finding of unfitness, but several consultees raised the issue.
- 1.325 The Bar Council/CBA was the only respondent who thought that available disposals are adequate.

Magistrates’ courts and youth courts

- 1.326 The JCS thought that the magistrates’ courts need a wider range of disposals. The CPS wrote:

... the orders that can be made following a section 4A finding should be the same [in the magistrates’ courts], save that only the Crown Court should have the power to make a restriction order. This would enable magistrates’ courts to make a supervision order where the nature or degree of the defendant’s disability makes a hospital order inappropriate. A new order should be available to both courts that is comparable with the Mental Health Treatment Requirement that can be included in a Community Order or Youth Rehabilitation Order on conviction. This would benefit a defendant who does not meet the criteria for a hospital order but has a condition that is likely to benefit from treatment, including treatment from a psychologist or GP rather than under the supervision of a psychiatrist.

- 1.327 Just for Kids Law gave this full comment:

The consultation paper does not address disposals in detail but in our experience there are a number of concerns about the current disposals available in a finding of unfit to plead and having done the act.

Firstly, the disposals available in the magistrates/youth court differ from those in the Crown Court. Currently in the magistrates/ youth court a defendant can be given a hospital order or a guardianship order if they have been found to have done the act. However the guardianship order does not mirror the supervision order that is

available in the Crown Court. Indeed one of the immediate problems is that Guardianship orders are only available to those over the age of sixteen (see s.7 Mental Health Act 1983). Further, guardianship orders are only available for those suffering from a mental disorder (a person suffering from a learning disability as defined in s. 1 (4) of the amended MHA 1983, is not suffering from a mental disorder for the purposes of s. 37 [see MHA 1983, s. 2A and 2B). Supervision orders, by contrast, are available as a disposal under the Criminal Procedure (Insanity) Act 1964, s. 5(2) and Sch. 1, and are available to any defendant found to be unfit and have done the act (there is no age restriction or mental disorder requirement, although medical treatment can be part of the order) and can include requirements for medical treatment or residence and can be overseen by a social worker or a provider of probation services. Lastly, there is no option for an absolute discharge in the magistrates' courts. This means that youths, who should be entitled to greater protection under the law are, in fact, discriminated against. Youth Courts hear more serious charges as they are considered the most appropriate venue for trials of youths and have sentencing power of up to 2 years detention and training order. In the current system there is no community option available if an under sixteen year old is found 'unfit to plead' and to have done the act in the youth court, nor is there a possibility of an absolute discharge.

Secondly, there are difficulties with the current system of hospital orders and supervision orders in the Crown Court, with the possibility of no entity taking responsibility for the supervision order

Thirdly, there needs to be a robust alternative to supervision order so the judiciary can feel, when handing down a disposal for a defendant who has been found to have done the act but a hospital order is not appropriate, that suitable and appropriate work and treatment is being undertaken with that individual – perhaps an intensive supervision order, in the same vein as an intensive referral order is now available.

1.328 Just for Kids Law also gave this case study:

BP a 17 year old youth was charged with a Grievous Bodily Harm with Intent, contrary to s.18 of the Offences Against the Person Act. He was found unfit to plead due to a severe learning difficulty but to have done the act. A hospital order was not appropriate as he was not found to have a treatable mental disorder. His local CAMHS service would not take him on a supervision order under the CPIA as he did not have a treatable mental disorder. His local learning disability project would not take him on a supervision order as they did not have forensic capability. His Youth Offending Team would not take him on a supervision order as he turned 18 during the course of the proceedings. Probation would not take him on a supervision order as he would not be able to understand and participate in their programs. Eventually after many months on stringent bail conditions (all of which he complied with) BP was given an absolute discharge as the court felt it had no other options available.

Supervision orders

1.329 Broadmoor psychiatrists had this to say about disposals: “Whilst some clinicians were satisfied with the current disposal options for defendants found unfit, there was some discomfort around the lack of assertive management of supervision orders. Some psychiatrists expressed interest in having more assertive community disposals, similar to powers described under Supervised Community Treatment (i.e. Community Treatment Orders), for those defendants that do not require hospital admission.”

1.330 Dr Tim Rogers’ response is also worth quoting in full on this issue:

I note your discussion of the making of supervision orders, particularly following the Domestic Violence, Crime and Victims Act (2004). In my view the Commission is quite right to observe that a change in the test for unfitness would be likely to catch increasing numbers of mentally disordered offenders for whom hospital orders are inappropriate. Such patients may well not be under the care of a forensic specialist and in my experience many psychiatrists are unfamiliar with supervision orders. Those that are, sometimes, describe them as being ‘without teeth’ or otherwise perceive them not to be useful. Subsequent to 2004, the Mental Health Act (1983) has of course itself been amended (2007) to include the introduction of community treatment orders (CTOs). As you are likely aware, this confers the power of recall to hospital for a short period of assessment where conditions of discharge from hospital have been breached. It would be my suggestion that the utility of supervision orders after a finding of unfitness would benefit from some consideration in this respect. One possibility could be, where an accused did an act or omission in which a hospital order was not appropriate, that after the provision of appropriate medical evidence, the Court could be given the power to make an order equivalent to a CTO. The effectiveness of CTOs remains under evaluation by the ‘OCTET’ trial in Oxford.¹¹⁴ There is very little good research evidence about the effectiveness of compulsion in the community, due to the many difficulties (ethical, legal, logistical, financial) in studying the area. It is however perhaps illustrative that, since their introduction, more than ten times the expected number of orders have been made. Their use has proven highly popular among clinicians, many of whom would point anecdotally to a role in protecting the public as well as patients themselves. Patients, understandably, are found to have mixed feelings, but appreciate CTOs in particular where they provide an alternative to hospitalisation. In my view, it would be feasible for a Court to have this power. In my view it follows a clear line of logic for a Court to impose a CTO instead of a supervision order where an ‘unfit’ defendant has committed an act or omission in the context of not having adhered to treatment for the illness that has rendered them under disability (in whatever way).

¹¹⁴ Oxford Community Treatment Order Evaluation Trial.

Of all the points above, I think that the replacement of supervision orders with CTOs, or at least an alteration to the way in which supervision orders operate, is perhaps one of the most important issues. I am mindful that if they are not improved at this juncture, there may not be another opportunity to do so for some considerable time.

Resources and finality/implementation of orders made

- 1.331 From Nottinghamshire NHS Trust, one contributor was particularly concerned that the proposals should not reduce the availability of “interim disposals” (ie detention in hospital after a finding of unfitness). These were felt to be a useful option in the treatment and just management of a case. There was concern that a more robust section 4A hearing would lead to more cases being definitively resolved before effective participation could be recovered. This ties in with the view that a finding of unfitness is not in itself a disposal, and should be regarded as an interim measure.
- 1.332 HM Council of Circuit Judges had concerns about the resources available for appropriate disposal. They argued that the net effect could nevertheless be no increase in the number of hospital orders, because those who would be found unfit under a reformed test would probably be made subject to a hospital order under the current law, but following a trial rather than a section 4A hearing. They urged the Commission, however, to take proper account of the availability of resources for disposals, especially bearing in mind the current difficulties of finding hospital beds.
- 1.333 The PRT would like to see more effective implementation of orders: “disposal decisions made by the court should be put in place within a given timeframe, decided by the court, and in consultation with providers of such disposal options”.
- 1.334 Karina Hepworth was concerned about the possibility of revoking a person’s Referral Order where it turned out that the accused did not have the capacity to comply with it.

OTHER ISSUES

Terminology

- 1.335 Although the test is referred to as “fitness to plead”, the full label is “fitness to plead and to stand trial”. The Bar Council/CBA thought the term “unfitness to plead” inapt to describe the kind of capacity at stake. The BPS thought this point might be usefully addressed, such as by using the label “competence to stand trial”, as in the US.
- 1.336 Dr Enys Delmage thought there is a problem with terminology: “is there not an argument that someone could be unfit to plead on the basis that they are not developmentally mature enough to grasp the process (for those 10 year olds in court)? If so, you may need to change your vernacular from ‘a person with a disability’.”

Lack of familiarity with the relevant provisions

1.337 Master Venne commented that the

unfitness procedure and its effects are not as widely understood as might be hoped. Anything which can be done to make the procedure easier to understand and more accessible, both by practitioners and by the persons who may be affected, is to be commended. It is, for example, rare indeed to see any consideration given to any permissible postponement of the issue of fitness after it arises or any overt consideration being given to the appointment of a person to put the case for the defence in the s 4A hearing. Many of the problems which arose in *B and others* [2008] EWCA Crim 1997 might well have been avoided by a postponement of consideration of the issue of B's fitness, until immediately before the opening of his defence case. So far as I am aware, that was never done.

1.338 HM Council of Circuit Judges also referred to a lack of understanding of the relevant provisions: "Sometimes there is a lack of understanding of the legal issue which arises. Some advocates equate mental disorder and learning disabilities with being unfit to plead. We think that without a proper scheme for informing practitioners about the new test, this problem may increase." Dr Lorna Duggan also thought that there was not enough understanding by legal practitioners and by psychiatrists. The Broadmoor psychiatrists also commented that some provisions are underused.¹¹⁵

1.339 A linked issue is the need for better instructions to experts from the legal professionals, as argued by the RCP. They urged the Commission to consider a mechanism for ensuring improved instructions. Extra skills may well be needed for legal advisors (National Steering Group).

Whose responsibility is it to trigger a fitness hearing?

1.340 Just for Kids Law thought that the court may need the power to instruct an expert of its own accord to consider whether the accused is fit, such as where the accused does not consent to his or her fitness being investigated. Dr Eileen Vizard, however, cautioned against leaving it to the judge to decide whether an assessment of fitness is needed: "That decision should presumably be made by the defence lawyers with the court's agreement".

1.341 The Bar Council/CBA noted that it has been held that the judge may raise the question of fitness,¹¹⁶ and asked whether there might be "circumstances in which a judge should be empowered to initiate an examination of the defendant's mental or physical condition for the purpose of determining whether he or she has decision-making capacity". They had in mind powers similar to section 37(3) of the 1983 Act and section 11(1) of the 2000 Act (applicable to magistrates) being made available to judges.

¹¹⁵ Such as the powers under ss 36 and 38 of the MHA 1983 – see para 1.162 above.

¹¹⁶ Citing *McCarthy* [1967] 1 QB 68.

Under-detection and screening

1.342 Professor Poole thought that “detection remains a major worry” and noted that in his experience, “defence solicitors cannot always be relied upon to notice or raise the issue”. Kids Company made a comment to similar effect: “whether a report is carried out is somewhat determined by the quality and initiative of the legal representative”. Dr Duggan’s view, by contrast, was that “defence solicitors are generally very accurate in identifying defendants who are unfit to plead”, and the Bar Council/CBA thought that “legal practitioners are able to recognise (and do) mental abnormality and learning difficulties”.

1.343 In a similar vein, the Centre for Mental Health wanted to see a focus on identifying cases pre-court, and suggested how screening could help:

We believe that the Law Commission’s proposals on unfitness to plead should fit into a wider approach which seeks to divert people with mental health problems towards treatment and other appropriate support. We are concerned that the Law Commission does not discuss in depth the difficulties in identifying mental health problems before a person comes to court and the possible solutions to address this. The court process provides an important opportunity to identify mental health problems and ensure that people get access to the necessary support. Unless the issue of identification is addressed, the Law Commission’s proposals are unlikely to have any significant impact. For example, it may be that more training is required for the judiciary, solicitors and barristers. It may also help to adopt a screening process at courts using, for example, liaison and diversion teams which were recommended by the Bradley Review and which the current Government has committed to rolling out nationally.

1.344 The JCS similarly referred to use of a mechanism for pre-court assessments and thought that if that happened then “there is no reason why a court of summary jurisdiction should not be able to address the proposed test”. The National Steering Group commented, as regards liaison and diversion schemes: “The good news from various courts who have strong liaison and diversion services is that the extra effort required results in more effective disposals and greater impact on reducing re-offending”.

1.345 The Broadmoor psychiatrists made this similar suggestion:

Since not all cases require a psychiatric assessment of unfitness to plead, a possible need for screening of defendants was raised. A method or procedure to assist lawyers to identify defendants who are unfit to plead would help facilitate appropriate referrals for specialist assessment. (Screening tools are used in numerous other fields to improve liaison with psychiatric services.)

This might fit well alongside the principle of the “two-step test” in the Mental Capacity Act 2005 [described at paragraph 1.44 above].

1.346 Dr Tim Rogers suggested a pro-forma to be completed by mental health specialists (not necessarily psychiatrists) to inform the court.

Difficulty in obtaining psychiatric reports

1.347 HM Council of Circuit Judges commented that “obtaining psychiatric reports in a short time continues to be a problem”; the RCP was also concerned about the length of time that can elapse while a report is prepared, with the accused in custody all the while. Zoe Bremer, on the other hand, thought that courts should recognise how long it takes in practice for a psychiatric report to be prepared: “As a general rule, at least a month, preferably six weeks, would be an appropriate length of time for an inmate to be studied for the purposes of a psychiatric report. Often the visiting psychiatrist is given only a fortnight”.

1.348 The PRT argued that:

should it be deemed necessary for a mentally disordered defendant to be remanded at any stage of his or her trial, including for a report on his or her mental condition or while awaiting trial or awaiting sentence, the accused should not be remanded to prison. This would be generally in line with the recommendations by Lord Bradley in his review, and the current proposals put forward in the Justice Green paper. It is generally acknowledged that prisons are unsuitable environments for mentally disordered people, and such incarceration is likely to result in a further deterioration of their mental health.

1.349 The RCP emphasised the different kinds of costs which result from extended remands, namely, personal to the accused (who may not receive a custodial sentence) and financial to the public purse.

Funding of reports

1.350 HM Council of Circuit Judges drew the Commission’s attention to a cause of difficulty in securing expert reports:

We understand that a significant factor in encouraging psychiatrists to prepare reports is the level of fees which are paid. This is particularly, but not exclusively, a problem in the magistrates’ courts. We understand that there has been considerable discussion in the Ministry of Justice and in advisory groups to resolve these issues but that progress is very slow. Proposals for “Service Level Agreements” have yet to be finalised or implemented. This is an area in which we consider action is essential.

The determination of fitness

1.351 One member of the Working Party which produced the Bar Council/CBA response thought that the determination of fitness should be made by the jury (as used to be the case).

Adverse inferences

1.352 Dr Keith Rix wanted to see clarification of the relationship between the test for fitness to plead and the test in section 35 of the Criminal Justice and Public Order Act 1994 (adverse inference from silence). Dr Tim Rogers noted that expert evidence “could be a useful way of avoiding adverse inference”.

Appeal

1.353 Master Venne noted that:

It goes almost without saying that a person who has been found unfit to be tried (whether under the existing *Pritchard* test or any of the replacements you might think appropriate to recommend) cannot understand the proceedings or instruct his lawyers in his defence. Doubtless that is the reason for the statutory provision requiring the appointment of a person to put the case for the defence. The anomaly which flows from that is that the rights of appeal under ss 15 & 16A, Criminal Appeal Act, 1968, nevertheless remain vested in the unfit person. As a matter of logic it is difficult to see how he can exercise them. Might it be appropriate to vest the rights of appeal which exist in unfitness cases in the person appointed to put the case for the defence? When the Court of Appeal, Criminal Division, gave its judgment in *Antoine* [1999] 2 Cr App. R. 225 it took the view that the person appointed would have the authority to conduct the appeal (at 236G) but it seems to me that having authority to conduct an appeal is not the same as the right of appeal itself. I view this as an important issue worthy of further consideration.

A broader perspective

1.354 Nicola Padfield found it difficult to consider the law on unfitness to plead separately from the law on the defence of insanity and the civil proceedings which might be applicable. She asked, "Are you making a mistake in drawing a line between the two which therefore will reinforce the existing, contentious, divide?" She illustrates her concern with reference to cases where the narrow legal questions may have been answered, but it seems that, in her view, no one took a step back to consider the appropriateness of the proceedings as a whole. She states that "A humane system would properly identify those whose mental disorders or illnesses mean they are not 'really' blameworthy, or should at least not be prosecuted." As a specific example, with regards to *H*¹⁷ in which the accused was 13, found unfit to plead and faced two trials, she poses the questions: "Were these proceedings really necessary in the interest of public protection? More importantly, perhaps, were they in the interest of welfare of this 13-year-old defendant?"¹¹⁸

IMPACT

1.355 In the Impact Assessment appended to the CP, we asked for consultees' views on the estimate that in 90% of cases where the result of the section 4A hearing was known, the accused was found to have done the act on at least one count. Professor Mackay was the only respondent to address this issue specifically, and he supported this estimate.

¹¹⁷ [2003] UKHL 1, [2003] 1 WLR 411.

¹¹⁸ Footnote omitted.

- 1.356 Professor Poole was not sure whether the impact assessment included possible impact on defendants in the magistrates' courts. He added:

If the proposals are to have an impact upon the number of acutely unwell people in prison (as appears to be an aspiration) and if a change in the law leads us towards a much larger number of capacity hearings, such as currently occurs in the USA, then there could be a major problem in finding sufficient psychiatrists to conduct these assessments. However, I do think that it would be desirable to consider capacity in a far larger number of defendants than is currently the case. Whilst I entirely understand the desire to ensure that the proposals are fully congruent with human rights obligations, it would be much easier to meet the workload in the magistrates' courts through mental health nurses who are currently employed in the criminal justice liaison teams and who have the expertise to conduct these assessments. This would be congruent with the significant move to delegation of medical responsibilities to multi-disciplinary team members in the UK.

- 1.357 HM Council of Circuit Judges noted that at present, the issue of fitness to plead is not usually disputed "and can therefore be dealt with by the judge expeditiously; almost by agreement".¹¹⁹
- 1.358 The Bar Council/CBA was concerned about the impact if the proposals were taken as a whole.¹²⁰

3. ... We suggest that were all of the fourteen proposals to be put into effect (at least as the proposals are currently structured) the courts would find the revised scheme no less incoherent and arguably a great deal more confusing, as well as unnecessarily demanding on scarce resources.

...

24. The question arises whether the existing rules of England and Wales in relation to Unfitness to Plead are as unsatisfactory and as problematic as the analysis of the English Law Commission suggests in its CP. We are by no means suggesting that the existing rules require no modification or revision. We accept that doing nothing is not an option on the grounds that the law must indeed be "consistent with modern psychiatric thinking and with the modern trial process" (see above). But it is respectfully submitted that the CP does not pay sufficient regard to the practical implications of its proposals were all fourteen to represent the law and practice of England and Wales.

...

¹¹⁹ Under the current law, it is the judge who determines the issue of fitness.

¹²⁰ Some footnotes and emphasis omitted.

3. ... According to the Impact Assessment, appended to the CP, the value of the benefits would exceed costs. The workload of the courts would undoubtedly increase. The Impact Assessment assumes that there will be 500 additional cases, but we believe (for the reasons that we give in this response) that the figure is likely to be considerably higher: [they cite here the section on the best estimate from page 2 of the Impact Assessment appended to the CP]

4. The number of hearings of unfitness to plead has been relatively small (albeit that the number has increased since 1992)¹²¹ but the combination of proposals 1, 3 and 4, would surely make hearings pertaining to a defendant's "decision making capacity", common place. ...

5. Trials are becoming increasingly complex to prepare and to conduct. Legislation enacted during the past ten years alone present an accused with many difficult decisions to make from the moment of arrest until proceedings are concluded. These decisions encompass (for example) whether to answer questions posed by persons in authority at the investigative stage, the preparation of Defence Case Statements, bad character and hearsay applications, whether to give evidence, and – if convicted – possible confiscation proceedings, the making of Serious Crime Prevention Orders, and other orders in respect of which the defendant's effective participation is at least desirable if not essential.¹²²

6. There are very many defendants whose "decision making capacity" might be questioned by their legal advisers and other professionals (e.g. probation officers, and social workers). Many defendants have personality disorders, or who are problematic drug users or alcoholics. We are concerned that under the Commission's proposals, legal practitioners would be exposed to unwarranted criticism were they not to routinely invite the Court to determine their clients' "decision making capacity".

¹²¹ See R D Mackay, B J Mitchell and L Howe, "A Continued Upturn in Unfitness to Plead: More Disability in Relation to the Trial under the 1991 Act" [2007] *Criminal Law Review* 530.

¹²² The Commission propose that it would be "incumbent on the judge to take account of the complexity of the particular proceedings and gravity of the outcome. In particular the judge should take account of how important any disability is likely to be in the context of the decision the accused must make in the context of the trial which the accused faces." [CP 197, para. 3.101] (footnote in original)

7. It is submitted that the prospect of routine applications being made is not fanciful having regard to proposal 5, namely, that D's decision-making capacity "should be assessed with a view to ascertaining whether an accused could undergo a trial or plead guilty with the assistance of special measures".¹²³ Special measures to assist non-defendants and (increasingly) defendants, are already well-developed, and improvements in that regard continue to be made. Although rules relating to special measures have developed incrementally, the development has been controlled. We accept that there is no reason why special measures should not be tailored in individual cases having regard to the defendant's mental and physical condition.

8. Typically a defendant's application for special measures would be considered pre-trial. But we would eschew a proposal that envisages a defendant's application for such measures being almost invariably dealt with by way of a hearing that is set down to determine the extent of his/her decision-making capacity.

1.359 The RCP stated that "there are 100 [capacity hearings] per year in the UK at present. That could easily become several thousand a year". Dr Carstairs thought that, on the basis of the proposals made, the number of defendants who will need to be assessed "could easily double". Dr Tim Rogers warned about feigned unfitness to plead as "another potentially huge problem that might follow revisions to the procedure". The District Judges thought the number of pre-trial hearings in the magistrates' courts could increase considerably. HHJ Wendy Joseph QC was also concerned about the numbers of cases which could generate reports on their condition:

I don't necessarily see the trial/unfitness hearing as being the problem. The problem is likely to arise in the need for a very much larger number of defendants to be the subject of reports before that stage can be reached.

Unless I misunderstand your proposals, I see the very likely consequence of them to be a much increased number of adjournments whilst these matters are investigated, delays while funding is sought, more delays and expense as reports and reports-in-rebuttal are prepared, and extra hearings for these matters to be investigated.

1.360 HM Council of Circuit Judges noted that those judges who sit on what used to be called the Mental Health Review Tribunal had found that "many patients are able to play a substantial, if not full part in hearings even though they may be suffering from a serious mental disorder or are affected by learning disabilities".

1.361 As to the ultimate disposal, Dr Rogers thought the Commission was right to assume that a change in the test for unfitness would be likely to catch increasing numbers of mentally disordered offenders for whom hospital orders are

¹²³ Para 4.27 of CP 197.

inappropriate. See also the comments of the Council of HM Circuit Judges on the net effect on the numbers of hospital orders above.

- 1.362 Professor Mackay picked up on the comment at page 9 of the Impact Assessment about the proportion of patients in hospital with a restriction order following a finding of unfitness to plead. He noted that, bearing in mind the number of people transferred to hospital from prison who had not yet been tried (484 in 2008), it is not known how many of those would have been found unfit to plead. He stated that explanation of the reference to “anecdotal evidence” which “strongly suggests that many [of the people transferred to hospital from prison] were suffering from significant mental disorder at the time of their trial which may have prevented their effective participation” would be useful.

APPENDIX I

1.363 The test in *A-G v O'Driscoll* is:¹²⁴

An accused person is so insane as to be unfit to plead to the accusation, or unable to understand the nature of the trial if, as a result of unsoundness of mind or inability to communicate, he or she lacks the capacity to participate effectively in the proceedings. In determining this issue, the Superior Number shall have regard to the ability of the accused—

(a) to understand the nature of the proceedings so as to instruct his lawyer and to make a proper defence;

(b) to understand the substance of the evidence;

(c) to give evidence on his own behalf; and

(d) to make rational decisions in relation to his participation in the proceedings (including whether or not to plead guilty), which reflect true and informed choices on his part.¹²⁵

1.364 The court in *O'Driscoll* also held that limited intellect is not sufficient; a clinically recognised condition is envisaged; the test would be applied by the Jurats; and the expression “rational decisions” is to be given its ordinary meaning: that is, decisions based on or in accordance with reason or logic. The court was not concerned with one snapshot in time but the capacity of the accused to participate effectively during the whole trial.

¹²⁴ As applied in *A-G v Harding* [2009] JRC 198, [2009] Jersey Law Review Note 52 at [20] and following.

¹²⁵ *A-G v O'Driscoll* [2003] Jersey Law Review 390 at [29] by Bailhache B.

APPENDIX II

CONSULTEES, LISTED BY CATEGORY

Some consultees could be placed in more than one category. Here, they are divided into what appears to be the most appropriate category. Any one consultee will only appear in one category.

Judiciary
HHJ Lamb QC (Circuit Judge, South Eastern)
National Bench Chairmen's Forum
HHJ Gilbert QC (Honorary Recorder of Manchester)
Justices' Clerks' Society
Master Venne QC, Roger (then Registrar of Criminal Appeals)
Legal Committee of the Council of District Judges (Magistrates' Courts)
Council of HM Circuit Judges
HHJ Wendy Joseph QC (Circuit Judge, South Eastern)
Legal practitioners
Taylor, Carolyn (TV Edwards LLP, Partner)
Law Reform Committee of the Bar Council and Criminal Bar Association
South Eastern Circuit (by Alan Kent QC)
Crown Prosecution Service
Law Society
Academics
Grubin, Don (Newcastle University, Professor of Forensic Psychiatry)
Peay, Jill (London School of Economics, Professor of Law)
Craigie, Jillian (University College London, Senior Research Fellow)
Loughnan, Arlie (University of Sydney, Senior Lecturer)
Padfield, Nicola (Fitzwilliam College, University of Cambridge, Senior Lecturer)
Arthur, Raymond (Teesside University, Reader)
Mackay, Ronnie (De Montfort University, Professor of Criminal Policy and Mental Health)

Bonnie, Richard (University of Virginia, Professor of Medicine and Law)
Howard, Helen (Teesside University, Senior Lecturer)
Medical professionals
Carstairs, Kari (Carstairs' Psychological Associates, Clinical Psychologist)
Gralton, Ernest (St Andrews' Healthcare, Consultant Forensic Psychiatrist)
Searle, Geoff (Consultant Psychiatrist)
Hepworth, Karina (Kirklees Youth Offending Team and Senior Nurse Specialist, Learning Disabilities)
Bickle, Andrew (Nottinghamshire Healthcare NHS Trust, Consultant Forensic Psychiatrist)
British Psychological Society
Poole, Rob (Glyndŵr University, Professor of Mental Health and Hon Consultant Psychiatrist)
Duggan, Lorna (Consultant Forensic Psychiatrist in Developmental Disabilities)
De Lacy, Charles (Mental Health Liaison Scheme, Clinical Nurse Specialist)
Rix, Keith (De Montfort University, Consultant Forensic Psychiatrist and part-time Lecturer)
Broadmoor Hospital psychiatrists
Edenfield Centre, Adult Forensic Secure Service
Sarkar, Sameer (Compass Psycare Ltd, Consultant Psychiatrist)
Nottinghamshire Healthcare NHS Trust Low Secure and Community Forensic Directorate and the Nottinghamshire Healthcare NHS Trust Offender Health Directorate
Rogers, Tim (Consultant Forensic Psychiatrist)
Rogers, Graham (Consultant Educational and Child Psychologist)
Vizard, Eileen (Consultant Child and Adolescent Psychiatrist)
Royal College of Psychiatrists
Monaci, Linda (Clinical Neuropsychologist)
Delmage, Enys (Consultant in Adolescent Forensic Psychiatry)
Bremer, Zoe (former Secretary to Head of Healthcare at HMP Pentonville)

NGOs, QUANGOs and interest groups
Kids Company
Association of Panel Members
National Victims' Association
Just for Kids Law
Centre for Mental Health
Sense
Prison Reform Trust
All Party Parliamentary Group for Children
Victim Support
National Steering Group with Responsibility for Health Policy on Offenders with Learning Disability
Mind
Richard Mills (National Autistic Society)