UNFITNESS TO PLEAD

CONSULTATION RESPONSES

These are the responses to the Law Commission’s Consultation Paper, Unfitness to Plead (Law Commission Consultation Paper No 197, 2010). An analysis of the responses, as well as details of the project, 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.

If you have any queries about the project, please direct them to:

Email: criminal@lawcommission.gsi.gov.uk

Tel: 020 3334 0278

Post: Law Commission, Steel House, 11 Tothill Street, London, SW1H 9LJ
CONSULTEES, LISTED ALPHABETICALLY

All Party Parliamentary Group for Children

Arthur, Raymond

Association of Panel Members

Bickle, Andrew

Bonnie, Richard

Bremer, Zoe

British Psychological Society

Broadmoor Hospital psychiatrists

Carstairs, Kari

Centre for Mental Health

Council of HM Circuit Judges

Craigie, Jillian

Crown Prosecution Service

De Lacy, Charles

Delmage, Enys

Duggan, Lorna

Edenfield Centre

Gilbart QC, HHJ

Gralton, Ernest

Grubin, Don

Hepworth, Karina

Howard, Helen

Joseph QC, HHJ Wendy
Just for Kids Law

Justices' Clerks' Society

Kids Company

Lamb QC, HHJ

Law Reform Committee of the Bar Council and Criminal Bar Association

Law Society

Legal Committee of the Council of District Judges (Magistrates’ Courts)

Loughnan, Arlie

Mackay, Ronnie

Mills, Richard

Mind

Monaci, Linda

National Bench Chairmen’s Forum

National Steering Group with Responsibility for Health Policy on Offenders with Learning Disability

National Victims’ Association

Nottinghamshire Healthcare NHS Trust Low Secure and Community Forensic Directorate and the Nottinghamshire Healthcare NHS Trust Offender Health Directorate

Padfield, Nicola

Peay, Jill

Poole, Rob

Prison Reform Trust

Rix, Keith

Rogers, Graham

Rogers, Tim

Royal College of Psychiatrists
Sarkar, Sameer
Searle, Geoff
Sense
South Eastern Circuit (by Alan Kent)
Taylor, Carolyn
Venne QC, Roger
Victim Support
Vizard, Eileen
Response from the officers of the All Party Parliamentary Group for Children (APPGC) to the Law Commission’s consultation on Unfitness to Plead

About the All Party Parliamentary Group for Children (APPGC)

The APPGC exists to raise the profile of children’s issues in Parliament. On 6 December 2010, it published a report summarising a series of six seminars it held on youth justice and youth crime over the 2009/10 parliamentary year. The meeting held on 18 October 2010 focused on the Age of Criminal Responsibility, with members of the APPGC concluding that the age of criminal responsibility should be raised to at least 12 years, the minimum recommended by the UN Committee on the Rights of the Child.

Law Commission consultation on Unfitness to Plead

While the detail of the Law Commission proposals for a new legal decision-making capacity test lies outside the areas debated and points agreed by the cross-party members of the APPGC, the issues raised in the paper in sections 8.38 to 8.66 regarding proceedings in youth courts, the doli incapax, and the age of criminal responsibility are of considerable interest to the Group.

Therefore, the APPGC wishes to echo many of the Law Commission’s findings in relation to children under the age of 18, and recommend the following:

- That the government should review the age of criminal responsibility in England and Wales on the grounds that:
  - The choice of ‘10’ is arbitrary, based on neither logic, evidence nor principle
  - 10 is the lowest age of criminal responsibility in Europe [Scotland recently raised its age of criminal prosecution to 12], and low in comparison to the rest of the world
  - Since the abolition of the doli incapax in England and Wales in 1998, there has been an 87 per cent increase in convictions for 10-12 year olds
The UN Committee on the Rights of the Child has encouraged all countries to increase the age of criminal responsibility to 12 as an absolute minimum – a recommendation replicated in its most recent Concluding Observations to the UK government on the implementation of the UNCRC\(^1\), and the UK’s Joint Committee on Human Rights review of that CRC report and government policy\(^2\).

There is a considerable body of research to support the case that, the earlier a child is drawn into the criminal justice system, the greater the chance they will re-offend, and the greater the chance of their ending up in custody.

Inconsistencies in approaches to whether children are expected to understand, or take full part in different proceedings in England and Wales are of note. For example:

- in judicial review and personal injury claims, a child under the age of 18 does not have a right to begin proceedings unless through a litigation friend who can inform the court of the best interests of the child
- in contrast, in the criminal justice system the overriding view is that every child from the age of 10 upwards can deal with the consequences of his/her actions

In summary, we believe it is time for the government to revisit this issue through an independent review of the age of criminal responsibility in England and Wales, which would also incorporate international comparisons of the different ages used in European and other nations, and the ways in which the different jurisdictions respond to and deal with problematic behaviour in children, as well as the outcomes of these approaches and systems.

25 January 2011

*Baroness Massey of Darwen*

*Chair, All Party Parliamentary Group for Children and officers of the APPGC*

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The Officers of the APPGC:

Baroness Blood of Blackwatertown  
Kate Green, MP for Stretford and Urmston  
Baroness Howarth of Breckland  
Jessica Lee, MP for Erewash  
Earl of Listowel  
Baroness Walmsley
Rethinking the Criminal Responsibility of Young People in England

Raymond Arthur

Summary: In 2010 two boys, aged 10 years, were convicted of the attempted rape of an eight year old girl in England. This paper will consider the question of when is it fair to hold young people criminally responsible and to subject them to the full rigours of a criminal trial.

Introduction

The recent conviction of two primary school boys for the attempted rape of an eight year old girl once again raises the issue of how old someone must be before they know they are committing a crime. The two boys were both aged 10 years old at the time of the offence. They had been accused of repeatedly assaulting the girl in a block of flats, a lift and a bin shed before taking her to a field and raping her in October 2009. During cross-examination via video the girl admitted lying to her mother about the incident and admitted that no rape had occurred. There was no other useful medical evidence, DNA evidence or forensic evidence. Nevertheless based on the evidence of an eight year old girl the two boys were convicted of attempted rape. This case raises the question of whether child perpetrators should be treated as adults.

In England and Wales the age of criminal responsibility is set at 10 years. The current law thus assumes all children are sufficiently mature at this age to accept criminal responsibility for their behaviour. This paper will consider the question of when is it fair to hold young people criminally responsible and to subject a young person to the full rigours of a criminal trial. It will examine the assumption that children mature earlier than in the past and argue that the law needs to recognise that children may not yet be developed enough to understand the wrongfulness of
what they do. I will argue that the low age of criminal responsibility runs the risk of children being prosecuted for crimes they are too immature to fully understand. A child of 10 years can know that they are doing something wrong but not appreciate it is criminally wrong and thus not form the requisite intent, or *mens rea*, to be criminally responsible.

**Principles of criminal liability**

The law, as a system of rules that guides and governs human interaction, is premised on the view that humans can understand and follow rules. The law’s concept of a person is a practical, reasoning, rule-following being who understands the difference between right and wrong. Effective criminal law requires that citizens understand that certain conduct is prohibited, the nature of their conduct and the consequences for doing what the law prohibits.¹ Thus criminal liability “should be imposed only on persons who are sufficiently aware of what they are doing, and of the consequences it may have, that they can fairly be said to have chosen the behaviour and its consequences”.² To be convicted of a criminal offence the defendant must have performed the *actus reus* and *mens rea* of the offence and have no defence available to them. The *actus reus* is the prohibited conduct of a defendant. *Mens rea* is the mental element required by the definition of the crime. *Mens rea* has evolved into a requirement of positive culpability on the part of the defendant and is the means through which those who are thought to be deserving of punishment, because of their responsibility and their moral blameworthiness, are identified.

When it comes to imposing criminal liability upon children, the law has traditionally recognised that children may lack the capacity to be mentally culpable. The very existence of a separate justice system for young people is predicated in part on the assumption that the
basic competencies of young people and adults differ in fundamental ways that affect judgment. Even prior to the creation of separate courts for young people in the late nineteenth century, young children were considered to lack the capacity to form culpable intent and thus could not be criminally responsible. For example, the pre-Norman Laws of Ine dating from the eighth century suggest the age of 10 years as the age at which young people could be held criminally responsible for their actions, below 10 years of age they were considered to lack *mens rea*. Bracton’s 13th century treatise does not specify a minimum age of criminal responsibility but does refer to children being protected from the criminal law by virtue of their “harmlessness of intention”, equating a child’s “innocence of purpose” with a “lack of intention to harm”. By the fifteenth century the pre-Norman age limits had been lowered to seven years of age. Section 50 of the Children and Young Persons Act 1933 raised the age of criminal responsibility from seven to eight years and the Children and Young Persons Act 1963 raised it to the current age of 10 years.

Although the minimum age of criminal responsibility in England and Wales is much lower than most other countries in Europe and many countries worldwide, traditionally the English youth justice system has not prosecuted young people once they have achieved the age of criminal responsibility. Instead the presumption of *doli incapax* was invoked. According to the legal doctrine of *doli incapax*, children did not become fully criminally responsible for their actions once they reached the age of criminal responsibility. They would only be held criminally responsible if in addition to committing the *actus reus* and *mens rea* of a criminal offence, the prosecution could also prove, beyond all reasonable doubt, that when doing the act, the child knew that what they were doing was seriously wrong as opposed to being merely mischievous or naughty. Thus under English law a child below the age of 10 was considered *doli incapax*, a child between 10 and 14 was presumed *doli incapax* as at this age
children were considered incapable of identifying right from wrong, and therefore lacked the criminal intent necessary for prosecution. To convict the child, the prosecution would need to rebut this presumption. The presumption of *doli incapax* reflected a concern that “using criminal penalties to punish a child who does not appreciate the wrongfulness of his or her actions lacks moral justification”\(^5\) and ensured that the law treated people as fully responsible from 14 years of age.

However attitudes towards children changed during the late twentieth century. In *C (A Minor)* v *DPP*,\(^6\) which concerned the actions of a 12 year old boy who had been caught with a companion tampering with a motorbike, Mr Justice Laws in the High Court ruled that the presumption of *doli incapax* was “no longer part of the law of England”. Laws J believed that the argument that a child of 14 years of age would not appreciate the moral obliquity of his actions was out of touch with today’s society and contrary to common sense. Laws J argued that:

> “whatever may have been the position in an earlier age, when there was no system of universal compulsory education and when perhaps children did not grow up as quickly as they do nowadays, this presumption at the present time is a serious disservice to our law.”\(^7\)

The judgment of Laws J was subsequently overruled by the House of Lords.\(^8\) The House of Lords case was decided on the grounds of legal propriety and the respective roles of the judiciary and parliament, rather than because of any judicial commitment to the merits of the presumption. Lord Lowry in the House of Lords stated that “the presumption has in recent years been the object of some logical and forceful criticisms” and that the presumption “is not, and never has been, completely logical”. Lord Jauncey described the presumption as “an affront to common sense”. Nevertheless the House of Lords ruled that abolishing the presumption of *doli incapax* was a significant change to the law and thus was a matter for
parliament to consider rather than the judiciary. The arrival of the New Labour government in May 1997 signalled a willingness to enshrine the views of Laws J in law. The White Paper *No More Excuses* recommended modernising “the archaic rule of *doli incapax*” as it was “contrary to common sense” which is “not in the interests of justice, or victims or of the young people themselves”. The New Labour government, echoing the judgment of Laws J, asserted that the presumption might have been justified in an earlier era but that the existence of compulsory education from the age of five meant that children grew up much quicker, mentally and physically, and therefore knew right from wrong. Following this White Paper came the Crime and Disorder Act 1998, section 34 of which abolished the presumption of *doli incapax*. Section 34 thus means that a child aged 10 years of age is no longer presumed incapable of understanding the nature of criminal conduct and can be considered as legally responsible for their actions as an adult. Thus English law now “holds that a person is completely irresponsible on the day before his tenth birthday and fully responsible as soon as the jelly and ice-cream have been cleared away the following day”.

**Are children mature enough to understand the nature of criminal liability?**

As *doli incapax* is no longer available, any child aged 10 years or older is now held to understand the significance of their actions unless they are suffering from a recognised medical condition. The abolition of the presumption is partly based on the universal availability of education from the age of five years. However in *C (A Minor) v DPP*, Lord Lowry responded with the following observation:

“It is true that there is (and has been for a considerable time) compulsory education and ... perhaps children now grow up more quickly. But better formal education and earlier sophistication do not guarantee that the child will more readily distinguish right from wrong.”

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Furthermore Paul Cavadino observes that “in view of the association between truancy and offending and the recent sharp rise in school exclusions, ... many of the children concerned have in practice failed to benefit from universal compulsory education.” To ensure that children understand the nature of criminal conduct, it is crucially important that young people attend school, and in particular are not prevented from attending through exclusion. Once at school the child’s experience needs to be a positive one. However various studies have found a strong link between truancy and youth crime, both of which were found to have begun at the same time. The Offending, Crime and Justice Survey noted that truancy was a ‘high risk’ characteristic since 62% of truants in their study admitted to offending and/or anti-social behaviour. The findings from that Survey echo the findings of earlier research. Graham and Bowling found that 67% of young males who had truanted from school admitted offences, whereas only 38% of non-truants offended. Graham and Bowling concluded that for both males and females the odds of offending of those who truanted were more than three times greater than for those who had not truanted. The Youth Lifestyles survey 1998/99 found that the more persistent the truant the higher the offending rates. Among males aged 12 to 16 years 47% of those who had truanted more than once a month reported offending behaviour compared with 13% of those who had truanted less often and only 10% of non-truants. Clearly there is a reciprocal relationship between delinquency and truancy and school exclusion. Truancy and school exclusion may be both a cause and a consequence of juvenile offending behaviour. Schools may use exclusion to respond to problematic behaviour including persistent non-attendance and offending behaviour; therefore it is difficult to determine which causes which. Nonetheless the probability of committing offences rises considerably if truanting or excluded from school, especially permanently excluded. Not only must the child be attending school, but the child’s experience of school and the extent to which they enjoy school, do well and achieve good results can be significant factors in
preventing crime. Graham and Bowling found that detachment from school was a significant indicator of offending behaviour especially in young females.\textsuperscript{16} The \textit{Offending, Crime and Justice Survey} asked respondents about their school environment and those who complained of poor teaching quality and a lack of clear rules amongst other problems, also reported a 50\% offending rate.\textsuperscript{17} The Survey found that decreasing levels of school discipline increased the likelihood of an offending trajectory and drug use. Consequently it recommended that further consideration be given to enhancing schools’ disciplinary policies.

Rather than using the availability of universal education as a justification for subjecting young people to the full rigours of the criminal justice system, greater attention needs to be paid to the links between the education system and the young person’s offending behaviour. Universal education does not necessarily act as a guarantee that young people will understand the nature of criminal conduct, but may instead be part of the problem. Engaging young people in suitable education is fundamental to preventing them from offending in the future.

To apply the same standards to a 13 year old, for example, as an adult is to ignore large amounts of evidence about the immaturity of children at that age. The abolition of \textit{doli incapax} removed an important principle which had acted to protect children from the full rigour of the criminal law. Bandalli argues that the abolition of \textit{doli incapax} reflects a steady erosion of the special consideration afforded to children and is ‘symbolic of the state’s limited vision in understanding children, the nature of childhood or the true meaning of an appropriate criminal law response’.\textsuperscript{18} Similarly Fionda refers to the abolition of doli incapax as being part of an ‘almost stubborn blindness towards the incapacity of children’. Its abolition reflects a complete refusal to recognise the nature of childhood and places greater
emphasis on ‘justice’ and less emphasis on ‘youth’. Research which has examined the brain developments and cognitive functioning of adolescents has found that the brain does not reach full maturity until the early-to-mid twenties. Moreover, with respect to moral culpability, those parts of the brain that deal with judgement, impulsive behaviour and foresight develop in the twenties rather than the teen years.

Anglo-American criminal jurisprudence shares the assumption that desert based on moral fault is a necessary precondition for just punishment. The judgment that the actor is responsible has to be made first and this is why it is permissible to blame him or her for their actions, because we have made the judgment that he or she is a responsible actor. If blameworthiness is a necessary precondition of punishment, then less responsible young people should not be punished as responsibility in criminal law is usually imposed on responsible subjects. Terms such as ‘intention’ cannot and should not be applied without taking account of the large differences in capacity and judgment between adults and children. Moore argues that criminal liability should be avoided for a wrongful action if ‘at the moment of such action’s performance, one did not have sufficient capacity or opportunity to make the choice to do otherwise’. Moore views infancy as within the category of ‘status excuses’ concerning ‘individuals who do not and cannot function well enough for us to confidently liken their actions and intentions to the actions and intention of sober, sane adults.’ Similarly Arenella asks ‘why should someone qualify as a moral agent if he lacks the capacity to deliberate about whether he should have acted differently?’ Until a young person is 16 years old they cannot consent to sexual relations or join the armed forces. The age at which you can buy cigarettes or alcohol or vote is 18 years. Thus ‘children are perceived as needing and receiving protection from the consequences of their immaturity in
other areas of the law’ and this is equally appropriate for criminal responsibility, otherwise
county becomes irrelevant to criminalisation.\textsuperscript{24}

These views are also shared by the judiciaries in England and the US. The US Supreme Court
decision in \textit{Roper v Simmons}\textsuperscript{25} which declared the juvenile death penalty unconstitutional
also accepted and reaffirmed the presumption of the diminished responsibility of youth. The
US Supreme Court ruled that young people’s objective immaturity, vulnerability and
comparative lack of control over their immediate surroundings renders them less culpable
than adult criminals. In England, Lord Steyn, in \textit{R v G and R}\textsuperscript{26} emphasised that ignoring the
special position of children in the criminal justice system is not acceptable in a modern civil
society. In the same case Lord Bingham held that conviction of serious crime should depend
on proof not simply that the defendant caused (by act or omission) an injurious result to
another but that his state of mind was culpable when so acting. Bingham believed that
although it was clearly blameworthy to take an obvious and significant risk of causing injury
to another, it was not clearly blameworthy to do something involving a risk of injury to
another if the accused genuinely did not perceive the risk. Such a person might fairly be
accused of stupidity or lack of imagination, but neither of those failings should expose him to
conviction of serious crime or risk of punishment. This case concerned two boys aged 11 and
12 years who went camping overnight without their parents’ permission. During the course of
this trip they threw lit newspapers under a plastic wheelie bin and caused £1m of damage to a
shop. The boys thought there was no risk of the fire spreading in the way it eventually did.
Lord Bingham held that it was neither moral nor just to convict a young person on the
strength of what someone else would have apprehended if the defendant himself had no such
apprehension. As Lord Diplock stated, in the differing context of the partial defence of
provocation to murder, ‘to require old heads on young shoulders is inconsistent with the law’s compassion of human infirmity’. 27

**Human rights obligations**

In *R v G and R* Lord Steyn argued that the criminal law was obliged to consider the mental incapacity of children in assessing their responsibility for criminal acts and drew special attention to the United Nations Convention on the Rights of the Child, Article 40.1 of which provides:

> “States Parties recognise the right of every child alleged as, accused of, or recognised as having infringed the penal law to be treated in a manner consistent with the promotion of the child’s sense of dignity and worth, which reinforces the child’s respect for the human rights and fundamental freedoms of others and which takes into account the child’s age and the desirability of promoting the child’s reintegration and the child’s assuming a constructive role in society.”

Article 40 of the Convention also requires each state to set a reasonable minimum age of criminal responsibility. The United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules) 1985 recommend that the minimum age of criminal responsibility should not be fixed at too low an age level, bearing in mind the facts of emotional, mental and intellectual maturity. The important consideration, as outlined in Rule 17 of the Beijing Rules, is whether a child, by virtue of his or her individual discernment and understanding, can be held responsible for their behaviour. The Commentary to the Beijing Rules stresses that there should be a close relationship between the age of criminal responsibility and the age at which young people acquire other social rights such as marital status and the right to vote. In line with this rule the UN Committee on the Rights of the Child has recommended the age of 12 years as the
absolute minimum age of criminal responsibility. The UN Committee also strongly recommended that states parties set a minimum age of criminal responsibility that does not allow, by way of exception, the use of a lower age. In its report in 2002 the UN Committee expressed that it was ‘particularly concerned’ about ‘the abolition of the principle of doli incapax’ and recommended that the age of criminal responsibility should be raised considerably.

The European Committee of Social Rights has also declared that the age of criminal responsibility in England is ‘manifestly too low’ and accordingly was not in conformity with article 17 of the European Social Charter which provides mothers and children with a right to social and economic protection. The European Social Charter is a Council of Europe treaty, signed in 1961, which guarantees social and economic human rights. The Council of Europe’s Human Rights Commissioner has also frequently expressed concern at the low age of criminal responsibility in England. The Commissioner in 2005, Alvarez Gil-Robles, commented that he had “extreme difficulty in accepting that a child of 12 or 13 can be criminally culpable for his actions, in the same sense as an adult”. While noting that the European Convention on Human Rights does not require any age limit to be set before a child can be held criminally responsible, the Commissioner suggested that the age level in England should be raised to bring it into line with other European countries. In 2006 the current Commissioner, Thomas Hammarberg, argued for an increase in the age of criminal responsibility across Europe with the aim of progressively reaching 18 years and recommended that innovative systems of responding to juvenile offenders below that age should be tried with a genuine focus on their education, reintegration and rehabilitation. Domestically, the House of Lords and House of Commons Joint Committee on Human Rights recommend that the age of criminal responsibility be increased to 12 years. The Joint
Committee argued that unless evidence of the effectiveness of the present age of criminal responsibility in reducing crime and disorder can be convincingly presented, then it needs to be brought more in line with our European neighbours. Such a recommendation would meet both the requirements of effective criminal justice and our duty under the UN Convention on the Rights of the Child to uphold children’s human rights.

England’s closest neighbours have taken steps to increasing their ages of criminal responsibility. In Scotland the age of criminal responsibility at which children can be prosecuted in adult criminal courts has been raised to twelve. This change brings Scots law into line with jurisdictions across Europe and will mean that children between the age of eight and twelve years will instead be held to account for any offending behaviour through Children’s Hearings. This system, which is respected internationally and has been emulated, most recently in Guernsey, addresses the needs and behaviour of children and young people who face serious problems in their lives. In the Republic of Ireland the Children Act 2001 raised the age of criminal responsibility in Ireland from seven to 12 years. This change means that children up to the age of 12 cannot be charged with a criminal offence. However the Criminal Justice Act 2006 allows for children as young as 10 years of age in Ireland to be charged with the offences of murder, rape and aggravated sexual assault. The Criminal Justice Act 2006 also abolished the rebuttable presumption of doli incapax which applied to any child between seven and 14 years. Children between 12 and 14, and those between 10 and 14 if they have been charged with a serious offence, no longer enjoy the presumption of doli incapax. For serious offences Ireland now has one of the lowest ages of criminal responsibility in Europe.
The views of the judiciary in the US and in England, academics and human rights organisations resonate with public opinion on this issue. The Independent Commission on Youth Crime and Antisocial Behaviour found that public attitudes towards dealing with crime in Britain have hardened in the past 40 years and are among the most punitive to be found in any European country. ‘Lenient sentencing’ has been widely perceived as a cause of both youth and adult crime and appears to be a significant reason for the lack of confidence expressed in the youth justice system. However the Commission found that public views on youth crime are more complex than they appear. When participants in surveys have been given in-depth information about real cases and asked to select an appropriate sentence, their choice of sanction has turned out to be either similar or more lenient than the sentence that was actually imposed by a court. Although abstract questions about offenders and offending may elicit an immediate, punitive response, people tend to be more thoughtful and fair-minded when exposed to the facts and background of particular cases. More generally there are indications that the public express less punitive views towards young offenders than adults. Attitude surveys show agreement that youth and immaturity can be mitigating factors, especially if the offence did not involve weapons or violence. ‘Deliberative’ surveys, where the participants take a view on specific cases after learning about the background circumstances reveal an approach to sentencing that is even more temperate. For example, knowing that a young person is remorseful and has taken reparative steps to make good some of the harm their behaviour has caused to a victim can have a powerful influence in reducing demands for custodial sentences. Similarly US research has found that the public may be more receptive to differential treatment of youth and to more rehabilitative rather than punitive policies. Scott et al. in their study found little support for trying young people as adults or for treating young offenders as adults. A report published by the Justice Policy Institute
found that “what the public wants ... are rational and effective juvenile justice reforms that treat young people in developmentally appropriate ways”.

Conclusion

The Prison Reform Trust reported that many who work in the field of youth justice are convinced that the adversarial court system of England and Wales is inappropriate as a means of addressing the wrong doing of children. Young defendants often do not understand legal proceedings or the language used by lawyers, they report feeling intimidated and isolated in court and may not receive a proper explanation of what has happened until after a hearing is over. They also feel frustration that the courts seem rarely to understand the context in which their offences were committed, including the pressures facing them. As the Privy Council stated in the case of *Kunnath v the State*:

“It is an essential principle of the criminal law that a trial for an indictable offence should be conducted in the presence of the defendant. The basis of this principle is not simply that there should be corporeal presence but that the defendant, by reason of his presence, should be able to understand the proceedings and decide what witnesses he wishes to call, whether or not to give evidence and if so, upon what matters relevant to the case against him.”

If young people are not sufficiently mature and competent to understand the process of a trial in a criminal court, can they be held criminally culpable for their behaviour? The age of criminal responsibility in England and Wales should be reviewed with a view to raising it at least to the UN Committee on the Rights of the Child recommended minimum of 12 years and preferably to the European norm of 14 years. Meanwhile the presumption of *doli incapax* should be re-established, and children who commit offences should be dealt with through a welfare-based approach. The adoption of a welfare approach to child offending does not imply that the harms caused by youth offending should be tolerated, but means ensuring that
all children who are alleged to have offended have access to the range of health and social
care services they require whether they are formally prosecuted or not. And with respect to
those who are prosecuted, it entails recognising fully the range of difficulties that they are
likely to face throughout the court process, and taking steps to address them.

4 Henry de Bracton ‘De Legibus et Consuetudinibus Angliae’, in George Woodbine Four Thirteenth Century
   Law Tracts (Yale University Press, 1910).
5 Penal Affairs Consortium The Doctrine of ‘Doli Incapax’ (Penal Affairs Consortium, 1995), p.5
6 [1994] 3 All ER 190
7 [1994] 3 All ER 190, 196
8 [1995] 1 AC 1
9 Home Office No more excuses: A new approach to tackling youth crime in England and Wales (The Stationery
   Office, 1997), para. 4.4
10 Home Office No more excuses: A new approach to tackling youth crime in England and Wales (The
12 C (A Minor) v DPP [1995] 1 AC 1. at p. 39
14 Jon Hales, Camilla Nevill, Steve Pudney, Sarah Tipping Longitudinal analysis of the Offending, Crime and
   Justice Survey 2003–06 (Home Office, 2009)
16 Ibid.
17 Ruth Hayward, Clare Sharp, Young people, crime and anti-social behaviour: findings from the 2003 Crime
   and Justice Survey (Home Office, 2005).
18 Sue Bandalli “Children, responsibility and the new youth justice” in Barry Goldson (ed.) The New Youth
   Justice (Russell House, 2000), at p. 94.
19 Julia Fionda “Case Commentary: The Age Of Innocence? – The Concept Of Childhood In The Punishment Of
   Young Offenders” (1998) Child and Family Law Quarterly 77


25 (2005) 543 US 551

26 [2003] UKHL 50, para 53

27 *Camplin* [1978] AC 705, 717


33 Section 52 Criminal Justice and Licensing (Scotland) Act 2010.

34 (section 52 Children Act 2001)

35 section 129 Criminal Justice Act 2006


43 Jessica Jacobson, Jenny Talbot Vulnerable Defendants in the Criminal Courts: a review of provision for adults and children (Prison Reform Trust, 2009)

44 Neal Hazel, Ann Hagell, Laura Brazier Young Offenders’ Perceptions of their Experiences in the Criminal Justice System (Policy Research Bureau, 2002). Also Independent Commission on Youth Crime and Antisocial Behaviour Time for a fresh start (The Police Foundation, 2010), at p. 23.

Introduction

1. The Commission states (S 8.36) “We are unaware of published material indicating whether practitioners believe that a test for determining unfitness to plead (or decision-making capacity as it would be under our provisionally proposed test for the Crown Court) is necessary in relation to cases which are triable summarily. The lack of authority on the point might be taken as an indication that the present system works quite well.”

2. The reason for a dearth of information is that the effects of juvenile justice legislation and accompanying measures introduced from 1998 onwards, have only recently begun to come to light. AOPM’s report to the Independent Commission on Youth Crime and Anti-Social Behaviour (December 2009) detailed the scale of unintended consequences.

3. Healthy Children, Safer Communities (HM Government, 2009b) recognised the high level of unmet health needs of children and young people in contact with youth justice services – including poor communication skills, mental health problems and learning difficulties and acknowledges the inadequacies of current provision. The report further recognises the need for improved assessment, noting that assessment tools used by youth justice services underestimate mental health problems, and that available tools do not assess for learning disabilities, communication difficulties or conduct disorder.

4. The report Seen and Heard; supporting vulnerable children in the youth justice system (Prison Reform Trust, November 2010), details how, far from working well, young people simply become trapped in the justice system.
Background

5. The Youth Justice & Criminal Evidence Act 1998 S 16 introduced special measures for support and assistance from a registered intermediary to young witnesses, other than the accused.

6. The C v Sevenoaks Youth Court [2009] EWHC 3088 (Admin) (03 November 2009) ruling states that both young witnesses and defendants should be serviced.

7. The Coroners and Justice Act 2009 extended the right of support from an intermediary to vulnerable defendants in court. No implementation date has yet been specified however; the use of registered intermediaries is entirely at the court’s discretion moreover.

8. Omission of services by a registered intermediary is the legal right of children, aged 17 years and below, currently withheld from child defendants. Coincident with the ‘net widening’ effect of a reduction of the age of criminal responsibility, the result has been that incarceration is the backstop for lack of diagnosis of children with Special Education Needs (SEN), who come to the notice of police. Combined with the absence of remedial provisions in mainstream secondary schools, the net effect is that learning disabled children are deemed acceptable casualties of a results-driven culture which is failing a significant cohort of the school-aged population.

9. Many candidates for the youth justice system fall under the broad category of SEN, but their needs - as defined according to the Education Act 1996 SEN code of Practice - are ignored or become ‘lost’ in their journey through the criminal justice system. Notwithstanding that the child’s parents may have fought tooth and nail to obtain a Statement - the direct result of a lack of sufficient financial resources within Local Authorities’ to fulfil statutory obligations re diagnosis – leaving a fall-back position of diagnosis in police custody, or jail.

10. The Centre for Mental Health with the YJB, are developing support for young people detained in police custody; this is far too late however.

Questions 8-11: 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? etc

11. The proposal is 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.
12. A lack of appropriate diagnostic facilities in the education system means that many learning disabled / delayed children remain undiagnosed, simply because local authorities lack the financial resources to fulfil their statutory requirements. Instead resources are channelled to meeting the requirements of the criminal justice system. (Justice Reinvestment\textsuperscript{viii}.)

13. More than 65 per cent of all school exclusions involve students with Special Educational Needs. Those without a statement are most at risk of permanent exclusion.\textsuperscript{ix} Whilst not all children who are excluded from school go on to criminal behaviour, the rate of mental health problems among children in the youth justice system are at least three times higher than within the general population of children.\textsuperscript{x} In addition, an assessment of children who offend in England and Wales found that 23\% had an IQ of below 70 (‘extremely low’) and 36\% had an IQ of 70-79\textsuperscript{xi}.

14. Since imposition of a fact-finding process is at the discretion of the youth court, and a Statement of Special Educational Needs becomes ‘lost’ once the journey through the criminal justice system commences, children are not guaranteed the same protection from conviction, enjoyed by adults. Accordingly, when a young person comes to the notice of the youth justice service the following measures are proposed, designed to fall in line with proposals in the Green Paper ‘Breaking the Cycle’.

A. If a child pleads guilty he/she should be protected from conviction for all but grave crimes. (Green Paper S 117, 250: ‘Wiping the slate clean’ once the offender reaches adulthood is a possible approach for all but the most serious offences.)

B. If he/she remains silent or pleads not guilty:
   - Factfinding should be delegated to Community Justice Panels (Green Paper S 223 .. explore opportunities for greater community involvement in the use of out-of-court disposals so that they become an integral part of innovative community justice approaches like Neighbourhood Justice Panels.)
   - Findings may only be that he or she did the act.
   - A Statement of SEN should be classed as unfitness to plead.
   - If no Statement is available, a status of ‘undiagnosed SEN’ should be presumed, due to the known, insufficient availability of resources within Local Authorities to meet statutory diagnostic requirements. (Green Paper S 234: Under the current system of out of court disposals, young offenders are automatically escalated to a more intensive disposal, regardless of the circumstances or severity of their offence.)

C. Motoring offences committed by under-eighteens should not be prosecuted in court as indicative of future criminal behaviour.

D. Possession of cannabis and alcohol / substance misuse for personal use should not be prosecuted as being more problematic for young people than for adults. (Young people are generally prosecuted for possession, although Police caution adults because informal warnings are not issued to juveniles.)
15. Under the above circumstances (but not limited to), children should be referred to Community Justice Panels to establish measures which address the offending behaviour and additional support measures to provide an exit route from the justice system. A significant element of support would be requirement of the Local Authority to undertake a statutory assessment of the child’s educational needs – without an option of refusal to undertake assessment.

**Question 12: How far if at all, does the age of criminal responsibility factor into the issue of decision-making capacity in youth trials?**

16. The thrust of government policy - to intervene as early and as positively as possible with young offenders - has been retained. A 10-17 year old is therefore presumed capable of instructing counsel in his/her own best interest; or the burden is imposed upon the parent/guardian, who may be equally indisposed in terms of decision-making capacity.

17. Recent history has shown that, irrespective of an individual’s decision-making capacity, procedural decision rules applied arbitrarily and without reference to holistic application of the early intervention principle, had the catastrophic result of criminalising and incarceration of young people at unprecedented rates.xii These procedures include:

- the ‘two strikes and you’re in’ system, fast-tracking young people into courts and custody
- perverse performance targets incentivised police to focus on the ‘low hanging fruit’ of young people
- sanctions were established in a complex matrix of rules least likely to be understood by poorly educated, disadvantaged young people.
- sentencing discretion gave rise to an arbitrary ‘custody threshold’ over-riding the holistic principle, delineated in the decision rule: Referral Order or Custody

18. Lord Corbett of Castle Vale suggestedxiii that while fewer children enter the criminal justice system under the age of 14 than over the age of 14, the younger the child is the more likely that she or he will go on to become a prolific offender.

19. Recent legislative changes and the ‘Breaking the Cycle’ Green Paper seek to redress immoderation, however as the Standing Committee on Youth Justice has noted (unpublished report 2009):

‘An adult of 40 years with the emotional maturity of a 10 year old ... can claim diminished responsibility if they are diagnosed as having a ‘recognised medical condition’, yet a 10 year old without such a recognised condition cannot succeed with the plea as their development has not been arrested, it is simply ongoing. The fact that children develop consequential reasoning as they grow older is disregarded and, in this way, more is expected of children than adults.’
End Notes

3 See and Heard (2010) Taibot, J. Prison Reform Trust
4 http://www.guardian.co.uk/society/2010/nov/24/vulnerable-young-people-trapped-in-justice-system
5 http://www.teachernet.gov.uk/_doc/3724/SENcodeofpractice.pdf
8 http://www.publications.parliament.uk/pa/cm200910/cmselect/cmjust/94/9408.htm para 139
9 http://www.barnardos.org.uk/not_present_and_not_correct-2.pdf
13 http://www.publications.parliament.uk/pa/ld201011/ldhansrd/text/101220-0001.htm#101220100010
Dear Sir/Madam,

I will be contributing to other collective responses to this consultation, including the Community Diversion and Prison Psychiatry Network of the Royal College of Psychiatrists, but on one specific issue, (unitary construct versus disaggregated test for fitness to plead as per para’s 3.60 to 3.82). I wish to set down my individual thoughts clearly.

In my view, a disaggregated test would be unduly complex and should be rejected on pragmatic, rather than theoretical grounds. I think the potential spectacle of experts who are essentially in agreement on the primary issue engaging in detailed and costly contention over the finer points of what could potentially be very many capacity issues is unlikely to pass a test of benefit versus cost.

Notwithstanding, I have concern that a unitary test according to my understanding of how it is set out in the Consultation Paper, provides for the unwelcome possibility of a defendant being found unfit to plead/without decision-making capacity with a supporting argument on the relevant capacity from only one expert. This is because in a unitary test experts could agree on overall unfitness to plead/absence of decision-making capacity whilst disagreeing on the nature of that incapacity. In my view, this would risk the basis for finding decision-making incapacity being unsatisfactorily tested in the Court.

I would suggest that this problem can be resolved quite easily whilst retaining the concept of a unitary test by simply insisting that experts must agree on impairment of at least one stated capacity. They could be free to disagree about other capacities, but providing that at least two experts agreed that one of the crucial capacities was impaired, this would re-assure the Court. Without such provision I would be concerned that within a unitary construct a supportive second opinion and the natural justice which goes with such an arrangement would not necessarily be provided before this important finding could be made.

Psychiatrists.

Yours sincerely,
Dr Andrew Bickle
Consultant Forensic Psychiatrist
Offender Health Directorate
The Wells Rd Centre
The Wells Rd
Nottingham NG3 3AA
Comments on “Unfitness to Plead,” Law Commission Paper No. 197 (TSO October 26, 2010)

Richard J. Bonnie¹

1. As the Commission observes, legal criteria bearing on the capacity of the accused to participate meaningfully in his or her own defence should be functional (task-specific) and sensitive to context. Clearly, capacity to make decisions in the course of the proceedings, both before and during a trial, should be included among the tasks covered by the legal criteria. The CP’s provisional recommendation that the Pritchard test be replaced with a new test encompassing a broader range of tasks, particular those relating to decision-making, is well-grounded in legal theory and modern forensic science.

2. However, it would be a mistake to reframe the criteria exclusively in terms of decision-making capacity as the Commission provisionally proposes to do. Most importantly, the revised legal criteria should explicitly include requirements that the accused (1) understand the nature and potential consequences of the criminal proceedings and (2) have the capacity to assist counsel. As I have explained elsewhere,¹ these two “foundational” requirements are conceptually distinct from the ability to make decisions regarding the defence or disposition of the case.

3. The requisite “understanding” of the process should include both factual and rational understanding, as described by the Dusky test in the USA. 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. Similarly, the “capacity to assist counsel” refers both to a factual understanding of the role and obligations of counsel as well as the ability to act rationally on that understanding in one’s own case. For 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.

4. Based on the analysis set forth in the CP, I infer that the Commission would agree with my observations in paragraphs 2 and 3 above that these deficits would amount to “unfitness” to plead or stand trial. However, it appears that the Commission incorrectly assumed that any person who lacks understanding of the proceedings or the capacity to assist counsel would also lack decision-making capacity as defined in the CP, and that these criteria would therefore be superfluous. (See, for example, CP Paragraphs 3.40 and 3.41.) In other words, the Commission appears to have assumed that these two functional capacities are subsumed within decisional capacity, and that decisional capacity always includes what I have referred to as a rational understanding of the proceedings, appreciation of one’s own legal jeopardy and a rational

¹ Harrison Foundation Professor of Law and Medicine and Director of Institute of Law, Psychiatry and Public Policy, University of Virginia

understanding of the role of the attorney for the accused. In both of the cases I just described, however, 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 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.

5. As the last point implies, there are cases (probably quite many of them) in which the accused’s lack of understanding of the proceedings or inability to assist counsel becomes apparent early in the case before decisional capacity has been or can be assessed. There is no reason to consider possible deficits in decisional capacity in such cases unless and until these “foundational” capacities are nurtured or restored. Accordingly, there are practical reasons to include these functional capacities in the legal criteria for fitness even if the construct of decisional capacity would subsume them in most cases.

6. It should also be emphasized that there are also strong moral reasons for including these criteria in the revised test as independent requirements. The Commission focuses its attention on decisional capacity because it is a necessary corollary of the principle, reflected in Article 6 the European Convention on Human Rights, that the accused has a right to effective participation in the proceedings. To amplify this idea further, the accused, as an independent moral agent, has the right to stand up for him or herself against the state, to participate meaningfully in the proceedings and to guide his defence if he or she chooses to do so. The underlying values being protected are respect for the dignity and autonomy of the individual. But these are not the only values that the law vindicates when it insists that the accused be “fit” for criminal adjudication. Effective representation by counsel and active engagement by the accused in his or her own defence also promote reliable adjudication (within the framework of rules governing criminal proceedings). Moreover, proceeding against an accused who lacks a basic factual and rational understanding of the nature and consequences of the criminal prosecution, and who fails therefore to appreciate his own jeopardy, offends the dignity of the criminal process itself because it treats the accused as an object of the state’s coercive power rather than as an independent moral agent.

7. I am led to wonder what would be lost by including the core requirements of understanding the proceedings and ability of assist counsel as independent elements of the test for “fitness” for criminal adjudication. Frankly, I do not see any affirmative argument for omitting these requirements, even if they might be redundant in most cases. In my view, nothing is lost and much would be gained by including them. A legal “test” of fitness for criminal adjudication that omits these “foundational” capacities lacks what behavioral and social sciences researchers would call “face validity.”
8. It would be very easy to insert these foundational requirements in the test provisionally recommended by the Commission. I do not intend to offer a definitive proposal in this memorandum, but I will offer some tentative suggestions as to how these two requirements might be incorporated efficiently in the Commission’s provisional formulation of the fitness criteria in CP Paragraph 3.13. As indicated in the text below, I would refer to the fitness criteria not as a test of “decision-making capacity” but rather as a test of “mental capacity for criminal adjudication”:

A person would therefore lack the requisite “mental capacity for criminal adjudication” if he or she is unable to understand the nature and consequences of the criminal proceedings against him or her, is unable to assist counsel in his or her own defence, or lacks the capacity for rational decision-making in relation to the defence or disposition of the case. 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],

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

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

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

9. It should be emphasized that the repeated use of the term “rational” in this revised formulation refers to the process of reasoning, not to the outcome or content of the decision, just as the Commission has correctly proposed. The Commission seems to have avoided using the term “rational” at all in the proposed criteria in order to avoid any suggestion that an accused could be regarded as “unfit” simply because his decision itself seems unwise or “irrational.” (See, e.g., CP Paragraphs 3.48 and 3.54.) However, I think that the Commission has been overly

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2 The bracketed language strikes me as useful but not necessary.
3 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.
4 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.
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 (as the Commission has explained in CP Paragraphs 3.51-3.53) rather than avoiding term “rational” altogether due to fear that it will be misunderstood.

10. Although this is a complicated issue, I agree with the Commission that the “unitary approach” for assessing decisional capacity is preferable to a “disaggregated” approach’ on grounds of practicality and efficiency, and I have retained the unitary approach in the provisional formulation offered above. A completely disaggregated approach would be unwieldy and could lead to unacceptable inconsistency in the application of the criteria. I understand that some forensic specialists believe that a disaggregated approach is necessary to implement the fundamental principle (with which I agree) that decisional capacity is task-specific. However, I think that the unitary formula can be implemented in a contextualized manner in order deal with the subtle problems that may arise in a few complicated or borderline cases. Thus, I am confident that particularized concerns about the capacity of an accused to make a specific decision that might arise in a given case (for example the decision to waive a jury trial) can be addressed as these cases actually arise without insisting that capacity to make every possible decision must be separately assessed in every case, as the disaggregated approach would seem to imply.

11. However, there is one category of tasks that should be disaggregated from the standard test of “mental capacity for criminal adjudication” proposed above and should be subject to heightened scrutiny – those that arise in connection with waiver of counsel and self-representation by an accused. The special issues that arise in such circumstances were not addressed in the Consultation Paper. The only reference to the problem appears in CP Paragraph 2.79 and its accompanying footnotes, where my own comments are quoted. The Commission observes that these problems arise in “extreme cases,” typically cases involving the death penalty, thereby implying that the Commission regarded these problems as peripheral to its task. However, I believe that these problems (waiver of counsel and self-representation or profound conflict between the accused and counsel regarding specific decisions) arise sufficiently often in non-capital cases to merit specific attention in the Commission’s report.

12. I would be willing to discuss the problems to which I referred in the previous paragraph at some length in a subsequent communication if it would be helpful to the Commission. For present purposes, though, I will confine myself to a few remarks concerning two pertinent decisions by the U.S. Supreme Court. In Godinez v. Moran, the Court decided that a single test of fitness for criminal adjudication (the Dusky test modified to include decisional capacity) should apply to all cases in which the defendant is represented by counsel, even when the accused pleads guilty. I agree with this part of the Court’s ruling. The troubling part of the Godinez decision is that the Court refused to elevate the standard in cases where the defendant waives representation by counsel altogether and pleads guilty against counsel’s advice, as the defendant in that case (Richard Moran) had done. The Court recently receded somewhat from the insistence on a unitary standard when it ruled, in Indiana v. Edwards, that a defendant who is competent to stand trial when represented by counsel is not necessarily competent to represent

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5 509 U.S. 389 (1993)
6 554 U.S. 164 (2008)
himself at trial. The Court did not attempt to define the standard that should be applicable in these unusual cases, but its decision in *Edwards* clearly reflects a judgment that allowing an defendant with severe mental illness to represent himself at trial poses an unacceptable risk of an erroneous conviction and could also compromise the dignity of the proceedings, and that these considerations are sufficient to override the otherwise “competent” defendant’s right to make his own decisions.

The Supreme Court assumed that Edwards was competent to stand trial under *Dusky* based on the trial court’s finding and was therefore competent to decide that he wanted to represent himself. Beneath the surface, however, one has to worry about whether Edwards was really capable of making a deliberate, self-interested decision about the advantages and disadvantages of self-representation. The lesson in both *Godinez* and *Edwards*, in my opinion, is that decisions to forgo legal representation should be scrutinized with great care and should not be allowed if there is any significant doubt regarding the mental and emotional capacity of the accused to exercise rational self-interested judgment – as there was in both cases.

13. As mentioned in Comment 8, note 3, I believe that the Commission should discuss the legal rules that govern the allocation of decision-making prerogatives between the accused and counsel. This issue has a direct bearing on the Commission’s proposed approach to “assisted participation” for accused persons with intellectual disabilities or other cognitive impairments. Presumably the Commission’s proposed decisional capacity criteria require an ability to make the specific decisions that must be made by the accused (such as the plea). However, many other decisions that might be made by an actively participating client may lawfully be made by the attorney in cases involving clients with intellectual disabilities. Human rights norms and professional ethical norms probably obligate counsel to facilitate participation by the accused to the maximum possible extent allowed by his or her capacities, but these efforts have no bearing on the fitness issue.

14. The Commission expresses its hope that a standardized instrument for assessing mental capacity for criminal adjudication will be developed and seems to envision that use of such a “test” would be a required element of the assessment. As one of the architects of the MacArthur Competence Assessment Tool to which the CP refers (CP Paragraph 5.3) I believe that use of such instruments can enhance the quality of these evaluations. However, I would be reluctant to prescribe use of such an instrument. In this context, the law should require only that the experts conducting the assessments have specialized training and experience in conducting forensic assessments. The practice standards for conducting such assessments should be governed by professional education, training and certification.

15. Based on the American experience, I believe that clinical psychologists are fully capable of conducting forensic assessments of “fitness” to plead or stand trial. I suspect that the majority of such evaluations in this country are now performed by psychologists, and that is certainly true in Virginia. Medical expertise is not required for the routine case. When medical consultation is needed (due to suspicions about a neurological condition, for example) it is standard practice to

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As previously noted, the issues raised in *Godinez* and *Edwards* are subtle and complicated and I have not tried to deal fully with them here. I mention them only to encourage the Commission to consider whether the criteria for decisional capacity set forth in CP Paragraph 3.13 are sufficiently demanding to deal properly with such cases or whether a distinct “test” should be formulated.
request one. It strikes me as ironic that the Commission has provisionally recommended the
development and routine use of a standardized assessment instrument while retaining the current
statutory requirement that such assessments be conducted exclusively by psychiatrists. I say that
because psychiatrists (in this country at least) are not typically inclined to use standardized
instruments in their practice.
Dear [Redacted],

I am writing in response to your Consultation Paper. I was secretary to the head of healthcare at HMP Pentonville a few years ago and would like to add my concerns.

1. Magistrates seem to have little knowledge of the length of time required to prepare a psychiatric report. I had to contact the Clerk of the Court in many cases to ask for extra time. It may cost more money to keep inmates on remand for longer but the result should be more accurate reports as to each person's fitness to plead. It can also help to identify remand prisoners of low intelligence who should be under the care of a hospital for people with learning disabilities. 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;

2. It would help if more police surgeons were recruited from physicians with a background in psychiatry so as to minimise the risk of vulnerable prisoners failing to be remanded for psychiatric reports;

3. There needs to be a much greater emphasis on psychiatric evaluation for all prisoners accused of violent crimes, whatever their age. This would help to keep those who are mentally ill out of the prison system and get them into appropriate hospitals.

I would like to point out that, although it is estimated that around 60% of prisoners have some kind of psychological problem, about 90% of the work of prison medical officers is of a psychiatric nature.

On the positive side, I always found visiting doctors from Rampton very efficient in coming to assess possible patients for transfer, which is more than can be said for NHS Catchment Area psychiatrists, who seem to have all manner of excuses not to come and assess inmates, even though, legally speaking, even if they deem them in need of hospital care, they only have to find them a suitable bed somewhere in the UK, not necessarily in their own hospital.

Yours sincerely,

Zoe Bremer
Response to the Law Commission consultation:  
Unfitness to Plead: A consultation paper

The British Psychological Society thanks the Law Commission for the opportunity to respond to this consultation.

The British Psychological Society (“the Society”), incorporated by Royal Charter, is the learned and professional body for psychologists in the United Kingdom. The Society is a registered charity with a total membership of almost 50,000.

Under its Royal Charter, the objective of the Society is “to promote the advancement and diffusion of the knowledge of psychology pure and applied and especially to promote the efficiency and usefulness of members by setting up a high standard of professional education and knowledge”. The Society is committed to providing and disseminating evidence-based expertise and advice, engaging with policy and decision makers, and promoting the highest standards in learning and teaching, professional practice and research. The Society is an examining body granting certificates and diplomas in specialist areas of professional applied psychology.

We are content for our response, as well as our name and address, to be made public. We are also content for the Law Commission to contact us in the future in relation to this consultation response. Please direct all queries to:-

Consultation Response Team¹, The British Psychological Society,  
48 Princess Road East, Leicester, LE1 7DR.

Email: [email protected] Tel: [Tel:]

This response was prepared on behalf of the Society by Paul Devonshire, CPsychol, AFBPsS, member of the Division of Clinical Psychology (DCP), the Division of Forensic Psychology (DFP) and the Faculty of Forensic Clinical Psychology, with contributions from: Dr Alice Campbell Reay, CPsychol, CSci, AFBPsS, member of the DCP, the Division of Neuropsychology and the Faculty for Psychologists Working with Older Adults; Bernard Kat, CPsychol, AFBPsS, member of the DCP, the Division of Health Psychology and the Managers’ Faculty; Robin Lomas, CPsychol, Associate Fellow of the Society; and Dr Gary Macpherson, CPsychol, CSci, AFBPsS, member of the DCP, the DFP and the Faculty of Forensic Clinical Psychology. We hope you find our comments useful.

Dr C A Allan, CPsychol, CSci, AFBPsS  
Chair, Professional Practice Board

¹ formerly Policy Support Unit
Response

The Society welcomes the opportunity to respond to this consultation. As well as addressing the questions set out in the consultation paper, we think it pertinent to make certain observations and comments separately upon certain issues raised in the document.

It appears that the need for change is predicated upon the observation that the existing Pritchard test is “outdated and inconsistent with modern psychiatry” (footnote 3, p. 1). In addressing the issue of fitness/unfitness to plead, we concur with the expectation that this will be brought into line with the principles underlying the recent legislation of the Mental Health Act and the Mental Capacity Act, particularly the latter. These Acts are couched in the language of decision-making capacity. It is therefore thought appropriate to use this language in estimating a defendant’s fitness to plead, conceptualizing the function of pleading as a decision-making process. It would be our contention that, though the term ‘decision-making’ does not appear in the Pritchard legal test, it is implicit. This may be a reflection on the change in language over time since Pritchard was originally promulgated in 1836. However, a nineteenth century judge captured the task demand of an accused person very well, that within due process he or she is potentially an active party in the trial. Thus, the accused person needs to be able to:

- comprehend the evidence;
- give proper instructions to legal representatives;
- know that he/she can challenge a juror;
- comprehend the course of proceedings on the trial in order to give a proper defence.

It can be seen from the above list that the criteria apply to the decision-making needed throughout the trial and not just at the submission of plea stage. Unfortunately, however, the title ‘Unfitness to Plead’ might suggest to some people that it only applies to that single stage. In the USA, the issue is called “competence to stand trial”, and perhaps by describing it so in UK law rather than “(un)fitness to plead”, there would not be the present confusion. We are not aware that any such change in wording has been proposed: originally called the Incapacity Bill, it finally became the Capacity Act.

One of the criticisms raised in the document is that Pritchard “places a disproportionate emphasis on cognitive ability, and does not take any or sufficient account of factors such as emotion or volition” (Section 3.23). From the perspective of academic and practising psychologists, this does not represent modern psychological thinking. Decision-making could be said to be the cognitive function par excellence, and occupies much of the attention of cognitive psychologists and scientists. People who are not psychologists often restrict the term ‘cognitive’ purely to intelligence and intelligence quotient (IQ) testing. This is an unfortunate error as people can have the same IQ and be quite different in their decision-making capacity, a fact which mitigates against the placing of too much emphasis on IQ scores.

It is of note that when possible capacities to be included in evaluating fitness to plead are itemised (in Section 3.13), four processes are cited that psychologists would consider to be cognitive, 1) understanding of information (comprehension), 2) recall of information (memory), and weighing up information (reasoning). The last, 4) ‘communicating decisions’ leaves out the process of deciding what to communicate, which will be based upon the process of ‘problem-solving’, which can also be said to be cognitive.
We are concerned about the inclusion of the quotation from Heginbotham & Kinton (2007) in Section 3.38, “[A sophisticated capacity test should address the interplay between cognition (knowing), emotion (evaluating) and volition (acting)].”, as psychologists would not describe ‘emotion’ as ‘evaluating’, but would rather place ‘evaluation’ under cognition. Psychologists might also be uncomfortable with ‘volition’ being described as ‘acting’, since it refers to motivation and, in older parlance, will.

The Pritchard test, as a legal test, demands the presence of certain requirements on the part of the accused. As with the Mental Health Act, it does not require an explanation of the reasons for any deficit. This is appropriate for a legal test: it is well recognised that certain emotional and physical states will adversely affect cognitive/decision-making competence, but awareness of those causes does not diminish the presence of any deficits. There is a danger that of less focus being placed on the decision-making capacity per se and greater attention on the states that may be contributing to it. This can lead to the logic that if someone has a particular diagnosed condition then they must lack capacity. We would doubt that there is such simple correlation.

There follows from this an apparent emphasis on how fitness to plead sits with psychiatric diagnosis. In our opinion this is somewhat ‘cart before the horse’ – we consider it more appropriate to decide the presence or absence of capacity first, then to be concerned with diagnosis if it is relevant. Clearly, the reasons for a lack of capacity will raise the question of the appropriate disposal, since it may have implications for clinical care. [As an aside, it would be interesting to know how many people who have been charged are already known to mental health services and how many whose mental health problems have been exposed through criminal proceedings.]

Psychologists would also be uncomfortable with the rest of the Heginbotham & Kinton quote presented in Section 3.38 (“A person’s ‘reasoning defect’ may be linked to any of these ‘capacities’ [cognition, emotion and volition] and perhaps is more likely to result from an emotional or psychological deficit than any obvious failure in cognitive function. Impairment of decision-making ability is often a result of diminished or absent emotion such as embarrassment, sympathy and guilt, this may be related to an impairment of emotion related signals and the failure to activate an emotion related memory.”) as psychologists would not refer to cognition, emotion and volition as ‘capacities’. This raises the problem of terms having different referents in differing universes of discourse. This quote makes it appear that the deficit is either psychological/emotional or cognitive. However, psychologists would not consider this a simple dichotomy: rather, there is a great interdependence between these two domains (see Domasio [1994]). For example, being depressed (an emotional state) has an impact upon thoughts (a cognitive process). It is also recognised that this works the other way – reflecting upon depressing things can have an impact on mood. The question in Pritchard’s criteria for fitness to plead is ‘is there an impairment in decision-making capacity?’. The law is not interested in why.

Proportionality

The Society is unconvinced that the principle of proportionality, which is accepted in civil cases, is not appropriate in criminal cases (as suggested in 3.11). Proportionality accepts that someone’s capacities are, as in the evaluation of parenting, ‘good enough’

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1 referenced in full in footnote 42 on p.62.
for the task in hand. This would apply to a criminal trial where there is variation in the complexity of the evidence being evaluated. This would keep it in line with the Mental Capacity Act, which appears to be one of the thrusts of the present proposals. Where proportionality is an important principle, the evaluator of the individual needs to consider the capacity of that individual and also the demands of the task he or she may be called upon to perform so that, in the interests of fairness, there is a reasonable match. Clearly, there is convenience in having an all-or-nothing approach to the judgment of someone’s fitness to plead, since there is not the requirement to know the nature of the task.

We also recognise that, in accepting a decision-making capacity model, the concept of age of criminal responsibility is challenged. 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; however, this is not the occasion to pursue this point.

**Unitary test**

The *Pritchard* test is referred to in Section 3.60 as a unitary test. We would contest that it is an aggregated test, since it identifies different processes and/or stages in the trial process that need to be addressed by the investigator, but with one answer. The problem arises if a clinician does not use all the criteria in making a judgment with regard to fitness to plead. The research quoted would suggest that clinicians often have not employed all of the criteria in reaching their conclusion. In such situations, it could be said that the fault lies, not with the criteria, but in the absence of rigour on the part of the investigating clinician, despite Grisso’s unequivocal advice (cited in footnote 3 on p.92) that “each of the relevant legal constructs must be captured.” (our underlining).

Perhaps it is not surprising that psychologists find the statement of “the necessity for reform to take account of the relationships between the disciplines of law and psychiatry law” (Section 5.4) somewhat prejudges the issue. One interpretation of the research could be that the discipline of psychiatry is only one of the disciplines which has expertise in assessing the cognitive functions relevant to an accused’s competence in a court room, though traditionally they have been given the role of experts in this area. It would be opportune to challenge the hegemony granted to the discipline in this document. This would be very much in line with the developments in the working of the Mental Capacity Act, where psychologists regularly submit reports of decision-making capacity in a variety of contexts.

In the wake of the Mental Capacity Act, the Society published its *Assessment of Capacity in Adults: Interim Guidance for Psychologists*\(^3\) which included a section (2.1) on fitness to lead. This took a very functional approach to the assessment of fitness, which allowed the assessor to address the issues without regard for the possible diagnosis. Thus, although someone might be diagnosed with schizophrenia, a symptom of which is formal thought disorder, that symptom might not be present to a degree that would impair performing to an adequate level under the *Pritchard* criteria. Similarly, in neurological disorders, the diagnosis will not indicate the level of competence that an individual will necessarily possess. It is of note that the list of features to consider had items not included in the present document’s recommendations.

\(^3\) British Psychological Society (April 2006).
Although “*objective medical evidence*” is mentioned in Section 5.34, research which demonstrates the failure to use developed assessment tools would suggest that the judgment of fitness that is currently applied may at times be regarded as subjective. The experience of risk assessment would suggest that, whilst there are tools like the HCR-20⁴, it is still better to deal with individuals on a case-by-case basis. Fitness to plead is in this respect similar. As its title suggests, the Society’s interim guidance document offers guidelines to clinicians on how to address the *Prichard* test within a framework of ‘best practice’. This adds such dimensions as concentration/attention span and suggestibility. It also uses well-validated neuropsychological tools already used by clinical psychologists, forensic psychologists and neuropsychologists in other clinical contexts, and therefore grounds it in established, evidence-based practice.

“UNFITNESS TO PLEAD”

BROADMOOR HOSPITAL RESPONSES TO A CONSULTATION PAPER BY THE LAW COMMISSION

25th January 2011

1. Introduction

The following comments have been collated from numerous sources including:
- Email correspondence and discussions with colleagues at Broadmoor Hospital
- A seminar held at Broadmoor Hospital on 17th January 2011

2. Limited usage of existing powers

Clinicians gave examples of using existing legislation in ways that might not be widespread, in order to achieve better outcomes in specific cases. Use of remand orders and transfer to hospital to treat patients who are unfit to plead has given defendants the opportunity to become fit to plead – and thus defend themselves - after treatment.

A senior Mental Health Act Office Manager drew attention to provision to make remand orders (s.35, s.36 and s.38) under the DVCVA. She had only come across one such remand order under this legislation in our hospital since it was introduced, and suggested it should be used more often.

3. The role of psychiatrists

There is a potential danger of stretching the role of psychiatrists and mental health professionals beyond their professional abilities and duties. Many of the points in the consultation document refer to legal procedures and structures which psychiatrists cannot comment on authoritatively. In a sense, psychiatrists were most comfortable when asked psychiatric or medical questions.

4. Referral of defendants who are unfit to plead

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. 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

1. Is there an impairment of, or disturbance in the functioning of a person's mind or brain? if so
2. 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 brain or mind prevents them from being able to make the decision in question at that time.

5. Assessment of unfitness to plead

The proposal for development of a psychiatric “capacity-based test” for assessment of unfitness to plead drew a sceptical response, with clinicians unconvinced that a tool would be any better (in terms of reliability or validity) than a thorough clinical assessment. There was also a sense that the responsibility for developing such a test had been laid on psychiatrists without consideration of the viability or usefulness of such a test.

No decisions or diagnoses in psychiatry are made on the basis of a single tool or test, and there are dangers that such a tool would be open to just as much variability and abuse as the current system – or perhaps more so, since the result of a recognised “test” can in some situations lend an air of unmerited respectability to an inadequate assessment. Moreover a standardised test may not be able to accurately address the issues of malingering.

Overall, however, there was a consensus that some “tidying up” of legislation around the test for unfitness would help clinicians who have been asked to comment on unfitness (i.e. would clarify confusion arising from overlapping issues of Pritchard criteria, effective participation and use of special measures).

It was also suggested that the assessment of unfitness to plead should be conducted as a joint assessment undertaken by both a psychiatrist and psychologist together, rather than independently, to facilitate use of neuro-psychological tests to assess the defendant’s cognitive functions.

For all defendants under the age of 18, assessment of unfitness to plead should include an assessment of cognitive function (IQ testing).

6. Unitary vs Disaggregated

There was a general consensus that a completely disaggregated approach, with repeated assessments of capacity at every stage of a trial, would hamper proceedings to an extent that could be potentially unworkable. In addition, the current legal framework would require extensive modification, as described in the consultation paper.
On the other hand, the so-called continuum with a unitary construct appears to be quite limited, in that it might helpfully re-emphasise use of special measures and effective participation, but still potentially fails to distinguish the separate questions of fitness to plead, fitness to stand trial and fitness to give evidence.

The question of whether any of these three should be considered together or not was not fully resolved, but the notion of separating fitness to plead and fitness to stand trial has face validity for many psychiatrists, even if it makes less sense in the legal framework.

7. Children and developmental immaturity

Colleagues working with children and adolescents stated their concern at the age of criminal responsibility in England remaining at 10 years of age. Not only has this continued within a firmly criminal (rather than social welfare) structure, but the removal of the defence of *doli incapax* has rendered child defendants more vulnerable.

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. Evidence-based interventions at this stage will serve not only the best interests of the child but also the public.

8. Effective participation

The group discussed the Law Commission’s proposal on effective participation and issues on proportionality. While proportionality may not be specifically relevant for patients in maximum security as those who are found unfit to plead or stand trial for very serious offences are admitted to help regain fitness, the group nevertheless felt it (proportionality depending upon the nature of the offences) is an important factor and needed to be considered in the proposed changes.

9. Disposal

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.

10. General Comments

Overall, our staff group showed a great deal of interest in this consultation and agreed there was a case for some reforms of the law. The consultation document is a readable
and highly informative document, and it provided a platform for introducing members of staff to the important work undertaken by the Law Commission.

However, it became clear that only a very small minority of staff had read the lengthy original consultation paper. Recent articles by Clare Wade had been circulated to help provide an overview of the Law Commission’s proposals, but it may have been helpful to have a summary (perhaps under ten pages in length) which would have given busy clinicians a better chance to inform themselves and to contribute to this consultation.

11. List of contributors

Contributors at West London Mental Health Trust:

Dr Kevin Murray, Clinical Director, Broadmoor Hospital
Mrs Sheena Ebsworth, Mental Health Act Office Manager
Mr Kevin Towers, Mental Health Act Office Manager
Dr Heidi Hales, Consultant Child & Adolescent Forensic Psychiatrist
Dr David Reiss, Consultant Forensic Psychiatrist
Dr Samrat Sengupta, Consultant Forensic Psychiatrist
Dr Amlan Basu, Consultant Forensic Psychiatrist
Dr Mrigendra Das, Consultant Forensic Psychiatrist
Dr Callum Ross, Consultant Forensic Psychiatrist
Dr Andrew Payne, Consultant Forensic Psychiatrist
Dr Jose Romero-Urcelay, Consultant Forensic Psychiatrist
Dr Natalie Pyszora, Consultant Forensic Psychiatrist
Dr John Dent, Consultant Forensic Psychiatrist
Prof Tony Maden, Consultant Forensic Psychiatrist
Dr Richard Church, Specialty Registrar in Forensic Psychiatry, Broadmoor Hospital

External contributors:

Dr Tim Exworthy, Consultant Forensic Psychiatrist
Ms Shauneen Lambe, Director, Just for Kids Law
Dr Tim Rogers, Consultant Forensic Psychiatrist
RE: Consultation paper no. 197 Unfitness to plead

I am a clinical psychologist. I have been preparing Court reports in civil, criminal and family cases for over 15 years. In that time, I have prepared approximately 20 reports in criminal cases where the main issue was fitness to plead/stand trial and I have given evidence in Court for about half of these cases. In most of them, there were no psychiatrists involved.

I read your consultation paper with interest and I am responding to your first 7 proposals as outlined in paragraph 9.1. I do not consider that I can respond to the remaining proposals as they appear to relate to legal/procedural issues about which I am not qualified to comment.

I welcome the proposal to replace the Pritchard test with a broader assessment of whether the defendant has “all the requirements for meaningful participation in the criminal proceedings.” I agree that this assessment should not require that any decisions made must be “rational or wise.” Instead, it should be based on objective evidence relating to the psychological processes that govern decision-making.

I also agree that what is required can vary depending on the nature of the trial. Some of the cases in which I acted as expert were complex fraud cases where the evidence consisted of very lengthy, detailed financial documents. Such cases make different demands on the defendant as compared with cases where the issue is whether or not he or she took part on one count of burglary, for example. I am therefore in agreement with proposals (3) and (4).

The question of special measures is one that I have been asked but it can be hard to answer with any confidence because we lack the research base to determine whether, for example, allowing breaks and sitting for a shorter day will help a particular defendant who is suffering from anxiety that disrupts concentration and attention.

I certainly agree with proposal (6) that expert evidence should be offered in such cases. You rightly make the point that a standardised test should be used. Standardised tests are those which have a research base to support them, relating to how reliable and
valid the findings are so we can have more confidence in the results as compared with a more subjective clinical interview (Meyer et al, 2001).¹

Where I disagree is proposal (7) that the expert evidence must come from a psychiatrist. You raise some legal points about this and I cannot respond to those but the professional issue that I would draw to your attention is that psychologists are trained in the administration and interpretation of standardised psychometric tests, not psychiatrists. Some psychiatrists may seek to learn about testing but it is not an integral part of their training as it is for psychologists.

You mention in paragraph 3.97 some research with the MacArthur Competence Assessment Tool – Criminal Adjudication. I would point out that this test was developed by seven authors, five of whom are psychologists.

In paragraph 5.38 you ask, “What cognitive abilities are central to the ability to comprehend court proceedings and to follow evidence?” Psychologists are trained to assess cognitive abilities with standardised IQ testing, not psychiatrists.

In paragraph 3.41 you make the point that the current Pritchard test is narrower than your proposed assessment of decision-making capacity. So it follows that if we implement your proposal, the number of defendants who will require an assessment of fitness to plead/stand trial will increase although as you say, you do not know by how much (paragraph 3.22). Looking at the figures you cite in paragraph 2.61, one might estimate that the number could easily double.

In my experience of working for the criminal Courts, there is already a dire shortage of suitable experts. For example, last month I was instructed by the defence as an expert in a murder case and I was informed that the prosecution were in some difficulty because there was no expert available who could respond within the required timeframe.

If your proposals are implemented, I anticipate that this problem will become even more acute. I propose that psychologists be included as recognised experts in fitness to plead/stand trial cases to help meet the demand.

Yours sincerely,

Kari Carstairs, Psy.D.

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Law Commission consultation on unfitness to plead

Response from Centre for Mental Health

Centre for Mental Health is an independent charity which works to improve the life chances of people with mental health problems by influencing policy and practice in mental health and related services. We have two major strategic objectives: improving the life chances, mental health and wellbeing of offenders, and of children and young people with risk factors for offending and costly future mental health problems; and enhancing the lives of people with mental health problems through employment. We also carry out work around broader mental health and public policy issues.

A large part of our criminal justice programme looks at the role of diversion in the criminal justice system for people with mental health problems. In this context, diversion is the process to ensure that people with mental health problems who enter (or are at risk of entering) the criminal justice system are identified and provided with appropriate mental health services, treatment and any other support that they need. People can be diverted at any stage of their route through the criminal justice system. Diversion can occur within or outside the criminal justice system, and need not replace any sanctions for any offence a person has committed. Well-designed arrangements for diversion have the potential to yield multiple benefits including: cost and efficiency savings within the criminal justice system; reductions in re-offending; and improvements in mental health.

We strongly welcome the Law Commission’s consultation paper on unfitness to plead which we believe draws attention to the prevalence of mental health problems among people in the criminal justice system and proposes a more modern and appropriate approach to the unfitness to plead procedure.

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 (see “Breaking the Cycle” (Ministry of Justice, 2010)).

Comments on specific proposals and questions

Provisional Proposal 1: The current Pritchard test should be replaced and there should be a new legal test which assess whether the accused has decision-making capacity for trial. This test should take into account all the requirements for meaningful participation.

Provisional Proposal 5: 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 and where any other reasonably adjustments have been made.
Question 1: 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 hearing 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?

We agree that the test for unfitness to plead needs replacing to align it with modern psychiatric thinking. The proposed decision-making capacity test appears a more appropriate way of assessing whether a person is able to stand trial. Importantly, it is focused on an individual’s abilities and is not determined solely by reference to that individual’s mental health diagnosis. We also welcome the inclusion of special measures in the test. It is important that those who are able to stand trial with assistance are allowed to do so, and we would encourage greater consideration and use by the courts of special measures for people with mental health problems. We would stress, however, that these measures must ensure effective participation on the part of the accused and should be reviewed where necessary for example, if the person’s mental health deteriorates during the course of a trial. We would also welcome greater discussion of the role that sections 35 and 36 of the Mental Health Act 1983 should play alongside the law on unfitness to plead. For example, section 36 allows people to be remanded to hospital for treatment which could be appropriate in many cases where treatment will improve a person’s mental health problems so that the trial can take place within a reasonable period of time.

Provisional Proposal 4: 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 the trial which the accused faces.

We agree with the Law Commission’s reasoning as to why it would be difficult to include so-called ‘proportionality’ considerations in a test for decision-making capacity in the criminal context. We would be particularly concerned that the ‘gravity’ of the outcome would be determined, for example, by reference to the possible length of a custodial sentence. This could, for example, fail to take into account the detrimental effect that short sentences can have on a person with mental health problems. For offenders with mental health problems, short sentences do little to prevent re-offending, can be detrimental to an individual’s mental health and are also costly to the tax payer. They can result in a person losing their job, home, benefits and family. Short sentences can also disrupt any health care that prisoners may be receiving in the community. At the same time, they do not provide enough time for prisoners to have their needs assessed in prison or to get access to the services that could help. We would therefore be concerned about a decision-making capacity test which requires the judge to take into account the matters detailed in provisional proposal 4.

Provisional Proposal 7: A defined psychiatric test to assess decision-making capacity should be developed and this should accompany the legal test as to decision-making capacity.

Obtaining access to psychiatric assessment can be a significant hurdle at different stages in criminal proceedings and could be one reason behind the low numbers of unfitness to plead hearings. Also, there is some evidence that psychiatric reports can be inappropriate or unfit for purpose. A defined psychiatric test could result in more relevant psychiatric reports and
could possibly mean that they take less time to produce. We therefore see the benefits of having a defined psychiatric test but would welcome more evidence of how it would operate in practice and whether it would allow for sufficient flexibility.
The Response of H.M. Circuit Judges to the Law Commission’s Consultation Paper “Unfit to plead”.

Introduction

1. We hope that it may be of assistance if we make some comments about the present experience of the Circuit Judges who sit mainly in the Crown Courts.

2. We have noticed an increase in the number of cases in which the issue of unfitness to plead is raised. 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. This may be due to a number of reasons. 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. In other cases, there is a change in the degree of mental disorder which means that the defendant is no longer to be considered unfit to plead. For example, a defendant who has suffering from a psychotic episode,
whether present at the time of the alleged offence or arising since, may have recovered once appropriate medication is taken.

3. Secondly, we have noticed that the issue of unfitness to plead is not commonly in dispute and can therefore be dealt with by the judge expeditiously; almost by agreement.

4. Thirdly, obtaining psychiatric reports in a short time continues to be a problem. This will have implications for the implementation of the proposed test, if, as we think likely, it may require even more careful consideration of the mental state and functions of the accused to determine his or her mental capacity than are necessary under the present criteria.

5. 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.

6. Fourthly, there may be an increase in the number of cases in which a “hospital order” is made. There are significant difficulties at present in
obtaining a suitable bed and we doubt that there is likely to be a significant increase in resources to meet the present, let alone any increased demand. At present, it is impossible to assess this aspect. One could argue that there should not be any significant increase. Any person who is found to be unfit to plead under the existing test is likely to be found unfit under the proposed capacity test. So, there would be no increase there. Any person who would now be found unfit to plead but would not have been so found under the existing test, would have been likely to have been made subject to an order under Section 37 or 37/41 Mental Health Act 1983 following a trial.

7. We do not think that this necessarily conforms to the reality in all cases. Some judges feel so frustrated by their unsuccessful efforts to find a hospital bed that they take the view that if they impose a prison sentence, then if appropriate, the defendant will be transferred under the provisions of Section 47/49 Mental Health Act 1983 and that route to hospital is likely to be faster than remanding a defendant in custody whilst a bed is found. This does, of course, ignore the power which is available but not widely used, to obtain information under Section 39 Mental Health Act 1983. We consider that on any view of the matter, there needs to be careful consideration of the availability of resources necessary on
disposals. We consider that the reform of this aspect of the law needs to be considered in the context of the available disposals.

8. In preparing this response we have used the expression “fit to plead” to include “fitness for trial” except where it becomes necessary to distinguish the two aspects.

**General comments**

9. We acknowledge that this Consultation Paper must be orientated towards the defendant who may be unfit to plead but we consider it important to keep in mind that there is an important element of public interest in all criminal cases. It may be a general interest but, where the defendant is or maybe unfit to plead, there is often a specific interest for an alleged victim. Often the offences alleged are of violence or present serious danger to others e.g. arson in all its forms, or sexual offences. There is in such cases a need to remember that the alleged victims may require closure on the alleged events. They, and the general public, may need reassurance that repetition can be minimised and that steps are being taken to care for the wellbeing of the offender. It is pertinent to remember that the wording of Section 37 Mental Health Act 1983 is that “treatment is necessary in the interests of the patient’s own health and safety and the
safety of others”. We consider that the implementation of the proposed changes may have some effect upon these aspects as we mention later.

10. We submit that the general approach should be that a person charged with a criminal offence should, if possible, have his or her guilt decided by trial either by a jury or by magistrates. That should involve the accused being able to take a part in the trial process. The focus must be to determine the extent of that participation. Under the present criteria to determine whether an accused is unfit to plead means that participation may be very restricted. If the proposed test is a “decision-making” one then the potential participation would increase. That would depend upon the ambit of the decisions to be made by the accused. We do, of course, also agree that because of the disability of the defendant it may be inappropriate for him or her to be tried.

11. In considering the issues raised in this Consultation Paper, in our view, it is important to bear in mind that the particular disability may be due to many different factors which may call for different considerations when determining their cases. A person suffering from a mental disorder such as schizophrenia may not be able fit to plead no matter what measures are taken to assist him. On the other hand, he may recover quickly because of appropriate medication so that he is fit to plead. A person with learning
difficulties may or may not be fit if particular measures are taken but his condition is unlikely to alter so that he becomes fit to plead.

12. We also consider that care must be taken in drawing any conclusions about the present efficacy of the procedure from the fact that there are many people who have exhibited psychotic symptoms and conclude that they are unfit to plead. It may be that the numbers are lower than should be the reality. On the other hand, we consider it a dangerous conclusion.

13. It is the experience of many of those Circuit judges who sit on the Restricted Case Panel of the First-tier (Health, Education and Social Care Chamber) Tribunal (formerly, the Mental Health Review Tribunal) 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. We acknowledge that the issues are very different from those to be faced in a criminal trial. Some, however, are no less complex and require considerable understanding.

14. 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 maybe 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.

Consideration of the issues raised in the Consultation Paper.

Provisional Proposal 1: 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 requirements for meaningful participation in the criminal proceedings.

Reply

15. The first issue is whether the present test permits sufficiently of the active participation of an accused who is suffering from a disability.

16. We agree that the present Pritchard test does not and should be replaced by a decision-making capacity test. We accept that the current test as set out and developed from *R v Pritchard* is based upon cognitive ability. As such, it is insufficient to accord with the approaches of the medical
profession to treatment, the civil law system as set out in the Mental Capacity Act or the jurisprudence of the European Court of Human Rights. If there is to be amendment of the law, we consider that it is sensible to seek to provide a test which is compatible with the general approach across that spectrum.

17. We consider that the directions as given by the judge in R v John M [2003] EWCA Crim 3452 and discussed at Para 2.52 to 2.59 went some way to affecting an active role for the accused. It is worth noting his inclusion of the ability for the accused to give evidence if he wishes in his own defence; an omission from the original criteria due presumably to the prohibition on a defendant given evidence on his own behalf until the Criminal Evidence Act 1898. We consider that they may afford useful guidance until any amendment of the law could be implemented.

18. We do not think that such new test will necessarily remedy all the evils which are pointed out as criticisms at Paras 2.63 to 2.65. Perhaps, more importantly, we suggest that it will have practical and resource consequences.

**Provisional Proposal 2:** A new decision-making capacity test should not require that any decision the accused makes must be rational or wise.
REPLY

19. We agree with this proposal. There is no such requirement for a person in respect of whom, no issue of fitness to plead arises. We see no valid reason for imposing such a requirement when assessing capacity. Furthermore, we consider that it would be very difficult to devise a comprehensive test to assess when a decision is rational or not. We consider that the proper role for a decision which would generally be regarded as irrational is for it to raise the issue of capacity. The more “irrational” decisions, the more important that the issue is investigated and perhaps, the more likely that the person lacks capacity.

Provisional Proposal 3: 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 criminal proceedings.

Provisional Proposal 4:

20. 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 the 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 he
faces.

Reply

21. As these Provisional Proposals are set as alternatives we shall give one
reply to cover each proposal. We accept that it could be useful to import
the criteria set out in the Mental Capacity Act 2005. That means that the
accused would have to:

(a) Understand the information relevant to the decisions that he or she would
have to make in the course of the trial;

(b) Retain that information;

(c) Use or weigh that information as part of the decision-making process;

(d) Communicate his or her decisions.

22. These criteria, however, beg the question: what are those decisions? The
Consultation Paper speaks about the “whole spectrum of trial decisions”.
We have difficulty in understanding precisely what is meant by this
expression.

23. We think some assistance can be gained from bearing in mind the duties
of Counsel in this regard as set out in the Bar Council Code of Conduct.
Counsel is required to exercise his or her personal judgment in all
professional activities. He or she is personally responsible for the conduct and presentation of the case. Specific duties include consideration of further enquiries, the instruction of an expert, the determination of the witnesses necessary and the making of admissions. All these are matters upon which counsel will take instructions from the accused, either directly or through an instructing solicitor. The Code requires Counsel to advise on the plea to be entered and whether the accused should give evidence but in respect of only these two issues is it 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. But the Consultation paper then speaks of capacity reflecting, “an appreciation of what is at stake in a trial and what are the likely consequences for the defendant.” It is a capacity reflecting, “an appreciation of what is at stake in a trial and what the likely consequences for the defendant of a decision one way or the other may be. If that is the minimum extent we would agree.

24. It is clearly good practice to involve a client in as many of the decisions as are possible. But even with a client in respect of whom no issue of fitness to plead arises, there will be decisions which have to be left to the professional judgment of counsel. Accordingly, we would support Provisional Proposal 3.
25. We consider that Provisional Proposal 4 would produce serious practical difficulties. In our view it would lead to discussion of detail which would lead to an accused being found to be unfit to plead when the reality is that he or she has the capacity to make decisions and participate in the essential process. Further it would be likely to inhibit the professional judgment of counsel as it would be difficult to know whether a decision was one which counsel could make from his or her own expertise or one which it was necessary for the accused to confirm.

26. We consider that to involve the judge in a detailed assessment of the issues may lead to micro-management of the case. It may lead to the judge having to be told matters which should remain within the realms of professional privilege. Furthermore, even at the beginning of a trial, it is not possible to know whether some issue might arise which the accused might not have the capacity to decide. Accordingly we do not consider Provisional Proposal 4 would be wise.

27. We do not support the suggestion that there should be two tests: one for fitness to plead and another for fitness to stand trial. We accept that in the civil context it is practicable for there to be a consideration of a specific issue. If the person does not have capacity to make a decision, then civil litigation may nevertheless continue through a “Next Friend”. No such procedure could be applied in the criminal context. A decision must be
for the whole case. If one were to divide the issues into fitness to plead and fitness to stand trial, it would provide practical difficulties for the defendant’s legal representatives. It would be difficult to ensure that an accused who did not have the capacity to stand trial actually understood adequately the issues so as to be able to decide to plead guilty. The more complex the issues of a case the more difficult it would be to obtain such assurance. But there could be no test based upon the complexity of the decisions to be made. It may be a simple matter in a case of assault where there is an unprovoked attack for the defendant to decide but perhaps, not so easy where there is an allegation of the excessive use of self-defence.

28. We favour an approach which is practical and that is to be found in as simple an approach as possible. That can only be obtained by applying a uniform test to both issues.

29. We also agree that the present arrangement for the conversion of a trial to a Section 4A hearing should continue. The finding of fitness to plead is a finding at a specific time. The position may change. The pressure of the trial may have an adverse effect and require a re-assessment of the issue. That works at present and there is no reason to think that the suggested new test would provide any impediment to its working under the proposed test.
Provisional Proposal 5: 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 and where any other reasonable adjustments have been made.

Question 1: 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 hearing 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?

Reply

30. We support Provisional Proposal 5 and agree with Question 1. 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.

31. We further agree that “special measures” should be developed as widely as possible. The Consultation Paper correctly points out that they have been developed piecemeal by reference to the evidence of children and
then other vulnerable persons. They have been directed at the giving of evidence. There has been slowness to develop them from assisting a witness to assisting a defendant. The provision of an intermediary to assist a defendant in giving evidence which is to be inserted as Section 33BA Youth and Criminal Evidence Act 1999 has yet to be brought into force. It should be noticed that even when in force it will not enable the provision of the use of an intermediary as any stage of the trial other than that of the defendant giving evidence. We understand that the Ministry of Justice are considering whether, having regard to available financial and practical resources it would be possible to extend the statutory regime. This situation is eased to an extent by the decision in R (on the application of C v Sevenoaks Youth Court [2009] EWHC 3088 Admin. It does, however, highlight the fact that special measures if they are to be meaningful in setting the decision-making test, do need to cover all aspects of the trial process and not merely the giving of evidence by an accused.

32. We consider that applying special measures with this wider meaning would lead to it being more likely that an accused would be found fit to plead and therefore go towards the general aim which we set out in paragraph 1. If “special measures” remain only to assist the accused in
giving evidence, it is unlikely that they would have an acceptable level of impact.

**Provisional Proposal 6:** 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.

**Reply**

33. As a general proposition, we support this Provisional Proposal but we think that there are practical difficulties. There are many misconceptions about people who are suffering from mental disorders or learning disabilities or difficulties. These are not restricted to the general public but also are to be found within the legal profession. The need for education was one the important recommendations of the Bradley Report and it has yet to be adequately implemented. Accordingly, we consider it would be of assistance when evaluating the evidence which such a defendant might give for the court to have such general information.

34. The practical difficulty is one which was discussed in the context of “late complaints in sexual cases”. The anxiety which was expressed was that it may lead to experts being called on both sides, attempts to apply general observations to the particular case which might deflect attention from the
essential issues of the case. A resolution was found in that context by the inclusion in the summing up of a passage such as is set out in Crown Court Bench Book March 2010 Page 363 ff. We would be wary of an extension of the expert evidence to giving advice as to the specific defendant. That may lead to experts being called on both sides and the trial resolving into a trial by expert rather than a trial by jury.

35. **Question 2:** 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?

**Reply**

36. We have already indicated the need for the development of special measures to cover all aspects of the trial. We would also suggest that the court should be required to consider whether there are ways in which there could be increased informality in order to assist the accused in taking part. The possibility of the accused being connected by live link rather than sitting in court is already a possibility though we think not widely used.
**Provisional Proposal 7:** A defined psychiatric test to assess decision-making capacity should be developed and this should accompany the legal test as to decision-making capacity.

**Reply**

37. We would encourage any research which may assist in providing a fair system for anyone who is or may be unfit to plead. We do, however, consider that the decision must be one for the court rather than expert witnesses no matter how eminent. The Consultation Paper makes it clear how difficult it has been found to provide a suitable test. We do not feel able to make any meaningful comment without details of the test. We do acknowledge that at present there are many reports which do not properly address the Pritchard criteria. Some psychiatrists do not address all of the criteria; others import capacity. We think it would be useful if the medical profession could seek to apply the factors in each case so that when the court has two or more reports, it knows that the same considerations have been applied. But this takes one back to determine the ambit of the expression, “the whole spectrum of decisions” which an accused is required to make.

38. We would add this in relation to the discussion whether the qualification should be reserved to psychiatrists or should be extended to include psychologists. There are many forensic psychologists who are able to
assist especially in relation to capacity of those with learning difficulties. Their expertise is to be preferred to the qualification of a psychiatrist who is a specialist in mental illnesses but has little or no experience of persons with learning difficulties. If the present limitation is to remain, it must require that the psychiatrist does have expertise in the specific type of disability from which the accused suffers.

**The problem of a Section 4A hearing.**

39. We propose to set out our views and in so doing respond to the Provisional Proposals and answer the questions posed.

40. We agree that there must be a hearing to determine that the act done by the accused was unlawful. Where no mental element arises, the present procedure works well. The role of the independent representative has proved to be successful and could be used to provide participation in the Provisional Proposal 8 as suggested at Paragraph 6.129.

41. In some cases, the determination of whether the accused has done the act involves consideration of a mental element. Where this arises, we consider that it is important that a person who is under a disability should have the same protection as one who is not. It cannot be fair for a person who is under a disability to be subjected to any of the orders available if, in the same circumstances, a person not unfit to plead would be acquitted.
42. The difficulty lies in that the mental element frequently involves a subjective assessment of the alleged offender’s state of mind. This is a factor not only in those comparatively rare offences mentioned in Paragraph 6.28 but much more frequently in cases of self-defence, arson with intent, joint enterprise and inchoate offences.

43. However, if one introduced a trial in the traditional sense, where the failure to prove a mental element resulted from the accused’s mental disability and so he was acquitted, the consequences arising from that, may affect the safety of the public. For example, a person charged with an offence of violence may raise the issue of self-defence. The substantive law provides that even if the accused may have had a genuine but mistaken belief that he was about to be attacked, he is to be acquitted. If that were to be applied to a person who was unfit to plead, even though his belief was based upon a delusion which had given rise to him being found unfit to plead, he would be acquitted. His action may have been extremely dangerous yet he would be free to act in the same way again. We do not consider that could be an acceptable situation even though that there may be intervention under Section 3 Mental health Act 1983 in such circumstances. It is therefore necessary to factor into any procedure an acknowledgement that the accused’s mental state resulted from his
mental disorder or learning difficulty to allow steps to be taken for the protection of the public.

44. We accept that criticisms can be made of the approach set out in R v Antoine [2001]1AC 340 though experience shows that in many cases the procedure works satisfactorily. There are, however, cases where that is not so. We consider it worthwhile therefore, to try and find a more comprehensive approach which is fair to the accused whilst providing that opportunity for protection of the public.

45. It follows that we do not consider that Option 1 is appropriate. For the reasons set out in the Consultation Paper, we agree that Options 2 and 3 are not appropriate. They add little if anything to the present regime.

46. We consider that any approach should be on the premise that the burden should be on the prosecution to prove the elements of the offence. To impose the burden on the defence to prove that there are no grounds for acquitting the accused seems to us to impose a burden which would not lie on a person who is fit to plead. As this is the centre of Option 4, we find that unattractive.

47. This leads us to Option 5. We consider that this is the most suitable option of those presented. However, we do consider that the two stage approach to the mental element is unnecessarily cumbersome. It
envisages that there could be an acquittal where the accused had not done the actus reus of the offence. That is clearly appropriate. But it envisages that there may be a two stage determination of the lack of a mental element. It would seek to distinguish those cases in which the accused’s belief was assessed by the jury as being objectively correct on the evidence and those where it was based upon a factor flowing from his mental condition. In other words, was his belief based upon his delusion or might it have been correct in the circumstances viewed objectively. We consider that it should be possible for a jury to return a verdict which reflected which situation appertained i.e. the defendant’s belief was genuine and not affected by his mental condition or was affected by his mental condition. In our view, this could be reflected by a finding that that there are no grounds for an acquittal which are not connected with his mental disorder or learning disability.

**Provisional Proposal 8:** The present section4A 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.

**Reply**
48. It follows from the above that we favour this option but with the rider we have suggested.

**Provisional Proposal 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 at the time of the offence.

**Reply**

49. We would not envisage such a procedure to be necessary if our amendment were adopted. If it were not accepted, then we consider that this would have to follow but that it would make for an unnecessarily cumbersome procedure. It would be likely to add further anxiety to a person who is either mentally disordered or suffering from learning disability by prolonging the hearing and inevitable further expense. We do not consider it inappropriate for a jury to consider all aspects of the case. It is often the situation that a jury has to consider conflicting issues. In the rare case where such a division were necessary, it could be provided by provision within the Indictment Rules for severance of the issue.

**Provisional Proposal 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.
Reply

50. We consider we have already adequately covered this issue.

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

Reply

51. We have already covered this issue.

52. **Question 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?

Reply

53. We have already covered this issue

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

Reply

54. We have expressed our preference for Option 5 with the amendments set out above.
**Question 5:** Should a jury be able to find that an unfit accused has done the act and that there are no grounds for an acquittal in relation to an act other than that specifically charged?

**Reply**

55. We consider that this should follow from our conclusions in respect of a Section 4A hearing.

**Provisional Proposal 12:** 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 medical evidence confirms) that the accused is still unfit to plead, the court should be able to reverse the decision to remit the case.

56. We agree with this proposal.

**Provisional Proposal 13:** in the event of a referral back 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 whether the accused did the act. This is subject to the proviso that the court considers it to be in the interests of justice.

**Reply**

57. We agree with this proposal.
**Question 6:** 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?

**Reply**

The situation could arise in which an accused becomes fit to plead and is able to give instructions which may lead to evidence being available which might throw doubt upon the original finding. Such circumstances may be rare but nevertheless should be covered by an appropriate procedure.

Although not directly relevant, it is worth noting that there is no procedure for removal of a person’s name from the “Sex Register”. We understand that this is an issue which is being considered and may apply to a person who was found unfit to plead and had done the act. However, even such a procedure would not allow a person to “clear his name” if the Secretary of State did not refer the case for trial. Given the public attitude towards sex offenders, this might be viewed as unjust.

**Question 7:** 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?

**Reply**
58. We consider there are such circumstances and that there should be power
to allow this. It is difficult to provide a list of such occasions and it may
be best to leave a general provision to be applied on a case by case basis.
The circumstances would, however, include a case in which there is no
conflict between the person found unfit and the other defendants. It may
be that the evidence of the other defendants could be of importance to the
mental issue; e.g. where it provides the objective evidence referred to in
R v Antoine. A case which has begun and the issue then arises,
particularly where there are a number of vulnerable witnesses who would
otherwise have to give evidence twice, might also be a situation. We
would suggest that it is a power which if available should used cautiously
and should not be regarded as the norm.

Provisional Proposal 14: We agree with this proposal.

The position of the Magistrates’ Court and Youth Court

59. The jurisdiction of the Magistrates’ Court is primarily designed to deal
with the less serious offences in which decisions can be made swiftly and
economically. The problem which arises is that complex issues arise
when considering those who may be unfit to plead. There can be no short-
cut to a fair disposal of such cases. At present save for the procedure
under Section 37(3) Mental Health Act 1983 there is no provision which
attempts to consider the issue of unfitness to plead. Further, that provision
builds upon the disposal of the case being by a Hospital Order under Section 37(1). There are, however, many cases which do not require such an order but may be properly dealt with by a Community Order with an appropriate requirement. At present this would only be possible if there had been a conviction whether by plea or by trial. The result 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.

60. In our view, when considering the approach which should be taken, one should have in mind the programme which has been set out following the Bradley Report. Lord Bradley envisages a system in which those alleged to have committed an offence but who may be suffering from a mental disorder or learning disability should be identified and “diverted” from the criminal justice system. He applied a wide definition to “diversion” to include removal altogether from the criminal justice system but also to providing support to address their problems before any sentence were imposed. This has led to schemes being developed in some areas to identify those who may fall within these categories and their needs, irrespective of guilt. He was also supportive of the use of Community Orders with appropriate conditions. He was highly critical of the lack of use of the “Mental Health Treatment” requirement. We support this
approach. His comments underline the fact that there are many ways of addressing the problems of the mentally disordered or learning disabled offender than the imposition of an order under Section 37 Mental Health Act 1983. The present system seems to ignore this proposition.

61. We would point out the other power under Section 43 to commit a person “of or over the age of 14 years who is convicted by a magistrates court of an offence punishable on summary conviction with imprisonment” with a view to the Crown Court making a Hospital Order accompanied by a Restriction Order under section 41. We understand that this power is rarely used. It serves as a good illustration of the inadequacy of the thinking behind the present regime.

62. We think 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. A Hospital Order, with or without a Restriction Order is a serious deprivation of liberty. Whilst the Section 37 Order is for 6 months, as it is renewable it often leads to much longer periods. A Hospital Order with a Restriction Order almost inevitably result in periods of detention measured in years.

63. If cases are to be dealt with in the Magistrates’ Courts, then there should be a comprehensive and logical regime which is essentially the same as that to be applied in the Crown Courts. It may draw on the model for
determination of jurisdiction as applies in “either way” cases i.e. the Justices determine whether they are prepared to accept jurisdiction. They should only do so if, on the available evidence a Hospital Order was clearly inappropriate. It may be necessary for there to be a power of committal if it transpired, on the basis of further information not previously available, the Community Order was insufficient.

**Question 8:** 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.

**Reply:** We consider that this should follow if the magistrates are to be given jurisdiction to hear issues of unfitness to plead.

**Question 9:** Do consultees think that if an accused lacks decision-making capacity there should be a mandatory fact-finding procedure in the magistrates’ court?

**Reply:** We consider that this should follow if the magistrates are to be given jurisdiction to hear issues of unfitness to plead.

**Question 10:** 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?

**Reply:** We consider that if there is a fact-finding procedure, then to avoid the problems which have been discussed at length under Provisional Proposals 8 and 9, it should be the same as the amended proposals we have made. Issues such as self defence are common in cases which fall within the jurisdiction of the magistrates’ courts.

**Question 11:** Do the matters raised in question 8, 9, and 10 merit equal consideration in relation to the procedure in the youth courts?

**Reply:** We agree with the reasons advanced in order to afford protection of the youth.

**Question 12:** How far, if at all, does the age of criminal responsibility factor into the issue of decision-making capacity in youth trials.

**Reply:** We consider that there needs to be a careful re-appraisal of the issue of the age of criminal responsibility. The United Kingdom is at variance with many other countries in setting a low age of responsibility. We express no view as to whether it is appropriate or not.

64. We do consider the issue of the age of the accused is 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 years old. The mental age of the accused needs to be factored into consideration of his capacity.

We should like to express our gratitude for the careful exposition of the difficult problems which this topic raises. There are areas where further research is envisaged and we look forward to reading of the results from that work. There is also a need for further discussion and thought on all topics both from the point of view of the accused but also of the general public. We fear that financial constraints may more than allow for adequate time for this further debate.

His Honour Judge Robert K. Atherton on behalf of the Council of H. M. Circuit Judges

31st January 2011
Respondent:
Dr Jillian Craigie
Centre of Medical Law & Ethics
School of Law
King’s College London
Strand Campus
London
WC2R 2LS

NB: In June 2011 I will be moving to the Department of Philosophy, University College London, Gower Street, London, WC1E 6BT.

Submitted: January 26, 2011

Comments in response to Law Commission’s Consultation Paper No 197
Unfitness to Plead

I have made some comments below in response to the consultation paper (CP). However, the main purpose of this submission is to bring the Law Commission’s attention to a relevant research project that is about to get underway. The project is funded by a three year Wellcome Trust Biomedical Ethics Fellowship. Its aim is to examine justifications for taking different features of mental disorder into account in assessments of mental capacity and criminal responsibility; or holding these features to different standards. Broadly, it’s about fairness in the way people with a mental disorder are treated in the English legal system across these civil and criminal contexts. The project will be based in the Department of Philosophy at University College London, and will be advised by Jonathan Wolff (UCL, Philosophy), Genevra Richardson (KCL, Law), Jill Peay (LSE, Law), Tony Hope (Oxford, Ethox), John Tasioulas (Oxford, Law) and George Szmukler (KCL, Institute of Psychiatry). My own background is in neuroscience and philosophy and their applications in medical ethics and law. I would be very interested in taking part in any further steps in the consultation process, as a part of the Wellcome Trust project.

There were three points raised in the CP that will be of particular interest for my project: sections 3.48 – 3.57 on “the need for decision-making capacity to be rational”; section 3.47 on whether “the criminal defendant is in a worse position than the civil litigant”, and the relative potential for unfairness in the two situations; and section 2.69 on the “disproportionate emphasis on cognitive ability”.

I will responds here to the first of these issues, concerning rationality and capacity. I am in agreement with the essence of the proposal at 3.48. However, in taking this position the CP has implicitly endorsed a particular understanding of the term “rational”. In the interests of clarity and transparency it’s my view that the CP should make this assumption explicit, especially given the noted ambiguity of the term.
The assumption that has been made is that assessments of rationality refer to the content of the decision rather than the process by which the decision was reached (see 3.51 for the distinction). The content of the decision necessarily depends on the decision-maker’s interests and values. So to base an assessment of capacity on the content of the decision would threaten the right to self-determination (3.48); the right to pursue one’s own interests and values. Instead, the CP proposes, I think appropriately, that evaluations of decision-making capacity should “focus on the process of understanding and reasoning” that gives rise to the decision (3.51). The CP notes, however, that “This is not to say ... that the rationality or otherwise of a decision is irrelevant.” In other words, this is not to say the content of the decision is irrelevant.

The understanding of “rationality” adopted in the CP is consistent, I believe, with the understanding of the term most widely adopted in discussions of mental capacity in English law. However, this usage diverges from the dominant use of the term in psychology and philosophy, where “rationality” is used to refer to both the process and the content of decisions. The former is often called “procedural rationality” and the latter “substantive rationality”. And of the two, procedural rationality is generally considered the most basic use of the term. I have explored these ideas more fully in a paper that is currently under review (Craigie & Coram, under review).

While I believe the CP’s use of the term should be made explicit, it is my view that this use of the term is justifiable given its consistency with the established use of the term in English medical law. I note, however, that this usage has been criticized in the context of US medical law:

“Some courts have shied away from embracing this standard because of an apparent confusion regarding interpretation of the term irrational. A decision sometimes has been called irrational merely because the patient’s choice was unconventional ... In contrast, the “irrationality” to which this standard properly refers pertains to illogic in the processing of information, not the choice that eventually is made” (Appelbaum & Grisso 1995: 110)

References:


CPS RESPONSE TO LAW COMMISSION CONSULTATION PAPER NO. 197: UNFITNESS TO PLEAD

1. 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 hearing 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?

Yes. The starting point of the scheme should be the assumption that the defendant has decision-making capacity unless it is established that he lacks it. The defendant should not be treated as being unable to make a decision unless all practical steps to help him do so have been taken without success. This would align the new decision making capacity test with the principles set out in section I Mental Capacity Act 2005.

The scheme should require active consideration of the requirement in the Practice Direction (Criminal Proceedings: Consolidation) para.III.30 that all possible steps are taken to assist a vulnerable defendant to understand and participate in criminal proceedings, including the use of special measures. We agree that in decision making capacity, consideration should be given to the extent to which special measures could assist the defendant to participate in his or her trial. This would be comparable with the procedure for determining the competence of witnesses in criminal proceedings as set out in section 53 Youth Justice and Criminal Evidence Act 1999. The assessment of competence should utilise techniques or measures, including special measures to enable a witness to understand and answer the questions put to him or her.

The use of special measures should not be confined to the proceedings, but should be available beforehand to enable the defendant and his legal team to prepare for trial. 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. He may need help to follow the case as it proceeds, to decide whether to question witnesses, to accept their evidence or to challenge their credibility, to decide if he is to give evidence, and if so the help or special measures he will need help to do so. (C v Sevenoaks Youth Court [2009] EWHC 3088 (Admin))

The purpose of criminal proceedings is to determine guilt, if that is in issue, and decide on the appropriate sentence if the defendant pleads guilty or is convicted. All possible steps should be taken to assist a vulnerable defendant to understand and participate in those proceedings. It is in the interests of the defendant to be acquitted, if he is innocent, and in the interests of victims, witnesses and the wider community that the trial takes place as soon as possible and the issue is determined.

The ordinary trial process should, so far as necessary, be adapted to meet those ends. The section 4A procedure should be reserved for the minority of cases in
which the court is satisfied that the defendant lacks capacity and cannot participate in his trial.

We agree with the observations of Smith LJ in *CPS v P [2007] EWHC 946 Admin* that in most cases, the medical evidence should be considered as part of the evidence in the case and not the sole evidence on a freestanding application. Although the medical evidence might on its own appear quite strong, when other matters are considered the court might conclude that the defendant’s understanding and ability to take part in the trial are greater than were suggested by the doctors, and that, with the proper assistance from his legal adviser and suitable adjustments to the procedure of the court, the trial can properly proceed to conclusion.

The risk of sole reliance on medical evidence to determine fitness was evident in *Ferris v DPP [2004] EWHC 1221 (Admin)*, where the opinion of the responsible clinician that the defendant was now fit was not shared by the psychiatrists instructed by both the defence and prosecution and was rejected by the court.

In a recent case, an expert report concluded that the defendant, charged with a sexual assault on a child of 4, was unable to participate in his trial because of his hearing and communication disabilities. He gave a no comment interview to the police and his solicitor was unable to communicate with him. However, the prosecution adduced evidence that the defendant’s difficulties were not so severe as to prevent communication, as suggested in the expert report. CCTV evidence showed the defendant answering questions in a police interview, turning around to look at the floor when asked if he had dropped a £20 note, using a mobile phone and arguing with a staff member when he could not present a ticket at the barrier at the railway station. There was also evidence from earlier cases to show that the defendant could speak and communicate using gestures in addition to spoken language.

2. 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?

Yes. We think that whenever an expert reports on the defendant’s fitness to plead or his ability to participate in his trial, the expert should be asked consider how the defendant’s capacity to participate can be increased and to advise on adaptations that are necessary to facilitate or maximise participation. This should include:

- 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.

Where the court is satisfied that the defendant is unfit or lacks decision making capacity, it should consider using its powers under the Mental Health Act 1983 (MHA 1983) to order hospital treatment prior to trial if there is a prospect of recovery within a year. Section 36 MHA 1983 allows an accused to be remanded to hospital for treatment, instead of being remanded in custody, pending trial or sentence. Section 38 MHA 1983 gives the Crown Court and magistrates’ courts the power to make an interim hospital order for a period not exceeding 12 weeks. The order can be renewed for 28-day periods, subject to an overall maximum period of twelve months. These powers may be used in cases where the defendant might otherwise be found unfit to plead, to provide treatment prior to trial, which may proceed at a later date when his or her condition has improved.

We suggest that greater regard should be had to the duty of the court and the parties to proceedings to further the overriding objective of the Criminal Procedure Rules 2010 (CPR 2010) to deal with criminal cases justly (1.1 (1) CPR 2010) by actively managing the case, in particular by:

• the early identification of the real issues (3.2 (2) (a) CPR 2010); and

• ensuring that the evidence, whether disputed or not, is presented in the shortest and clearest way. (3.2 (2) (e) PR 2010).

The defence should be required to identify to the prosecution the matters that are in issue and make admissions pursuant to section 10 Criminal Justice Act 1967 in regard to all matters that are not contested. This should simplify the trial process and enable the evidence to be presented in the shortest and clearest way. This should maximise the defendant’s understanding of the trial and increase his capacity to participate effectively in the trial.

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?

We have no suggestions for other options for reform of the section 4A hearing.

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

In our view the approach taken in Antoine [2000] UKHL 20 strikes the correct balance between the need to protect a defendant who is unfit to plead and therefore cannot advance a defence, or in the case of murder, a partial defence to the charge; and the need to protect the public.
The current section 4A procedure requires the prosecution to prove beyond reasonable doubt that the defendant has done the act or made the omission charged. This includes disproving accident, self defence or mistake where there is objective evidence to this effect. In our view it is inappropriate to allow such an issue to be raised on the instruction or evidence of a person who has been found unfit or to lack decision making capacity. We accept that a defendant may have killed or injured a victim whilst under a genuine but mistaken belief caused by a mental illness that the victim was attacking him. However, we do not agree that the current procedure places a defendant who is unfit at a significant disadvantage compared with a fit defendant who may be able to obtain an acquittal on this basis. The unfit defendant is not denied this outcome, as it will still be available if and when he becomes fit to plead.

We do not think it necessary or helpful for a jury to consider mens rea, as its relevance is confined to conviction and passing a sentence that reflects culpability, which are not potential outcomes of a section 4A hearing. It would not be in the interests of justice to require the prosecution to prove beyond reasonable doubt all the elements of the offence, as required by option 5, because the unfitness of the defendant would make it impossible to test mens rea, including the genuineness of a mistaken belief, by cross examination. This could result in the acquittal of a person who, because of his delusional belief, continues to present a danger to the public. We think that the risk of acquittal because the prosecution cannot establish mens rea to the criminal standard is higher than set out in the Consultation Paper.

In many cases, the prosecution seeks to prove the requisite mens rea by proving the actus reus and asking the jury to infer mens rea from those actions. If the defence considers that the facts relied upon do not give rise to the prima facie inference that the defendant had the requisite mens rea for the offence charged, it may request that the trial proceeds and a submission of no case to answer is made at the conclusion of the prosecution case.

We think that the special verdict is problematic. As paragraph 6.105 Consultation Paper points out, the defendant may have had the necessary mens rea at the time of the offence but later becomes unfit. It is unclear from the proposal whether the special verdict requires the defendant to have a diagnosis of a mental disorder at the time of the offence or at the time of his plea. It is also unclear whether a defendant who is acquitted by way of mental disorder could face a trial if he becomes fit to plead. If not, a defendant who admits his guilt in interview, is unfit for trial but recovers soon afterwards, will never be held to account by the criminal law.

The current system permits the defendant to receive a full criminal trial, in which his Article 6 ECHR rights are protected, if and when he becomes fit to plead. It also meets the positive obligations on public authorities to ensure that the criminal law provides adequate protection for individuals against the infliction of inhuman or degrading treatment by other individuals that Article 3 ECHR imposes.

Option 5 would render the prosecution case indistinguishable from a full trial, without the possible outcome of a conviction. This may undermine public confidence in the criminal justice system, and provide insufficient protection to the victims of crime.
5. 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?

We disagree that Option 5 is the best option for reform. However, if Option 5 was adopted, we cannot envisage any circumstances in which it would be useful to allow a jury to find that an unfit defendant has done the act and that there are no grounds for acquittal in relation to an act other than that specifically charged.

6. 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?

The difficulty experienced in Ferris v DPP [2004] EWHC 1221 Admin could be avoided by an amendment to section 5A(4) Criminal Procedure (Insanity) Act 1964 (CP(I)A 1964) to delete the sentence “On the person’s arrival at the court or prison, the hospital order and the restriction order shall cease to have effect.” In our view both orders should remain in place unless and until the court finds that the defendant is now fit to plead. We suggest that there should be a procedure for determining fitness that mirrors the original procedure for determining unfitness. The issue of fitness should not be decided by a single responsible clinician, but by the court, informed by the evidence of two medical practitioners. This would enable a person detained in hospital after a finding of unfitness to ask a court to decide whether he can be remitted for trial.

The case of Ferris v DPP [2004] EWHC 1221 (Admin) also highlights the gaps in the legislation and the absence of guidance on the use of the Secretary of State’s power to remit a person to court or to prison if he becomes fit to plead while detained in hospital under a hospital order and a restriction order made under section 5(2) CP (I) A 1964.

The CP(I)A 1964 pre dates the establishment of the Crown Prosecution Service (CPS), and has not been amended to reflect the role of the CPS in the decision to resume the prosecution of a person who becomes fit to plead and participate in his trial. There is no guidance to explain the consultation with the CPS or to assist the Secretary of State to decide whether the defendant should be remitted to prison rather than to court.

The current power of the Secretary of State to remit for trial is exercised by the Lord Chancellor and Minister for Justice, who conducts regular checks with the responsible clinician on the progress of the offender. The CPS will be consulted by the Secretary of State, through the Public Protection and Mental Health Group of NOMS (National Offender Management Service) when the responsible clinician has advised that the offender is now fit to plead. Reports from the responsible clinician are not routinely supplied, but will be forwarded in high profile cases or on request by the CPS. The CPS may need to seek further information from the responsible clinician to determine whether the prosecution should be resumed.
The CPS then re-reviews the case in accordance with the Code for Crown Prosecutors and the principles set out in the Legal Guidance on Mentally Disordered Offenders. A prosecution will not be resumed, and therefore the defendant will not be tried unless the Full Code Test is satisfied. The Full Code Test has two stages: the evidential stage followed by the public interest stage. The evidential stage is satisfied if there is sufficient evidence to provide a realistic prospect of conviction, which means that an objective, impartial and reasonable jury or magistrates’ court is more likely than not to convict the defendant of the charge alleged. A case which does not pass the evidential stage must not proceed, no matter how serious or sensitive it may be.

If the evidential stage is satisfied, the CPS must decide whether a prosecution is required in the public interest. A prosecution will usually take place unless the prosecutor is sure that there are public interest factors tending against prosecution which outweigh those tending in favour. The more serious the offence or the offender’s record of criminal behaviour, the more likely it is that a prosecution will be required in the public interest. Some factors that the CPS may take into account are:

- The views of the victims and witnesses;
- The impact of a prosecution on the health of the victim, witnesses and defendant;
- The seriousness of the offence;
- The risk of reoffending and the risk of harm. The length of any delay between the offence, resumption of fitness to plead and the likely trial date;
- The fact that the offender was suffering from significant mental ill health at the time of the offence;
- The effect of the hospital treatment on the offender’s mental health and behaviour;
- The likely sentence or order of the court on conviction;
- The duration of the hospital order/restriction order, and whether it is commensurate with the seriousness of the offending.

The legislation is also 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.

In R v Birch [1989] 11 Cr. App R (S) 202, the Court of Appeal held that “once the offender is admitted to hospital pursuant to a hospital order without restriction on discharge, his position is almost exactly the same as if he were a civil patient. In effect he passes out of the penal system and into the hospital regime. Neither the court nor the Secretary of State has any say in his disposal.” However, these comments referred to the effect of a hospital order made on conviction as an alternative to a custodial sentence. At the time, the only order that could be made following a finding of
unfitness was an order for admission to hospital, which was distinct from a hospital order.

Supervision and treatment order and an absolute discharge were introduced as alternatives to an order for admission to hospital by the Criminal Procedure (Insanity and Fitness to Plead) Act 1991. The admission order was replaced with a hospital order, with or without a restriction order, and the supervision and treatment order was replaced with a supervision order by the Domestic Violence, Crime and Victims Act 2004. The statutes neither restrict nor reserve the trial of an offender who becomes fit to plead after an order is made.

Section 4A (2) CP (I) A 1964 provides that a finding of unfitness will have the effect that the trial “shall not proceed or proceed further. Although the fitness to plead procedure can result in an acquittal, a finding that the offender did the act or made the omission charged is not a conviction and does not amount to the determination of a criminal charge. It does not preclude a full trial of the accused if he becomes fit to be tried. (R v H [2003] UKHL 1)

The Reference Guide to the Mental Health Act 1983 (Department of Health 2008: pares 11.8 to 11.10 states that “because patients admitted to hospital when found unfit to plead have not (by definition) received a full criminal trial, they may be sent back for trial by the prosecuting authority if that authority is satisfied, after consulting with the responsible clinician, that they can now properly be tried. The Secretary of State for Justice may also do this, if the patient concerned is still subject to a restriction order and still detained in hospital.”

There is no duty on the responsible clinician or supervising officer to advise the CPS if an offender subject to a hospital order (without a restriction order) or supervision order becomes fit to plead. The CPS is therefore unlikely, in reality, to be made aware of such circumstances. However, such a situation may come to light if a person is subsequently charged with a further offence and their previous fitness to plead becomes known. In such cases, prosecutors should carefully consider whether the public interest requires a prosecution. The fact that the original Judge decided that a restriction order was not necessary for public protection may well indicate that offence was not so serious as to now require prosecution and that the public interest has been satisfied by treatment rather than punishment.

7. 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?

Yes. We agree with the approach taken by the Court of Appeal in R v B and others [2008] EWCA Crim 1997 that the court should be able to determine whether the trial of fit defendants and the determination of whether unfit defendants did the act or made the omission alleged should proceed at the same time before a single jury.

We appreciate that a full trial is a different issue to a section 4A hearing, but consider that the usual rules of joiner and severance should apply, so that in the majority of
cases, there should be a single trial for those who are jointly indicted. This avoids the distress and inconvenience cause to victims and witnesses if they are required to give evidence more than once and is an efficient use of resources.

A direction to the jury to consider separately the issues in relation to each count and each defendant and make separate decisions upon them should be sufficient to ensure fairness to both fit and unfit defendants. However, the Judge retains discretion to order severance where there is a risk of injustice to any defendant.

8. 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?

We think that there should be a single test for capacity in both the Crown Court and magistrates’ courts. However, expert reports should take into account the less formal nature of the magistrates’ court when conducting an assessment of capacity. There is greater scope for the magistrates’ court to adapt its procedure to enable defendants to participate, especially if lay magistrates and District Judges received specialist training in dealing with defendants who are under a disability. It follows that if both courts are using the same capacity test, the orders that can be made following a section 4A finding should be the same, 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.

9. Do consultees think that if an accused lacks decision making capacity there should be a mandatory fact-finding procedure in the magistrates’ court?

Yes. We agree that there should be a fact finding procedure that requires the prosecution to prove that the defendant did the act or made the omission charged. A statutory procedure would reduce the current confusion surrounding the use of the magistrates’ courts powers under section 37(3) Mental Health Act 1983 and provide the same safeguard against compulsory detention and treatment in hospital that exists in the Crown Court. A statutory procedure would achieve clarity and certainty but 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 CPS has no direct contact with defendants prior to charge, so is not unusual for the prosecution to become aware of any mental disorder for the first time when the defendant attends court. The issue may be raised by the defendant’s solicitor, or it may become apparent during proceedings that the defendant is suffering from a mental disorder. The CPS may re review the case in the light of the mental disorder,
and the case may be discontinued on the basis that the public interest does not require a prosecution.

In a recent trial for assault, a medical report coupled with the defendant’s incredible evidence showed that the defendant was suffering from dementia, and the case was discontinued. In another case, a retired lady was charged with theft (shoplifting), following expert advice that she knew what she was doing and that a prosecution would reinforce that her behaviour was unacceptable. However, her behaviour in court demonstrated that she did not know where she was, and further enquiries revealed that she had a five year history of shoplifting, assaults on store staff and wandering the streets at night in her night clothes. The case was discontinued as the cost of further psychiatric reports was disproportionate to the seriousness of the behaviour.

10. 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.

We think that the procedure in all criminal courts should be limited to consideration of the external elements of the offence.

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

Yes. The need for an effective procedure in the youth court merits greater consideration because the issue of effective participation/fitness occurs more frequently, the offences tried in youth court are more serious and more cases are stayed than in magistrates’ courts. The disposals available on a finding of unfitness are rarely suitable to address the disorders commonly diagnosed in youths, nor do they tackle the offending behaviour.

There is anecdotal evidence of an increase in the number of youth prosecutions that are stayed as an abuse of process because the youth lacks sufficient cognitive ability to participate in his trial and therefore is denied his right under Article 6 ECHR to a fair trial.

In our experience, the issue of fitness to participate in a trial arises more frequently in the youth court than in the adult magistrates’ court. We agree with the observation of the Judge in TP v West London Youth Court [2005] EWHC 2583 (Admin) that many young defendants are intellectually limited and many have difficulty in appreciating the ingredients of some offences. 23% young offenders have an IQ of 69 or below and an additional 36% have borderline difficulties with IQs in the range of 70 to 79 (Child and Adolescent Mental Health Services Interdepartmental Report 15 June 2005 paragraph 8). In addition, many youths have disabilities, disorders, difficulties and conditions that either individually or cumulatively have a negative effect on their ability to participate in their trial.

The youth court is a specialist court and adapts its procedures to maximise effective trial participation e.g. by the use of specialist prosecutors, solicitors and
magistrates/District Judges, keeping the trial short and using appropriate language. However, despite these adaptations, some young people are unable to participate in their trial and proceedings are stayed. We submit that this occurs more frequently than suggested in paragraph 8.35 of the Consultation Paper.

A 13 year old youth was found unable to participate in his trial for a sexual offence, because he had both language and educational difficulties, and was functioning at the level of a 7 year old. He was also suffering from mental health problems, which may have been caused by his witnessing rape and murder prior to seeking asylum in the UK. The case was discontinued because the youth could not participate in his trial. This caused concern because the youth was not diverted to appropriate services, and also because he posed a risk of committing further offences, having been diverted from prosecution twice for similar sexual offences.

Another 13 year old living in a children’s home was charged with sexual assaults on three female staff members. Reports showed that he had severe learning difficulties and an inability to remember what he had done and was unable to follow court procedure. The case was stayed, and care staff were concerned that his placement in the home was inappropriate and he needed to receive closer supervision.

A 17 year old youth with hearing and communication difficulties in addition to learning disability has twice had proceedings stayed because he has been found unable to participate in the trial process. The subject matter of these proceedings has been serious sexual assaults against children as young as 4 years of age. Despite reports that have persuaded the court that he is unfit, he has pleaded guilty to other types of offences, including burglary and Public Order Act 1986 offences.

The fact finding procedure is rarely used as in the majority of cases, the criteria for making a hospital order are not satisfied, usually because of the nature of the diagnosed disorder(s).

A 15 year old was charged with five sexual offences committed against two nine year olds. All three have learning difficulties, and the defendant’s police interview was terminated as it was obvious that he did not understand the questions that were put to him. An independent psychologist report found that the youth was unfit to plead or to stand trial, but due to the seriousness of the charges and the defendant’s previous out of court disposal for a sexual assault it was not in the defendant’s interest nor the wider public interest for no action to be taken. A further psychiatrist report has been requested, but it is unlikely to recommend a hospital order.

It is the absence of an appropriate disposal on a finding of facts that causes considerable difficulty in the youth court. The nature of the disabilities and disorders suffered by young offenders rarely meets the criteria for compulsory detention and treatment in hospitals. The shortage of specialist Mental Health Act facilities for children and young people means that even where the clinical criteria for detention under the Mental Health Act 1983 are met, it is not always possible to admit a young person who is unfit to plead and so ill as to require compulsory medical treatment.

A 14 year old was found unfit to plead to a charge of arson, after he set fire to his grandmother’s house and went back into the smoke filled house saying that he wanted
to die. He was rescued by a neighbour, although the fumes could have killed them both. There were only two hospitals in the country that were capable of treating him, one could not meet his needs and the other had only one bed, and two other young people who needed it. The bed was made available for this youth after the prosecutor, with the consent of the youth and his solicitor, wrote to the consultant pleading for it.

In another recent case, a youth charged with wounding with intent was found unfit to plead in the Crown Court, where his case was being heard due to the gravity of the offence. He was found to have committed the act and to meet the criteria for a hospital order. However, no suitable placement could be provided, so an absolute discharge was made.

The result of the current practice in the youth court is that young people who are charged with criminal offences are immune from criminal justice intervention if their disorder or disability prevents them from participating in their trials.

The offences tried in the youth court are often far more serious than the summary and less serious either way matters tried in the adult court. The youth court has jurisdiction to try all offences except homicide and those offences involving prohibited weapons that attract a three year mandatory minimum sentence for 16 and 17 year olds, and routinely hears cases of robbery, rape and grievous bodily harm.

When these proceedings are stayed and the court makes no order, the confidence of victims and communities in the youth justice system is undermined, particularly where the offending behaviour is violent, sexual or persistent. There is also a risk that unless there is appropriate intervention to tackle such behaviour, the offending will continue and the mental disability will deteriorate and the youth will add to the growing number of prisoners with mental health problems when he reaches adulthood.

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

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. The CPS will already have considered chronological age when deciding whether the Full Code Test has been satisfied. This includes careful consideration of whether such a young defendant has the mens rea necessary for the offence and whether the public interest requires a prosecution. In general, youths are less culpable than adults as they have less insight into the causes and consequences of their offending behaviour.

Strategy and Policy Directorate
Crown Prosecution Service
January 2011
Disaggregated Test 3.64-3.82

To allow for disaggregated approach in some cases would widen choice. 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 Special Experts are content with this approach. I would therefore suggest that this option should not be excluded.

The Legal Test 3.99

I wondered whether there was not wisdom in the Scottish approach in having, both a legal test, and a wider pool of experts in deciding the issues of fitness. I therefore think the pool of experts should be widened beyond two doctors to determine fitness to plead under a capacity decision making process. This would also recognise the developments not only in psychiatry but also in the fields of psychology.

Role of the Judge 3.101

This gives the Judge a good degree of discretion. On the other hand if the Judge decides issues of fitness around assessments of trial complexity it draws him into the decision making process beyond simply making a judgment between potentially conflicting special experts. I would suggest it’s the special experts who should evaluate trial complexity and capacity and make their recommendations accordingly. The Judge should decide between the conflicting opinions.

Special Measures 4.27

Agree it makes sense to look more carefully at special measures in the trial process and how they may address concerns raised by any evaluation of fitness. In my experience it is not uncommon for psychological reports served pre trial, which find the defendant fit to plead, to also advise on special measures.

Giving Evidence 4.31

Agree that if a defence team thought it advantageous to their defence of the client the admission of expert evidence would make sense.
Defined Psychiatric Test 5.17

I wondered about the practicality of the proposal in the light of the lack of agreement on a defined test in the USA. I think the combination of the test with a clinical opinion is helpful if a defined psychiatric test is adopted as this allows for flexibility of approach.

Section 4A Hearings 6.140, 152 7.21, 7.59

I read the proposals with interest. I can see the sense of cases returned for trial where the defendant is still found to be unfit to be remitted back to hospital without another trial of the facts.

I can imagine if the fault component is introduced to the sec 4A process then cases prior to any change in the law might want the chance of an acquittal under the new system if they had been returned to court and then found unfit.

Charles de Lacy

Clinical Nurse Specialist Central Criminal Court

24th January 2011.
I had a question - 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" - apologies for the very late response to your consultation paper.
From: Lorna Duggan
Sent: 24 January 2011 06:51
To: LAWCOM Criminal Law
Subject: Consultation on Fitness to plead

A well thought out and comprehensive piece of work. My comments are from the perspective of a 12 years' experience as a Consultant Forensic Psychiatrist in Developmental Disabilities working in the independent sector in medium and low security (both adults and children). I have been instructed by both the prosecution and the defence (once by the trial judge) with the defence raising the issue in approx >95% of cases. Defence solicitors are generally very accurate in identifying defendants who are unfit to plead.

In many cases the legal professionals appear unsure of the process to be followed and I have advised the court. Clearly, an uncomfortable position. In addition, some psychiatrists are unsure of the Pritchard criteria and what they mean eg guilty means you've done it and not guilty means you didn't, rather than a more sophisticated answer. This becomes apparent when the Judge hears the issue, however, in many cases the issue may not be raised because of erroneous conclusions of the psychiatrist instructed by the defence. The seriousness of the consequences are clear.

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. I am concerned that for a group of defendants whatever is done the person cannot effectively participate in their trial - the concepts are just too complicated. As Einstein is quoted as saying "Everything should be made as simple as possible, but not simpler"

Regarding the proposals

LIST OF PROVISIONAL PROPOSALS AND QUESTIONS

PROVISIONAL PROPOSALS

9.1 We provisionally propose that:

(1) 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.

[Paragraph 3.41]

AGREE

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

[Paragraph 3.57]

AGREE

(3) 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.

[Paragraph 3.99]

AGREE

(4) 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 the trial which
the accused faces.

[Paragraph 3.101]

DISAGREE - I DO NOT AGREE WITH PROPORTIONALITY IN THIS CASE - FOR A PERSON WITH LD ANY CONVICTION WOULD HAVE AN ADVERSE EFFECT OF THE PERSON'S SLIM CHANCE OF GAINING EMPLOYMENT (SIMILAR TO A DOCTOR RECEIVING A CONVICTION FOR A MINOR OFFENCE THAT CAN HAVE A GREAT EFFECT ON EMPLOYMENT). THE DECISION SHOULD STAND-ALONE, THE DEFENDANT EITHER HAS DECISION-MAKING CAPACITY OR NOT

(5) 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 and where any other reasonable adjustments have been made.

[Paragraph 4.27]

DISAGREE - AGAIN IT IS A STAND-ALONE DECISION. I WOULD BE CONCERNED THAT SPECIAL MEASURES WOULD NOT BE SUFFICIENT IN ALL CASES.

(6) 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.

[Paragraph 4.31]

AGREE
(7) A defined psychiatric test to assess decision-making capacity should be
developed and this should accompany the legal test as to decisionmaking
capacity.

[Paragraph 5.17]

DISAGREE - I AM CONCERNED THAT THIS COULD MAKE THE
ASSESSMENT FORMULEIC AND COULD NOT COVER THE DIVERSITY OF
DEFENDANTS WHO WOULD NEED TO BE ASSESSED - RANGING FROM
THOSE WITH ENDURING MENTAL ILLNESS THROUGH THOSE WITH
ACQUIRED BRAIN INJURY, DEMENTIA AND THOSE WITH LEARNING
DISABILITY OR AUTISTIC SPECTRUM CONDITIONS.

FROM MY EXPERIENCE IN LEARNING DISABILITY AND AUTISTIC
SPECTRUM CONDITIONS THE ABILITY TO ANSWER QUESTIONS ABOUT
VIDEO CLIPS/SCENARIOS CANNOT BE EXTRAPOLATED TO THEIR OWN
PARTICULAR SITUATION.

(8) 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.

[Paragraph 6.140]

AGREE

(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.

[Paragraph 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.

[Paragraph 6.152]

(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.

[Paragraph 6.152]

(12) 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 medical evidence confirms) that the accused is still unfit to plead, the court should be able to reverse the decision to remit the case.

[Paragraph 7.21]
(13) 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.

[Paragraph 7.21]

AGREE

(14) 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.

[Paragraph 7.59]

AGREE

QUESTIONS

9.2 In addition to the above proposals, we also ask the following questions:

(1) 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 hearing 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?

[Paragraph 4.27]

YES

(2) 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?

[Paragraph 4.31]

THE DEFENDANT SHOULD HAVE A PERSON WITH THEM THROUGHOUT THE COURT PROCESS EXPLAINING WHAT IS HAPPENING. THERE SHOULD BE FREQUENT BREAKS DURING WHICH THE DEFENDANT SHOULD BE ABLE TO GO THROUGH WHAT IS HAPPENING, THE ISSUES AND WHAT WILL HAPPEN. THE PERSON'S SUPPORTER SHOULD BE ABLE TO INFORM THE COURT OF ANY CONCERNS ABOUT THE DEFENDANT'S CONTINUING ABILITY TO EFFECTIVELY PARTICIPATE IN HIS TRIAL.

(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?

[Paragraph 6.153]

YES

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

[Paragraph 6.159]

YES

(6) 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?

[Paragraph 7.26]

YES - TREATED MENTAL ILLNESS OR WHEN THE DEFENDANT FEIGNED MENTAL ILLNESS OR LEARNING DISABILITY AND IT BECOMES APPARENT THAT THEY POSSESS DECISION MAKING CAPACITY

(7) Should an accused who is found to be unfit to plead (or to lack decisionmaking capacity) be subject to the section 4A hearing in the same proceedings as co-defendants who are being tried?

[Paragraph 7.44]

NO - THE REASONS ARE CLEARLY SET OUT IN THE CP
(8) 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?

[Paragraph 8.37]

YES

(9) Do consultees think that if an accused lacks decision-making capacity there should be a mandatory fact-finding procedure in the magistrates’ court?

[Paragraph 8.37]

YES

(10) 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?

[Paragraph 8.37]

YES

(11) Do the matters raised in questions 8, 9 and 10 merit equal consideration in relation to the procedure in the youth courts?
YES

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

SUBSTANTIALLY, IF THE AGE IS INCREASED THEN MORE DEFENDANTS WILL HAVE DECISION MAKING CAPACITY.

Dr Lorna Duggan
Medical Director
Kneesworth House Hospital
Partnerships in Care
Bassingbourn
Herts
SG8 5JP

Direct Dial
Reception
Mobile
Fax
The Law Commission  
Steel House  
11 Tothill Street  
London  
SW1H 9LJ

26th January 2010

To Whom It May Concern:

Below is the collective response from the Edenfield Centre, Adult Forensic Secure service, regarding the unfitness to plead consultation paper (No. 197). We have attempted to address all the questions which were put forward by the Law Commission and have added some additional comments at the end.

Yours Sincerely

Dr Hany El-Metaal  
Specialist Trainee 5 Forensic Psychiatry  
Edenfield Centre

Dr Fareed Bashir  
Consultant Forensic Psychiatry  
Edenfield Centre
Question 1:

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 hearing 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?

This question refers to Paragraph 4.27 & Provisional Proposal 5

Paragraph 4.27:
However, taking account of the availability of special measures as part of the decision making capacity test will not remove the possibility of an accused being found to lack decision-making capacity. There will always be accused who are not going to be susceptible to the assistance which can be offered by way of special measures. It is these accused who would be subject to a reformed section 4A hearing.

Provisional Proposal 5:
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 and where any other reasonable adjustments have been made.

Response
It was felt that there is a clear continuum among defendants with regard to all the elements of mental and cognitive competence required to engage meaningfully with a trial. Pritchard criteria, are not able to allow for this variation. However the new proposals may help with this issue.

Regarding special measures, it was felt to be already known to happen. Slowing down the pace of the trial, multiple breaks, appropriate adult to help explain things to them were suggested but this would need to be assessed on an individual basis. Video links may have the advantage of allowing (when required) psychotropic medication to be administered to improve concentration or reduce distress for example if they suffer with a psychotic illness or anxiety disorder.
Question 2:

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?

This question refers to Provisional Proposal 6 and paragraphs 4.28 to 4.31:

Provisional Proposal 6:
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.

Response
The courts should take into consideration expert evidence on the general effect the individuals mental disorder may have on the trial process. For example if an individual is suffering from a psychotic illness and has persecutory delusional beliefs regarding video equipment, addressing court using a video link would be inappropriate. Therefore proposed measures should be individualised and not applied broadly.

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.

Consideration should be made as to whether individuals within a court room should wear less formal attire, with specially trained judges/barristers expert in mental disordered cases.

There are however practical concerns as to how this may be achieved, by whom, and the financial implications.
Question 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?

This question refers to Provisional Proposal 8 to 11 and paragraphs 6.128 to 6.153:

**Provisional Proposal 8:**
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.

**Provisional Proposal 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.

**Provisional Proposal 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.

**Provisional Proposal 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.

Response

This concerns mens rea and the admissibility or otherwise of such evidence in ‘trial of the facts’. How far can self-defence be introduced into a discussion of trial of the facts when the patient was deluded and paranoid? This is primarily a legal question and one for real experts in this complex area of law.
Question 4:

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

This question follows on from the proposals in Question 3. “Option 5” proposals are outlined in paragraphs 6.128 to 6.153.

Response
We understood that option 5 introduces three outcomes:
(1) a finding that the accused has done the act or made the omission AND that there are no grounds for acquitting him or her
(2) an outright acquittal
(3) an acquittal which is qualified by reason of mental disorder (akin to special verdict and more compliant with right to a fair trial in ECHR).

It was felt that this seemed reasonable but is primarily a legal question and outside the expertise of psychiatrists.
Question 5:

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?

This question refers to paragraphs 6.154 to 6.159:

**Response**
Again this was felt to be a legal question.
Question 6:

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?

This question refers to provisional proposal 13 and paragraphs 7.22 to 7.26:

Provisional Proposal 13
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.

Response
This is felt to be primarily a legal question beyond our expertise as psychiatrists.
Question 7:

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?

This question refers to paragraph 7.44:

Paragraph 7.44

However, on the basis of our reasoning in Part 6 for the reform of the section 4A hearing, and on the basis of the fact that we set great store by the appointment of a person to represent the accused interests in a section 4A hearing. We do not believe that under our proposed scheme, the problems that we have identified with B and others would persist. Therefore, we do not think that we need to make any proposal in relation to the need for separate trials of the fit and the unfit co-accused. Given some of the concerns with the decision raised in the above paragraphs however, we invite consultees' views on this point.

Response

Yes. There are no obvious reasons why this would be problematic. However this is felt to be primarily a legal question beyond our expertise as psychiatrists.
Question 8:

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?

This question refers to paragraphs 8 in the document and is linked to questions 9 and 10.

Response

Yes, in as far as those accused before the magistrates have an equal right to justice.
Question 9:

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

Refer to paragraphs 8

Response
Again this is felt to be primarily a legal question.
**Question 10**

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?

**Refer to paragraphs 8 and Proposals 8 & 9**

**Provisional Proposal 8:**
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.

**Provisional Proposal 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.

**Response**
Again this if felt to be primarily a legal question
Question 11

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

Response
Again this if felt to be primarily a legal question
Question 12

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

Response

There could be an argument for 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. This is on the basis that children lacking capacity will increase with decreasing age. It is likely that this could be similar to the minimum age for criminal responsibility and may be dependent on the gravity of the offence. This may introduce the question of who should carry out assessments of decision making capacity of children without any evidence of mental illness.
Response

Regarding proposal 1 the majority of consultants were opposed to this 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. The capacity test in MCA can be very broadly interpreted e.g. Ian Brady lacking capacity to consent to force feeding. It 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. They may find it hard to resist a tendency to carry best interests into the equation and forget that the best interests test does not apply in the criminal context. The level of knowledge and expertise in using the MCA capacity test by psychiatrists in criminal proceedings is untested in the UK to my knowledge. Ultimately, the Pritchard test lends itself to a sufficient level of interpretation and utility.

Using a capacity test has to be specific to the decision in question. A trial can be a dynamic process with multiple decisions required to be addressed. This would be make the capacity act difficult to apply to a trial as a whole. The Pritchard criteria are well placed to break down this complex process into broad categories of understanding that are practical to assess. We would therefore need clear guidance with vignettes and possible training if the new proposals were put forward.

The case for a finding in 4A procedure for a special verdict may be sufficient in conjunction with a preserved Pritchard test to advance justice for the vulnerable without opening up the floodgates to findings of unfitness to plead.

Regarding proposal 7 some felt a prescriptive test would be too narrow and inappropriate to apply in all circumstances. Notwithstanding that, such a test may prove impossible to scientifically validate, it may equally be prone to scientific advances in understanding of mental capacity.
CONSULTATION RESPONSE TO

THE LAW COMMISSION CONSULTATION PAPER NO 197
“UNFITNESS TO PLEAD”

By HH Judge Andrew Gilbart QC
Honorary Recorder of Manchester

1. This response is concerned with the question of how one proceeds once there is a finding of unfitness – i.e. the issues addressed in section 6 of the Consultation Paper.

2. The starting point must be that the State should only have the power to impose a constraint on liberty as a result of an allegation that the accused has committed a criminal act, where it has been shown by the State\(^1\) that the accused has committed the crime in question.

3. While the traditional approach of English and Welsh Law is to divide the elements into the act (actus reus/conduct) and the intention (mens rea/fault), that distinction is not easy to apply to some situations which may arise which can affect the question in issue. But at the same time one must be alive to Lord Hutton’s observations in Antoine [2001] 1 AC 340 about the need for protecting the public from harm inflicted by those who would have been convicted of an injurious act if committed with the requisite mens rea. I do suggest however that the clarity of the distinction between conduct and fault elements of an offence is more apparent than real, and varies from offence to offence.

\(^1\) There are almost certainly no, or almost no, cases where a private prosecution involves issues of unfitness to plead
4. *Antoine* probably reflects a reasonable interpretation of section 4A as enacted\(^2\). However the narrow definition of “act” in section 4A does not accord well with the complexities of the offences which come before the courts. While I note the examples chosen in paragraph 6.28-29, there are examples of much more commonplace offences where the traditional actus reus/mens rea or conduct/fault distinctions can be hard to apply.

(a) **Criminal Damage/Arson.** Arson is an area where issues of unfitness to plead and/or insanity are very likely to arise. The law now regards it as wrong in principle to criminalise those committing the offences of criminal damage or arson where the Defendant would be shown to be reckless on an objective test, but not shown to be so on a subjective test: see *R v G* [2003] *UKHL 50*. Criminality now only occurs where the Defendant is reckless, assessed on a subjective basis. If one applies *Antoine* without qualification, then the mindset of the accused is irrelevant. If a person who is stupid or thoughtless (but fit to plead) is tried, and would be acquitted and free from any loss of liberty if one applied the subjective test, why should a person who is unfit to plead, and therefore ill rather than dim, be in a worse position?

(b) 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

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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?

(c) Assault, unlawful wounding and wounding with intent. The actus reus of each includes elements that are bound up with the state of mind of the Defendant.

(i) In the case of common assault, if C strikes D and causes injury, the Crown, if it is to gain a conviction, has to prove both that it was intentional, and that it was unlawful (e.g. that it was not in self defence). Both may involve consideration of both the act in question and the thinking of its perpetrator, but need not do so. An involuntary movement of the arm which causes injury is not an unlawful act. A blow struck in self defence is not an unlawful act. An injury caused by an unintended blow, or a lawfully inflicted one, is thus not unlawful conduct. However in the case of unlawful wounding or wounding with intent under sections 20 and 18 of the Offences Against the Person Act 1861 respectively, additional specific intentions/states of mind have to be shown for there to be a conviction. That is where mens rea may become relevant.

(ii) If it is suggested that the mindset of the unfit man causing injury while defending himself falls within the fault part of section 4A, that produces unfair anomalies. Suppose E and F are out in the streets of a city at night. Both are attacked by a group of 4 men armed with knives. To defend themselves, E and F each pick up a piece of scaffolding with which to resist the attack. Both
succeed in doing so, but at the cost of two fractured skulls, one inflicted by each of the two. Both are charged with the s 18 offence of causing grievous bodily harm with intent, and each wishes to contend that he was acting in reasonable self defence, saying that he thought that he was about to be stabbed and receive serious injury. The jury will be directed by the trial judge that it is only if they find that the blows were not inflicted in lawful self defence that they need to go on and consider the specific intent under section 18. E is fit to plead, but F is not. If the state of mind of F is excluded from consideration, then he will be deprived of a good defence which addresses whether there was an unlawful act, not whether he had the requisite mens rea/degree of fault.

(d) In the case of certain common sexual offences the belief of the accused is relevant to whether there was a crime at all.

(i) For example in the case of sexual activity with a child aged between 13 and 16 under section 9 of the Sexual Offences Act 2003, the prosecution must prove against G

- a sexual touching of H
- which was intentional
- and that G did not reasonably believe that H was over 16.

(ii) If the evidence is not such that a jury finds itself able to be sure that G lacked such a reasonable belief, then it would be anomalous, and unfair on the unfit accused, if the jury could not determine in the section 4A procedure that the prosecution had failed to prove its
case that a crime was committed. Suppose for example that there was evidence from a number of witnesses that H had held herself out to G and others as being 17, and that G had believed that she was 17. It would be obviously unjust if he were liable to an interference with his liberty without that topic being explored at the section 4A stage. However the current section 4A would suggest that he would be liable to being the subject of a hospital or supervision order or other disposal. (One can exclude from the scope of the anomaly those cases where his belief is unreasonable and related to his disorder)

5. The appeal in *Antoine* was not concerned with a case where there could be an issue over an ingredient which has to be proved to found a conviction: it was concerned with whether a partial defence (where the burden of proof lies on the defence\(^3\)) could succeed, which by definition could only be considered if the jury were satisfied that all the other relevant ingredients were present – i.e. they were bound to convict of murder unless the statutory defence was proved. However the general observations approved there means that the test under s 4A applies to all types of offence, whether there is a risk of injury to the public or not, and whether the burden of proof lies on the Prosecution or Defence..

6. But there may also be problems even if one deals with aspects of a crime which fall much more readily into the “mens rea” description. Take the example of the offence of “simple” theft (where, it should be noted, risks to the safety of the public as per *Antoine* will be unlikely to occur);

   (a) Suppose one is dealing with three Defendants J K and L, each charged with stealing some clothes from M, which clothes were

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\(^3\) Section 2(2) *Homicide Act 1957*
kept in a shared wardrobe at the hostel for former patients in the local mental hospital, in which hostel they all reside. The clothes are not unusual in design, style or fabric, and consist of jeans and other casual clothing, all bought from a well known large retailer of inexpensive clothing, which operates from a chain of retail warehouses. Each of J K and L has been seen wearing them and treating them as his own.

(i) J is fit to plead. He agrees now in the light of the evidence called at trial that the clothes were M’s, but says that he was wearing them because at the time he wore them, he then genuinely but mistakenly believed that the clothes were his, and thus, if the prosecution fail to disprove what he says, is not guilty of theft.

(ii) K is fit to plead. He says that he was wearing them because he believed that the clothes had belonged to a former resident who had left them behind and had abandoned them, and thus, if the prosecution fail to disprove what he says, is not guilty of theft.

(iii) L is unfit to plead. However N, a volunteer worker at the hostel, can give evidence that when he discussed the clothing with L before the events in question, L (like K) was convinced that the clothes had been left behind and had been abandoned, and was so for reasons in which his illness played no part.

(b) It would be profoundly unjust if the jury could not hear the evidence from N in the section 4A proceedings.

(c) If that approach is appropriate for theft, then so must it be for robbery, where proof of theft is an essential ingredient, but where there are potential risks to the public.
7. 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.

8. Section 4A, as currently enacted, undoubtedly involves a finding that a Defendant has committed a criminal act (however defined), and where such a finding is made, results in a significant deprivation of liberty, albeit to varying possible degrees. It would surely be illogical to insist that as against accused persons of sound mind, the Prosecution had to disprove a defence to the criminal standard, whereas in the case of the especially vulnerable and mentally ill, the burden lay on the Defendant to show that there were grounds for acquitting him or her. Section 4A as currently enacted does not shift the burden of proof. The test is “whether (the jury) are satisfied, as respects the count or each of the counts on which the accused was to be or was being tried, that he did the act or made the omission charged against him as the offence.” That puts the legal and evidential burden on the Prosecution.

9. Paragraphs 6.129 and 6.130 of the Consultation Paper as currently drafted imply a shifting of the burden of proof. The current proposals would also mean that in the arson example cited above, if the prosecution failed to prove recklessness, then A would be acquitted and suffer no penalty, while B would be “acquitted by reason of mental disorder” (see consultation paper 6.136.) and would suffer a deprivation of liberty, even though the case against them was identical, and even though the prosecution could not show R v G recklessness against him.

10. The nettle must therefore be grasped that the new replacement procedure must reflect the usual incidence of the burden of proof. It would then be for the prosecution to 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. That then permits the court to distinguish between

(a) *offences which would have been proved against the Defendant had he not been suffering from a mental disorder* (e.g. 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* (i.e. he may be unfit to plead, but his mental disorder did not affect either his actions or intentions at the time of the offence). One may note that a similar causation test now appears in the new statutory provisions dealing with the statutory defence to murder of diminished responsibility⁴;

(c) *offences which would not have been proved against the Defendant in either case* e.g. 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.

11. There seems to be no compelling reason why the jury cannot determine all three questions, provided the relevant statutory provision is drafted. The questions posed are no more complicated than those asked of a jury in a case where issues of diminished responsibility arise, and much less so than in many cases of “loss of control” under sections 54-55 of the *Coroners and Justice Act 2009*⁵. I do not accept that, if that approach is adopted, such prejudice will be caused to the Defendant that s/he could not receive a fair trial. That potential for psychiatric evidence to be before a jury even though the carrying out of the offence is denied is

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⁴ See the new section 1(1B) of the *Homicide Act 1957*, enacted by the *Coroners and Justice Act 2009*. \[See text on page 8\]

⁵ Albeit that the complexities of summing up and jury consideration inflicted by that legislation as enacted are to be seen as examples of what to avoid rather than of what to achieve.
entirely possible now under the existing law - for example in murder cases where diminished responsibility is one of the issues at trial. I have experience as a trial judge where a Defendant was acquitted by the jury of murder (on the basis that the Crown had failed to prove that he was the man who killed the deceased) while it had still heard evidence from psychiatrists to the effect that, if it was proved he had killed the victim, he was suffering from diminished responsibility as the result of psychotic illness. The question of a jury hearing of the psychiatric condition of a Defendant may also arise if a bad character gateway is opened under section 101 of the Criminal Justice Act 2003: indeed in the case cited above, the psychiatric history of the accused (and expert psychiatric evidence about it) had been admitted as part of the prosecution case because the prosecution argued that it tended to show that he engaged in aggressive outburst of violence.

12. I am therefore generally supportive of the Provisional Proposal 8 (para 6.140) but do not agree with Proposal 9.

Andrew Gilbart QC
21st January 2011

Hon Recorder of Manchester
Manchester Crown Court
Crown Square
Manchester
M3 3FL
Dear [Name],

RE: Feedback on Unfitness to Plead Consultation Paper No 197

Thank you for sending me a copy of this extremely comprehensive and well written document.

I am in agreement that a unitary approach is preferable to a disaggregated one - as having to assess an individual and take into account the potential complexity of the evidence for every trial would be extremely problematic.

The adolescents that I tend to see have a variety of co-morbid disorders - that is to say that they have combination of a variety of mental and developmental disorders like ADHD and Autism (with sensory sensitivities), learning disabilities & mental illness, that in themselves may be relatively modest, but taken together can produce much more significant impairment.

A new test would I hope take into account situations where there may be multiple factors that are going to affect an individual’s overall ability to engage in the legal process - a gestalt view.

Ernest Gralton
Consultant Forensic Psychiatrist in Adolescent Developmental Disabilities

St Andrew's Healthcare
Billing Road, Northampton, NN1 5DG
Many thanks for sending the Law Commission consultation paper on unfitness to plead. In your cover letter of 27 October you invited a direct response, and I am taking you up on this; I of course had some advance notice of what was going to be proposed through the working party. I have included these comments, amongst others, as part of my contribution to the Forensic Faculty (of which I am a member) of the Royal College of Psychiatrists response, so you may or may not see them again through that avenue, depending on whether others agree with me.

Overall I am supportive of the proposals, and I agree that a capacity based approach is the right way forward. I think you have done an excellent job in dealing with a range of contentious issues - even those like me who believe there should be different thresholds for those who want to plead guilty can be satisfied. I do, however, have a couple of small points, and one more significant one.

In terms of the latter, I am uncomfortable with Proposal 7 regarding the use of a 'psychiatric test' to assess decision making capacity. My view is that this gives an illusion of scientific validity because there is no objective anchor on which to base the test - how do you decide if the test has got it right, and who decides? Evaluations under the Mental Capacity Act do not make use of any such test, and I don't believe that the case has been made in Section 5 that fitness assessments are any different in nature. The fact that some psychiatrists who don't understand what they are doing base their fitness recommendations on problematic grounds (Paragraphs 5.8 to 5.12; I found some much more humorous ones in my 1980s research) means that more care needs to be taken in the choice of expert, and experts should be reminded of the criteria they are assessing on. Misuse of tests in other areas (for example, suggestibility) shows that having a test doesn't necessarily improve assessments. In my view assessors should be free to use a test should they want to do so, but there shouldn't be an expectation that they will. Capacity in respect of fitness to plead, like Diminished Responsibility, does not lend itself well to a standardised test.

The other, smaller points, I have are:

No reference is made to a default position. In the Mental Capacity Act the starting point that individuals have capacity. I believe the same should be true of fitness to plead.

It is not made explicit what the standard of 'proof' should be, although it is probably implicit from the paper that it is 'on balance'.

I am uncomfortable with how difficult it is for cases to come back to court. In my research the number of cases returned for trial increased five fold when Leon Brittan,
then the Home Secretary, said that being unfit to plead was a postponement of a trial, not a substitute for one. Some of these cases resulted in acquittal. Could not the Court decide at the time of an unfitness finding whether there is a public interest in bring the case back should fitness be regained. (As an aside, you said in the paper that you were unsure why only those given a restriction order are able to be remitted for trial in the legislation - the reason given to me at the time was it was only these individuals whose whereabouts would be known).

Finally, and though it may not strictly be part of the consultation's remit, but I think it worth stating that a trial of a fit defendant is preferable to a Part 4A hearing of an unfit one. Finding someone unfit should be at the end of the road, and effort should be made to get an individual fit before going down this route. In my research I was sometimes amazed at how quickly some lawyers and psychiatrists wanted to push the defendant through the unfit to plead door.

Again, I think the Consultation Paper is excellent (and well written), and in that vein I hope you find the above comments of interest.

Don Grubin
Dear Colleagues,

I am responding to the consultation regarding unfitness to plead in the capacity of my role as a learning disabilities nurse employed by a mental health NHS trust but working within Kirklees youth offending teams for a period of eight years. I am going to go through a specific case I dealt with a few months ago which I hope will give light in practice as to a positive way forward.

A young woman was referred to me following a court appearance for criminal damage and was an extension to a referral order made elsewhere in the country. This young woman (I’ll call her Mary) resided in a residential home run by the voluntary sector for people with learning disabilities and challenging behaviour, she is seventeen years old. Mary had lived at several addresses away from her local area and had been moved around due to issues with her family and behavioural concerns. On seeing her I knew that she had very significant issues with ability and was concerned that she wouldn’t be able to undertake the delivery of the referral order. I had a discussion with YOT staff, contacted her previous YOT and several health and social care professionals who had known her previously for several years all who doubted Mary’s ability to engage in the process and felt that she had fluctuating capacity. In looking at the code of practice around mental capacity, speaking to regional workers in health and legal services for advice I discussed with the YOT that we should take this order back to court and that I would write a report for Court outlining the issues and why this was necessary plus the supporting evidence in relation to the Bradley report etc. It was also significant that Mary had been assessed as being fit to plead at a one off assessment as requested by the solicitor and therein were my concerns around being assessed as fit to plead but lacking capacity and found this to be a real contradiction and had resulted in Mary going through a process she had little understanding of. In speaking to regional officers around risk, offending, mental health I found little help and they were at a loss as to how to offer any support. The guidance was to try to go through with returning the order to Court. The Order did return to Court and I supported Mary to attend (there was also the difficulty of the previous order in another Court) and Mary was given an absolute discharge, she is doing well in a new environment nearer her family.

I would be interested to know if there had been any thoughts about an Order being given and then needing to be revoked as in Mary’s case. I do think that there needs to be a new test which takes capacity into account, fitness to plead seems to be a separate entity but how can the two be separated? and reports should be open for a range of professionals to complete. I don’t see that it should be the Judge who should ascertain the complexity of the case.

I hope this information is sufficient and would be happy to expand on some of the issues if needed.

Regards, Karina Hepworth
Law Commission Consultation Paper No 197: Unfitness to Plead

Response to Provisional Proposals by Helen Howard, Senior Lecturer in Law, Teesside University

Provisional Proposal 1

The new proposals are undoubtedly an improvement on the current law. Paragraphs (1), (2) and (4) do not appear to deviate as far from the current law as paragraph (3). In its current form, the third paragraph seems to be very broad, and open to interpretation. In the context of mental illness, this flexibility offered by this paragraph should mean that the test is open to many more mentally ill defendants, and that unfair trials should be avoided to a much greater degree.

However, could paragraph (3) be open to abuse? Is there a danger that a defendant who has no recognised mental illness will try to claim an inability to use or weigh information as part of a decision making process? Might such a provision allow an individual claiming stress, crippling shyness, overwhelming tiredness, nervousness, or poor social background to escape a full trial? It may be that the proposal needs to be linked to some kind of identifiable mental illness. The proposed psychiatric test may remedy this issue to some degree. However, 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...”
Provisional Proposal 2

It is accepted that a decision need not be rational or wise. So long as irrational decisions are able to trigger a need for assessment, then this provision will recognise the individual’s right to self-determination. No one can say that a decision which appears rational to one person is necessarily a good decision in the eyes of another.

Provisional Proposals 3 and 4

While it makes sense to assess an accused against the whole range of activities in which he may be required to participate during a trial, clearly some trials will be more straightforward than others. ¹ The difficulty here lies in measuring where the threshold for capacity should be set. If the threshold is too high, then some individuals may unfairly escape the criminal justice system. If it is too low, then some will be unfairly drawn into trials, where special measures do not compensate for the lack of capacity. It seems that much will hinge on how the proposed psychiatric test is drafted and applied.

Provisional Proposal 5

With regard to the use of special measures forming part of the decision-making capacity test, there is merit in the argument that this would avoid special measures being overlooked at trial.² However, there could be a danger that an accused who lacks capacity may be ‘pushed’ into a trial, in which he is dependent on the special measures being adequately resourced. It is suggested that the special measures should be separate from the legal and psychiatric tests.

² Para. 4.20.
Provisional Proposals 6 and 7

There is currently no set psychiatric test\(^3\) and existing psychiatric tests are criticised.\(^4\) The proposal that the test should assess decision-making capacity is concerning. The ultimate decision should lie with the court. Will a judge allow for the consideration of factors outside of the, as yet unwritten and untested, psychiatric test, or will he be exclusively guided by it? The danger here is that too much weight may be attached to the opinion of psychiatrists who will make the final decision as to whether an individual has the capacity to enter the criminal justice system. The potential to admit evidence that falls outside of the experience of experts in line with the proposed Scottish model\(^5\) seems to be rejected on the grounds that “the majority of cases...concern conditions in relation to which psychiatric opinion is relevant.”\(^6\)

While it is accepted that the opinions of two medical practitioners are necessary, it is hoped that this will not exclude the possibility of evidence outside of the psychiatric remit where this would be useful. It may be helpful, for example, where an accused is being educated in a school which caters for special educational needs, for a teacher to provide evidence. Equally, where social services are involved in supporting the accused, the opinion of a social worker could be pertinent. The psychiatric test should merely “assist in measuring the capacity of the accused”\(^7\) and not usurp the position of the legal test.

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\(^3\) Para. 5.2.  
\(^4\) Para. 5.3.  
\(^5\) Para. 5.24-5.28.  
\(^6\) Para. 5.36.  
\(^7\) Para. 5.39.
Summary

In terms of the proposed capacity test, the proposals go a substantial way towards remedying the problems connected to the current law on unfitness to plead. With the caveat that the legal test should contain a reference to temporary or permanent physical or mental illness, and that there should be caution in creating an over-dependence on the psychiatric test, the proposed reforms deserve support. Most importantly, the paranoid schizophrenic who is hindered by his own psychosis from presenting and challenging evidence will be recognised as lacking the decision making capacity to stand trial. In the writer’s opinion, such a test is a positive step towards the protection of vulnerable adults.
Dear David,

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. It is against that background that I tentatively make these observations. They are in no sense criticisms, nor even disagreements, but just observations made from the practical point of view of someone who sits.

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 1st does not address the relevant criteria. Clearly the test needs to be changed.

As to the nature of the new test: I was interested to see that you were not tempted by a Scottish-type ‘effective participation’ test. Of course both that and a ‘decision-making capability’ type test have to be interpreted in a way that covers substantially the same ground so perhaps the phrase chosen matters less than the way in which you define what it should cover. On that subject, I merely observe that to be tried fairly, an accused would (as a very minimum) have to be able

- to give instructions as to whether he did the act complained of and
- to describe his state of mind at the time

Without these two aspects he cannot be properly advised as to the appropriate plea. In addition he must be able to

- follow the evidence so that he can give further instructions if necessary
- understand advice re the advantages/disadvantages of giving/calling evidence
- give evidence on his own behalf if appropriate

Without these 3 aspects he cannot properly participate in the trial

Clearly some of these processes are better described as decision making, others as participation.

I agree that, whether or not his decisions are in his own best interest is not the relevant test. I am constantly confronted with defendants (about whose fitness to plead no question is ever raised) whose very decision to plead not guilty is profoundly against their own interests. It is usually caused by a stubborn refusal to publicly accept their wrongdoing (particularly in child sex cases) or a stubborn optimism that somehow the wool can be pulled over
the jury’s eyes. Someone with a mental illness may be motivated by the same stubbornness. It is only if an accused’s inability to make a sensible decision is due to his e.g. a delusional illness that the situation is different.

My real problem with your use of the term and definition of ‘decision-making capacity’ is the very wide number of situations which it is capable of embracing which are presently outside the ‘Pritchard’ test – or at least outside the way it is currently applied.

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 e.g. special measures, and others of which are not e.g. whether a borderline defendant is having a good or bad day.

I quite see that in practice, by the time those who potentially might fall within your definition have been the subject of reports, and the judge has listened to arguments and ruled, sensible decisions can be made. But 2 things are clear.

a. There are likely to be a very much larger number of defendants who will be deemed unfit.

b. There will certainly be a hugely larger number of defendants who will need to be examined to see if they are unfit.

It is b. that may cause the practical difficulty. At the moment it is generally only when lawyers find themselves with a client with a history of mental illness, or where they find they really can’t take instructions, that the question of psychiatric reports arises. Under your much broader definition of unfitness, those representing the alcohol and drug-addicted, the depressed and learning-disabled will be bound to pursue this avenue in their client's interests. No doubt, once reports are obtained, the vast majority of these defendants will be able to be tried, perhaps with the assistance of special measures. 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. I quite see that in an ideal world, your solution is the fairest, the ‘most right’. But we are not living in an ideal world. We are living in a world where money is being withdrawn from the system’s every aspect, and in which time is an increasingly scarce commodity.

Whilst I unreservedly accept that an expensive, delayed and stressful trial is better than an unfair trial, I really do wonder if such a broad brush approach can realistically be achieved in present times. In particular I wonder about its applicability for some relatively minor, non-dangerous offences. Where a finding of unfitness is likely to lead to s37 / s41 disposal – with the potential for denying an accused of his liberty without limit of time – such an approach as yours may well be justified. But can that be said of all cases? Should there be a distinction between different sorts of cases?
I totally agree that the test must be applied to the issues of the case. It is 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 multi-handed 6 week case where his defence is ‘I didn’t have the appropriate mental state.’. He may be well able to cope with a case that does not touch upon his fears and anxieties, but not if it does. However this means that the psychiatric reports will have to deal with the issues in the case rather than just his general decision-making / participation capacity. This will require more input from psychiatrists than we often get at the moment, more reading by them of case papers and other trial-related material, and with it bigger bills for their services. Sorry to return to the same theme. But at present it is a battle to get funding for anything, and I can't help wondering where all the extra money will come from.

The only solution that occurs to me is, to return to an earlier theme, the possibility of providing your better (though much more expensive) scheme for cases whose gravity – both to the complainants and defendants – warrants it. In other words, perhaps cases where issues of public protection are engaged may need to be dealt with differently from those where they are not.

I totally agree that the decision for a judge must include whether problems can be alleviated by the use of appropriate special measures. In my view the full range of measures available to other witnesses (with the exception of pre-recorded evidence-in-chief) should be available for consideration for an accused. This should include the use of an intermediary, screens, a TV link, shortening court hours, increasing the number of breaks, preventing the use of complex language and sentence structure by counsel etc.

I agree that a D with a mental disorder etc. who wishes to give evidence should not have to do so without the jury understanding the possible / likely effect of his impairment. However, and again, you will be aware of the extra delays and escalating costs when experts are involved.

I agree that a defined psychiatric test should assist the judge. It would no doubt be part of the reports. I would be very interested to see how it could be designed since the judge’s decision must be made against the background of the particular offence. Like you, I am sure it can be achieved, but am having some difficulty imagining it.

I am fascinated by your suggestion that there should a further judge-held hearing to determine if the acquittal is because of mental disorder at the time of the offence. It is an interesting idea that a judge should try to interpret the thoughts of a jury. At present, in ordinary trials, in some circumstances the judge is entitled to make his / her own findings of fact when sentencing, if the jury’s verdict doesn’t make the factual basis clear. Your proposal, if I understand rightly, will go very much further. Of course juries do not always have a unanimous factual basis for their conclusions, and judges do not always agree with a verdict. I wonder what appeal process there could be
from a decision such as this after an acquittal, where the defendant did not agree with it and felt it adversely affected his future life chances?

I shall continue to ponder the rest of the CP because it is so interesting, but rest assured, I shan’t trouble you with my further thoughts.

Thank you, if you have been, for bearing with me.

Yours

Wendy.
Just for Kids Law: Response to the Law Commission Consultation
Paper No.197 Unfitness to plead

Drafted By
• Brenda Campbell
• Kate Aubrey Johnson
• Maya Sikand
• Shauneen Lambe

Just for Kids Law is a charity (1121368) that works in conjunction with the Youth Department of a legal aid firm providing complete support and representation to children and young people in the criminal justice system. We have an established history of working with vulnerable children and young people and as such we are recognised as a specialist provider of services by organisations such as the National Autistic Society. At any one time our lawyers are running 5-10 cases where there are issues of fitness to plead or effective participation. We have taken a number of legal challenges in this area and in particular the case of TP v West London Youth Court (cited in the consultation paper). Given the statistics provided by Professor Mackay it appears that we provide representation in a significant percentage of the cases where fitness to plead is raised.

Our experience and knowledge of the way fitness to plead is litigated in the Crown Court and more importantly the Youth Court leads us to believe that there is the need for a radical overhaul of the law as it relates to those with disabilities in the criminal justice system.

PROVISIONAL PROPOSALS

Provisional Proposal 1: 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. (Paragraph 3.41)

We agree with this proposal. We think it is important to enshrine within criminal proceedings the requirement that all defendants, and in particular youths, can meaningfully participate in criminal proceedings¹.

We would suggest that the wording in provisional proposal one is changed to say “proceedings” rather than “trial” as the world “trial” could be interpreted to exclude pre-trial issues such as giving instructions, “sentencing” or other hearings that run adjunct to trials, such as ASBO hearings.

¹ The inconsistencies in the current approach are highlighted in Keating, H., ‘The ‘responsibility’ of children in the criminal law’ [2007] Child and Family Law Quarterly 183

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We believe that the Grisso criteria, which we understand is recommended by the Royal College of Psychiatry to its members when assessing fitness to plead, encompasses the elements that need to be considered when assessing whether a defendant is fit to plead or effectively participate in the proceedings. (See attached – Appendix 1).

The test currently set out in the CP at paragraph 3.13 is limited to decision-making capacity, we would propose it is expanded to reflect all aspects of the court process, for example, that an accused should be found unable to effectively to participate if he or she is unable to do any of the following:

- Have the capacity to make decisions for him or herself
- Understand the charges and potential consequences
- Understand the trial process
- Have the capacity to participate with his or her legal team in a defence
- Have the ability for participation during court hearings

Provisional Proposal 2: A new decision-making capacity test should not require that any decision the accused makes must be rational or wise. (Paragraph 3.57)

We agree with this proposal, however, we think that there should be consideration of the situation where an accused person refuses or does not agree with advice provided by his or her legal team. In our experience it is not uncommon for the accused person to disagree with his or her legal advisers who wish to explore capacity/effective participation issues.

We feel that the court should be given an inherent jurisdiction to invoke the effective participation procedure and instruct an expert to advise in appropriate cases. The lawyers for the defendant must act on the defendant’s instructions, until such time as the defendant is found not to have capacity. The Court, however, is independent and could order the investigation even if the defendant did not wish that avenue to be pursued. Should a defendant be found not have capacity based on the Court instructed expert, the court would then be in a position to appoint the defendant with a lawyer who would act in the defendant’s best interests and not necessarily according to the defendant’s instructions.

Our additional proposal
- JfK Law Proposal 2A - A new effective participation test should include the power for the court to independently instruct an expert to consider effective participation issues.

Provisional Proposal 3: 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. (Paragraph 3.99)
We agree with this approach for a revised unitary test. However, we would propose, as with provisional proposal one, that the language should state ‘proceedings’ and avoid reference to ‘trial decisions’ as ‘trial’ may be interpreted to exclude other forms of criminal or adjunct proceedings.

We further propose the use of the phrase ‘effective participation’ rather than ‘decision-making capacity’. We note ‘effective participation’ was adopted by the Scottish Law Commission in its recommendations and incorporated by the changes in Scottish law. ‘Effective participation’ is the terminology used by the European Court of Human Rights (the European Court) and would therefore keep the language in England in Wales in line with the European Court decisions and has the potential to be more expansive than ‘decision-making capacity’.

Provisional Proposal 4: 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 the trial which the accused faces. (Paragraph 3.101)

We would not adopt this alternative proposal. We think that this would lead to injustice. The decision as to the ability of a defendant should be decided on the opinion of the relevant experts rather than a member of the judiciary, who may or may not have any prior knowledge of the particular circumstances or condition of a defendant.

We acknowledge that effective participation may vary depending upon the specific charges the defendant faces – however this could be dealt with more appropriately by asking specific questions of the expert in relation to the elements of the charges and can be incorporated into the instructions for the psychiatric/expert assessment process.

We think Proposal 3 should be followed.

Provisional Proposal 5: 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 and where any other reasonable adjustments have been made. (Paragraph 4.27)

We agree that effective participation should be assessed with regard to the assistance of special measures or any other reasonable adjustments, however, we think that there should be a safeguard. Firstly, in cases where special measures and reasonable adjustments have been implemented, that their effectiveness is kept under review. Secondly, that there is a procedure for halting the trial should the defendant’s ability not be as thought/envisaged by the expert report or the circumstances change. Any expert recommendation regarding the use of special measures or reasonable adjustments to allow the defendant to effectively participate can only ever be
theoretical, the reality of proceedings may prove otherwise. We would suggest this safeguard be built into the legal framework.

We would make the following recommendations for improvements to the existing special measures regime:

- The statutory provision to provide an intermediary for the defendant is not yet in force. This needs to be implemented to ensure equality of arms.
- Special measures and reasonable adjustments are not limited by statute but are expansive and suggestions can be made according to the particulars of each defendant (and witness).
- The funding for special measures for defendants and witnesses is clear (this is not currently the case for intermediaries for the defendant see Sevenoaks [2009] EWHC 3088 (Admin)). The defendant must be entitled to the equivalent cost as any prosecution witness in the proceedings. The same is true when instructing experts, the defendant must not be limited in who can be instructed because public funding will not pay for the relevant expert.

Example

We represented a young woman who was accused of killing her uncle. We wanted to instruct a well known expert in the field of sexual abuse and domestic violence relating to provocation and diminished responsibility. We applied for prior authority and the Legal Services Commission refused on the grounds that they would not pay our expert’s rate/fees. Our expert could demonstrate from receipts that on 2 previous occasions the Legal Services Commission had paid the rate she was asking for. This kind of arbitrary decision making cannot take place. A defendant should not be at the mercy of a costs appeal process as legal proceedings must continue, the courts cannot force the hand of the public funders and many legal aid firms would not take the financial risk involved.

In relation to children in criminal proceedings we would suggest a two layer test. Where children and young people are deemed to be able to effectively participate with the consideration of enhanced features to the existing special measures framework we would suggest that a Guardian/Litigation friend option is available to them, this would provide parity with the civil system (Gillick competency). It is important to acknowledge (as the consultation paper does at p75) child defendants’ emotional immaturity and that many child defendants are Children in Need as defined by the Children Act 1989.

Our additional proposals

- JfK Law Proposal 5A - In cases where the defendant’s ability to effectively participate relies upon special measures and/or reasonable adjustments during the criminal proceedings, there should be a regular review of the defendant’s participation and a statutory procedure for halting the criminal proceedings and shifting into a section 4A hearing if necessary.
Provisional Proposal 6: 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. (Paragraph 4.31)

We agree with giving a defendant, who has been found able to effectively participate, the opportunity to call an expert with regards to their condition or impairment - in our experience this is what is happening in practice, usually through an admission or submission of extracts of an expert report rather than relying on live evidence.

Provisional Proposal 7: A defined psychiatric test to assess decision-making capacity should be developed and this should accompany the legal test as to decision-making capacity. (Paragraph 5.17)

We agree that a defined expert test could be used as part of the assessment for effective participation – it would ensure some standardisation within the expert reports. A concern would be, as with all standardised tests, repeat exposure may give varying results. So a defendant who might have to undergo 3 attempts at the same standardised test may be aware of what answers the tester is looking for by the third attempt.

- We therefore do not think the test should be exclusive or mandatory.
- We think the Grisso criteria could be used as the standardised test.
- We think a Code of Practice similar to that which is used in the civil capacity test would be essential.

However we do not believe that the requirement for two medical experts one of whom is duly approved should be retained. In our experience, a psychiatrist is often not the best qualified to assess effective participation and we would endorse the use of ‘the responsible clinician’, the terminology used in the Mental Health Act 2007, this criteria has also been adopted by the changes in the Scottish system. We do not agree that this would impact a defendant’s article 5 rights. Should a hospital order be considered it would be at the disposal stage, it then becomes necessary to authorise this hospitalisation by someone from the defendant’s primary care trust and also by a practitioner within the receiving hospital. We believe that in fact the requirement of 2 medical practitioners, one of whom must be duly approved, is an unnecessary expenditure of public funds, it is psychologists who, for example, performs IQ tests, in these effective participation cases a psychiatrist is often merely rubber stamping the psychologist’s assessment as a statutory requirement.
Case Study

JW is a 19 year old defendant on the Autistic spectrum, charged in the magistrates’ court with threatening words and behaviour and common assault that relate to his condition. He lives in a residential unit for people with Autism. His social worker wrote a report that in her opinion he was not fit to go to trial. He was seen by a leading expert on Autism, psychologist Professor Simon Baron Cohen, who stated in his opinion the defendant is not fit to go to trial. However neither of these reports fulfill the requirements of s.37 of the Mental Health Act 1983 in conjunction with s.11 Power of Criminal Court (Sentencing) Act 2000 and so his legal team – at public expense – must instruct two medical practitioners to provide such reports, delaying the proceedings and adding unnecessary cost.

We would amend Proposal 7 as follow

- JFK Law Proposal 7A – The requirement for the expert evidence of two medical practitioners, in the magistrates and youth court and 2 medical practitioner one of whom is s.12 approved, in the crown court should be removed and replaced with two ‘responsible clinicians’

- JFK Law Proposal 7B – A defined clinical test should be introduced as a standard test (but not exhaustive test) for assessing ‘effective participation’ in conjunction with an interview which would include analysis of the legal test as to ‘effective participation’. Where relevant, clinicians should be able to use the most appropriate clinical assessment tools to enable them to assess an individuals’ ability to participate in the trial process.

- JFK Law Proposal 7C – A code of practice should be introduced to guide clinicians in the assessment of ‘effective participation’.

Provisional Proposal 8: 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. (Paragraph 6.140)

We agree with this proposal as the best way to proceed – We would include within this the protection under Article 6 of the European Convention of Human Rights as is stated within the consultation paper.

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.

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² Terminology used in the Mental Health Act 2007

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

Provisional Proposal 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. (Paragraph 6.140)

Provisional Proposal 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. (Paragraph 6.152)

Provisional Proposal 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. (Paragraph 6.152)

We do not agree with Proposal s 9 – 11, they are predicated on the basis that
dangerous offenders will be acquitted by a jury where there is a mental
element of the offence, however, in our experience a jury, if they find the act
has taken place, make a finding accordingly and do not consider the lack of
mental element as grounds for acquittal.

There is some cross over here between a defendant who was insane at the
time of the act and not fit to plead at the time of trial but these are two different
issues and a jury (or magistrate) finding the act to have been done can do so.

We would therefore submit that the trial of the facts (section 4 A hearing)
follow the procedure set out in provisional proposal 8.

Provisional Proposal 12: 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 medical evidence confirms) that the
accused is still unfit to plead, the court should be able to reverse the
decision to remit the case. (Paragraph 7.21)

We agree with this proposal.

Provisional Proposal 13: 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. (Paragraph 7.21)

We agree with this proposal.

Provisional Proposal 14: 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. (Paragraph 7.59)

We agree with this proposal.

QUESTIONS

Question 1: 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 hearing 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? (Paragraph 4.27)

We agree – in addition though we think the test needs to include a requirement that where an expert finds an accused ‘fit to plead’ subject to special measures – then the special measures are clearly set out in the expert report and if not followed or there are concerns that the defendant is not able to effectively participate that the trial can be stopped. See our response to Provisional Proposal 5.

Question 2: 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? (Paragraph 4.31)

As stated above there needs to be a proper funding regime in place that ensures equality of arms so the defendant has access to the same experts and special measures as the Crown. This regime must be accessible to defence witnesses as well as the defendant.

Question 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? (Paragraph 6.153)

Retain fact finding trial

Question 4: If consultees do not agree that option 5 is the best option for reform, would they agree with any other option? (Paragraph 6.153)

Option 4, with the fact finding trial, is our preferred option.

Question 5: 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? (Paragraph 6.159)

We think that a defendant can be found to have done lesser included charges, as would be an option for the jury in a normal criminal trial.
Question 6: 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? (Paragraph 7.26)

Yes – if the defendant is subsequently fit and feels that a miscarriage of justice has occurred in having been found to have done the act. If, for example, a defendant feels that by giving evidence they would be acquitted, this option should be available.

Question 7: 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? (Paragraph 7.44)

We believe that the decision in R v B, W & Others [2008] EWCA Crim. 1997 should be the exception rather than the rule. In our submission the overwhelming presumption should be in favour of separate trials, save in the most exceptional circumstances as arose in R v B, W & Others ie where there was a 30+ count indictment, charges dating back 40 years, numerous civilian witnesses.

We believe joint trials of fit and unfit defendants could lead to a miscarriage of justice. Either for the unfit defendant, who is unable to defend himself in a cut throat defence or for the fit defendant who may be seen, in the eyes of the jury, as leading a vulnerable person astray.

Case Study

JB was charged with robbery with 3 co-defendants. The Crown’s case was that the defendant had committed the robbery but that the co-defendants were involved as part of a joint enterprise. The Crown’s evidence was based solely on the evidence of the victim, however the Crown’s case would have been bolstered by the Co-defendants case, had they been able to run presence but non-participation. JB, the unfit defendant would not be able to give evidence in his own defence to respond to the allegations made by the fit co-defendants. The defence moved for separate hearings for the trial of the facts and the actual trial, which was granted.

Question 8: 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? (Paragraph 8.37)

Yes – the procedure in the magistrates’ court (including the youth court) should mirror that in the Crown Court. The Barking Youth Court procedure is an unhappy compromise. There is no basis for distinguishing between procedures based solely on the gravity of an offence – particularly as in the youth court, very serious offences (grave crimes) are heard in the summary jurisdiction. Arguably the distinction is both arbitrary and discriminatory. There
is also a real discrepancy between the different disposals available under the MHA 1983, s. 37 and the Criminal Procedure (Insanity) Act 1964, further highlighting that the procedure set down in Barking fails to protect defendants in the magistrates/youth courts to the same degree. We have highlighted these discrepancies in a separate section at the end of this response.

**Question 9:** Do consultees think that if an accused lacks decision-making capacity there should be a mandatory fact-finding procedure in the magistrates’ court? (Paragraph 8.37)

Yes. There is no rational basis for distinguishing between the Crown Court and magistrates’ courts. Indeed when defendants plead guilty to minor offences in the magistrates’ court despite being unfit (due to pragmatic advice), this is often relied upon by the Crown as evidence of “fitness” at any later unfitness hearings in the Crown Court.

**Question 10:** 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? (Paragraph 8.37)

We think it should mirror provisional proposal 8

**Question 11:** Do the matters raised in questions 8, 9 and 10 merit equal consideration in relation to the procedure in the youth courts? (Paragraph 8.68)

Yes – The youth court is a magistrates’ court and all the concerns relating to the procedure in the adult magistrates’ court should apply at least equally, and as recognised in the consultation paper, more forcefully. We believe there should be further consideration in the youth court in relation to a defendant’s age, and this limiting his ability to participate, and also with regards to his developmental immaturity and lack of impulse control. This is addressed more fully below.

**Question 12:** How far if at all, does the age of criminal responsibility factor into the issue of decision-making capacity in youth trials? (Paragraph 8.69)

We believe it factors considerably. Academic and scientific research shows that both neurobiological immaturity and psychological immaturity together impact the way that adolescents respond in or to situations. Dr BJ Casey, Director of the Sackler Institute (Center for Brain, Gene and Behavioral (CBGB) research across development and the Neuroscience Graduate Program) Cornell University states; “Adolescents show adult levels of intellectual capability earlier than they show evidence of adult levels of impulse control (Reyna & Farley 2006). As such, adolescents may be capable of making informed choices about their future (e.g., terminating a pregnancy) but do not yet have full capacity to override impulses in emotionally charged situations that require decisions in the heat of the moment. Unfortunately,
judges, politicians, advocates, and journalists are biased toward drawing a single line between adolescence and adulthood for different purposes under the law that is at odds with developmental cognitive neuroscience (Steinberg et al. in press).

The United States Supreme Court has recognized that adolescents, by virtue of developmental immaturity are inherently less responsible for their behavior than adults. In the case of *Graham v. Florida* the US Supreme Court emphasised neuroscience research in explaining why it violated the 8th Amendment to impose a sentence of life without parole on a juvenile, except in homicide cases. Similarly in abolishing the juvenile death penalty in *Roper v. Simmonds* the Supreme Court Justices were referred to *Amicus* briefs filed by the American Medical Association and the American Psychiatric Association showing that the adolescent mind operates differently, their brains are more anatomically immature. Research shows that adolescent brains are more active in regions related to aggression, anger and fear and less active in regions related to impulse control, risk assessment and moral reasoning.


In the UK research by Dr Ernst Gralton and Dr Felicity de Zulueta supports the American research that the adolescent brain does not work in the same way as an adult brain.

We would not limit developmental immaturity to ‘youth trials’ but to ‘proceedings that involve youths’ (as these occur either in the youth court or for more serious crimes in the Crown Court).

### Additional Concerns not addressed in the consultation paper

**Disposals**

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 (see text box below).

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.

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**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.
Appendix One

GRISSO CRITERIA

Thomas Grisso (American Psychologist) outlined a conceptual framework for competence in juveniles based on legal and psychological definitions of competence. His framework consists of four stages:

1. **Understanding charges and potential consequences:**
   - ability to understand and appreciate the charges and their seriousness
   - ability to understand possible dispositional consequences
   - ability to realistically appraise the likely outcomes.

2 **Understanding the trial process:**
   - ability to understand, without significant distortion, the roles of
   - participants in the trial process (for example, judge, defense attorney,
   - prosecutor, witnesses, jury)
   - ability to understand the process and potential consequences of pleading
   - and plea bargaining
   - ability to grasp the general sequence of pre-trial/trial events.

3 **Capacity to participate with attorney in a defense:**
   - ability to adequately trust or work collaboratively with attorney
   - ability to disclose to attorney reasonably coherent description of facts
   - pertaining to the charges, as perceived by the defendant
   - ability to reason about available options by weighing their consequences,
   - without significant distortion
   - ability to realistically challenge prosecution witnesses and monitor trial
   - events.

4 **Potential for courtroom participation:**
   - ability to testify coherently, if testimony is needed
   - ability to control own behavior during trial proceedings
   - ability to manage the stress of the trial.
JUSTICES’ CLERKS’ SOCIETY

Law Commission Paper No 197: Unfitness to Plead

Ref: 54.0005   Date: January 2011
The Justices' Clerks' Society is pleased to respond to the consultation paper. Although the main weight of the Society's response will deal with the provisional proposals and questions relating to summary proceedings in magistrates' courts and youth courts the Society comments on other proposals in order to assist in the development of a consistent and coherent process for dealing with the issues of fitness to plead in all courts.

PART 3: THE NEW LEGAL TEST

Provisional Proposal 1:

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 criminal proceedings. (Paragraph 3.41).

Response

The Society supports the view that the current test should be replaced and notes that the test put forward is based on decision-making capacity. So long as the term “decision-making capacity” embodies all the basic requirements for effective and meaningful participation in the trial process as set out in paragraph 3.40 the proposal will have the Society’s support. The Society would be concerned if the phrase “decision-making capacity” was not sufficiently well defined to include, for example, the capacity to understand facts, to make representations and to challenge where necessary. The Society endorses the approach to effective participation set out in Secretary to the Committee v UK (2005) referred to in the consultation paper. It agrees that the Pritchard Test is outdated and that some aspects of the test, notably the reference to the ability to challenge a juror, are not useful in determining the fitness of the accused to stand trial.

Provisional Proposal 2:

A new decision-making capacity test should not require that any decision the accused makes must be rational or wise. (Paragraph 3.57).

Response

The Society agrees with this proposal and supports the line of argument which suggests that the important factor is the ability to receive information, understand it and use it in a reasoned way to make a decision. The fact that such decisions might be difficult to support or even irrational should not be a factor to determine whether an accused person is fit to stand trial.

Provisional Proposal 3:

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. (Paragraph 3.99).

Response

The Society supports this proposal since the test which is proposed is sufficiently wide for a
range of issues regarding capacity to participate in the trial to be taken into account. The
Society supports the simplicity of this test over the later proposal which requires an
assessment of the complexity of the proceedings and the impact of the disability of the
accused on his/her decision-making capability in the context of the trial. The Society agrees
that the proper approach is to address the ability of the accused to participate effectively in
each stage of the process to decide whether the accused is unfit to plead. The Society
believes that such a test is sufficiently clear for application in both summary trial and trial on
indictment and agrees that addressing proportionality introduces a risk of uncertainty and is
likely to lead to inconsistent decisions based on the views of the court on whether
adaptations to the trial process can enable participation. It is, in the Society’s view,
preferable that the decision is based on information provided by experts where possible so
that the court can address the issue of whether or not the accused has the necessary
decision-making capacity or not. Paragraph 3.105 is agreed in its entirety.

Provisional Proposal 4:

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 the trial which the accused faces. (Paragraph 3.101).

Response

For the reasons set out above the Society believes it would unwise to introduce a test which
requires the court to evaluate the decision-making capacity of the accused according to the
complexity of the proceedings and the gravity of the outcome.

PART 4: THE ROLE OF SPECIAL MEASURES

Provisional Proposal 5:

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
and where any other reasonable adjustments have been made. (Paragraph 4.27).

Response

The Society agrees that the use of special measures may enhance the capacity of the
accused to participate in proceedings and improve the accused capacity to make decisions.
However, it is extremely rare for a defendant to be granted the right to give evidence by way
of live-link in proceedings in magistrates’ courts. As you are aware, the use of an
intermediary to assist the defendant is not yet available. Accordingly, the Society is unable
to comment on the efficacy of such measures. The Society would express reservations
about the extent of the impact such measures might have on the capacity of the accused
who would otherwise be found to lack the necessary decision-making capacity to participate
effectively in the proceedings. The Society notes that the paper rejects the need for a wholly
disaggregated test to determine the capacity of the accused. If such an approach were to be
adopted the Society 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. The Society does not believe it is such a straightforward exercise when the unitary exercise to capacity is adopted. If the availability of the special measure was to be factored into this decision it would require some degree of disaggregation of the process to assess the impact of the measure. The Society believes that this will build-in confusion to the decision-making process for the court. It does, however, support the use of such measures for defendants who have found to have the necessary decision-making capacity but who require assistance properly to present evidence in the trial. Accordingly, the Society supports the approach to special measures which is set out in paragraph 4.17(2).

Question 1: 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 hearing 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? (Paragraph 4.27)

Answer

Please refer to the comments above. The Society agrees with the creation of a scheme which allows the use of fact-finding hearings for those accused persons who lack capacity and supports the use of special measures to improve the quality of evidence of the accused in a trial so long as the accused has been found to have capacity to make decisions as set out in part 6. The Society would point out that decision-making capacity goes beyond merely the giving of evidence and it is this aspect of the trial process which benefits from the availability of special measures.

Provisional Proposal 6:

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. (Paragraph 4.31)

Response

The Society does not find this proposal contentious.

Question 2: 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? (Paragraph 4.31)

Answer

Provisions contained in Chapter 1A of the Youth Justice and Criminal Evidence Act 1999 which provide for the availability of special measures for an accused person limit their use to the participation in the proceedings by way of giving evidence. So, for example, Section 33BA which is introduced by the Coroners and Justice Act 2009 (yet to be implemented) provides for the use of an intermediary to assist in the examination of the accused. The intermediary would not be available, on the face of the provisions, to assist the accused in participation in the cross-examination of prosecution witnesses or other aspects of the trial. It might be argued that this is the function of the legal representative of the accused. However, the intermediary may be able to enhance the ability of the accused to raise issues with his or her legal representative. The Society would advocate the use of intermediaries
where necessary to enhance the ability of the accused to participate in all aspects of the trial process.

PART 5: ASSESSING THE CAPACITY OF THE ACCUSED

Provisional Proposal 7: A defined psychiatric test to assess the decision-making capacity should be developed and this should accompany the legal test as to decision-making capacity. (Paragraph 5.17)

Response

The Society would support the development of such a test and notes the comments at the close of this part of the consultation paper in relation to capacity to do some things but not others. The Society would restate its support for the unitary test and would oppose the disaggregated approach to assessment for the reasons set out in paragraph 5.42.

PART 6: THE SECTION 4A HEARING

Provisional Proposal 8: 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. (Paragraph 6.140)

Response

The Society supports the conclusion that option 5 described in the paper is the most appropriate procedure to ensure that there is fairness to the accused while providing for protection to the public.

Provisional Proposal 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. (Paragraph 6.140)

Response

The Society supports this proposal but will return to practical issues relating to its possible application in magistrates’ courts.

Provisional Proposal 10: A further hearing should be held at the discretion of the Judge on the application of any party or representative of any party to the proceedings. (Paragraph 6.152)

Response

The Society agrees.

Provisional Proposal 11: The special verdict should be determined by the jury on such evidence as has been or on any further evidence as is called. (Paragraph 6.152).

Response

The Society agrees.
Question 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? (Paragraph 6.153)

Answer

The Society would not wish to refer to other options for reform.

Question 4: If consultees do not agree that option 5 is the best option for reform, would they agree with any other option? (Paragraph 6.153)

Answer

The Society agrees that option 5 is the best option for reform.

Question 5: 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? (Paragraph 6.159)

Answer

Although The Society sees such an option being of limited application it agrees that a jury should be able to make such a finding.

PART 7: MISCELLANEOUS ISSUES

Provisional proposal 12: 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 medical evidence confirms) that the accused is still unfit to plead, the court should be able to reverse the decision to remit the case. (Paragraph 7.21)

Response

Members of the Society have no experience of dealing with such cases but can see no reason why this provisional proposal should not be supported.

Provisional proposal 13: 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 provision that the court considers it to be in the interests of justice. (Paragraph 7.21)

Response

The Society agrees.

Question 6: 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? (Paragraph 7.26)

Answer

The Society notes the summary of responses given at paragraph 7.25 and would support the contentions attributed to lawyers, namely that a trial would be necessary to avoid the stigma
and/or injustice of an adverse finding made at an examination of the facts. The Society recognises the potential for distress to be caused to an accused person with ongoing treatment requirements so would emphasise the need for the trial to take place following an informed request from the accused.

**Question 7:** 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? (Paragraph 7.44)

**Answer**

The Society takes the view that if separate hearings were to be required there would be a risk of the appearance of unfairness and that it is desirable for the section 4A hearing to be in the same proceedings as those against the co-accused.

**Provisional proposal 14:** 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 rehearing under section 4A. (Paragraph 7.59)

**Response**

The Society agrees.

**PART 8: UNFITNESS TO PLEAD AND THE MAGISTRATES’ COURTS AND YOUTH COURTS**

**Question 8:** 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: (Paragraph 8.37)

**Response**

The Society is strongly of the view that an accused person in summary proceedings should have no lesser protection than an accused person in indictable proceedings. The Society notes the reference in the consultation paper to the various problems which apply particularly to summary proceedings. There is a higher likelihood of the issue of a defendant's unfitness to plead or capacity to make decisions being missed. However, many courts operate early assessment arrangements, commonly in conjunction with the Drugs Intervention Programmes. Other courts have arrangements in place which enable cases to be referred for initial assessment to a community psychiatric nurse. Expectations have been raised by recommendations in the Bradley Report. The Society believes that if a mechanism for organising a pre-court assessment can be made there is no reason why a court of summary jurisdiction should not be able to address the proposed test.

The Society understands the misgivings expressed by the commission in the consultation paper regarding the assertion by Mr Justice Wright in *R (P) v Barking Youth Court*. The Society agrees that whilst the process set out by section 37(3) Mental Health Act 1983 and section 11(1) Powers of Criminal Courts (Sentencing) Act 2000 addresses issues in relation to an accused person suffering with mental illness the process does not address the wider range of issues relating to capacity to make decisions and capacity to participate effectively in proceedings due to learning difficulties. It is wanting in respect of the range of disposals. Therefore the Society agrees that some certainty over a procedure would be desirable. It would also be desirable for the magistrates' courts to have a range of disposals which was more extensive than merely consideration of a Hospital Order or a Guardianship Order.
Question 9: Do consultees think that if an accused lacks decision-making capacity there should be a mandatory fact-finding procedure in the magistrates’ court?

Answer

Notwithstanding that the offence charged is only triable summarily, cases presented to the magistrates’ courts involving accused persons who are unfit to plead may, and frequently do, give rise to serious concerns over the need to protect the public. The risk of further uncontrolled behaviour can in such cases be high. Accordingly, it is, in the Society’s view, essential that there should be a transparently fair hearing to establish the facts so that the court can determine whether any order is necessary and, if so, the level of intervention required.

Question 10: If consultees think 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?

Answer

The Society would support provisional proposals for the court to have the option of ordering a further hearing to determine whether the accused was acquitted due to a mental disorder existing at the time of the offence. It is inevitable that, in many cases, the issue of the defendant’s mental state at the time of the offence will be explored during the fact-finding hearing. It is, for example, possible that the accused might be acquitted since he or she was unable to form the necessary criminal intent for the commission of the offence. Despite such a finding a further hearing would be necessary if a separate finding of mental disorder existing at the time would be necessary to justify any formal order being made by the court. Such hearings should be at the discretion of the court which dealt with the fact-finding hearing.

Question 11: Do the matters raised in questions 8, 9 and 10 merit equal consideration in relation to the procedure in youth courts?

Answer

The Society can see no reason why the procedure which is set out in the provisional proposal in the consultation paper should not apply equally to youths. The rights of the young accused person must qualify for the same level of protection as those of the adult accused.

Question 12: How far, if at all, does the age of criminal responsibility factor into the issue of decision-making capacity in youth trials?

Answer

Whilst the Society acknowledges that a lack of developmental maturity may be a factor which is highly relevant to the issue of capacity to make decisions and/or participate in a trial, it is not convinced that it is necessary for the court to address the capacity of the accused to understand that the actions he/she is accused of doing are seriously wrong. The Society accepts that part of decision-making capacity is an understanding of the seriousness of the proceedings and the potential consequences. However, it would contend that the key to resolving this issue is determining what steps need to be taken to ensure that the rights of the accused are not adversely affected as regards engagement in the trial process. 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.
Response to the Law Commission Consultation Paper No.197: Unfitness to Plead

Submission by Kids Company
January 2011

Kids Company (KC) is pleased to submit the following response to the Law Commission’s consultation on updating a modern legal test for unfitness to plead. We would be happy to supply any further information as requested.

Kids Company is a vulnerable children and young person’s charity that provides therapeutic, emotional and practical support. As a charity we do not have a policy of lobbying or campaigning on particular issues, rather we seek to work with the legal system and it’s professionals for the benefit of our client group.

Contact:
Kids Company
1 Kenbury Street
London
SE5 9BS
Email:

Email:
BACKGROUND

Kids Company and Unfitness to Plead

This submission is on behalf of Kids Company. Kids Company is a charity that was founded in 1996 by Camila Batmanghelidjh. The charity aims to provide practical, emotional and educational support to vulnerable inner city children.

Currently Kids Company services reach 14,000 children across London, and we specialise in working with the most deprived and at risk whose parents are unable to care for them due to their own practical and emotional challenges. Kids Company aims to provide a safe, caring, family environment where support is tailored to each individual. We currently operate through four street level centres and have services in over 30 schools across London.

The value base at Kids Company: Kids Company is an organisation whose ethos is to respond directly to the needs of children. We have a policy of never turning away a child who presents as in need. Naturally, this leads to a situation where our response to children is “non-bureaucratic”; we do not have “thresholds” for example. Many of the children with whom we work are in crisis and require our immediate response. Kids Company operates through a culture of advocacy and understanding of our client groups. There is a strong emphasis on inclusivity and equal opportunities and a culture of working in a transparent and fair way. Kids Company have clear guidelines about upholding non-discriminatory and thoughtful practice.

The two central philosophies that underpin the work at Kids Company are that the children must come first, and we cannot turn a child away. These are both immensely
liberating and immensely challenging but are extremely important to the ethos and culture in which the organisation operates.

Within Kids Company we have developed an in-house safeguarding team. The team was established in 2007 in direct response to the level of need in the client group. All Kids Company services are client led and the safeguarding team came into being to support key working staff or staff in schools who were not able to make referrals that met the thresholds of children’s social care. It was established in recognition of the fact that the client group that were presenting in large numbers at the street level centres were often multiply traumatised and extremely high risk with not just one but several complex and interlinked issues with which they needed support.

Kids Company is very clear about the role of the safeguarding team. It is a multi-disciplinary team who work to support front line staff and assist children or families in crisis. The team are very clear that they have no powers of investigation and no statutory powers; however we are also very clear that safeguarding children is everyone’s responsibility. As such the Kids Company safeguarding team recognises the importance of working together with both statutory services and in partnership with parents and seeks to advocate and promote honesty, trust and best practice in this area. An integral part of the work that the team undertakes is relationship or bridge building between statutory partners and children and their families. The safeguarding team recognises the importance of the Kids Company staff member who maintains a relationship with a child or a family and the shades of grey that these workers negotiate to protect and keep vigil over vulnerable children every day. The safeguarding team works in partnership with front-line Kids Company staff in the street-level centres and schools in which we operate.
Due to our expertise and experience since 1996, Kids Company is beginning to recognise prevalent patterns and trends throughout our client group: extreme destitution, homelessness, and undiagnosed mental health conditions, and other such safeguarding issues that negatively impact upon children. Whilst these kinds of issues have traditional been viewed as primarily the concerns of the individual they impact upon, it would be a fallacy to not understand that they have wider social implications and create new problems for society as we fail to address them.

From our experience it is often the case that due to a wide range of factors, our varied client group have at some stage experienced the criminal youth justice system. The other major concern at the moment is the numbers of young people presenting with significant mental health problems, often co-morbid disorders or dual diagnoses. Presently national statistics show that there is a growth in mental health figures. These are of course two separate issues from an operations perspective and we have tailored programmes to assist our clients back to lead fulfilling and constructive lives in either eventuality.

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1 “Adolescents who commit serious offences have been shown to often experience a broad range of psychosocial problems as well as reduced educational, occupational and social opportunities (Martin, G & Stathis, S, 2004), Fenton, S-J, 2007, “A comparative study of adolescent mental health policy in Australia and the UK to examine whether or not there is a demonstrable need for a specific adolescent mental health policy”, Unpublished, Oxon, pg 14.

2 “The Epidemiological Catchment Area Study (Reiger et al., 1998 in Roers, A & Pilgrim, D., 2003) showed that the median age for the onset of mental illness was sixteen years old and previously in Part II discusses the average onset of first stage psychosis as being at 22 years old”, Fenton, S-J, 2007, “A comparative study of adolescent mental health policy in Australia and the UK to examine whether or not there is a demonstrable need for a specific adolescent mental health policy”, Unpublished, Oxon, pg 14.

3 2009 - 2010 findings state that 1.25 million people used NHS specialist mental health services of which 107,000 spent time in hospital which included 42,000 sectioned patients – 3,000 of which came via the criminal justice system, The Times, 12th January 2011, pg 7.
However it is where these two areas intersect, that we have to ensure that our client group is treated justly.

As such we have been monitoring the legal position on unfitness to plead since we first raised our concerns in 2007, with then presiding Law Commissioner Professor Jeremy Horder. We are therefore 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.

Need for Reform: A Kids Company Perspective

To understand why there is indeed this notion of unfitness to plead we can turn to the Consultation Paper (CP) itself where it cites Lord Chief Justice Keynon:

“No man shall be called upon to make his defence at a time when his mind is in that situation as not to appear capable of so doing.”

Moreover we agree that the principle is further explained through Professor R A Duff’s argument:

“That the reason why an unfit accused should not be tried is that the trial would be a travesty, we would be attempting or pretending to treat as a rational agent, answerable for his actions, someone who cannot answer them.”

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4 Please read Appendix V Mind, leading UK mental health charity, Statistic 8 on Mental Health and the Criminal Justice System.

Both these statements understand that there is the need for legal protection where the accused has a mental disorder or disability and where this will impact on his or her ability to stand trial. The statements cited, come nearly some two hundred years apart, which when analysing the legal history of unfitness to plead is unsurprising given the begrudging pace at which any reform has taken place. Unfortunately unfitness to plead, is also indicative of the slow pace of understanding the needs of those who have mental disorders and disabilities. With the last major overhaul of the law taking place in 1964 and then a subsequent revision in 1991 and 2004 is further evidence that even in the relatively modern context the use of modern psychiatry has not been fully explored with respect to its role within the legal process of unfitness to plead.

The Law Society Gazette reporting 1990, evidences a case study that serves to highlight two key points – the double vulnerability of the client group this area of law seeks to protect and the starkly low figure of those declared unfit in an eight year period, in comparison to the national figures in respect of diagnosed mental health disorders or disabilities for the same period:

“Although the case is four years old, the experience of Glen Pearson (see [1989], 19 April, 19) illustrates two sides of a rumbling debate over the issue of fitness to plead. Mr Pearson, a deaf mute of limited intelligence, was one of only 295 people who were declared unfit to plead between 1976 and 1988. Accused of house burglary, he was remanded in custody until he was found a place in hospital. His crime: the attempted theft of a £5 note and two light bulbs. In all Mr

6Above p 3 para 1.9.

7 “Multi-disciplinary pressure to amend fitness to plead rules” [1990] Gazette, 20th June.
Pearson was detained for three months. It was three months too long, according to last week’s conference… Mr Pearson’s case is especially unusual, because he was born the victim of the strict nature of the Act as well as being a member of a minority within a minority; of the 295 total cases, Mr Pearson was one of the only seven deaf mutes who were declared unfit to plead in the past eight years.”

From the perspective of our client group, it is essential to appreciate that the CP in relation to unfitness to plead acts to preserve the integrity of the English legal system. The unfairness created by the present legal test is due primarily to its emphasis on cognitive deficiency, rather than the full spectrum of mental disorders and disabilities. In this context despite the confines of the law, the importance the role of the judiciary in administering fairness must not be dismissed. Professor Robert Fox writes in the correspondence section of the British Journal of Psychiatry with the following case study extracted from Bluglass & Bowden (1990)8:

“Sir: The law on fitness to plead is generally held to be highly unsatisfactory… It is good to know that British Justice can have a human face – and in the Crown Court… Case report – Mr X, a man in his 30s, was arrested as a result of erratic behaviour culminating in a car chase during which several police vehicles were damaged and officers has to be treated in hospital. He faced eleven charges of ABH, theft, reckless driving and property damage, but was allowed bail. [Following this Mr X was sectioned and it became clear that he had been a law abiding citizen but following an episode he had become] increasingly unpredictable with unrealistic plans of the most grandiose kind. Although unemployed he claimed he to have made £6 million profit, for which reason

8 Correspondence. Fitness to plead. R Fox. BJ PSYCH, 159, 6, 887a [http://bjp.rcpsych.org/cgi/content/citation/159/6/887a]
Social Services was understandably unwilling to allow his family to claim benefit. His recovery in hospital was swift but he lapsed into an anxiety state with panic and some secondary depression as a presumed result of trying to come to terms with the consequences… Three psychiatrists including one for the prosecution service, concurred with the diagnosis of hypomania or mania and accepted the amnesia as genuine. The prosecution decided to offer no evidence and the judge, after consulting with both counsel in Chambers and reading the reports, decided not to put the issue to a jury. Describing in open court “an extremely serious series of events under ordinary circumstance calling for extreme punishments”, he agreed that offering no evidence was the right decision by the Crown. He called attention to the special circumstances of the case and the background of the defendant. Severe warnings were given if Mr X defaulted from his treatment and relapsed and the Crown Psychiatrist’s report was to be sent to DVLA. Those advising Mr X were both astonished and happy.”

The above case studies serve to highlight the general position, that, but for the judicial presence in the case study of Mr X, the present legal test would have failed to serve the interests of justice, as it failed in the case of Mr Pearson and no doubt many countless other vulnerable defendants who have passed through our criminal legal system who do not possess the requisite understanding of their unfitness in respect of their capacity and decision making processes. It is KC’s understanding that the concern in relation to unfitness to plead is based around the current legal test which is separated into two stages. The first stage, addresses the question of, is the accused “under a disability” so that it would be inappropriate for him or her to stand trial? Currently the test construes disability as physical impairment or mental disorder, and gives the impression of including all forms of mental disorders. This is not the correct position when looking at the practical application. The criteria within the Pritchard test, the CP states and we
wholly agree with, focuses predominantly on cognitive understanding which is abstract and discounts the requirement for the accused to have the capacity to perform the task of making decisions in set circumstances as part of an equation [as set out in figs.1 and 2 below].
Historically prior to 1964, we agree with the CP finding that the numbers of accused who relied on unfitness to plead were lower due to the second procedural stage: *where the court finds an accused under a disability, the jury must determine whether or not the accused did the act or omission charged*. The reason for this was the court had the ability once the accused was found unfit to plead, to detain the accused indefinitely under an Hospital Order. Whilst the legislative changes of 1964, 1991 and 2004 and the introduction of section 4A hearing have assisted the position, they have in no way afforded the vulnerable accused the kind of robust protection it requires from the legal system.

Unfitness to plead touches at the heart of not only the dual keystone principles of the rule of law and due process, but also the relatively modern principle of effective participation enshrined in human rights law.
Whilst this is a submission in relation to a legal reform, we are not in a position to offer alternative suggestions from a legal perspective. Where we feel our expertise and knowledge base lies is viewing the reforms, expressing our rationale from our practical and anecdotal experience. It is therefore on this basis and understanding that we hereby submit our response to the CP and proposed reforms.
INTRODUCTION

KC welcomes the overall goal of the Law Commission to reform unfitness to plead and the proposals to modernise the legal test, bringing the law in line with modern psychiatric thinking, as set out in the Consultation Paper (CP). To that end we firmly support the majority of the proposals. Where we have a diverging viewpoint, we include comments that may not have not been adequately covered and, which based on our experiences, we consider essential from our clients’ perspectives at this stage in the consultation process.

In Section 1 we address each of the consultation questions and where relevant, detail our experiences in dealing with relevant issues brought to our attention where our clients have lacked capacity or are unfit to plead, including any benefits and/or disadvantages each particular proposal will have from the perspective of one of our clients.

In Section 2 we provide additional analysis through the use of case studies (as set out in Appendix I – IV) setting out the practical realities and where they may fall short even after the implementation of the CP proposals.

In Appendix I - IV we set out anonymised case studies of two clients which we will make reference to where appropriate.

In Appendix V we have extracted statistics in relation to mental health and the criminal justice system, from the mental health charity, Mind.
SECTION 1 : KC RESPONSE TO PROVISIONAL PROPOSALS AND QUESTIONS

- Provisional Proposal 1: 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. (Paragraph 3.41)

We agree with this proposal.

In summary we agree with the legal premise and analysis of psychiatric thought behind the replacement of the Pritchard test with a new decision-making capacity test. The removal of archaic provisions such as the ability to challenge a juror are welcomed. However essentially it should be noted that the decision - making capacity test by virtue of the breadth of area it covers, incorporates the Pritchard criteria in to its considerations. KC appreciates that proposed decision - making capacity based test ensures for fairer treatment of the accused, the proposed test looks into the wide range of decisions that are required throughout a criminal trial and enables dissemination of whether the individual accused with his or her particular mental disorder or disability would be able to meaningfully and effectively participate at trial. The concept of effective participation was not addressed within the criteria of the Pritchard test as it was not a necessary consideration at the time to ask, whether the accused would be able to make effective decisions to participate. This is the result of Pritchard test’s emphasis on cognitive ability rather than decision – making capacity. The reason why KC believes that the test needs to take into account all the requirements of criminal proceedings is to ensure fair treatment of the most vulnerable, due process and prevent miscarriages of justices that were prevalent under the Pritchard test.

From clients case studies at Appendix I – IV it is apparent that the current test does not adequately deal with unfitness to plead in an just and fair manner.
Provisional Proposal 2: A new decision-making capacity test should not require that any decision the accused makes must be rational or wise. (Paragraph 3.57)

We agree with this proposal.

Having a comprehension of the theory of decisional capacity from a medical perspective enables an understanding of why a decision may neither required to be rational or wise.

“Health care subjects can make unpopular decisions, even ones that are considered highly irrational by others. A good example of such a decision is the refusal of life-saving transfusion due to doctrinal religious reasons (Charland 2001, 137).”

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. As the CP sets out the decision-making capacity test proposed allows for such self-determination but does not allow for unlimited bad choices. The distinction whilst fine is important to be made in the context of the types and nuance of decisions that face the accused in criminal proceedings.

From our clients’ perspectives the ability to understand what is being asked of them in relation to procedure and process is very much distinguishable from bad decisions that can be made by anyone.

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• Provisional Proposal 3: 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. (Paragraph 3.99)

We agree with this proposal, save for the issue of proportionality.

In summary we agree with maintaining a revised unitary test opposed to a disaggregated test which it is agreed would be unworkable, impractical and time absorbing. A test of such a complex area needs to be flexible and practical whilst ensuring fairness. In addition the CP makes proposals for circumstances where a unitary test would be most beneficial and disposes of this issue sufficiently through the use of proposed special measures.

From our client perspective the legal system is a daunting and stressful period for anybody, however for the most vulnerable without a sufficient support network in conjunction with any untreated or untreatable mental disorders or disabilities the process should not, as far it as possible, be more protracted than necessary.

In relation to the issue of proportionality, whilst it is understood and agreed that proportionality is largely inconsistent with the aim and purpose of criminal proceedings, this is not the same as using proportionality in the overall sense in relation to the kinds of decisions necessary to be made throughout the proceedings and we comment on this further under proposal 4.
• Provisional Proposal 4: 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 the trial which the accused faces. (Paragraph 3.101)

We agree with this proposal.

In summary we agree with proposal 3 save for the element of proportionality, which is the purpose of proposal 4. The issues at hand in criminal proceedings are grave matters, as they involve potentially a conviction and the loss of liberty. When assessing how important a disability is likely to affect the accused’s decision-making process, the additional requirement of proportionality enables judicial contemplation at the initial stage. This sits neatly with any special measures that need to be thought about. We do not agree that the special measures are essentially a de facto proportionality test. In this context the importance of using proportionality provides a judicial assessment incorporating not only the nature of criminal proceedings but also the exceptional circumstances that unfitness to plead presents.

When dealing with vulnerable clients we would expect that fairness is afforded at the highest level at each possible stage of assessment. In addition using judicial expertise and experience is invaluable. Whilst each case is different and throws up their own complexities along the way, if at the outset potential decisions and pitfalls that might occur are considered through the eyes of judicial experience this can only lead to a fairer test.

The case study of Mr Y at Appendix III highlights cases that may present themselves can be wide and varied, therefore a test that included proportionality would benefit the accused with having the breadth of experience gathered and converged through the judicial eye.
Provisional Proposal 5: 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 and where any other reasonable adjustments have been made. (Paragraph 4.27)

We agree with this proposal.

In summary we agree with the proposal that decision-making capacity should formally incorporate special measures. This is based upon the distinction as set out in the CP, that there is a difference between being unfit to plead and being fit to plead, but due to an impairment or condition needing assistance to participate effectively in the trial process. Our rationale for formally incorporating special measures is based upon an analysis of case law and the unsatisfactory system that is being used at present. We understand that the concept of special measures has evolved, from criminal cases involving child defendants and in recent jurisprudence on Art. 6 effective participation with respect to vulnerable defendants. We agree that due to the piecemeal manner of unfitness to plead, special measures have been increasingly adopted to deal with defendants not fulfilling the Pritchard criteria but still presenting with significant learning or mental disabilities and therefore requiring specialist assistance at trial. The problem that has been correctly identified in the CP by Dr Blackwood’s research\(^\text{10}\) is that whilst judicial decisions to invoke special measures are in place at the beginning of a trial, they do not remain for the longevity of the trial process. Dr Blackwood attributes this lack of consistence structure to the legal profession and/or the judiciary who should ensure that such measures do not fall by the way side as the trial progresses. This position is correct to an extent, however there are other systemic considerations that also ensure for unsatisfactory results in using special measures effectively. We note in the CP and agree with, that there is potentially the non-identification by legal professionals and the

\(^{10}\) CP pg 83, para 4.12
judiciary of “hidden disabilities”\textsuperscript{11}. It is somewhat in the paradoxical behaviour of those with disabilities who feel the need to protect themselves to the effect of hiding any such impairments. This problem can also contribute to the issues in relation to early identification and screening. It is on this basis that we additionally endorse the use of the seven recommendations set out at CP para 4.15, with special regard for recommendations 4.15 (1), (2), (4), (7). Our main reason for supporting the inclusion of the special measures within the legal test is based upon ensuring effective participation. We would state that the piecemeal approach to date has highlighted that special measures are a necessary and logical consideration to be made when determining whether the accused will be able to stand trial. To not include special measures as part of the test would be to reform the unfitness to plead in a rather counter-productive manner.

Question 1: 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 hearing and those defendants with decision - making capacity should be subject to a trial with or without special measures depending on the level of assistance they need?

We agree with this proposal

In addition to our comments to proposal 5, we agree that operating a continuum scheme using special measures where defendants are deemed to have decision - making capacity and therefore subject to trial with or without special measures as appropriate. The rationale for agreement, based within understanding the proposed unfitness to plead decision – making capacity test, is that at every stage in the criminal process it is possible for the defendant to be assisted according to his or her needs. It is through this in-built procedural mechanism

\textsuperscript{11} CP, 83, para 4.11
that the defendant’s capacity is also monitored, and therefore at any stage in proceedings unfitness to plead may be identified and dealt with, if appropriate through a section 4A hearing at a later stage.
• Provisional Proposal 6: 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. (Paragraph 4.31)

We agree with this proposal and the interpretation of “full inclusion” of evidence in keeping with the spirit of the Bradley Report.

In summary we agree with the CP that evidence given by the accused where there are mental disabilities to account for, must ensure equality and fairness. We agree with the CP’s interpretation of the full inclusion principle from the Bradley Report. We additionally highlight the importance of the ability to give evidence is to enable a fair and just defence. That being said adverse inferences relating to evidence given due to a condition the defendant suffers needs to be appropriately dealt with. The solution provided in having an expert report prepared so that the evidence given is seen in the light of the condition, would enable a fair and effective form of participation.

The case study in Appendix II of Mr Y highlights the crux of the problem that without expert evidence of the accused’s mental health impairment to understand the accused, evidence can lead not only to the accused being treated unfairly but the public safety being put at risk.
Question 2: 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 the impairment require additional assistance to participate?

The feedback that we have from our key workers who attend court is that the process can be very hard for a young person, especially where they come from an atypical family background and may not have the relevant support structure or authority figures to seek help and assistance from. Furthermore, if parent/s are in attendance at court this can often lead to tension and the accused becoming further resistant to the court process. If there are mental health issues that exist but have not been identified then this process becomes further convoluted. Our key workers have suggested that an independent advocate at this stage would be useful for the vulnerable accused young person or child. They also think that legal representative should have a better understanding of communication needs and the effects. The Communication Trust have produced a very useful and practical guide called “Sentencing Trouble” which deals with communication issues that can arise from numerous mental disorders. They have also produced a website www.sentencetrouble.info in conjunction with the pamphlet.
- Provisional Proposal 7: A defined psychiatric test to assess decision-making capacity should be developed and this should accompany the legal test as to decision-making capacity.

We agree with this proposal in principal however reserve our final comment upon reviewing such a proposed test in its final form.

In summary we agree with the CP in proposing a defined, purpose-made (as opposed to an adapted) psychiatric test. This is a stark example of the need for the law and psychiatry to be able to work in a more compatible manner in the future. The absence of such a test, has led to the Pritchard test being interpreted by medical practitioners in a discretionary manner. This is wholly unsatisfactory for the accused and we agree with the recommendations that a standardised test be provided for. Whilst we agree with the proportionality in the legal test as set out in our response above, we do not agree with the CP in stating that the inclusion of an assessment of facts looking into the gravity and complexity of proceedings would in itself negate the need for proportionality to be excluded in the legal test. Moreover, our position would be that these should treated as two separate issues, one of law and the other of psychiatry, and together they are used to determine a finding of unfitness to plead. Therefore this should arise from the relevant professionals who can adduce the position from their area of expertise. Additionally we agree with the provision in relation who is “duly approved” to carry out such a test, and concur that it should be one psychiatrist and another medical practitioner.
• Provisional Proposal 8: 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. (Paragraph 6.140)

We agree with proposal 8 and the requirement to clarify the procedure around section 4A hearings.

In summary we understand the piecemeal manner at which section 4A hearing has somewhat evolved as a result of legislation and case law such as Antoine. Therefore instead of providing clarity this has muddied the waters of certainty, in addition to the debate surrounding exclusion of Art 6 in such circumstances. We understand the requirement for a distinction between section 4A hearing and a trial. The modus operandi of a section 4A hearing sits distinctly outside of the norms of criminal proceedings. It was constructed as a mechanism within which to provide a just system to protect the accused, as well as the public. There has been a classification debate as to whether section 4A hearings are criminal or civil proceedings. We agree with the CP and the view of Professors Mackay and Brookbanks, that in fact section 4A hearings are by virtue of their substance and form, a “hybrid procedure”\(^\text{12}\)

However there have been inherent complications vastly due to the difficulty with certain offences in separating the fault element from the conduct element of the act or omission. The CP set out its reasoning in this regard with clarity. We agree with the CP in its identification of the current problems that the present system of section 4A hearings creates, namely: \textit{in consistent, arbitrary and incoherent decisions}. In relation to new criminal offences the separation of the mental element from the external element is problematic when the external elements of an offence namely, the conduct and fault element can be virtually impossible to separate. We agree that as part of these reforms

\(^{12}\text{CP, (2010), p 120, para 6.25.}\)
this issue in relation to the conduct and fault elements needs to be rectified, so that a section 4A hearing is fit to carry out the function and task it was constructed to do.

The CP outlines five potential options; the fifth being the above proposal. We would submit that the CP have correctly identified the most workable and just option in the circumstances. This option balances as best it can in the circumstances, the need to protect the accused, public interest, whilst also providing a solution to the dilemma posed by Antoine and allowing for Art 6 protection to be afforded to the accused.

We therefore briefly address the other four options and why we view them as unviable.

Option 1, effectively seeks to maintain the status quo in relation to section 4A hearings, which while it currently functions, for the reasons outlined above would be unsatisfactory in the context of reforms to other aspects of unfitness to plead.

Option 2 which is to adopt the recommendations that the Butler Committee, which effectively would mean that the accused would have a “special hearing” akin to a full trial as all the elements of the offence are raised. The issue in relation to potential acquittal would not only leave the accused without assistance of treatment but also is not in line with the interest of public safety. This option whilst it may have offered some assistance at the time it was written, is now outdated.

Option 3 proposes that section 4A hearing should be abolished altogether, which whilst is the most simple option of the five, it is not the fairest in that it subjects an unfit accused to plead at a full trial. It our view this option would be reverting into the past and not be in line with the rest of the proposals for reform laid out in the CP.
Option 4 which looks at reform to mirror the Scottish procedure, which revolves around lowering the burden of proof. This is useful in relation to the issue that presently faces section 4A hearings with respect to clarity and the problems encountered with separating conduct and fault elements. We agree with the rationale set out in the CP that at present it would not be in the interests of our client group for there to be a lower burden of proof.

At present we have no additional proposal to offer the Law Commission in relation to an alternative option on this matter.

From the perspective of our client group having clarity and consist decision making provides for fairer treatment. Legal professionals also like to have a clearer understanding of the outcome of section 4A to give more effective advice to their clients.

**Provisional Proposal 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. (Paragraph 6.140)

We agree with this proposal.

In summary our position essentially follows on from our response to proposal 8. Where the prosecution have proven all the elements of the offence there should be a further determination by virtue of judicial discretion. This is only in the interest of public safety but minimising the accused being wrongly subject to a disposal but allowing for a determination where necessary to consider whether or not the acquittal is due to a mental disorder existing at the time of the hearing. From our clients’ perspective, this allows for a disposition where the accused may eventually receive further assistance through accessing treatment for the mental disorder he or she may still exhibit.
Provisional Proposal 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. (Paragraph 6.152)

Provisional Proposal 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. (Paragraph 6.152)

We agree with proposals 10 and 11 in relation to special verdicts.

In summary our view is in line with the CP’s argument for a further hearing to be held at the discretion of the judge. We agree with whilst there is a cost benefit argument for using the same jury to determine both issues on the same occasion, the question of whether they are best qualified to make this decision is also a relevant consideration. Our view would be that 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 acquitted because of mental disorder. It also provides clarity in relation to mental state at the time of the offence and unfitness to stand trial. The options raised within paragraphs 6.75 – 6.79 have been considered and we do not think that in the structure of the proposed reforms that would be the best option with which to move forward.
• Question 5: 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?

In our view the purpose of this reform is not simply an overhaul of the law but also a tidying up and clarification exercise for existing abnormalities. It would not be in the interests of fairness, justice or our client group, if an unfit accused during the hearing was found to potentially have committed another act other than that specifically charged, to be acquitted for other acts without a separate hearing.

• Provisional Proposal 12: 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 medical evidence confirms) that the accused is still unfit to plead, the court should be able to reverse the decision to remit the case. (Paragraph 7.21)

  Provisional Proposal 13: 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. (Paragraph 7.21)

We agree with proposals above.

In summary we agree that there are adequate provisions through reforms already carried out in this area to deal with the eventualities outlined in the proposals. We therefore agree that there is no need to reform with respect to the above.
• Question 6: 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?

We at present do not have further submissions on this point. The law as it currently stands and the proposals set forth in the CP adequately address this point. Whilst contentious as it affects areas outside our response remit in relation to public interest and budget, the most important point to be maintained is that the accused found to have done the act can receive treatment and is monitored until considered well.

• Question 7: 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? (Paragraph 7.44)

We agree with the CP's response to this question.

In summary we agree that the manner in which the CP considers that the issue of procedural unfairness would be appropriately dealt with through the proposed implemented reforms. We agree that at present there is the risk of procedural unfairness in relation to an accused who is unfit to plead and his or her fit to plead co-defendants, using the accused position to their advantage.

From our client group perspective this scenario would most commonly arise in relation to ‘Gang Kids’. The hierarchy within which such gang structure operate would predicate that at least one member if not more could potentially be identified, as an accused unfit to plead due to mental disorder or disability in addition to any cognitive function concerns. Such a scenario would lead to an injustice if there are not appropriate mechanisms in place, and adequate training of legal professionals and judiciary to understand the nature of such complex social groupings.
Please note the exploitative scenario that can occur as set out in Appendix IV case study of Mr O, which illustrates this point.

- **Provisional Proposal 14**: 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 4.

We agree with this proposal and the CP adequately addresses this issue.

- **Question 8**: 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? (Paragraph 8.37)

Question 9: Do consultees think that if an accused lacks decision – making capacity there should be a mandatory fact-finding procedure in the magistrates’ court? (Paragraph 8.37)

Question 10: 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? (Paragraph 8.37)

Question 11: Do the matters raised in questions 8, 9 and 10 merit equal consideration in relation to the procedure in the youth courts? (Paragraph 8.68)

Question 12: How far if at all, does the age of criminal responsibility factor into the issue of decision-making capacity

We have read the submissions made in the CP at Part 8 and understand that there is no explicit proposals and as such we have the following response.

The CP states at paragraph 8.30 that the reasons set out in relation to effective participation in a trial as set out in Part 2, “are not any less compelling” in the context of
summary jurisdiction. We wholly agree with this assertion. At present magistrates courts and Crown courts are effectively operating a two tier legal process in the manner with which they operate in relation to unfitness to plead. Whilst there is a process at magistrates and youth courts to deal with an accused presenting with mental disorder or disabilities, this is by no way to be considered the same as the legal test which is used to determined unfitness to plead at Crown court. We would consider this more than wholly unsatisfactory. The lack of formal procedure for unfitness to plead can, in our view, be rectified with taking on board the recommendations of the Bradley Report, especially with regard to screening procedures (we set out rationale in relation to this in more detail in Section 2).

The logical approach set out in the CP at paragraph 8.21 clearly mirrors the structure for procedure that is present at Crown court. The disparity in procedure leave our clients at risk for conviction where there is not an adequate procedure to assess the same issues that arise at Crown court in relation to unfitness. This is a level of unfairness that should not exist within our legal structure and furthermore one that should not allow a subgroup within an already vulnerable section of society, children and young people, to not have certain absolute rights that are afforded to adults, especially in light of no defence under dolli incapax.

We refer to our case study of Mr Z at Appendix II, in relation to the manner in which procedurally Mr Z was not able to be assisted due to the lack of an appropriate screening and decision – making capacity test or any such legal test to ascertain his unfitness.

With regard to mandatory fact – finding test or having a mirror of the proposals 8 and 9, it would be, in our view, a better system where there are similar processes being carried
out in Crown, magistrate and youth courts with regard to incapacity. There are a number of reasons for this logic. First there is a standardised test that can be applied at an earlier stage in the criminal justice system. With regards to our client group this could mean the chance to receive treatment earlier on before potentially having committed further graver offences, which can be attributed to a deterioration of an untreated condition. If screened and dealt with in the Magistrates’ court the burden on Crown court in either way offences, which would have at present to be sent to the Crown court if unfitness to plead was a live issue so that it can be appropriately dealt with. Finally if dealt with at the Magistrates’ court, there should be a positive cost implication for the criminal justice budget. The above would also be our response in relation to a similar procedure being mirrored in youth courts.
SECTION 2

KIDS COMPANY CASE STUDY

Please refer to the set of cases studies at Appendix I - IV

As our responses highlight, we commend the Law Commission in relation to their proposal as set out in CP. However there are number of areas that in our practical experience have not been addressed adequately and we therefore raise them at this stage.

The CP makes brief reference at paragraph 2.62 to the role that of determination of unfitness to plead has with respect to the role of the legal profession and unsatisfactory screening procedures so that a client’s mental state is identified as soon as possible. It correctly identifies the core issues, which are illustrated through Mr A case study at Appendix I.

Mr A’s experience was that his solicitor was not able to determine or lacked the positive onus to screen for Mr A’s mental capacity. The LSC requirement to obtain prior authorisation to carry out such reports leaves the fate of the client in a somewhat of a pot luck situation, in that whether a report is carried out is somewhat determined by the quality and initiative of the legal representative. This does abide by the principle of fairness.

Furthermore as set out in the case study of Mr Z; had a Kids Company representative not been present to advocate on behalf of the client to produce a psychiatric report this crucial piece of work would not have been afforded to Mr Z’s case.
In the case studies of Mr Y and Mr O the long-term effects the youth criminal justice system not addressing mental illness is not only dangerous to the individual affected but to the wider public. The need for Magistrates and youth courts to have a test and to be able to deal with the accused who are unfit to plead is an effective form of early intervention in relation to treating mental disorders and disabilities.

Whilst these are a few cases of many that we deal with, they are indicative of the kinds of practical realities that are faced by clients who are vulnerable due to mental disorders or disabilities. In consultation with our key workers who escort high risk clients we have received feedback that where there are clients who have mental disorders or disabilities having an advocate, who can independently liaise with the legal professional ensures that the vulnerabilities of that client may be picked up on. Whilst legal professionals are trained in the law, it may also be necessary for additional training as set out in the Bradley Report in screening and awareness of conditions that clients may present with and also the way in which to manage clients with certain mental disorders and disabilities to ensure that the client’s best interest are understood as best possible.

CONCLUSION

We commend the CP and the Law Commission for its bold proposals in a neglected area of law which will assist a vulnerable section of society. We have raised our concerns and should we be required to provide additional responses or clarification then we are happy to assist where possible.

A further question that we think is relevant is in relation to practical implementation – should these proposals become effective to what extent will budgetary implications affect
their implementation and are there alternatives being formulated if such practical constraints arise.

A final general comment from our experience, where there are mental health concerns and involvement in the criminal justice system, there may be parallel involvement in other areas of the justice system. In the current climate there needs to be a multi-agency approach to deal with vulnerable people and children, so that they have fairer treatment but also so the system can work more productively. In effect that is what all legal reforms are essentially regarding.
APPENDIX I

Case Study: Mr A

[This case study has been anonymised to protect our client’s identity and confidentiality]

Mr A first attended Kids Company as a late teenager. He presented at our street level drop in centre the Arches II and was using the after school club and eating meals. He was attending college and wanted help with his university applications so he could get out of the gang he was involved in. Mr A had been to Kids Company as a younger child to play and had returned. Mr A was supported to apply for university and gained a place and we did not hear from Mr A as he mostly disengaged from services, except when he popped in to say his course was going well and he was happy.

Mr A reappeared at Kids Company following us not having heard from him for about a year. He was on tag, and seemed quite shaken and said he was staying with his brother. Mr A was having difficulty returning to his university education as he had been in prison. Mr A had been involved in a violent fight and had been charged with either ABH or GBH however the details of this were unclear. Kids Company is not automatically entitled to records from statutory agencies and so as an agency we are reliant on the information the client provides, or checks we can make ourselves.

Mr A seemed genuinely confused about the incident that led to his arrest. At this point we feel that there should have been at once an assessment of whether he was unfit to plead. When we tried to trace Mr A’s history of incarceration we could not find evidence that Mr A had served a sentence under his own name. However when he came to us he was on tag. Mr A stated that he had many different names and it was only upon working with Mr A more closely that we began to understand that he was ill and had been for
some time, and largely due to paranoid and schizophrenic symptoms, used different names when he was stopped by the police.

I met Mr A as I was assigned to support him at a meeting with his university about reintegration. Mr A arrived late, and said he was late as the devil was chasing him and the train had been delayed. Through the course of working to reintegrate Mr A to university it became clear that at times he was very lucid and clear and at others he presented in a very concerning manner. We registered him with a general practitioner and arranged for him to be assessed as within a few weeks Mr A was evidencing symptoms of psychosis.

Mr A spoke of lights that were shining out of peoples shoulders. Mr A became increasingly paranoid and kept trying to ask me to “go somewhere” with him. I started working with him in pairs as the situation was risk assessed as being unsafe for lone working. Throughout this time Mr A was in communication with the university about his difficulties and eventually through our intervention received clinical help from a community mental health team and psychiatrist. Mr A still accessed Kids Company and continued to say he felt unwell. Over Christmas he was called by our 24 hour duty team as he was deemed high risk, and Mr A stated he felt tormented and wanted to die as the gremlins were scratching his brain.

Through the health services intervention and work with Mr A it then became clear that he had an unresolved immigration matter. Mr A provided details of his lawyer who when Kids Company obtained consent to speak to her stated that she was very vexed with Mr A as he had entered an application with inconsistent information. The legal process continued with Mr A continuing to be interviewed and submit evidence whilst being very
unwell. Mr A was being seen every couple of days by a community mental health worker and was on medication.

Mr A was regularly signing on at an immigration centre. At one of these meetings he was held and sent to a detention centre. Whilst in the centre he could not access his medication and became actively suicidal believing his “auntie” to be haunting his room in the centre. He wet the bed and the staff became increasingly exasperated with his manic behaviour. He did not sleep or eat and was terrorised by auditory and visual hallucinations. Kids Company sent a private psychiatrist to prepare a report and his lawyer had to advocate to have him released back into the care of the community mental health team who had been unable to access him in the detention centre.

Eventually the lawyer refused to represent Mr A at his appeal as she stated he had exhausted his legal aid funding. Mr A appeared in the High Court and I accompanied Mr A with a man he had met on a train and his girlfriend. His mental health worker was due to attend but called to state his car had broken down and he would not be able to make it. Prior to court Mr A informed me that he was being tormented by voices and lights and so he had taken all his medication (he had taken an overdose) he insisted on going into the court as he wanted to see a judge and stated that I would have to talk for him as he “felt like he was going to switch and hurt someone”. He sat in the bench rocking throughout. I offered a pathetic defence for a complex case with no legal training. I explained Mr A had been brought to the UK as a child by an aunty; he had been used as a domestic servant and we think sexually abused as he showed symptoms of this and alluded to it, i.e. adult wetting in public when nervous; we explained Mr A’s aunty had abandoned him largely and that he had been sent between Wolverhampton, Manchester and London. Mr A had fallen into gang activity when in London to survive but had attended college and then obtained a place at university. Mr A, until he was in sixth
form, had not realised he had immigration issues and was afraid of what this would mean if he sought help. His brother who had leave to remain encouraged him to make an application to the UKBA, however whilst Mr A was doing this he was already ill. His case was mismanaged from the start and the judge made a fair and balanced decision that Mr A must return as I could provide no evidence and they had to consider the case on the information presented.

The outcome of this case was that Mr A came out of court and wanted “to be alone”. I contacted his mental health team and insisted they visit him immediately as I was very concerned. Mr A took a meat cleaver to both wrists and threw himself out of a window. He was hospitalised and sectioned again. Kids Company staff visited Mr A in hospital. Mr A was discharged and graduated however other problems now presented. Kids Company could no longer support Mr A as he was by now too old for our services and furthermore he had no further right of appeal and was in the country illegally having exhausted the legal options. His mental health team withdrew their services despite our protestation, however he still has access to his GP. Mr A is still in the country and has little access to mental health services. He, when unwell, poses a risk to both himself and society.
APPENDIX II

Case study: Mr Z

[This case study has been anonymised to protect our client’s identity and confidentiality]

Mr Z presented at our post sixteen education facility the Urban Academy unexpectedly. He sat on the wall opposite the facility with his head lowered looking over the road to the building under his brow. We were aware that Mr Z was both watching and waiting. Mr Z had an effect on the other young people who normally know or at least approach strangers. None of the young people approached Mr Z. Mr Z was approached by the staff and was described as being completely incoherent.

This was the time at which I met Mr Z. When I spoke to him he talked in a confused manner and would join thoughts in his head into sentences i.e. “women like penis, I ain’t seen nobody, yeah yeah, like I know how it was, I used to come Kids when I was little, pussy pussy”. Mr Z was incapable of following a conversation easily and presented as paranoid, having auditory hallucinations and being very aggressive.

The other young people reported upon sight of Mr Z that he was a “madman” and was staying because he was homeless in a known crack den. He was also reported to have shot someone at point blank range with a pump shotgun, and furthermore to have gone to a party where other young people were and randomly exposed himself and waved his penis about. It was clear that Mr Z was very unwell. It was also clear from his behaviour and some of the things that he was saying as well as the reports and fear of the other
young people, that Mr Z was potentially extremely violent. He behaved in an intimidating way and spoke of killing.

Kids Company tried to locate anyone connected with Mr Z, or to establish a professional network. Through working offsite with Mr Z with two males at a time it became clear that Mr Z had returned to Kids Company’s new premises having been to our first site and played as a young child. He remembered this as some of his only happy memories and so had come to try and get help. Mr Z had served the latest date of release from prison having been incarcerated since his early teenage years.

Kids Company alerted the police to the concerns around Mr Z and his mental health as he became increasingly unstable and talked of “killing all the whites”, by which he meant anyone who he felt had lighter skin than himself. Kids Company had arranged to have him assessed by a psychiatrist when the inevitable happened. Mr Z was arrested for a violent assault and held on remand at Brixton prison. The assault was one where a fight had broken out between himself and the owner of the crack den he had been sleeping in (it is unclear why probation had not sought to support or monitor Mr Z on his release) about rent money. Mr Z had lost his temper, punched the person in both eyes with both fists at the same time and then stripped them (we were very concerned and had communicated our concerns to the psychiatrist about the sexualised tone of his speech and his inappropriate sexualised behaviours). We were told that Mr Z had been found chasing this naked man down the street trying to give back his clothes.

Kids Company remained very concerned about Mr Z’s mental health and tried to alert Brixton Prison to these concerns. Kids Company also tried to ensure Mr Z had a lawyer who would be able to represent Mr Z and who could work with his mental ill health
sensitively. A lawyer was obtained and I attended the listed hearing along with the lawyer to support Mr Z.

Upon arrival at the court, despite a solicitor being instructed by Mr Z and arranged by Kids Company, a duty solicitor had been into the cells to speak to Mr Z and had him sign legal aid forms and instruct him. I spoke to the solicitor and said he was unwell and it was unethical to change his lawyer to someone who knew nothing about the case or his history at the last minute and he had instruction, and the lawyer became extremely verbally abusive and started shouting. This lawyer then disappeared (with the signed legal aid forms) and I with another key worker who had been working with Mr Z onsite pleaded with the lawyer to stay. She did and represented Mr Z who sat growling and staring under his brow at the magistrate. He did not know the difference between the lawyer who he had seen in the cell and the other lawyer; he did not follow clearly what was going on, and the magistrate who was visibly irritated agreed to send him back to Brixton, for Kids Company to arrange a psychiatric assessment with Brixton and for him to appear at Crown Court. This highlights the need for a procedure to ensure that from the outset of the criminal process unfitness to plead is considered.

Kids Company sent a psychiatrist (privately paid for) to work with the Brixton mental health team and Mr Z was remanded in the secure wing to begin treatment for psychosis.

Mr Z was deported before his trial or completion of his treatment unexpectedly from Brixton prison to the Ivory Coast, Kids Company only knew of this after a letter written from Mr Z to a worker arrived after the event.
APPENDIX III

Mr Y
[This case study has been anonymised to protect our client’s identity and confidentiality]

Mr Y had attended Kids Company’s Urban Academy facility (a post-sixteen education centre located in Bermondsey). He had successfully obtained a job and moved forward from our services and our project. He was described as a friendly, funny young man with great potential.

One afternoon Mr Y was seen by staff on the opposite side of the road to our centre and they went to greet him. He was pacing erratically up and down the pavement. Mr Y was clutching at his clothing and flesh “to pull the feathers off”. The staff contacted one of the safeguarding team high risk outreach workers who came and spoke to Mr Y. By the time the worker had arrived Mr Y had contacted his cousin who came to collect him. The worker had a discussion with the cousin, and Mr Y, the cousin and the Kids Company worker attended a hospital accident and emergency department. On the way to the department Mr Y wet himself whilst walking along.

Mr Y was seen and was treated as an outpatient and given follow up appointments, which he struggled to attend even with support. Following an incident Kids Company were not involved in, Mr Y was eventually sectioned. He remained under section for many months moving between wards, and his mental state did not seem to improve despite medication. He had a confused thought process, was incapable of holding a conversation with any logical flow, and would at times telephone staff members up to thirty times in an hour and all day from the hospital. Mr Y was eventually allowed on day
release accompanied by a nurse. Kids Company attended one of these visits and the worker was concerned about the sexualised manner in which he was speaking about and talking to women. This was reported to the psychiatrist in charge of his care. Kids Company also attended a hearing during his time in hospital at which he requested to be released and it was deemed at that hearing that he was too unwell, and not capable of making safe or rational choices.

At some point during this time, a rape allegation was made against Mr Y by a former girlfriend who was pregnant with his child. It was clear that this allegation was made and the event took place after Mr Y had first been to hospital evidencing symptoms of mental disorder but whilst he was in the community. The concern that we have here is that there needs to be procedure in place to deal with unfit to plead accused whilst on bail or remand and treatment plans to ensure the safety of not only the accused but also the public at large.

Recently Mr Y (who is still awaiting trial for this first charge) was charged with assault. It was deemed that with support, Mr Y, who remains unwell, could be discharged to be looked after in the community. My Y would be allowed to return to his own flat. He was taken off the ward and was left to wait in the hospital whilst someone came to accompany him home. During this time an argument ensued between himself and a member of hospital staff in which Mr Y either spat at or struck a member of staff. The police, as he was no longer under section on the ward, decided he could be arrested and detained and so he is awaiting trial for this incident and currently incarcerated in prison without a robust package of mental health support. He has attended a Magistrates court and entered a plea with a duty solicitor who will not have his significant mental ill health history.
APPENDIX IV
[This case study has been anonymised to protect our client’s identity and confidentiality]

Mr O

Mr O was brought to Kids Company in February 2009 by a cousin of his as he had been seen to be becoming increasingly depressed. Mr O was assessed by Kids Company on 12.02.09 and was referred into our Urban Academy (a post-sixteen education service) for children and young people who have not accessed a full range of education opportunities during school and who want to gain qualifications in order to go into higher education or employment. Upon assessment Mr O presented as depressed and as having disrupted sleep due to being blinded in one eye the year before in an incident with a firework. He was assessed by a child psychotherapist working with Kids Company who was quite concerned about his presentation. He could not remember his father and had poor and limited attachment relationships. He had very low self-esteem and seemed isolated and vulnerable.

Mr O attended the Urban Academy (a little erratically at first) but by mid-March had engaged well in an emotional literacy syllabus as part of the accredited course at the Urban Academy. He was said to be shy in classes but was well liked by teachers. In April 2009, Mr O was involved in an incident that led to the fatal stabbing of one of his friends in Larkhall Park. He was stabbed in the leg but managed to escape. This incident had a profound effect on him and his entire peer group and Kids Company established a new service to work with around fifty children, young people and young adults from the Stockwell area who were known to be affected by this fatal incident.
At this time, Mr O ceased engaging in his new education programme at the Urban Academy, the relationship with his mother had become increasingly poor and Mr O was taken in August to social services by a Kids Company representative as he was extremely depressed and had no food or money for clothes and cited he was about to be made homeless. He was relying on street crime to survive. We were significantly concerned about his depression and efforts were made to encourage him to make use of therapy to deal with some of his trauma and depression. There was some debate between boroughs over who was responsible for conducting his assessment however his case was assessed at Lambeth.

In September Mr O decided he wanted to attend mainstream college and so he was taken to Clapham college to enrol. During this time Kids Company also provided him with legal advocacy around his needs as a vulnerable child and homelessness. He was contacted weekly by the therapist identified for him but his engagement with this service was poor. He continued to be depressed and “tired” when contacted. There were concerns about continuing gang involvement and his extreme vulnerability. Mr O was (following a long assessment process) placed into foster care.

Mr O was arrested for carrying a gun and incarcerated. The vulnerabilities that he faced during his trial are listed below:

1. He was not assessed for physical or mental disorders or disabilities.
2. His physical and mental disabilities/disorders were not accounted for as result throughout the trial process.
3. The only independent support advocate he had during the trial was his key worker. The key worker reported that there was no time to give advice or support without the co-defendant being present.

4. Whilst on remand Mr O was attacked due to only having one eye and the only option available to him in this scenario was to await sentencing and request to move to a smaller facility due to his physical disabilities.

In summary, Mr O was highlighted as being vulnerable to exploitation, five months before this incident. The enormous delay in processing his case at social services, the unnecessary debate about which borough was responsible for Mr O, and the lack of intensive social work support for this very vulnerable young person has let him down. This instability in his housing, his having to survive on the streets and his extreme preoccupation with his visual disability have made his situation even worse as he is vulnerable and prey to adult exploitation. Even when our workers have walked with him down the road he has to look over his shoulder twice as much as he only has one eye to see the danger he perceives everywhere. I doubt his sleeping patterns have improved since being caught or incarcerated however I find it very sad that Mr O refuses to apply for bail as he feels he has no safe space outside prison. He is being failed as a vulnerable child and a robust care plan really needs to be developed for Mr O irrespective of the outcome of the court hearing.

CASE STUDIES WRITTEN BY: SARAH-JANE FENTON, CHIEF OPERATING OFFICER, KIDS COMPANY
APPENDIX V
MIND: STATISTICS: FACTSHEET 8

The Criminal Justice System

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Introduction

This factsheet is targeted at mental health professionals, journalists and students. However, it is also our aim to present statistics in a way that makes this factsheet accessible to all those who are interested in mental health.

Note: The language used in this factsheet reflects the sources referred to. The use of such language does not imply Mind's automatic acceptance of it.

Prisoners and mental health

Number of prisoners with mental health problems

According to the ONS (the Office of National Statistics), a large proportion of prisoners in England and Wales have a mental health problem.

In one survey they found that in the week before the interview, 39 per cent of sentenced males and 75 per cent of female remand prisoners had significant neurotic problems, such as anxiety, depression and phobias. Rates for all groups were much higher than the 12 per cent of men and 18 per cent of women found to have significant levels of neurotic symptoms in a similar household survey carried out by the ONS.

Differences between remand prisoners and sentenced prisoners
Remand prisoners (prisoners awaiting trial) have higher rates of neurotic disorder than sentenced prisoners and women have higher rates than men. ONS suggest that 58 per cent of men and 75 per cent of women remand prisoners experience significant neurotic symptoms. The figures are lower for sentenced prisoners, with 39 per cent of men and 62 per cent of women showing some form of neurotic disorder.

Another survey found that 45 per cent of suicides in prisons were by people held on remand and who were still waiting to go to trial.

**Self-harm among prisoners**

ONS has found that self-harm during the current prison term, without the intention of suicide, is just under 10 per cent for female prisoners and just under 6 per cent for males. The rates reported by remand and sentenced prisoners were similar; however, two thirds of remand prisoners had been in prison for less than three months compared with only about a quarter of the sentenced prisoners.

Women represent more than 50 per cent of all self-harm cases in prison. This is worrying as women represent only 5 per cent of the prison population. The rate of self-harm is particularly high among women under 21. At two women's prisons they have reported around 10 cases of self-harm per day.

Between 2004 and 2008, incidents of self-harm in prisons increased by 25 per cent. In female prisons the increase was 42 per cent in the same period. The total number of self-harm cases in 2008 was 10,466 for men and 12,560 for women - a total of 23,026.

**Attempted suicide among prisoners**

ONS has found that a high number of prisoners have tried to take their own lives, particularly women and remand prisoners. Just under one in four men and nearly two in five women reported a suicide attempt at some time in their life. In one survey, over a quarter of female remand prisoners reported attempting suicide in the year before the interview.

**Suicide among prisoners**

The suicide rate among prisoners went down from 92 in 2007 to 61 in 2008. However, it is important to note that this followed a sharp increase in the numbers from 67 in 2006 to 92 in 2007. Although the numbers are going down, the suicide rate for prisoners is still alarmingly high with 91 suicides per 100,000 in the prison population compared with 8.5
per 100,000 in the general population. This means that the risk of suicide is more than 10 times higher for a prisoner than for the general population.

Psychosis among prisoners

In an ONS survey, a random sample of one in five prisoners interviewed previously were selected for an additional interview by a clinician to assess personality disorder and functional psychoses, such as schizophrenia and manic depression (but not organic psychoses such as dementia). In this follow-up interview, 14 per cent of all the women, 10 per cent of the men on remand and 7 per cent of the sentenced men were assessed as having a functional psychosis, in the year prior to interview. These rates for psychosis are much higher than for the general population, where the figure is only 0.4 per cent.

Mental health in-reach teams (MHIRT) confirms high rates of psychosis among prisoners. A survey of clinical records of prisoners treated by the MHIRT’s showed that 18 per cent had a diagnosis of schizophrenia and another 18 per cent had a diagnosis of psychosis.

Personality disorders among prisoners

ONS suggests that over three quarters of the men on remand, nearly two thirds of the males sentenced, and half of the women sentenced fitted a diagnosis of personality disorder. Another survey shows that, among prisoners treated by MHIRT, around 17 per cent have a diagnosis of personality disorder, usually in combination with another diagnosis.

Antisocial personality disorder (ASPD)

The most common type of personality disorder seen in prisons, according to the ONS, is antisocial. This has been found in 63 per cent of males on remand, 49 per cent of males sentenced and 31 per cent of all female prisoners. This would be expected, since the category of ASPD requires the presence of antisocial behaviour before the age of 15 years and persisting into adulthood. Criminal behaviour is often seen as antisocial, so many prisoners are therefore likely to be diagnosed with this disorder. The figures are broadly in line with the results of studies carried out within the United States prison system.

Paranoid and borderline personality disorders

Paranoid and borderline personality disorders are the next most common types of disorder seen in prison, according to ONS. A total of 29 per cent of male remand, 20 per cent of male sentenced and 16 per cent of female prisoners were assessed as having
paranoid personality disorder. The equivalent figures for borderline personality disorder were 23 per cent, 14 per cent and 20 per cent respectively.

According to the ONS, paranoid personality disorder is often combined with ASPD in criminal populations and is characterised by pervasive mistrust and suspiciousness. People with borderline personality disorder are considered to be highly impulsive, experience brief mood swings, have a poor sense of self-image and have difficulty in sustaining close relationships. They are the group most often seen by psychiatric services in prisons.

Another survey also found that prisoners in England and Wales have very high rates of mental illness, substance misuse and personality disorder.

**Prevalence of personality disorder**

<table>
<thead>
<tr>
<th>Type of personality disorder</th>
<th>Male Remand</th>
<th>Male Sentenced</th>
<th>Female All</th>
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<tbody>
<tr>
<td>Antisocial</td>
<td>63</td>
<td>49</td>
<td>31</td>
</tr>
<tr>
<td>Paranoid</td>
<td>29</td>
<td>20</td>
<td>16</td>
</tr>
<tr>
<td>Borderline</td>
<td>23</td>
<td>14</td>
<td>20</td>
</tr>
<tr>
<td>Avoidant</td>
<td>14</td>
<td>7</td>
<td>11</td>
</tr>
<tr>
<td>Obsessive-compulsive</td>
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<td>10</td>
<td>10</td>
</tr>
<tr>
<td>Narcissistic</td>
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<td>7</td>
<td>6</td>
</tr>
<tr>
<td>Schizoid</td>
<td>8</td>
<td>6</td>
<td>4</td>
</tr>
<tr>
<td>Dependent</td>
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<td>1</td>
<td>5</td>
</tr>
<tr>
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<td>2</td>
<td>4</td>
</tr>
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<td><strong>64</strong></td>
<td><strong>50</strong></td>
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<td><strong>210</strong></td>
<td><strong>105</strong></td>
</tr>
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</table>
Prisoners and the Mental Health Act

People sent to hospital (rather than prison) under Part III of the Mental Health Act

During 2007/08, the courts in England sent a total of 1,400 people to hospital for treatment under the Mental Health Act (Part III). Some were sent by the courts at the time of sentencing, while others were transferred from prison to hospital. During 2007/08 the courts in Wales sent 103 people to hospital.

People detained in high security hospitals under Part III of the Mental Health Act

In England, a total of 7,500 people were sent to secure hospitals (Place of Safety Orders) during 2007/08 - most of these were to an NHS hospital. That means the figures have trebled since 1997/98 when the number of Place of Safety Orders was 2,483. In Wales, a total of 367 people were put on Place of Safety detention in 2007/08. The figures have increased since 2003/04 when 262 people in Wales were sent to secure hospitals.
REFERENCES

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- Fenton, S-J, 2007, “A comparative study of adolescent mental health policy in Australia and the UK to examine whether or not there is a demonstrable need for a specific adolescent mental health policy”, Unpublished, Oxon


- “Sentencing Trouble” www.thecommunicationtrust.org.uk/.../sentence%20trouble.aspx

- “Statistic 8 on Mental Health and the Criminal Justice System www.mind.org.uk/.../statistics_8_the_criminal_justice_system
PART 9
LIST OF PROVISIONAL PROPOSALS AND QUESTIONS

QUESTIONS

9.2 In addition to the above proposals, we also ask the following questions:

(1) 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 hearing 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?

[Paragraph 4.27]

Yes

(2) 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?

[Paragraph 4.31]

No. However, it has to be questioned whether the resources for special measures will be made available. For one reason or another Lord Bradley’s recommendation cited at paragraph 4.15(2)CP has not been implemented to date.

(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?

[Paragraph 6.153]

No.

In ANTOINE Lord Hutton said:

“..... it is therefore necessary to set out the provisions ....... of the Criminal Lunatics Act 1800 (39 & 40 Geo. 3, c. 94). The preamble to the ..... Act began by noting that individuals

‘ may have been or may be of unsound mind at the time of committing the offence wherewith they may have been or shall be charged, and by reason of
such insanity may have been or may be found not guilty of such offence, and it may be dangerous to permit persons so acquitted to go at large: . . ."

The problem for the Courts has been the same for centuries.

The treatment of psychiatric disorders has, however, advanced. And the involvement of the psychiatric profession in the resolution of the problem has increased.

The justification for CP proposal (9) is said to be protection of the public against an accused who may be “dangerous” [CP 6.138 final sentence].

In the passage from Antoine quoted at paragraph CP 6.17 Lord Hutton did not use the word “dangerous”.

It is perhaps unnecessary to create a new power in criminal proceedings when a power to detain the dangerous, mentally disordered, acquitted, accused already exists.

The decision to detain at the proposal (9) stage is more psychiatric than judicial.

The Commission has already recognised the importance of the psychiatric input at the proposal (7) stage.

The Court could not arrive at the proposal (9) stage without having had the opinion of two registered medical practitioners, at least one of whom is duly approved under section 12 of the Mental Health Act 1983, at both the unfitness stage [CP paragraph 5.21 penultimate sentence] and at the proposal (9) stage [CP 6.148 penultimate sentence].

And even at the proposal (9) stage the Judge cannot make an order under section 37 (2) (a) (i) Mental Health Act (1983) without the further evidence of two registered medical practitioners.

In the notional proceedings to this point the Judge’s inquiry has concentrated on:

(i) the present ability of the accused to deal with the issues at trial
(ii) the facts surrounding the alleged offence(s), which may have occurred many years before the current proceedings; and
(iii) the accused’s mental state at the time of the alleged offence(s)

Whereas, the psychiatrists have considered the whole medical history - (iii) and the aetiology of that disorder, his present condition, the aetiology thereof and the appropriateness of treatment in the future - section 37 (2) (a) (i) Mental Health Act 1983.

In short, the notional judicial inquiry has concentrated on specific issues arising at two points in time. Whereas the psychiatrists in arriving at their diagnosis(es) and opinions will have had to consider more of the accused’s medical history and they will also have been required to look into the future.

The material part of section 3 Mental Health Act 1983 provides:
3 Admission for treatment.

(1) A patient may be admitted to a hospital and detained there for the period allowed by the following provisions of this Act in pursuance of an application (in this Act referred to as “an application for admission for treatment”) made in accordance with this section.

(2) An application for admission for treatment may be made in respect of a patient on the grounds that—

(a) he is suffering from mental disorder of a nature or degree which makes it appropriate for him to receive medical treatment in a hospital; and

(c) it is necessary ................for the protection of other persons that he should receive such treatment and it cannot be provided unless he is detained under this section....”


At the proposal (9) stage all that the Judge has to guide him on the question of “dangerousness”, if “dangerousness” is to be the test, is an acquittal by the jury.

A psychiatrist who has been involved in the notional unfitness and 4A proceedings is likely to have before him much better material and information upon which to make a section 3 decision than is available to the Judge; and, for that matter, any of his professional colleagues dealing with civil cases of “dangerousness” outside the criminal justice system.

The ultimate decision about detaining the unfit, disordered, acquitted, dangerous accused should be made or guided by a psychiatrist rather than a Judge.

That seems to be the pragmatic approach which has been adopted in Scotland ( CP paragraph 6.125 quote ).

That same pragmatic solution could be arrived at in at least 2 ways :

(1) By appointing a psychiatric Assessor at the 4A stage – see by analogy CPR Rule 35.15. At the end of the proceedings the Judge could turn to the Assessor and say, “Do you want to commit the accused under sec 3?”; alternatively

(2) By making the exercise of the judicial power at the 4A stage to detain under sec 37 MHA 1983 (CP 7.8) conditional upon the expression of opinion by one or more medical practitioners that a section 3 committal would be appropriate.

At the proposal (9) stage it is hard to argue that Judges are possessed of expertise superior to the entire psychiatric profession.
After the making of a section 37 order it is the psychiatrists who will have to treat the patient and it is they or the Mental Health Review Tribunal who will determine for how long the patient is detained.

It is the fact that Judges and psychiatrists work satisfactorily together, making joint decisions, every day of the week in the MHRT.

(4) If consultees do not agree that option 5 is the best option for reform, would they agree with any other option?
[Paragraph 6.153]

See above.

(5) 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?
[Paragraph 6.159]

Yes

(6) 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?
[Paragraph 7.26]

Yes

Suppose that the accused is indicted with D2 and D3 on 2 counts:

Ct 1- conspiracy to supply Class A, all 3 Defendants

Ct 2 – D1 alone, possession Class A with intent

The accused 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.

(7) 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?
[Paragraph 7.44]

No
(8) 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?
Paragraph 8.37
No
The proposed capacity test is far too complicated and time consuming for summary proceedings.
See the comment on CP paragraph 5.16 below.

(9) Do consultees think that if an accused lacks decision-making capacity there should be a mandatory fact-finding procedure in the magistrates’ court?
Paragraph 8.37
No

(10) 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?
Paragraph 8.37

(11) Do the matters raised in questions 8, 9 and 10 merit equal consideration in relation to the procedure in the youth courts?
Paragraph 8.68
No comment

(12) How far if at all, does the age of criminal responsibility factor into the issue of decision-making capacity in youth trials?
Paragraph 8.69
No comment

ADDITIONAL COMMENTS

Comment on paragraph 5.16:
The Defence Solicitor, the Defence advocate, the Registered Medical Practitioners, the CPS, Prosecuting Counsel and the Judge will each have different views about the nature of the issues in any given case.
Further, the Defence lawyers may have access to detailed evidence affecting the issues which they may not want to reveal to the Prosecution through the Medical Practitioners in advance of any trial.
Comment on paragraph 5.21 final sentence:

One Snaresbrook Defendant with a history of mental and physical illness refused to participate in the trial process, refused to take his medication, refused to see a psychiatrist and ended up in the isolation ward at Pentonville suffering from TB.

He would not have participated in any test, standardised or otherwise.

He had a history of murder (he decapitated the corpse), attempted rape and sexual assault.

HHJ Tim Lamb QC

Wednesday, 19 January 2011
UNFITNESS TO PLEAD

A response to Law Commission C.P. 197

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Rudi Fortson QC, Peter Grieves-Smith, and Valerie Charbit

25th January 2011
Introduction

Opening remarks

1. The Law Reform Committee of the Bar Council, and the Criminal Bar Association, take this opportunity to pay tribute to the Law Commission on the publication of its detailed and thought-provoking Consultation Paper (the “CP”) concerning a topic of considerable practical importance that has vexed the Courts and the Legislature for over 200 years. Needless to say that we welcome the opportunity of responding to that Paper.

2. Notwithstanding that the timetable for the submission of responses is short, we have endeavoured to answer as many of the questions that have been posed by the Law Commission as possible. Nevertheless, the submissions and representations that we have made herein are provisional only as we acknowledge both the complexity and the breadth of the matters addressed in the CP. We also acknowledge that none of the members of the Working Group have been trained in, or hold a qualification in psychiatric medicine. Nonetheless, we have endeavoured to pursue a principled and practical approach to the issues raised in the CP, seen from the perspective of experienced in-court criminal law practitioners, having regard to the information and data that we have researched.

Whether the proposals, if accepted, represent an improvement on the existing scheme

3. Although we agree that it is desirable that the law should be “consistent with modern psychiatric thinking and with the modern trial process” and that existing rules of law, practice and procedure, are in need of modification, we have considerable reservations whether the Commission’s Provisional Proposals would constitute a significant improvement on the existing position. Indeed 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

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1 The Criminal Bar Association (“CBA”) represents about 3,600 employed and self-employed members of the Bar who appear to prosecute and defend the most serious criminal cases across the whole of England and Wales. It is the largest specialist bar association. The high international reputation enjoyed by our criminal justice system owes a great deal to the professionalism, commitment and ethical standards of our practitioners. The technical knowledge, skill and quality of advocacy guarantee the delivery of justice in our courts; ensuring on our part that all persons enjoy a fair trial and that the adversarial system, which is at the heart of criminal justice, is maintained.

2 Noting the Criminal Lunatics Act 1800, R v Pritchard (1836) 7 Carrington & Payne 303; Rex v Dyson 7 C&P 305n.

3 Listed at para.1.35 of the CP.

4 One member of the Working Group, Valerie Charbit, specialises in mental health issues, particularly concerning defendants. She represents health authorities on restricted cases before the Mental Health Review Tribunal for which she has also been a part-time judge since 2004.

5 CP, para.1.15.

6 CP, para.1.34.

7 Appendix A to this Response.
UNFITNESS TO PLEAD
Response by the Law Reform Committee of the Bar Council and the Criminal Bar Association of England and Wales

demanding on scarce resources. 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.\(^8\)

For the best estimate we assume that there will be 500 additional cases where decisional capacity is raised. In 70% of cases (350) the accused will lack decision-making capacity and be subject to a section 4A hearing. 20% could have a trial assisted by special measures and 10% will have a normal trial. Of the 70% found to lack decision-making capacity, 90% will be subject to a disposal under section 5. 50% of these disposals will be hospital orders and 40% supervision orders. For benefits, the 315 receiving a disposal under section 5 would have had a custodial sentence. 70% of those receiving a hospital order would, if they had gone to prison, have been transferred to hospital.

4. The number of hearings of unfitness to plead has been relatively small (albeit that the number has increased since 1992)\(^9\) but the combination of proposals 1, 3 and 4, would surely make hearings pertaining to a defendant’s “decision making capacity”, common place. This is because the test would be whether the accused has “decision-making capacity for trial” that would “take into account all the requirements for meaningful participation in the criminal proceedings” [CP, paragraph 3.41], in relation to the “entire spectrum of trial decisions he or she might be required to make” [CP, para. 3.99]. The Commission states that an accused “should not stand trial unless he or she has the capacity to participate in all aspects of his or her trial” [CP, para. 5.42].

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.\(^10\)

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\(^8\) Impact assessment (page 2).


\(^10\) 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, para. 3.101]
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”.

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”. 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.

9. At CP paras. 3.15 to 3.22, the Commission provide six examples that illustrate a defendant’s lack of decision-making capacity (examples 3A to 3F). Such a conclusion in respect of examples 3A, 3C and 3F, is unremarkable, but two examples are illustrative of our concern that the proposed test for a defendant’s decision-making capacity could be applied in many (arguably too many) cases.

Example 3B
A is suffering from severe depression. He has no interest in interacting with other people and says that he does not care what happens to him. He has a disturbed sleep pattern, poor concentration and is unable to remember things. He has difficulty focusing on specific matters and has a poor ability to express himself verbally.

11 See CP, para. 4.27.
12 D has a mental age of a five-year-old and a very low cognitive ability. He does not understand much of what is said to him and finds unfamiliar surroundings frightening.
13 “A is a 13-year-old male who suffers from severe Attention-Deficit Hyperactivity Disorder (ADHD). This is at its worst when he is anxious. He cannot focus and is impulsive. He finds it almost impossible to remember any new information he is given.”
14 “A is autistic and is unable to communicate with others. He can understand information and process lots of it, but does not acknowledge others and tends to “live in his own world”.

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Example 3E
A suffers from obsessive compulsive disorder which is at its worst whenever he is stressed or anxious. Whenever he is asked a question, he feels compelled to consider the question from all angles and ruminates obsessively about the underlying meaning of the words or phrases in the question. He finds it impossible to come to a clear conclusion and make a decision.

10. The Commission opines that the facts of example 3B illustrate a lack of decision-making capacity because A “will not be able to retain information or retain sufficient information to be able to focus on a decision or on subsequent decisions which may be related to his initial decision.” ¹⁵ However, persons vary widely in their ability to retain information or to focus on a decision. Persons may genuinely or fraudulent underestimate or exaggerate such ability. Legal practitioners, despite their best endeavours, are frequently given scant/inadequate instructions from their lay clients, but this is not necessarily indicative of a client’s lack of decision-making capacity. We cannot predict the extent to which a psychiatric report might be sought by a legal practitioner in those circumstances, if only as a precautionary measure. The prospect of medical reports being requested as standard practice, or routine applications being made to determine D’s decision-making capacity, is unattractive and, we believe, would constitute an unwarranted demand on scarce resources.

11. Specific difficulties experienced by a defendant (e.g. the need for regular breaks to ease stress) can be addressed – as they frequently are – on a case-by-case basis without the need for a formalised hearing to determine the extent of the defendant’s capacity for decision-making. But, the Law Commission’s proposals appear to envisage a formal determination of a defendant’s capacity for decision-making, applying a unitary test “that could be sufficiently wide to take into account the range of different decisions and tasks required as part of a trial” ¹⁶ and which “will include consideration of the extent to which special measures will assist the accused”. ¹⁷ However, the Commission also contemplate the requirements of the trial being “broken down fully and the decision-making capacity test would therefore inevitably bear some of the characteristics of a more disaggregated approach”. ¹⁸ With respect, such an approach is disaggregated in all but name. Moreover, different measures might fall to be considered at different stages of the trial process.

¹⁵ CP, para. 3.17.
¹⁶ CP, para. 3.81.
¹⁷ CP, para. 3.77.
¹⁸ CP, para. 3.81.
12. In cases where the defendant faces more than one indictment, to be tried at different courts, the same medical condition coupled with the same submissions with regards to capacity, could be canvassed before different tribunals with (potentially) different outcomes. How courts should approach the issue of a lack of decision-making capacity, where there are other (or parallel) proceedings, is not canvassed in the CP.

13. Breaking down the trial into parts, and applying a decision-making test in relation to each part, might (conceivably) result in a defendant being held to have capacity to plead “guilty” but yet not have capacity to be tried in the event that he/she pleaded “not guilty”. Our tentative/provisional view is that such an outcome would be undesirable, and that a process that permitted such an outcome might be vulnerable to abuse by some defendants who choose to make a tactical decision to plead “not guilty” whilst playing the ‘medical card’ in the hope that, for example, (a) a full trial, perhaps leading to conviction, might be avoided, or (b) the defendant can justify not giving evidence, or (c) the defendant can avoid adverse inference directions.

Legal test alone or combined with a psychiatric test?

14. The Commission proposes that there should be both a “legal test” and a “defined psychiatric test” to assess D’s decision making capacity (proposal 7). Given that the subject matter of the CP is one of mental “capacity” it is unsurprising that the Commission should attach considerable importance and value to the representations made to it by eminent psychiatrists. But it is evidently a central plank of the Commission’s proposals that the psychiatric test (as yet undefined) should be the “standard means of assessing whether the accused has decision-making capacity in accordance with the legal test” [CP, para. 5.16].

15. The Commission say that the psychiatric test would not be the only part of the assessment process and that in most cases the test would also be accompanied by a clinical interview. But it seems plain that the Commission envisages the psychiatric test being the primary means by which the legal test is judged to be satisfied or not.

16. Precisely what role there would be for judicial input into the assessment of a defendant’s capacity is unclear. In Moyle, the Court of Appeal had regard to M’s conduct at trial, which in conjunction with the medical evidence, did not demonstrate that M was unfit to plead. But, at CP para. 2.86, the Commission

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19 See CP, para.5.14 to 5.17/
20 [2008] EWCA Crim 3059.
suggest that cases such as Diamond\textsuperscript{21} (and presumably Moyle) make a “mockery of what we know to be the concept of participation” and complain that the participation...is ultimately a sham in which legal professionals and the courts are forced to collude. We return to this complaint later in this Response but the thinking of the Commission appears to be that an assessment of capacity should be primarily a medical one.

17. Given the importance that the Commission attaches to the standard psychiatric test, it is therefore surprising to discover that the proposals are made in the absence of what that “defined psychiatric test” should be. Indeed, the seventh proposal is that such a test “should be developed”\textsuperscript{22} The Commission state that psychiatric experts are analysing a test which Dr Blackwood and his colleagues have devised\textsuperscript{23} but that research is ongoing.\textsuperscript{24} It is not clear whether or when such a test would be ready for use in practice. Even if it sees the light of day it will doubtless take time before its value can be accurately assessed. The American experience is not encouraging [CP, para. 5.3]:\textsuperscript{25}

It has been pointed out that between 1965 and 2005, some 19 psychiatric tests have been constructed in North America for the assessment of competence or fitness. The tests have been variously and specifically criticised in terms of their particular limitations. Psychiatrists in England and Wales have not adopted the MacArthur Competence Assessment Tool-Fitness to Plead which was adapted for use in England and Wales.

18. Given the importance that the Commission attaches to the “psychiatric test”, and upon which its proposals appear to hang, we believe that the publication of the CP without the inclusion of a proven psychiatric test, was premature. We do not know what the Commission’s preferred option is, or would be, in the event that a reliable psychiatric test cannot be defined.

19. The \textit{Pritchard} test is a legal test, albeit that by virtue of s.4(6) of the 1964 Act (as amended),\textsuperscript{26} the Court shall not make a determination as to fitness to plead under s.4(5) “except on the written or oral evidence of two or more registered medical practitioners at least one of whom is duly approved”. The 1964 Act does not apply to Scotland.

\textsuperscript{21} [2008] EWCA Crim 923.
\textsuperscript{22} CP, para. 5.17.
\textsuperscript{23} CP, para.5.37
\textsuperscript{24} CP, para.5.40.
\textsuperscript{25} And note the study by D.V. James, G.Duffield, R.Blizard, and L.W. Hamilton: “Fitness to plead. A prospective study of the inter-relationships between expert opinion, legal criteria and specific symptomatology”; Psychological Medicine, 2001, 31, 139-150. 2001 Cambridge University Press.
\textsuperscript{26} Criminal Procedure (Insanity) Act 1964
20. As the Commission points out, “the Scottish model provides an example of a unitary legal test which does not contemplate a particular psychiatric test or that there will even necessarily be any psychiatric input. It is based on the recommendations of the Scottish Law Commission”.\(^{27}\) Section 53F of the Criminal Procedure (Scotland) Act 1995\(^{28}\) provides the following criteria for determining fitness to plead in that jurisdiction:

1. A person is unfit for trial if it is established on the balance of probabilities that the person is incapable, by reason of a mental or physical condition, of participating effectively in a trial.

2. In determining whether a person is unfit for trial the court is to have regard to—

   a. the ability of the person to—

      i. understand the nature of the charge,

      ii. understand the requirement to tender a plea to the charge and the effect of such a plea,

      iii. understand the purpose of, and follow the course of, the trial,

      iv. understand the evidence that may be given against the person,

      v. instruct and otherwise communicate with the person's legal representative, and

   b. any other factor which the court considers relevant.

3. The court is not to find that a person is unfit for trial by reason only of the person being unable to recall whether the event which forms the basis of the charge occurred in the manner described in the charge.\(^{29}\)

21. In Scotland there is now no restriction that written or oral evidence of two medical practitioners is required before a Court may find that a defendant is unfit to plead.\(^{30}\) This is to allow the court to receive evidence on the issue from a variety of sources [see CP, para. 5.28].\(^{31}\) The Commission believes that restrictions should remain on the type of evidence that is capable of supporting a finding that an accused lacks decision-making capacity\(^{32}\) but recognises that an accused may lack capacity as a result of a condition outside the experience of psychiatrists as experts (such as a physical condition).\(^{33}\) We see merit in retaining the requirement for medical evidence pursuant to s.4(6) of the 1964 Act\(^{34}\) in order to satisfy Article

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\(^{27}\) CP, para. 5.22. Footnote 42 to this paragraph points out “The recommendations have been incorporated into the Criminal Justice and Licensing (Scotland) Act 2010, which received Royal Assent on 6 August 2010.”

\(^{28}\) Inserted into the Criminal Procedure (Scotland) Act 1995 by s.170 of the Criminal Justice and Licensing (Scotland) Act 2010.

\(^{29}\) Consider R v Podola [1960] 1 QB 325.

\(^{30}\) See s.170(2)(a)(i), Criminal Justice and Licensing (Scotland) Act 2010.

\(^{31}\) But we note and understand the reservations of the Law Commission as stated at CP para. 5.29 to 5.36.

\(^{32}\) CP, para.5.36.

\(^{33}\) CP, para. 5.36, fn 68.

\(^{34}\) Section 4(5) of the 1964 Act provides, “The question of fitness to be tried shall be determined by the court without a jury. Section 4(6), 1964 Act provides, "The court shall not make a determination under subsection (5) above
5 of the ECHR and that the court is able to make a proper determination in the light of expert medical/psychiatric opinion. We recognise that what is to be determined under s.4(5) of the 1964 Act, is “the question” of whether a defendant is fit to plead. But we submit that s.4(6) does not oblige the court to give an answer only if it corresponds to the conclusions and opinions expressed by the medical witnesses. Accordingly, even if a “defined psychiatric test” were to be developed and applied its function should only be as a tool that informs both the experts and the court but, the ultimate determination of whether, or to what extent, the defendant lacks decision-making capacity ought to be a matter of judgement for the court. A psychiatric test ought not to be applied prescriptively.

22. In Attorney General v. O’Driscoll 2003 JLR 390, the Royal Court in Jersey, declined to apply the Pritchard test, and proposed directing Jurats that the correct test is as follows:

“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.”

23. It follows from the above that by the laws of Scotland and Jersey the tests applied to determine the issue of D’s fitness to plead are ‘legal’ rather than psychiatric. In the absence of a workable and dependable psychiatric test, it makes obvious sense to hone criteria that can be applied, and be explained, on a principled, reasoned, basis.

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).

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35 Time will tell whether the question of D’s ability to make “rational decisions” is one that will require modification or qualification.
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.

25. Although the Commission has sketched the history of the rules relating to unfitness to plead in England and Wales in the CP, we feel that there is more to say about the history and the context in which the Pritchard test has been applied in practice, as well as the extent to which some modification of the test is required. The Commission might wish to consider whether there should be some elaboration of the criteria (consider John M36) that might, for example, be incorporated into the ‘Bench Book’.

*Fitness to plead, and personal autonomy*

26. We stress that personal autonomy is an important freedom.37 Although there will be circumstances in which it is the duty of practitioners to protect persons from themselves, only exceptionally should the law permit practitioners to deny personal autonomy and self-determination, and impose on an individual a course of action that is contrary to the latter’s wishes or judgement (whether ill-judged or unwise).38

27. The reasoning of the Law Commission appears to have been significantly influenced by the facts in Erskine. E was convicted of murder in 1988.39 The Court of Appeal quashed E’s conviction for murder and substituted a conviction for manslaughter. The Court said (emphasis added, para. 95):

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36 [2003] EWCA Crim 3452 – a decision that we discuss later in this Response.
37 We note that in his major work, *Trials and Punishment*, Professor Duff appears to take as his starting point “the implications of the Kantian demand that we should respect other people as rational and autonomous moral agents”. He goes on to argue that, “…to respect another person as a rational and autonomous moral agent is to treat him and respond to him as one who is able, and should be allowed, to conduct his own life and determine his own conduct in the light of his own understanding of the values and goals which command his allegiance. It involves a refusal to manipulate him, or to use him merely as an instrument for the attainment of social or individual goals; insofar as I may properly attempt to modify his conduct (or, more accurately, attempt to bring him to modify his own conduct), I should do so only by bringing him to understand and accept the relevant reasons which justify that attempt. I call this principle Kantian, since it is clearly related to Kant’s notions of autonomy and respect; but I do not call it Kant’s principle, since I do not aim to capture or express Kant’s own views on these matters.”; R.A. Duff, 1986, “Trials and Punishment”, Cambridge University Press, p.6; see also pp.29-38
38 It is submitted that the sentiments expressed by Lord Donaldson MR in *In re T. (Adult: Refusal of Treatment)* 3 WLR 782, CA (albeit in the context of the provision of medical treatment) have value in the context of decisions made by defendants during the course of the investigative/trial processes: “Prima facie every adult has the right and capacity to decide whether or not he will accept medical treatment, even if a refusal may risk permanent injury to his health or even lead to premature death. Furthermore, it matters not whether the reasons for the refusal were rational or irrational, unknown or even non-existent. This is so notwithstanding the very strong public interest in preserving the life and health of all citizens. However, the presumption of capacity to decide, which stems from the fact that the patient is an adult, is rebuttable…”; see also Jehovah’s Witnesses of Moscow v. Russia (10th June 2010, para.138); and *Re MB (Medical Treatment)* [1997] 2 FLR 426, noting Butler-Sloss LJ at 432G.
This is a straightforward case. It is overwhelmingly clear that at the time when the appellant appeared at trial, there was unequivocal contemporaneous evidence that his mental responsibility for his actions at the time of the killing was substantially impaired. In addition, there was contemporaneous evidence which suggested that as a result of reduced mental acuity, not amounting to unfitness to plead, but part and parcel of his illness, the decision not to advance the defence was irremediably flawed. There was nothing his legal advisers could do about it, and in reality nothing he could do about it himself.

28. The difficulty that faced E’s legal representatives was that E had denied involvement in the killings. In the Court of Appeal, E contended that his failure to run the partial defence of diminished responsibility at trial was attributable to his mental disorder.

29. The Commission believe that there is “a strong case for regarding such an accused person as unfit to plead, because the accused’s mental disorder means that he or she lacks the capacity to assess the strengths and weaknesses of his or her legal position, even though his or her understanding of the law and of legal process may be very good”. However, the Court of Appeal declined to hold that Erskine had been unfit to plead (para. 88):

....a defendant is not to be deemed unfit to plead merely because he will not accept what appears to be eminently sensible advice from his legal advisers. It is therefore for him, not his legal advisers or the court, to decide at the time of the trial whether to advance a plea of guilty to manslaughter on the grounds of diminished responsibility.

30. At para. 119 of the judgment, the Court elaborated on the issue of Erskine’s fitness to plead (emphasis added):

Professor Eastman also examined the issue of the appellant’s fitness to plead. He suggested that the appellant was so deluded that he was unable rationally to address the question whether to admit his offences and advance diminished responsibility, or to deny the offences altogether. The evidence would support a suggestion that he was “cognitively” unfit to plead. Professor Eastman addressed some of the difficulties arising from the application of the Pritchard criteria based on a nineteenth century view of mental disorder in the present century. This is not an appropriate case in which to address whether and how and in what circumstances the present law should be updated to take account of developments in psychiatric thinking. However the importance of the appellant’s delusional thinking, as summarised by Professor Eastman, is that his decision to deny responsibility for killing the victims “was

40 CP, para. 2.78.
determined not simply by wishing to avoid responsibility per se for the killing, and to avoid the consequences of doing so within the English justice system which was trying him, but to avoid a consequence which arose in his mind from his psychosis…if a defendant is deluded about matters directly related to his choice of plea, it might reasonably be argued that he is disabled as regards fitness to plead”.

31. We touch upon self-determination later in this Response⁴¹ but, for the moment, it is sufficient to identify the cases of Diamond,⁴² and Murray⁴³ as further examples that bring into focus the tension that can exist between the right of a defendant to make his own decisions as to plea etc., and his capacity for making decisions in his best interests (or which are, at least, rational).⁴⁴

32. Although the Law Commission’s proposals lower the threshold for determining whether a defendant is unfit to plead, the Court would remain bound to decide whether a given defendant’s condition has ‘disabled’ him with regards to his choice of plea or choice of decision. It is not inevitable (as the Commission appears to believe) that the accused’s mental disorder “means that he or she lacks the capacity to assess the strengths and weaknesses of his or her legal position”.⁴⁵ D’s mental disorder may demonstrate that circumstance, or it may not.

33. We note that in the cases of Erskine, Murray, and Diamond, the partial defence of diminished responsibility was in issue, and involved defendants whose psychiatric disability was profound. Such cases are complex on their facts. Whether the difficulties encountered in each of those cases would have arisen had the sentence of life imprisonment for murder not been mandatory, is debatable. But such cases are thankfully rare. The Commission has not alluded to decided cases where an offence other than murder has resulted in injustice by reason of the defendant’s lack of decision-making capacity.

The development of existing rules pertaining to unfitness to plead

Brief history of the current test of unfitness to plead

34. An historical sketch of the law on unfitness to plead is helpfully presented by the Commission at paras. 2.2 to 2.42 of the Consultation Paper. We do not suggest that the historical narrative is inaccurate in any respect but we do seek to give our

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⁴¹ See the discussion under the heading “Is the Pritchard test unsatisfactory?”
⁴² [2008] EWCA Crim 923.
⁴³ [2008] EWCA Crim 1792.
⁴⁴ We make it clear that references to the masculine include the feminine gender.
⁴⁵ CP, para. 2.78, underlining has been added.
own interpretation of the cases that have shaped existing rules relating to unfitness to plead.

35. We begin with *Rex v Steel* (1787),\(^{46}\)

.... the prisoner was indicted at the Old Bailey for larceny, and upon being arraigned she stood mute. A jury, duly sworn to inquire whether she stood mute of malice or by the visitation of God, found that she stood mute by the visitation of God...the judges...were of opinion...that the finding that the prisoner was mute by the visitation of God was not an absolute bar to her being tried upon the indictment, and that a plea of not guilty should be entered for her. The prisoner was accordingly tried and convicted.

36. By 1736, (the date of publication of Hale’s treatise, *Historia Placitorum Coronae*, i.e., *The History of the Pleas of the Crown*) it was open to a judge to empanel a jury to determine whether the accused was unfit to stand trial. Where a person became insane after the commission of a capital offence by him, he would not be tried, judged, or executed. But there appears, at that time, to have been various species of insanity [emphasis added]:\(^{47}\)

If a man in his *sound memory* commits a capital offence, and before his arraignment he becomes *absolutely mad*, he ought not by law to be arraigned during such his *phrensy*, but be remitted to prison until that incapacity be removed. The reason is, because he cannot advisedly plead to the indictment.

And if such person after his plea, and before his trial, becomes of *non-sane memory*, he shall not be tried; or if after his trial he become of *non-sane memory*, he shall not receive judgment; or if after judgment he become of *non-sane memory*, his execution shall be spared; for, were he of sound memory, he might allege somewhat in stay of judgment or execution.

But because there may be great fraud in this matter, yet, if the crime be notorious, as treason or murder, the Judge before such respite of trial or judgment, may do well to impanel a jury to inquire ex officio touching such insanity, and whether it be real or counterfeit.

37. In his submissions to the Court in *Padola*,\(^{48}\) Lawton QC\(^{49}\) usefully traced historically the meaning of the word “insane” at common law,\(^{50}\) to demonstrate that “sound memory” (actually the lack of it) was a factor of insanity, and that anyone who was not of sound memory was unfit to plead:

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\(^{46}\) 1 Leach, 451; the facts are summarised in *Rex v The Governor of his Majesty's Prison at Stafford* [1909] 2 K.B. 81.

\(^{47}\) Hale, *Pleas of the Crown*; Vol. i. p. 34.

\(^{48}\) On behalf of the appellant.

\(^{49}\) As he then was.

\(^{50}\) As well as for the purposes of the Criminal Lunatics Act 1800.
The old phrase used was “in sana memoria”; “memoria” means memory, not mind, while “sana” means sound, and a man could not be tried unless he had a good and “sound memory”: see Hale's Pleas of the Crown, vol. 1, pp. 34-35. That was a factor of insanity, and anyone who did not have it was “insane” and unfit to plead.

The emphasis on a “good and sound” memory runs through the law on this matter: see Beverley's Case51 [Reference was also made to Somervile's Case] Sir John Hawles in his remarks on the trial of Charles Bateman [Bateman's Case] said52 that the true reason of the law was that

“a person of 'non sana memoria', and a lunatick during his lunacy, is by an act of God....disabled to make his just defence. There may be circumstances lying in his private knowledge, which would prove his innocency, of which he can have no advantage, because not known to the persons who shall take upon them his defence,”

and criticised the “cruel and inhumane law” 33 Hen. 8, c.20, enacting, inter alia, that a man who fell mad after he committed high treason should notwithstanding be tried, but repealed by 1 & 2 Philip and Mary, c.10, so that the law was as it was at common law, and if Bateman was of “non sanae memoriae he ought not to have been tried, much less executed.”

38. However, in Padola, the Court of Criminal Appeal declined to treat a mere loss of memory as coming within Hale’s statement of the criteria applied at Common Law for determining whether a defendant was unfit to plead. It observed that the expression “sound memory” was to be contrasted with “absolutely mad” and with “frenzy”:53

It is to be observed....that the above passages occur in Chapter IV where Sir Matthew Hale is considering “the defect of idiocy, madness and lunacy” in reference to criminal offences. It will also be seen that in the first passage quoted, “sound memory” is contrasted with “absolutely mad” and with “frenzy.” Accordingly, in our judgment, the word “memory” there used does not relate to recollection but to a state of mind. We think that this meaning is to be attached to the word “memory” not only in the passages in Hale but also in the passage in Coke's Notes on Beverley's Case,54 and in other authorities previous to the Act of 1800 to which we were referred.

51 (1603) 4 Co.Rep. 123b, 124b.
52 (1685) 11 State Trials 467, 474, 476.
54 (1603) 4 Co.Rep. 123b
39. The Criminal Lunatics Act 1800\(^{55}\) was passed some thirteen years after *Rex v Steel* was decided. Section 2 of the 1800 Act created a statutory regime for determining whether a defendant was unfit to be tried, but the single qualification was that the defendant was “insane” at the moment of his/her trial. It was left to the common law to construe what “insane” meant for the purpose of s.2 of the Act [emphasis added]:

“if *any person* indicted for any offence *shall be insane*, and shall upon arraignment be found so to be by a jury lawfully impanelled for that purpose, so that such person cannot be tried upon such indictment... it shall be lawful for the Court before whom any such person shall be brought to be arraigned ....as aforesaid to direct such finding to be recorded, and thereupon to order such person to be kept in strict custody until His Majesty's pleasure shall be known.”

40. In order to give a degree of protection to defendants whose medical or physical disability was profound, the Courts gave the word “insane” (as it appears in s.2, CLA 1800) an extended meaning. Thus, in *Padola*, the Court of Criminal Appeal observed that section 2 has “in many cases since 1800 been construed as including persons who are not insane within the *M'Naughten Rules*, but who by reason of some physical or mental condition, cannot follow the proceedings at the trial and so cannot make a proper defence in those proceedings”.

41. *McNauten's case* was decided in 1843,\(^{56}\) but cases decided prior to that date (notably *Dyson*,\(^{57}\) and *Prichard*\(^{58}\)) show that the common law was prepared to treat a defendant as “non sane” if he or she, by a defect of faculties, “had not intelligence enough to understand the nature of the proceedings” against him or her (see *Rex v Dyson*, per Mr Justice Parke).

42. *Dyson* was indicted for the murder of her bastard child but D was deaf and dumb. The Court made efforts to address D’s disability by calling upon a witness to attempt to communicate with D using the “dumb alphabet”. The witness reported to the Court that D was “not so far advanced as to put words together” and that D was “incapable of understanding the nature of the proceedings against her”. A jury was empanelled to determine whether D was sane or not. The jury found that

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\(^{55}\) Repealed by the Statute Law (Repeals) Act 1981, Sch 1, Pt III. Note that by s.8(5)(a) of the Criminal Procedure (Insanity) Act 1964: “(a) the Criminal Lunatics Act 1800 and subsections (2) and (4) of section 2 of the Trial of Lunatics Act 1883 shall be repealed except as respects cases where the accused was arraigned before the time mentioned in subsection (3) of this section”.

\(^{56}\) 1 C. and K. 130; 4 St. Tr. N.S. 847: “...to establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused as labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong”

\(^{57}\) 1831.

\(^{58}\) 7 C. & P. 303.
she was not sane (having been referred to Lord Hale’s commentary in his Pleas of the Crown, cited above). D was ordered to be kept in strict custody until His Majesty’s pleasure was known.

43. It will be seen that even as long ago as 1831, the Court had an eye to what we now call “special measures” to assist the accused by addressing Dyson’s disability, with a view to proceeding to trial if practicable.

44. Dyson was followed in Pritchard (P was deaf and dumb). In his charge to the jury, Alderson B directed them to the question which they had to decide (emphasis added):

The question is, whether the prisoner has sufficient understanding to comprehend the nature of this trial, so as to make a proper defence to the charge....

There are three points to be inquired into:- First, whether the prisoner is mute of malice or not; secondly, whether he can plead to the indictment or not; thirdly, whether he is of sufficient intellect to comprehend the course of proceedings on the trial, so as to make a proper defence - to know that he might challenge any of you to whom he may object - and to comprehend the details of the evidence, which in a case of this nature must constitute a minute investigation.

Upon this issue, therefore, if you think that there is no certain mode of communicating the details of the trial to the prisoner, so that he can clearly understand them, and be able properly to make his defence to the charge; you ought to find that he is not of sane mind.

It is not enough, that he may have a general capacity of communicating on ordinary matters.

45. Pritchard is a further illustration of an attempt made by the Court to look for effective measures that might assist the defendant to understand the details of the trial and to “be able properly to make his defence to the charge”.

46. The decision of the Kings Bench Division in Rex v The Governor of HMP at Stafford,\(^9\) is a further example of the Courts construing the word “insane”, in s.2 CLA 1800, broadly. The prisoner, who was deaf and could neither read nor write, contended that his disability did not amount to being “insane”. The Court rejected that contention, and it manifestly did so on policy grounds to prevent “a great injustice”:

I should be very sorry if we were compelled to adopt the argument that the finding here does not amount to a finding that the prisoner is not sane.

\(^9\) [1909] 2 K.B. 81.
It might work great injustice in many cases to put a prisoner against whom such a finding was recorded upon his trial as if he were perfectly
sane, and if he was found guilty to punish him as an ordinary criminal; or it might be the cause of much mischief if he were found not guilty and were allowed to go free. I am glad to say that we are not driven to accept the argument.

47. The Court accepted as “perfectly true” that section 2 of the 1800 Act used the word “insane” and that the words “inability to plead”, “inability to understand the proceedings”, and “inability to communicate with other persons”, are not to be found in the Act. But, the Court reasoned that the word “insane” was qualified by the words which followed it:

It seems to me that when one looks at the words which follow the word “insane” in s. 2 of the Act of 1800 - “so that such person cannot be tried upon such indictment” - we ought to construe the word “insane” with reference to the question whether the prisoner can or cannot be tried upon the indictment; and we ought not to say that Parke J. and Alderson B. and the other judges who considered the matter misdirected the jury as to the test of insanity for the purpose of this Act. I cannot find in any text-book which I have seen that any doubt has ever been thrown upon the view acted upon by those learned judges.

48. The Court found its reasoning to be supported by the decision of the Court for Crown Cases Reserved in Berry (1876) where there was no question of general insanity “but only of insanity from the point of view of not understanding the nature of the proceedings” and yet an order that B be detained under section 2 of the 1800 Act was held to have been correctly made.

49. The Criminal Procedure (Insanity) Act 1964, as originally enacted, made a number of procedural amendments, but it did not modify the test for determining whether the defendant is unfit to plead or not. The 1964 Act has been amended by the Criminal Procedure (Insanity and Unfitness to Plead) Act 1991 and by the Domestic Violence, Crime and Victims Act 2004, but neither of those amending enactments has modified the common law test of unfitness to plead: see Erskine [2009] EWCA Crim 1425, para. 85. Unfitness is now determined by a judge rather than by a jury: s.4(5), DVCVA 2004.

**Is the Pritchard test unsatisfactory?**

50. It is true that the application of the Pritchard test has produced some hard cases, but we doubt whether the Commission’s proposals would produce different results

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60 (1876) 1 Q. B. D. 447
or constitute a significant improvement on existing principles. The Consultation Paper provides no examples where the outcome at first instance would have been different or fairer. Accordingly, we look at four cases referred to in the CP, that are said to “show the unfairness of the present situation” [CP, para. 2.86], and to consider them in the context of the Commission’s proposals.

51. In Erskine, E was not prepared to admit to his involvement in the killings. Even if the appropriate legal test was the one now proposed by the Commission, it is not a ‘given’ that his condition would have resulted in a finding that the defendant lacked decision-making capacity. Even if E had been found to lack such capacity, and a trial of the facts had been conducted in accordance with the Commission’s preferred option (option 5), it is conceivable that the disposal would have been indefinite hospitalisation. But option 5 would require the prosecution “to prove all elements of the offence”. It would have been open to E’s appointed representative to raise a partial defence (e.g. diminished responsibility). Option 5 includes provision for a qualified acquittal by reason of mental disorder that “ensures that the public can be protected from an accused who may be dangerous”. Thus, whether E was acquitted on a qualified basis, or was found to have done the act, the court would have available to it the same dispositions as are currently available under the 1964 Act. Fair labelling of a defendant’s conduct is important, but a defendant’s decision not to assert that he was unfit to plead would not necessarily be unreasonable if he (or his representatives) reasoned that he might face hospitalisation even if acquitted, but on a qualified basis.

52. The case of Murray is stated by the Commission to be “a good example of the proposition that the present dichotomy between understanding and capacity can lead to injustice”. The question arises whether that is the fault of the Pritchard test. M pleaded guilty to murder (as was her wish) in the face of what the sentencing judge described as “overwhelming medical evidence and overwhelming past facts indicating that, for a very substantial period of time, she has been suffering from a very severe mental illness which has had an almost overwhelming impact upon her actions” (per Moses J, as he then was). The Court of Appeal subsequently substituted a conviction for manslaughter on the grounds of diminished responsibility. The Court noted that the consensus of opinion among

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61 CP., para. 6.138. The Commission suggest that this “ensures greater fairness to an unfit accused. It also means that the difficulties resulting from the decision in Antoine [2000] UKHL 20 are avoided and would mean that an unfit accused would benefit from the protection of article 6 of the European Convention on Human Rights. The provision for a qualified acquittal, however, ensures that the public can be protected from an accused who may be dangerous.”

62 See CP., para. 6.129; contrast with the current position (see CP, paras.6.13-14, and R v Antoine [2000] UKHL 20.

63 See CP, para. 6.129.

64 CP, para.131.

65 [2008] EWCA Crim 1792.

66 CP, para. 2.80.
the psychiatrists was that she was not unfit to plead in the legal sense of the term “as they understood it” and that one psychiatrist stated in a recent report that “Psychiatric understanding and the law in relation to mentally ill defendants do not always sit together comfortably.” The Court described the case as illustrating “in acute form the problems of the potential mismatch between the legal test and psychiatric understanding in these matters. When the appellant pleaded guilty to murder, her legal team did not feel able to suggest to the judge that she lacked fitness to plead. She was therefore sentenced to life imprisonment”.

53. We doubt that it was (to use the Commission’s words) the “dichotomy between understanding and capacity” that led to the problem in the case of Murray. Firstly, M had resolved to plead guilty notwithstanding the legal advice that she had received. That is not a problem which arises from the existence or application of the Pritchard test. Secondly, the Pritchard criteria need to be understood and consistently applied by both legal practitioners and psychiatrists. If there was a “mismatch” then the problem does not necessarily rest at the door of the Pritchard test. Had M’s legal advisers been able to advance a plea of ‘unfitness’, the plea may (or may not) have succeeded.

54. One question, on the facts in Murray, is whether it was (or ought to have been) open to the court at first instance to have declined to accept M’s guilty plea in the light of the information in the reports (and in circumstances where it would seem that a plea of diminished responsibility would not have been contentious). Existing jurisprudence suggests that the powers of the trial judge to intervene is very limited indeed: see Diamond, where the court made the following observations:

54. The judge has a very limited duty. In Kookan, the Lord Chief Justice observed in answer to a submission by the defence that the judge could raise the issue:

“We very much doubt whether any such discretion can exist in the judge. However it is always dangerous to forecast that no possible situation could ever arise in which the judge may not have to consider his powers in that respect. But we find it difficult to envisage any situation where a judge could properly call evidence to this effect in the face of the wishes of the defendant, upon whom the choice lies and upon whom alone the choice lies”

55. In Campbell (Colin) (1987) 84 Cr App R 255, it was suggested that the judge should have left the issue to the jury. The view was expressed that the most a judge should do was to point the issue out to the defence and it was their decision as to whether to pursue the issue; a similar observation was made in Straw.

55. The Commission cite Moyle as a further illustration of an “anomaly” in relation to a defendant who has a serious mental disorder but who remains fit to plead. The appellant had given evidence at trial “and did so in a way which does not create doubts about his ability to understand questions put to him and to give answers he saw fit to give” and demonstrated “a tactical awareness” (para.39). The Court did not find that his conduct at trial, coupled with the medical evidence, demonstrated that he was unfit to plead (para. 40).

56. We suggest that it is doubtful whether the result would have been different in Moyle even if the legal test was defined as the Law Commission proposes. At the heart of the Commission’s proposed legal test is the concept of decision-making capacity: “in our view it is not possible for an accused to have meaningful participation in his or her trial unless he or she can perform certain tasks or make decisions”. But, on that basis, Moyle had been able to perform such tasks.

57. The case of Diamond, cited by the Commission, was another instance of a defendant who pleaded not guilty to murder rather than plead the partial defence of diminished responsibility. D had made a tactical decision and the Court declined to set aside his conviction. At para.46 of the judgment, the Court made the following observations (among others):

On the established test, a defendant is fit to plead in cases where his mental condition may well enable him to advance successfully the plea of diminished responsibility, yet his mental condition is still such that it may also prevent rational or sensible decision-making as to the conduct of his defence. Once it is concluded that the defendant is fit to plead, although it may be apparent to everyone that else that there is an issue as to whether his decision making is materially affected by his mental condition, he is entitled to refuse to have his mental condition assessed (absent an application under s.35 of the 1983 Act). The trial proceeds on the basis of the instructions given not to advance a defence of diminished responsibility, with the risk that at some future stage, a point will be taken on his capacity to give the instructions when the essential contemporaneous medical evidence is lacking.

58. In a hard-hitting passage, the Commission suggest that cases such as Diamond make a “mockery of what we know of the concept of participation”. The Commission even alleges “collusion” (CP, para.2.86; emphasis added):

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68 [2008] EWCA Crim 3059.
69 CP, para.2.82- 84.
70 CP, para.3.35.
71 [2008] EWCA Crim 923.
72 CP, para. 2.85.
As cases such as *Diamond* show, the unfairness of the present situation is demonstrated by the fact that a defendant may, for example, be delusional and yet fit to plead because he or she has an underlying cognitive understanding. Yet his or her delusional state may well be such as to impair his or her capacity to make decisions. This makes a mockery of what we know of the concept of participation because although the defendant may appear to be engaging with the trial process, the participation – such as it is – is not on the required level and is ultimately a sham in which legal professionals and the courts are forced to collude.

59. If the Commission has correctly described the position then it is obviously unacceptable. However, the burden is on the Commission to demonstrate that the cases which it cites (e.g. *Diamond*) are cases where participation was “a sham”. The judgments in cases such as *Erskine, Diamond*, and *John M*, are detailed and painstakingly constructed. Indeed, in *John M*, the trial judge’s directions to the jury on the issue of unfitness to plead were carefully crafted. The suggestion of “collusion” in a sham, between the professionals and the courts, is unwarranted and inappropriate. In *Murray* the Court spoke of the problems “of the potential mismatch between the legal test and psychiatric understanding in these matters” (see above). The Commission points to the inconsistent application of the *Pritchard* test, remarking that it is “probably a reflection upon the inadequate nature of the criteria”. However, and importantly, the Commission adds that “it is just as likely to be a reflection of the fact that there is no standard test for psychiatrists to use”73 – i.e. no standard psychiatric test. This is closer to the truth than “collusion” between legal professionals.

60. We draw the Commission’s attention to a study74 that indicates that problems over the application of the *Pritchard* test may be attributable, in part, to weaknesses in the exercise of clinical judgements:

> It is this issue of clinical judgement, which has preoccupied some US researchers (Hoge et al. 1997). In effect, clinicians assess symptomatology and then infer unfitness/incompetency in terms of legal criteria. In consequence, judgement as to unfitness may be affected by clinicians failing to detect symptomatology, or conversely by their over-interpreting its significance as regards unfitness/incompetency. An approach explored in the US is the development of instruments to measure incompetency directly. Success in this respect has been limited (Nicholson & Kugler, 1991), leading to the conclusion by some that the incompetency construct cannot be reduced to a finite set of operational indicators. Recently, a more sophisticated approach has been adopted in

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73 CP, para. 5.14.

the MacArthur Adjudicative Competence Study (Hoge et al.1996, 1997). However, given that it takes 2 hours for their test to be administered by a ‘highly trained research assistant’, its value as a clinical, as opposed to a research tool must remain in doubt.

61. Given the absence of a dependable and practical psychiatric test that is capable of exposing as a sham D’s participation in the trial process (or which is not on the “required level”), practitioners and the Courts have little option but to apply a legal test that requires the exercise of judgement based (in part) on its observation of the defendant’s behaviour and responses when, for example, giving instructions to his/her legal representatives, as well as his/her participation in the trial process (e.g. when giving evidence).

62. As stated above, the Commission complains\(^75\) that a defendant who is held to be fit to plead notwithstanding that his or her delusional state is such as to impair his or her capacity to make decisions, “makes a mockery of what we know of the concept of participation” because, although the defendant may appear to be engaging with the trial process, “it is not on the required level”. This statement begs two questions: first, what do we mean by “participation in the trial process”, and secondly, what is “the required level”? We agree that the accused has the right to effective participation in his or her criminal trial. In the case of a child, the position appears to be clear (\textit{SC v United Kingdom}; underlining added):\(^76\)

28. The right of an accused to effective participation in his or her criminal trial generally includes, inter alia, not only the right to be present, but also to hear and follow the proceedings (\textit{Stanford v. the United Kingdom}, judgment of 23 February 1994, Series A no. 282-A, § 26).

In the case of a child, it is essential that he be dealt with in a manner which takes full account of his age, level of maturity and intellectual and emotional capacities, and that steps are taken to promote his ability to understand and participate in the proceedings (\textit{T. v. the United Kingdom}, §84), including conducting the hearing in such a way as to reduce as far as possible his feelings of intimidation and inhibition.

29. The Court accepts the Government’s argument that Article 681 does not require that a child on trial for a criminal offence should understand or be capable of understanding every point of law or evidential detail. Given the sophistication of modern legal systems, many adults of normal intelligence are unable fully to comprehend all the intricacies and exchanges which take place in the courtroom: this is why the Convention,

\(^75\) At CP, para. 2.86.
\(^76\) [2004] ECHR 263.
in Article 6§3(c), emphasises the importance of the right to legal representation.

However, “effective participation” in this context presupposes that the accused has a broad understanding of the nature of the trial process and of what is at stake for him or her, including the significance of any penalty which may be imposed. It means that he or she, if necessary with the assistance of, for example, an interpreter, lawyer, social worker or friend, should be able to understand the general thrust of what is said in court. The defendant should be able to follow what is said by the prosecution witnesses and, if represented, to explain to his own lawyers his version of events, point out any statements with which he disagrees and make them aware of any facts which should be put forward in his defence (see, for example, the above-mentioned Stanford judgment,§30).

63. We make the following points in relation to the above extract from the judgment. First, that by a parity of reasoning and principle, much of the Court’s description of what constitutes “effective participation” can be said to be of general application. Secondly, the Court was not being over prescriptive about the level of understanding or capacity to be expected of the defendant in question (“broad understanding”, “general thrust”, etc). Thirdly, the Court attached importance to bespoke measures to assist the defendant in question to participate effectively in the trial. Fourthly, that a defendant’s cognitive ability and his/her ability to communicate are important considerations. Although the Court considered that “when the decision is taken to deal with a child, such as [SC] who risks not being able to participate effectively it is essential that he be tried in a specialist tribunal”77, it did not suggest that the proceedings ought not to be criminal proceedings leading to verdict and, if convicted, sentence.

64. We sense that the CP was heavily influenced by the thinking of Professor R.A. Duff in his scholarly work ‘Trials and Punishment’ (1986).78 We have already made reference to that work in this Response.79 Professor Duff’s analysis proceeds on the basis that the accused is typically a rational moral agent capable of being responsible for his/her actions and “one who can be brought to reform and redeem himself” [p.266]. Professor Duff has argued elsewhere80 that where a person is accused of a crime, “he should be called to answer that charge. This is to say that the defendant should be a participant in his trial. He is not merely someone about whom the court must reach a determination, but someone with whom the court must try to engage in a communicative process of accusation,

77 Para.35 of the judgment.
78 Cambridge University Press, re-issued as a digitally printed version in 2009. There are many references to that work in the CP.
79 Fitness to plead, and personal autonomy, para.27, footnote 37.
The argument runs that a defendant's ability to participate in his trial “depends partly on the nature of the trial, and partly on his own capacities”:

The language and procedures of the trial might be so arcane, so removed from the experience and understanding of ordinary citizens, that we could not expect them to take any real part in the proceedings. We should then say, not that they are unfit for trial, but that the trial is unfit for them: it is not a procedure through which citizens can be called to account for their alleged wrong-doings.

65. As to what these capacities are, Professor Duff has suggested the following [underlining added].

What are these capacities? Certain basic cognitive and intellectual capacities are clearly necessary for an ability to understand the trial, but are equally clearly not sufficient for fitness to plead. In particular, since the trial aims to determine whether the defendant is guilty of wrongdoing, she must be able to understand this normative dimension to the trial. She must be able to grasp what it is to be charged with, and condemned for, a crime, and to appreciate the seriousness of the charge and of the proceedings. She must also be able to make a rational response to the charge—which she cannot do if she is, for instance, so pathologically depressed that she can see no point in responding, or so disordered that she insists on pleading guilty to a charge of which she may well be innocent. Thus fitness to plead involves moral and emotional, as well as narrowly defined cognitive or intellectual, capacities.

66. It is in that context that Professor Duff went on to say that a defendant “must be able to grasp what it is to be charged with, and condemned for, a crime, and to appreciate the seriousness of the charge and of the proceedings”.

Similarly, in ‘Trials and Punishment’, Professor Duff stated his belief that a defendant must be able to understand the moral dimensions of the law and of his own actions [underlining added].

A defendant who is to be fit to plead must be able to understand the 'nature and quality' of his own past actions and of his present trial. He must be able to understand the factual claims and evidence which are relevant to his

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82 Ibid, Crim. L.R. 422
83 Some have argued that “psychopathic offenders lack even the basis of moral understanding; they cannot meet the conditions of moral agency and so are not the kinds of beings to whom we should attribute moral responsibility.”: ‘Mental impairment, moral understanding and criminal responsibility: Psychopathy and the purposes of punishment’, Cordelia Fine, Jeanette Kennett, International Journal of Law and Psychiatry 27 (2004) 425–443
84 Page 120.
85 Footnote 40 reads, “See the criteria of criminal responsibility laid down in M’Naghten (1843) 10 CL & F 200, at 209; and the controversy over the meaning of ‘nature and quality’, on which see N Walker, Crime and Insanity in England vol 1, chs.5-6”.

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case, and thus to take part in the discussion of whether he in fact performed certain actions: but he must also be able to understand the moral dimensions of the law and of his own actions. The charge against him is that he acted, not simply in a way which satisfied certain descriptive criteria, but in breach of his obligations; and though his trial may include no explicit discussion of those obligations, it must presuppose that he can understand them as obligations - as claims which are supported by a particular kind of moral justification. For if he cannot thus understand his obligations he can understand neither the charge which he faces nor the conviction which he may receive. If, for instance, he cannot see the law as (if he cannot understand how it could be or be thought to be anything more than a set of orders backed by threats which give him prudential reasons for obedience, he is not fit to be tried: for he cannot understand the trial for what it purports to be. We must, however, distinguish him from a defendant who understands the claims which the law makes on him, but refuses to accept those claims or to ascribe any legitimate authority to the law.\(^{[81]}\)

67. However, neither the law of England and Wales, nor the Strasbourg Court has imported a requirement that D must be able to understand the normative dimension of a trial that aims to determine issues of ‘guilt’ and ‘wrongdoing’. The Commission accept that part of the reasoning of Professor Duff may be going too far but believe that there remains “a great deal of sense in Professor Duff’s proposition”.\(^{[87]}\) However, we have 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.\(^{[88]}\)

68. We regard the *Pritchard* test as organic in its development.\(^{[89]}\) According to Tim Exworthy\(^{[90]}\) (and we agree) practically speaking, the *Pritchard* test has crystallized into four main areas:

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\(^{[81]}\) Footnote 41 reads, “Contrast A J Kenny, *Free will and Responsibility* 42-4.” Note that (at p.35) Professor Duff also stated “...we should neither try nor convict a defendant who is so disordered that he cannot understand his trial: for if the aim of the trial is not just to make an accurate determination of the facts, as a basis for further decisions about the defendant’s disposal, but to engage with the defendant in a rational process of argument and judgment, the trial and conviction of someone who cannot understand or take part in such a process becomes a travesty of the due process of law.”


\(^{[88]}\) See also, “Fitness to plead”, editorial, Professor Ian Dennis, [2010] Crim LR 887. It is conceivable that Professor Duff doubted that a trial process would be constructed on his theoretical analysis: “my discussion will begin with certain features of the English legal system, which are also to be found in many other legal systems. I will argue that they should be explained and justified in terms of certain non-consequentialist and Kantian values: but their role in my argument is meant to be illustrative and heuristic rather than probative...my aim is not simply to offer an explanatory analysis or justification of the status quo: it is rather to explicate the values and purposes - the ideals - which should be central to a system of criminal law and punishment, and in the light of which we can criticise existing legal institutions and practices which fall short of them.”; ’Trials and Punishment’, p.11.

\(^{[89]}\) As the Commission point out, the criterion of being unable to instruct legal advisors was added to the *Pritchard* criteria following the decision in Davies (1853) C&K 328; see CP, para. 2.46, fn 94.

i) an appreciation of the charges and potential consequences (including the significance of the potential pleas),

ii) an ability to understand the trial process,

iii) a potential for the defendant to participate in that process, and

iv) the ability to work collaboratively with his lawyer on his defence.

69. It is at least arguable that the defendant’s potential to participate in the trial process (i.e. (iii) above) is broad enough to encompass his/her ability to understand the substantial effect of the evidence against (or for) the defendant. The judgment of the Court of Appeal in John M,91 and the circumstances of that case, is instructive. The trial judge directed the jury that in order to be fit to stand trial a defendant must be capable of doing six things:

...it was sufficient for the defence to persuade them on the balance of probabilities that any one of those six things was beyond the appellant's capabilities. Those six things were as follows:

(1) understanding the charges;

(2) deciding whether to plead guilty or not;

(3) exercising his right to challenge jurors;

(4) instructing solicitors and counsel;

(5) following the course of the proceedings;

(6) giving evidence in his own defence.

91 [2003] EWCA Crim 3452 [20].


93 The trial judge gave the following direction: “This means that the defendant must be able to convey intelligibly to his lawyers the case which he wishes them to advance on his behalf and the matters which he wishes them to put forward in his defence. It involves being able (a) to understand the lawyers' questions, (b) to apply his mind to answering them, and (c) to convey intelligibly to the lawyers the answers which he wishes to give. It is not necessary that his instructions should be plausible or believable or reliable, nor is it necessary that he should be able to see that they are implausible, or unbelievable or unreliable. Many defendants put forward cases and explanations which are implausible, unbelievable or unreliable. The whole purpose of the trial process is to determine what parts of the evidence are reliable and what parts are not. That is what the jury are there for.”

94 The trial judge directed the jury what this entailed: “This means that the defendant must be able (a) to understand what is said by the witness and by counsel in their speeches to the jury and (b) to communicate intelligibly to his lawyers any comment which he may wish to make on anything that is said by the witnesses or counsel. Few defendants will be able to remember at the end of a court session all the points that may have occurred to them about what has been said during that session. It is, therefore, quite normal for the defendant to be provided with pencil and paper so that he can jot down notes and pass them to his lawyers either as and when he writes them, or at the end of the session. (Lawyers normally prefer not to be bombarded with too many notes while they are trying to concentrate on the evidence). There is also no reason why the defendant’s solicitor's representative should not be permitted to sit beside him in court to help with the note taking process.” He added, “It is not necessary that the defendant's comments on the evidence and counsels' speeches should be valid or helpful to his lawyers or helpful to his case. It often happens that a defendant fails to see what is or is not a good point to make in his defence. The important thing is that he should be able to make whatever comments he wishes.”

95 As to this, the judge directed the jury that, “This means that the defendant must be able (a) to understand the questions he is asked in the witness box, (b) to apply his mind to answering them, and (c) to convey intelligibly to the jury the answers which he wishes to give. It is not necessary that his answers should be plausible or believable or reliable. Nor is it necessary that he should be able to see that they are implausible or unbelievable or unreliable. Many defendants and other witnesses give evidence which is either in whole or in parts implausible, unbelievable or
70. It seems to us that the trial judge – with the approval of the Court of Appeal – applied the *Pritchard* test in a way that regarded as important the defendant’s ability to participate effectively in his/her trial.

71. At a time when commentators are considering (and rightly so) whether the *Pritchard* criteria is too narrow, it is arguably ironic that in 2001 a study suggested that the criteria could actually be pruned [emphasis added]:

> According to this study, the conclusion by psychiatrists as to whether someone is fit to plead is most strongly associated with judgements on two of the legal criteria - ability to follow the proceedings of the trial and ability to instruct a solicitor - which identified 91.25% and 90% of unfit cases respectively. The logistic regression produces a predictive model incorporating the three issues concerned with trial (following trial, instructing solicitor and understanding details of evidence). Addition of the factors relating to plea and charge did not increase the power of the model. This suggests that these factors could be jettisoned without affecting the performance of the remaining criteria in predicting unfitness.

72. There is a further consideration, namely, that the principle of a defendant’s self-determination (personal autonomy) is not to be lightly disregarded. We recognise that a bad/irrational decision made by the defendant at trial may be difficult to put right later. Indeed some appeals have been historic.

73. As the Commission points out, there is no standardised procedure for the screening of defendants in England and Wales but we suggest that legal practitioners are able to recognise (and do) mental abnormality and learning difficulties. We have considered whether provision might be made for a defendant’s legal representatives to be protected from complaint if, on reasonable grounds, they initiate (without the consent of their lay client) proceedings for a determination of the defendant’s capacity for decision-making. However, we do not believe that this would be tenable or practical. Apart from ethical considerations, there are practical considerations too. Even if the defendant’s legal representative alerted the Court of his/her concern, it would remain the defendant’s decision whether to submit to medical/psychiatric assessment or not. A legal practitioner will wish to

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unreliable. The whole purpose of the trial process is to determine what parts of the evidence are reliable and what parts are not. That is what the jury are there for. Nor is it necessary that the defendant should be able to remember all or any of the matters which give rise to the charges against him. He is entitled to say that he has no recollection of those events, or indeed of anything that happened during the relevant period.”


97 Consider Neaven [2006] EWCA Crim 955.

98 CP, para. 2.62.
have the lay client’s confidence in him/her rather than leave the client with a sense of grievance that his/her instructions have been disregarded. It is therefore unsurprising that the Court will be unlikely to “pick up on unfitness in respect of a defendant who is represented and in respect of whom no such representations are made”. A defendant who feels that his instructions are being ignored may decide to change his representation or to act in person. In the latter situation, who is to protect the mentally disadvantaged defendant from his own disability? We do not believe that the Commission’s proposals address and meet these realities.

74. We leave open the question of whether there could be circumstances in which a judge should be empowered to order assessment and psychiatric reports on a defendant in respect of whom the Court has concerns about his/her decision-making capacity. However, in that regard, we note that in *R v McCarthy*, Lord Parker CJ observed that it had been held “certainly before this Act, that the question of unfitness can be raised not merely by the prosecution or by the defence, but by the judge himself”. In support of that proposition, Lord Parker CJ cited *Reg. v. Beynon*, where Byrne J had said: As I have always understood the law and seen it administered, if the court is aware of the fact that there is a preliminary issue whether the person who is charged before the court on an indictment is insane so that he is unfit to be tried, it is the duty of the court to see that the issue is tried, even though no application is made by the prosecution or by the defence.

75. It seems that in *McCarthy*, there would have been no difficulty had the judge merely ordered medical reports and made up his/her mind on reading them whether an issue of unfitness to plead arose that ought to be determined. What the judge could not do (at least prior to the DVCVA 2004) was, in effect, to decide for himself/herself whether the defendant was fit to plead or not.

99 CP, para. 2.62.
100 That is to say, the Criminal Procedure (Insanity) Act, 1964.
101 [1967] 1 Q.B. 68. What the judge could not do, at least prior to the DVCVA 2004, was (in effect) to determine the issue of fitness to plead himself (rather than a jury) and it is submitted that this proposition is what *McCarthy* is actually authority for.
102 [1957] 2 Q.B. 111
103 [1957] 2 Q.B. 111, 114.
104 The head-note to the QB report of this decision reads: “The defendant, a deaf mute, was indicted for sending offensive material by post. Before arraignment the judge remanded him for medical examination. When the defendant appeared before the court again the judge had three medical reports and, in the defendant's absence, he informally questioned one of the doctors as to the defendant's fitness to plead. Neither the prosecution nor the defence raised the question of the defendant's fitness to plead and he was arraigned, the trial proceeded and the jury convicted him. On appeal, on the ground that a question regarding his fitness to plead had been raised within the meaning of section 4 of the Criminal Procedure (Insanity) Act, 1964, and that the judge should have caused a jury to be empanelled to decide it.”
Potential injustice of indefinite hospitalisation

76. Section 5(1) of the 1964 Act, as originally enacted, provided that where a defendant was found unfit to plead “the court shall make an order that the accused be admitted to such hospital as may be specified by the Secretary of State”. As the Commission point out, this was an order for “indefinite hospitalisation”.

77. The approach taken by the Courts in the Pritchard line of cases to prevent a “great injustice”, came to be viewed as itself being capable of causing great injustice. In November 1985, newspapers reported on the case of Mr Glenn Pearson who had been charged with burglary of a dwelling and stole therein a £5 note and three light bulbs. Mr Pearson was found to be profoundly deaf and of limited intelligence and had great difficulty in communicating. A jury found Mr Pearson unfit to plead and a “Place of Safety” order was made in his case. The case was reported as one of lifelong incarceration for the theft of £5. As Christopher Emmins points out in his article the actual consequences were not as draconian as might have appeared to be the case.

78. Mr Pearson’s case was taken up in Parliament by Edward Leigh MP who, with others, was permitted in 1986 to bring a Bill in Parliament to amend the law:

My Bill seeks to amend the law so that a person found unfit to plead will be detained in a prison hospital only if the strict criteria of insanity are met. Otherwise, he will be remanded in custody or on bail with conditions, as appropriate, until such time as he is fit to plead. Remand to prison custody would be appropriate only if the offence were of a serious nature and the defendant's unfitness was outside the scope of the mental health provisions. I must make it clear, therefore, that the Bill in no way lessens the protection available to the public; it simply widens the powers available to the courts.

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105 CP, para. 2.14.
107 Mr. Mellor (Secretary of State for the Home Department): “On 19 November, at Lincoln Crown court, Glenn Pearson was found unfit to plead, under the Criminal Procedure (Insanity) Act 1964, to a charge of burglary. On 26 November the same court directed his admission to Harmston Hall hospital as a place of safety, under schedule 1 to the Act, pending the Home Secretary's direction under section 5 on his longer term hospital placement.”: HC Deb 27 November 1985 vol 87 c568W.
108 Per Edward Leigh MP: “The Bill is prompted by the case of a constituent of mine, Mr. Glen Pearson, a 32–year-old deaf mute with few communication skills, who was alleged to have stolen £5.40 and three light bulbs and ordered to be detained in custody for an indefinite period by Lincoln Crown court. He was released three months later, after a national outcry. No ordinary person would be treated in that way by the courts. Why did it happen to Glen Pearson? He was found, rightly, to be unfit to plead. From that moment he was caught in the grip of an infernal machine, as remorseless in its purpose as anything out of a Greek tragedy....As two psychiatric reports and one psychologist's report showed later, Glen Pearson was not insane and he was not a serious danger to the public, but he was treated as if he was” [HC Deb 16 April 1986 vol 95 cc873–4].
109 Christopher J Emmins “Unfitness to Plead: thoughts prompted by Glen Pearson’s case” [1986] Crim LR. 604
110 Bill ordered to be brought in by Mr. Edward Leigh, Mr. Austin Mitchell, Mr. Michael Brown, Mr. Simon Hughes, Mr. David Ashby, Mr. Joe Ashton, Mr. Andrew Rowe, Mr. Tom Clarke and Mr. Douglas Hogg [HC Deb 16 April 1986 vol 95 cc873–4].
The Bill provides for the regular review of unfitness, there is no similar provision in the law as it stands. The Bill provides for the case to be brought to a conclusion within a specified period. ... Anyone, however reviled or lowly or disabled, has a right to be treated fairly and that anyone has the right to be considered innocent before guilt is proved.

79. Thus, the outcry was not in relation to the Pritchard test, or the determination that Mr Pearson was unfit to plead, or that too many persons were treated by the Courts as fit to plead when they ought not to be, but rather that the disposal was perceived as being draconian, namely, the prospect of lifelong hospitalisation.

80. The fate of Mr Leigh’s Bill is not known to the authors of this Response (and no reference is made in the CP to the Bill or what became of it) but, six years later, substantial amendments were made to the 1964 Act by the Criminal Procedure (Insanity and Unfitness to Plead) Act 1991.

81. Relevant to this part of the discussion is section 5 of the 1964 Act, as amended by the 1991 Act, and then by the Domestic Violence, Crime and Victims Act 2004, which empowers the Court to make the following orders in respect of an offender who is unfit to plead and it is found (under s.4A of the 1964 Act) that he did the act or made the omission charged against him:111

   (a) a hospital order (with or without a restriction order);
   (b) a supervision order; or
   (c) an order for his absolute discharge.

82. A significant reform brought about by the amending legislation is that the “Secretary of State no longer has a role in deciding whether or not the defendant is admitted to hospital and that a court can no longer order the defendant's admission to a psychiatric hospital without any medical evidence”112.

83. In cases where a finding of unfitness to plead has been determined, we are not aware of cases in which the options for disposal under s.5(2) are inadequate or unsatisfactory.

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111 See s.5(1) and s.5(2), 1964 Act, as amended.
112 See Mental Healthcare Online: http://www.mentalhealthlaw.co.uk/Domestic_Violence_Crime_and_Victims_Act_2004
The section 4A hearing; the dual role of counsel; conflict of interest concerns

84. The Criminal Procedure (Insanity and Unfitness to Plead) Act 1991 inserted s.4A into the 1964 Act[113] that provides for a mandatory hearing of the facts of the case once an accused has been found to be unfit to plead [see CP, para.2.22].[114]

85. As the Commission point out,[115] the procedure provided for by section 4A “was intended to counter the problems which arise when an accused cannot participate effectively in his or her trial by giving appropriate instructions to his or her lawyers, following the proceedings and, if he or she wishes, giving evidence in his or her own defence.”

86. The Commission reminds us that the 1964 Act enabled the question of unfitness to be postponed until any time up to the opening of the case for the defence.[116] Our researches suggest that this was intended, at least in part, to resolve a conflict of authority.[117]

87. Before turning to the nature and structure of section 4A hearings, we invite the Commission to consider whether a trial of the facts must be mandatory in all cases where a defendant has been found unfit to plead (or lacks decision-making capacity). There may be cases where a defendant’s lack of capacity is likely to be temporary, or susceptible to treatment, so that a trial in the ordinary way would be possible.[118]

113 Section 4A (1) and (2) provides: “(1) This section applies where in accordance with section 4(5) above it is determined by a [court] that the accused is under a disability. (2) The trial shall not proceed or further proceed but it shall be determined by a jury-(a) on the evidence (if any) already given in the trial; and (b) on such evidence as may be adduced or further adduced by the prosecution, or adduced by a person appointed by the court under this section to put the case for the defence, whether they are satisfied, as respects the count or each of the counts on which the accused was to be or was being tried, that he did the act or made the omission charged against him as the offence.”

114 We have been assisted by the useful article by Tim Exworthy, “Commentary: UK Perspective on Competency to Stand Trial” Journal of the American Academy of Psychiatry and the Law 34:466-71, 2006.

115 CP, para. 6.4.

116 See CP, para.2.13. Section 4(2) of the 1964 Act, as originally worded, provided: “The court, if having regard to the nature of the supposed disability the court are of opinion that it is expedient so to do and in the interests of the accused, may postpone consideration of the said question (hereinafter referred to as "the question of fitness to be tried ") until any time up to the opening of the case for the defence, and if before the question of fitness to be tried falls to be determined the jury return a verdict of acquittal on the count or each of the counts on which the accused is being tried that question shall not be determined.”


118 We note that according to Lord Hale, in his Pleas of the Crown (vol. i. p. 34), and in Pritchard, a finding of unfitness to stand trial might result in a “respite” of judgment or trial. Indeed, according to Lord Kenyon in Frith (1790) 22 St.Tr.307 [underlining added] “The humanity of the law of England...has prescribed that no man shall be called upon to make his defence at a time when his mind is in that situation as not to appear capable of so doing. For however guilty he may be, the inquiring into his guilt must be postponed to that season when, by collecting together his intellects, and having them entire, he shall be able so to model his defence as to ward off the punishment of the law”; quoted in ‘Trials and Punishment’, Professor R.A. Duff, 1986, Cambridge University Press, p.29.
88. The Commission describe one aspect of the section 4A hearing as a “great advantage”, namely, that the legal representative appointed under s.4A(2)(b) “is not bound to follow the accused’s instructions about the way in which the case should be run if he or she does not agree that those instructions are in the accused’s interests”. This may be a “great advantage” in cases where the defendant is unable to communicate effectively with his/her legal representatives, but the statutory entitlement of the appointed representative to override the wishes of the defendant bumps hard against the general freedom to self-determination (personal autonomy). It is conceivable that a few decades ago greater latitude was afforded to an advocate than now seems to be the case, to exercise skill and judgement on behalf of a lay client who could not communicate with him/her, to secure an acquittal if he/she could. Thus in Roberts, Devlin J said:

...it is a perfectly conceivable situation, although it appears never to have arisen in practice before, that counsel for the defence, although he cannot be instructed by the accused, may say: “I do not think that the prosecution can bring any case against this accused man at all. If they can, then of course I am in no position to defend it with his aid because he cannot instruct me and cannot tell his story. But as the prosecution can make out no case, I am not prepared to let the matter go merely on the issue whether he is fit or unfit to plead.”

89. Devlin J indicated the steps that counsel on behalf of the accused might wish to take [emphasis added].

In cases where the defence does not propose to challenge that the prosecution has a prima facie case, and has no evidence which might induce a jury to reject the evidence for the prosecution, then the convenient course is to let the issue of fitness to plead be tried at once. I can find no authority in these cases which would prevent counsel for the defence, who wishes to test the prosecution's case on the general issue, from having the right to do so and at the same time preserving all those rights which flow to the defence from the fact that the accused is a person, if it be so established, who is incapable of being communicated with or instructing counsel for his own defence. Were it otherwise, I think that the gravest mischief and injustice might follow. As I said earlier in the argument, the defence might wish to tender a witness who could prove that the accused was ten miles away at the time of the alleged crime. It cannot, I think, be our law that, by some formality of procedure, the defence should be prevented from laying matters of that sort before the jury, and so achieving, if they can, for their client a verdict of not guilty.

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119 CP, para 6.3.
120 [1954] 2 Q.B. 329, 332; and see the commentary to this case (author unknown): “Question Whether Accused Is Fit To Plead: Not Always Triable As Separate Issue”, 17 J. Crim. L. 318, 1953.
121 But note that Roberts was not followed in Beynon [1957] 2 Q.B. 111
90. It is obvious that a practitioner, by definition, is engaged in a discipline that results in the attainment of skills and judgement that may be lacking on the part of the person for whom the practitioner acts. But, although in medicine there may well be a recognised procedure for carrying out (e.g.) surgery, the course of a trial is rarely routine. The advocate will face many tactical dilemmas and will often encounter a development in the case that he/she had not expected. The advocate rarely holds all the cards. Not infrequently, the lay client holds back a card or two (notwithstanding the Criminal Procedure Rules). But even if - and despite the emphatic advice of the defendant’s legal representative - the defendant is determined to act unwisely, unreasonably or irrationally, at what point is it appropriate for the law to intervene and to require the professional to act contrary to the clear wish of the defendant? There are professional standards (e.g. not to gratuitously besmirch the character of a witness) as well as statutory rules that (e.g.) prohibit a defendant, acting in person, from cross-examining a witness in specified circumstances. The problem is (arguably) less acute if unfitness to plead is narrowly circumscribed (e.g. D is wholly unable to communicate with his/her lawyers). But, the wider the basis for determining unfitness, the greater will be the number of cases that require a ‘trial of the facts’ involving defendants whose disabilities span an increasingly wide spectrum (especially if judges are required to apply, in reality, a disaggregated approach to the question of unfitness to participate effectively in the trial process).

91. It is submitted there is force in a commentary to the Domestic Violence, Crime and Violence Act 2004, in the context of unfitness of plead, that mental health issues (unlike criminal proceedings) are not ordinarily adversarial and that the duality of roles of the criminal trial advocate may give rise to a conflict of interest.\textsuperscript{122}

\[...\text{. the issue of fitness to plead is a mental health issue. As such, and as set out in para 213 of the Auld report, the matter is often the subject of agreement between the defence and prosecution. Mental health issues are not ordinarily adversarial, as it is the case that all interested parties have the best interests of the patient or potential patient in mind when conducting proceedings.}\]

\[\text{Criminal proceedings are by their nature adversarial. The best interests of a defendant qua defendant may not correspond with the best interests of a defendant qua patient or potential patient. The provisions of the old law and the Act may therefore place advocates in a criminal trial, both prosecution and defence, and particularly the defence, in a position where a conflict of interest between those two roles arises or may arise. This may be particularly acute if the judge raises the issue of fitness to plead during the course of a trial in which the defendant does not wish the issue}\]

to be raised, for example because he has a good defence on the merits. 

*The new Act does nothing to address the duality of the roles of the trial advocate.*

92. Like the DVCVA 2004, the Consultation Paper does little to address the duality of the roles of the trial advocate. Indeed, we go so far as suggesting that the Commission’s proposals would have the effect of significantly increasing the number of defendants who meet the Commission’s proposed legal test with the consequence that more contested s.4A hearings are likely (with associated costs and delays), coupled with an increased risk in the incidence of a conflict of interest given the advocate’s dual role.

93. The Commission has set out its case for reform of s.4A hearings at CP para.6.11 to 6.54. It is an erudite analysis. But 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).  

**Question 1**

94. **Question 1: 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 hearing 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?**

95. We agree that the term “unfitness to plead” is not apt to describe the issue of whether or not a defendant has the capacity to participate effectively in the trial.

96. We do not agree with the Commission that under “the current Pritchard test, the role of special measures is not considered”. It is true that recent cases have not discussed the *Pritchard* test in the context of special measures but the absence of discussion does not mean that a consideration of such measures is irrelevant or excluded. Indeed, as we have pointed out (above), the judges in the cases of

123 We note that Provisional Proposal 5 is that “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 and where any other reasonable adjustments have been made”.

124 CP, para.4.25.
Dyson and Pritchard did consider measures that we would now describe as “special measures”. In Dyson, the judge appears to have called upon two witnesses to attempt to communicate with the defendant (who was deaf and dumb). In the case of John M, one of the psychiatrists expressed the opinion that JM was fit to stand trial “provided that measures were taken to cater for his memory difficulties, such as the provision of frequent breaks so that matters could be explained to him.”

97. The overarching consideration is whether the defendant’s trial is fair and Convention compliant. We are not aware of complaints from the judiciary that the Pritchard test has resulted in injustice (the CP provides no such reports/complaints).

98. Once the court is alerted to the existence of a defendant’s physical or mental condition and which, unless addressed, might render the defendant’s trial unfair, it should be open to the Court to consider steps or measures that will enable the defendant to participate effectively in the trial. Some trial judges are permitting vulnerable defendants to give evidence through an intermediary notwithstanding that s.104 of the Coroners and Justice Act 2009 has yet to be brought into force (and note Part 29 of the Criminal Procedure Rules 2010, in relation to special measures, defendant’s evidence directions, and the use of intermediaries).

99. There may be merit in adding to the Pritchard test a further consideration, namely, “any other relevant factor” (see s.53F(2)(b) of the Criminal Procedure (Scotland) Act 1995). However, whether a factor is “relevant” must be judged in the context of the aforementioned overarching requirement that the trial is fair. 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. We point out that in John M, the Court of Appeal did not criticise the trial judge who (on one view) expanded the factors to be considered to determine whether D was unfit to plead. The Court of Appeal remarked that “to include additional tests, even if unnecessary, can scarcely lower the standard of the test to be met when the judge had said that a failure to be able

125 [2003] EWCA Crim 3452, [14].
126 We point out that contrary to what is said in CP para. 2.62 our experience is that Counsel and solicitors are able to detect psychiatric problems, or at least detect that there may be such a problem that requires investigation.
127 Inserted into the Criminal Procedure (Scotland) Act 1995 by s.170 of the Criminal Justice and Licensing (Scotland) Act 2010.
128 The Commission may wish to consider what options ought to be available to the trial judge in those circumstances, e.g. whether proceeds may be stayed, or postponed, or to direct a ‘s.4A hearing’ of the facts/issues.
129 [2003] EWCA Crim 3452
to do any one of the six things would suffice to render the appellant unfit to stand trial” [27].

100. Although the issue of a defendant’s capacity to stand trial will often arise and be determined pre-trial, there may be circumstances in which the issue arises during the trial, or at the point of sentencing or the making of determinations in confiscation proceedings.

101. We are firmly of the view that the section 4A hearing should continue to be by judge and jury. We were less united on the question of whether the issue of ‘unfitness’ should also be determined by a jury. One member of the Group makes the powerful point that the proposed new test is broader than the Pritchard criteria with the result that there would be more contested hearings, and that the importance of the outcome is a highly material consideration.

Question 2

102. Question 2: 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? (CP. Paragraph 4.31)

103. Earlier in this Response we posed the question 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. We provisionally state that there may be some merit in vesting the Crown Court with powers similar to those available in Magistrates’ Courts, to deal with defendants with a mental or physical condition: see section 37(3) of the Mental Health Act 1983, and section 11(1) of the Powers of Criminal Courts (Sentencing) Act 2000.130

104. We consider that there may be cases where the defendant and the court would be assisted were a psychologist or psychiatrist to attend the hearing(s), perhaps acting as an intermediary, or to alert the court to difficulties that ought to be addressed in order that the proceedings are fair. We note that during the highly publicised trial

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130 See CP, paras. 8.4 to 8.7.
of Mr Barry George at the Central Criminal Court in August 1998, a psychologist had sat with him in the dock.\textsuperscript{131}

Question 3

105. \textbf{Question 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? (Paragraph 6.153)}

106. We remind ourselves that the s.4A hearing was “intended to counter the problems which arise when an accused cannot participate effectively in his or her trial by giving appropriate instructions to his or her lawyers, following the proceedings and, if he or she wishes, giving evidence in his or her own defence” [CP, para.6.4].

107. The Commission state that the statutory procedure “has more or less consistently succeeded in achieving that objective. Broadly speaking, it does what it was intended to do which is to enable the prosecution’s evidence to be properly tested and to allow any points which can be properly made in the accused’s favour to be put before the jury for their consideration” [CP, para. 6.5]. We have no reason to doubt the correctness of that statement.

108. The s.4A hearing is a limited enquiry, namely, to determine whether the defendant “did the act or made the omission charged against him as the offence” (s.4A(2), 1964 Act). We recognise that a significant problem with that formulation is whether and in what circumstances it is necessary for the jury to have regard to the fault element of the offence in question.\textsuperscript{132} It is clear that there are offences in respect of which the conduct element of the offence possesses a mental ingredient of some kind: examples of these are set out in CP, para.6.28 (e.g. failing to disclose knowledge or suspicion of money laundering, s.330, s.331, POCA 2002).

109. The Commission’s preferred option for reform is Option 5 [emphasis added]:

6.129 One way would be to have a procedure where, in so far as is possible, all the elements of the offence are considered. The prosecution would have the burden of proof in relation to this. In determining whether all elements of the offence are proved, it should be possible to consider defences in so far as this is consistent with the fact that decisions about the section 4A hearing are made by the accused’s appointed legal representative. In other words, as long as there is a sufficient evidential

\textsuperscript{131} \url{http://news.bbc.co.uk/1/hi/uk/7537797.stm} Mr George was tried and acquitted of the murder of the television presenter, Jill Dando.

\textsuperscript{132} CP, para. 6.7.
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 interests. If the accused is acquitted (because, for example, there is no evidence of fault) then there may (but would not necessarily be) a further hearing to consider whether or not the acquittal is because of mental disorder existing at the time of the offence.

6.130 As envisaged, there would be three possible outcomes to this procedure:

1. a finding that the accused has done the act or made the omission and that there are no grounds for acquitting him or her;
2. an outright acquittal; or
3. an acquittal which is qualified by reason of mental disorder.

110. The Commission’s thinking is summarised at CP para.6.138, namely, “In our view, option 5 strikes the most appropriate balance between protecting the accused and the public interest. By requiring the prosecution to prove all elements of the offence, it ensures greater fairness to an unfit accused. It also means that the difficulties resulting from the decision in Antoine are avoided and would mean that an unfit accused would benefit from the protection of article 6 of the European Convention on Human Rights. The provision for a qualified acquittal, however, ensures that the public can be protected from an accused who may be dangerous.”

111. At first sight Option 5 (and its underlying reasoning) has much to commend it. However, a hearing along such lines is barely distinguishable from a traditional jury trial. On the one hand the defendant would be advantaged to the extent (a) that the burden of proof would be on the prosecution throughout (and presumably in all cases),\(^{133}\) (b) that his/her legal representative would be free to put forward answers and defences in the accused’s best interest,\(^{134}\) and (c) that the accused may be subject to special measures. The ‘sting in the tail’ is that even if the defendant is acquitted, he might find that a further hearing takes place, the acquittal becomes “qualified”, and he is then made the subject of an order under s.5 of the 1964 Act. In short, he may find that his acquittal is a ‘Pyrrhic Victory’ and that he is in a worse position than if he had held out for a traditional trial or declined to assert that he lacked decision-making capacity.\(^{135}\) The Commission’s proposals involve up to two hearings, and possibly three (i.e. determination of capacity, trial of the facts, qualified acquittal determination). The impact of such hearings on the public purse and court time is obvious.

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\(^{133}\) What would be the position in relation to strict liability offences?

\(^{134}\) Whether this is actually an “advantage” to the accused is subject to the submissions we have made regarding the right to self-determination (personal autonomy).

\(^{135}\) References to the masculine include the feminine gender.
112. It seems to us that problems and issues relating to a ‘trial of the facts’, where D has been found to be unfit to plead, are linked to the level of severity associated with orders that a Court may make in D’s case, as well as concerns that D and/or the public may need to be protected from D. It could be argued that the unfitness to plead regime may bring to the attention of public authorities a vulnerable person who is in need of (or seeks) assistance or care. On that basis, the focus of attention moves away from whether D did the act or not, to providing the care and assistance that D needs/seeks. Similarly, if it is evident that D poses a risk to the public, then it is arguable that (regardless of whether D did the act alleged) that risk should be addressed. These difficult issues might be easier to address if the procedure for determining ‘fitness to plead’ was confined to a narrow band of cases where D’s disability is profound/evident. But the converse is true if the threshold of ‘unfitness to plead, etc’ is set low.

113. A further concern is whether the section 4A procedure (of whatever form) compounds incoherence that arguably exists in the trial process. We briefly look at three situations that may be said to give rise to that incoherence. In relation to the situation (ii) below, there is no disposal of the kind specified in section 5 of the 1964 Act if the trial does not proceed.

i. First, the existing scheme under the 1964 Act for determining unfitness to plead applies to trial on indictment but not to summary trial [see CP, Part 8].

ii. Secondly, were a court to be persuaded to stay proceedings as an ‘abuse of process’ on the grounds of a defendant’s incapacity, there would be no trial of the facts and no disposal other than the defendant being ‘released’.

iii. Thirdly, having regard to the decision of cases such as R v Jones, there are circumstances in which a defendant may be tried in his/her absence including where a defendant is ill or incapacitated [per Lord Bingham, emphasis added]:

6. For very many years the law of England and Wales has recognised the right of a defendant to attend his trial and, in trials on indictment, has imposed an obligation on him to do so. ... But for many years problems have arisen in cases where, although the defendant is present at the beginning of the trial, it cannot (or cannot conveniently or respectably) be continued to the end in his presence. This may be because of genuine but intermittent illness of the defendant (as in R v Abrahams (1895)

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[136] [2002] UKHL 5
114. A defendant who is absent through illness may nonetheless have provided his legal representatives with sufficient instructions to enable a trial to proceed in his or her absence. But the key feature is that the defendant is able to participate effectively in the trial process, and this issue is context/fact specific.

115. If a defendant is unable to participate effectively in a criminal trial by reason of a physical or mental condition then, despite the protections woven into the procedure under Option 5, it is difficult to see how the defendant would truly be able to participate effectively in a hearing of the kind proposed by the Commission. For example, there are many cases where the material facts/answers rest within the mind/knowledge of the accused. If the accused is unable to communicate those facts/answers to his/her legal representatives or to the Court, fact-finders are left speculating as to what they might be. Expressed rhetorically, would the accused in the cases of Pritchard (1831) and/or Dyson (1831) fare better under the procedure proposed under Option 5? Unfortunately, the CP is silent on the issue and it provides no examples. On the other hand, if an accused is able to participate with the assistance of special measures, then the preferred course is a trial pursued in the ordinary way.
116. It follows from the above that whilst we are content to proceed on the basis that the Commission has correctly identified options that merit consideration, we are not yet persuaded that Option 5 is needed or desirable.

Question 4

117. **Question 4:** If consultees do not agree that option 5 is the best option for reform, would they agree with any other option? (Paragraph 6.153)

118. We have acknowledged the complexity of this topic in our response to Question 3. For the moment (pending further consultation and reflection) we confine ourselves to the representations that we have made thus far.

Question 5

119. **Question 5:** 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? (Paragraph 6.159)

120. We find the expression “no grounds for acquittal” potentially confusing. It is submitted that a question answered positively is to be preferred to one that is couched in the negative. We tentatively suggest that the correct course is for the indictment to be carefully drafted, including (if appropriate) alternative charges. Judges are now encouraged to draft ‘routes to verdict’ and we are inclined to the view that a similar approach could/ought to be taken in relation to a section 4A hearing. One member of the Working Group (whose views are likely to be shared by many legal practitioners) suggests that a jury should also determine whether a defendant has decision-making capacity.

Question 6

121. **Question 6:** 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? (Paragraph 7.26)

122. Our provisional view is that there ought to be provision that enables a defendant who has been found to have ‘done the act’ to apply for a remission for trial. Despite the procedure proposed in Option 5, there may be circumstances in which, subsequent to the section 4A hearing, information relevant to the trial of the facts/issue becomes available (e.g. the accused recovers sufficiently to provide it).
We leave open (pending further consultation and reflection) whether and in what circumstances such provision should be restricted. There may be a case for imposing a time limit, and/or that the information must be ‘new’ in the sense that it was not available or capable of being adduced at the time of the original hearing. It may be that some consideration would need to be given to the extent of the court’s powers of case-disposal in the event that the defendant is convicted (e.g. where D has been hospitalised for many months).

**Question 7**

123. **Question 7:** 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? (Paragraph 7.44)

124. Our provisional view is that this is a matter best determined by the trial judge on a case-by-case basis albeit that there may be merit in a presumption that the hearings are discrete. Such determinations are fact-specific and it would be imprudent to lay down hard-and-fast rules. Option 5 presents particular problems in this regard because of the matters that the prosecution would be required to prove, including all the elements of the offence(s) charged.

125. However, there may be compelling reasons why the hearings should be joined (e.g. each hearing would be lengthy, detail-rich, and where the strands of the evidence involving all the defendants are so heavily interwoven that it would be in the interests of justice for the cases of all defendants to be heard together).

126. There may be other cases (arguably the majority) where discrete hearings are warranted because the cases can be presented separately without prejudice to the parties and that a joint hearing might result in directions to the jury (and routes to verdicts/findings of fact) being unduly complex, confusing, and even contradictory (e.g. as to the burden of proof on a given charge).

**Question 8**

127. **Question 8:** 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? (Paragraph 8.37)

128. We answer this question in the affirmative. There is no logical reason why the tests should be different as the rationale is rooted in the defendant’s effective participation in the proceedings with an understanding of the process.
Question 9

129. Question 9: Do consultees think that if an accused lacks decision-making capacity there should be a mandatory fact-finding procedure in the magistrates’ court? (Paragraph 8.37)

130. Our provisional view is that the decision should be discretionary (but subject to published guidelines to avoid seemingly inconsistent outcomes and arbitrary decision-making on the part of the Court).

Question 10

131. Question 10: 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? (Paragraph 8.37)

132. Not applicable

Question 11

133. Question 11: Do the matters raised in questions 8, 9 and 10 merit equal consideration in relation to the procedure in the youth courts? (Paragraph 8.68)

134. Yes.

Question 12

135. Question 12: How far if at all, does the age of criminal responsibility factor into the issue of decision-making capacity in youth trials? (Paragraph 8.69)

136. The age of the defendant is a material consideration especially when it pertains to his/her maturity and/or ‘developmental maturity’.

Concluding remarks

137. The Commission’s provisional proposals, were they to become law, would have profound consequences. But its preferred option for determining a defendant’s lack of decision-making capacity is constructed on the assumption that a
psychiatric test can be “defined” and that it would be the standard test for assessing capacity. In the event that such a test cannot be defined, or is flawed, no alternative option for reform is advanced by the Commission in the CP. The publication of the CP was therefore arguably premature. However, even if a psychiatric test can be developed, we believe that its value is in the information that it provides, rather than being prescriptive of the determination. Whether a “defined psychiatric test” comes into being or not, the CP has usefully put the Prichard test under the microscope and makes a powerful case for the use of special measures, as appropriate, in relation to vulnerable defendants as well as non-defendant witnesses.

Rudi Fortson QC, Peter Grieses-Smith, and Valerie Charbit

25th January 2011
APPENDIX A: Law Commission’s Provisional Proposals

Provisional Proposal 1: 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. (Paragraph 3.41)

Provisional Proposal 2: A new decision-making capacity test should not require that any decision the accused makes must be rational or wise. (Paragraph 3.57)

Provisional Proposal 3: 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. (Paragraph 3.99)

Provisional Proposal 4: 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 the trial which the accused faces. (Paragraph 3.101)

Provisional Proposal 5: 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 and where any other reasonable adjustments have been made. (Paragraph 4.27)

Provisional Proposal 6: 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. (Paragraph 4.31)

Provisional Proposal 7: A defined psychiatric test to assess decision-making capacity should be developed and this should accompany the legal test as to decision-making capacity. (Paragraph 5.17)

Provisional Proposal 8: 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. (Paragraph 6.140)

Provisional Proposal 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. (Paragraph 6.140)

Provisional Proposal 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. (Paragraph 6.152)

Provisional Proposal 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. (Paragraph 6.152)

Provisional Proposal 12: 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 medical evidence confirms) that the accused is still unfit to plead, 26 the court should be able to reverse the decision to remit the case. (Paragraph 7.21)

Provisional Proposal 13: 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. (Paragraph 7.21)
**Provisional Proposal 14**: 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. (Paragraph 7.59).
Law Commission consultation paper no 197
‘Unfitness to plead’
Law Society response to the Law Commission’s
Summary of provisional proposals and questions
January 2011
LAW COMMISSION CONSULTATION PAPER No 197 ‘UNFITNESS TO PLEAD’

LAW SOCIETY RESPONSE TO THE LAW COMMISSION’S SUMMARY OF PROVISIONAL PROPOSALS AND QUESTIONS

Introduction

The Law Society is the representative body for over 140,000 solicitors in England and Wales. It negotiates on behalf of the profession, and lobbies regulators, Government and others. It welcomes the opportunity to respond to this consultation paper.

This response has been prepared on behalf of the Law Society by members of its specialist Criminal Law, and Mental Health and Disability Committees. The Criminal Law Committee is drawn from a wide range of backgrounds, including a number of prosecution and defence solicitors, together with a member of the Justice’s Clerks Society, and an academic lawyer. Some members of the Committee hold part-time judicial office. The Mental Health and Disability Committee is made up of lawyers practising in the fields of disability discrimination, mental health, mental capacity and community care on both the claimant and respondent side and also has members from other professions. The diversity of the Committees’ compositions is intentional.

The Law Society welcomes the Law Commission’s consultation paper in relation to unfitness to plead. We agree that the law as it presently stands is out of date, and in need of reform. We welcome the paper’s emphasis on ensuring that people who suffer from a mental illness or impairment are treated fairly by the criminal justice system, that the test for unfitness should be one centred around decision making capacity, and that the issue of whether they are able to effectively participate in criminal proceedings is paramount. We also welcome the fact that the proposals aim to make the test for capacity to participate in a criminal trial mirror the test applicable in the civil context.

Here follows our view of the provisional proposals and consultation questions.

Provisional Proposal 1: 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. (Paragraph 3.41)

The Law Society agrees that the current Pritchard test is outdated, does not ask the right questions and is generally unfit for purpose. We agree that a new test which assesses the accused decision-making capacity for trial, and which takes into account the need for the defendant to meaningfully participate in the criminal proceedings, would be far preferable.

In the case of R v John M [2003] EWCA Crim 3452 the Court of Appeal approved the trial judge’s directions to the jury that the defendant must be capable of doing 6 things, namely:
(1) understand the charges
(2) be capable of deciding whether to plead guilty or not
(3) exercise his right to challenge jurors
(4) instruct his/her solicitors and counsel
(5) follow the course of proceedings; and
(6) give evidence in his own defence

The Society would recommend that the Law Commission consider the inclusion of some or all of these criteria when considering the criteria for any new test of unfitness to plead in the criminal context. Further, any new test should rest firmly on the assumption that a person has capacity unless it can be established otherwise, in accordance with the principle contained in Part 1 of the Mental Capacity Act 2005.

Provisional Proposal 2: A new decision-making capacity test should not require that any decision the accused makes must be rational or wise. (Paragraph 3.57)

We agree that a new test should not require that any decision the accused makes must be rational or wise.

Provisional Proposal 3: 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. (Paragraph 3.99)

We agree with this proposal. The assessment should take into account decision-making capacity of the accused by reference to the entire spectrum of trial decisions that may be required. We further agree that the person will be found to either have or lack decision-making capacity for the criminal proceedings.

Provisional Proposal 4: 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 the trial which the accused faces. (Paragraph 3.101)

We agree that the determination must be case specific and take account of the complexity of the particular proceedings and gravity of the outcome. We further agree that particularly the judge should take account of how important any disability is likely to be in the context of the decisions that the accused will have to make in the context of the trial. Importantly, the judge should also be guided by the advice of experts.
Provisional Proposal 5: 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 and where any other reasonable adjustments have been made. (Paragraph 4.27)

We have concerns in relation to this proposal, which would take into account the use of special measures in assessing decision-making capacity. It would seem to require consideration of whether the individual has decision-making capacity, but if not, further consideration of whether the provision of special measures may alleviate that difficulty. In our view this would create a risk that somebody who is not truly able to participate properly in their trial, on the basis they lack decision-making capacity, is subject to criminal proceedings. There is a danger that the issue of unfitness to plead could be glossed over.

We would suggest that assessing the decision-making capacity is one distinct issue, which should be decided on a yes or no basis. If it is decided that the person does not have decision-making capacity, the availability of special measures will not alleviate that lack of capacity. In our view, special measures are about ensuring the participation by vulnerable people in their trial in a fair way, and are therefore not relevant to the issue of whether or not the person is unfit because they lack decision-making capacity. In our view, a clear distinction should be maintained between the two issues.

Provisional Proposal 6: 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.

We agree that expert evidence on the general effect of the person’s mental disorder or impairment should be admissible when the person wishes to give evidence.

Provisional Proposal 7: A defined psychiatric test to assess decision-making capacity should be developed and this should accompany the legal test as to decision-making capacity. (Paragraph 5.17)

We agree with the Commission’s view that the role of “psychiatric tests” should be to provide a validated and reliable means of assessing whether the accused has decision-making capacity in accordance with the legal test and that this test should inform the court as to whether the legal test as to decision-making incapacity is satisfied in the case at hand.

However, we believe that the test adopted should clearly be a legal test, albeit informed by expert evidence, including expert evidence that might well properly include use of validated and reliable psychiatric or psychological instruments. Whether the test of incapacity is satisfied may not be susceptible solely to expert evidence but may also be informed by ordinary evidence, and this emphasises further why the test of capacity should clearly be a legal test and not in any way apparently a psychiatric or psychological test.

It follows also that we would prefer the test to be referred to as the “capacity test”, as the use of the phrase “psychiatric test” implies both that the test is a medical rather than legal test and that those who lack the required capacity will be suffering from a mental disorder, which is not necessarily the case.
Further, given that 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, we believe it would be unwise to adopt an overly complex test of capacity.

It follows from our concern about reliance upon any one psychiatric or psychological instrument, or instruments, that we also agree with the Commission that in most cases the test would be accompanied by a clinical interview.

We do not agree with the Commission’s proposal that the decision making capacity of the accused can only be determined on the evidence of two medical practitioners, one of whom must be approved under section 12 of the Mental Health Act 1983. An assessment of mental capacity should be undertaken by professionals who are skilled and experienced in assessing disabilities relevant to capacity. Experience has shown that the fact that a psychiatrist is approved under s.12, for example, does not necessarily imply that he or she has such skills, and there is little evidence also to support the contention that medical practitioners who are not psychiatrists possess such skills.

Further, some psychologists do possess such skills. Given that we believe that both psychologists and psychiatrists should be able to provide the court with evidence of capacity, it follows that we agree with the Government’s view that the concern of the Joint Committee on Human Rights that the use of evidence from psychologists is misplaced (para.5.35).

Provisional Proposal 8: 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. (Paragraph 6.140)

We agree with the Commission’s analysis of the problems surrounding the Section 4A hearing, which although designed to ascertain whether a person who is unfit to plead did the act, cannot adequately take into account cases where the offence charged does not lend itself readily to a neat division of the conduct and fault elements. We agree that the problem with the case of Antoine is that it requires a strict division between the conduct and fault elements of the offence, and that the reality is that it is not always possible to disregard the mental state of the accused for the purpose of ascertaining whether he or she had done the ‘act’.

Like the Commission, we prefer option 5. We agree that the procedure should be such that, in so far as is possible, all the elements of the offence are considered, with the prosecution having the burden of proof in this regard. We agree that in determining whether all elements of the offence are proved, it should be possible to consider any defence/s that may be open, in so far as this is consistent with the fact that decisions about the section 4A hearing are made by the accused’s appointed legal representative.

However, we query whether ‘sufficient evidential basis’ is too narrow a test, and that the advocate should be able to explore any possible defence that may be open on the facts of the case. This could perhaps be formulated as ‘any reasonable defence’ possibly open on the facts of the case. In our view, the test needs to be wider than a sufficient evidential basis to enable the possibility of a defence to be explored, given that the advocate will not have the advantage or assistance of their client’s instructions.
Provisional Proposal 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. (Paragraph 6.140)

We agree that if the accused is acquitted there should be provision for the judge to hold a further hearing to determine whether or not the acquittal was because of a mental disorder existing at the time of the offence.

Provisional Proposal 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. (Paragraph 6.152)

We agree with this proposal.

Provisional Proposal 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. (Paragraph 6.152)

We agree with this proposal.

Provisional Proposal 12: 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 medical evidence confirms) that the accused is still unfit to plead, the court should be able to reverse the decision to remit the case. (Paragraph 7.21)

We agree with this proposal.

Provisional Proposal 13: 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. (Paragraph 7.21)

We agree with this proposal.

Provisional Proposal 14: 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. (Paragraph 7.59)

We agree with this proposal.
In addition to the above proposals, we also ask the following questions:

Question 1: 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 hearing 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? (Paragraph 4.27)

Yes, we agree. We submit that the question of whether somebody has decision-making capacity should be an either yes or no decision and if the person has decision-making capacity they should be subject to trial, with or without special measures, depending on the level of assistance which they need. Please see our answer to proposition 5 in this regard.

Question 2: 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? (Paragraph 4.31)

A particular stumbling block, especially for clients with learning disabilities, is the overall language used in the court setting. Words and expressions which are in everyday usage in the Crown Court can be quite alien to those with no experience of criminal justice system, as well as other difficulties. Consideration could be given to reviewing legal terms and language used in criminal trials, perhaps in conjunction with the Plain English campaign. In this regard we note in that the very opening words of criminal trials, “you are charged on an indictment containing 3 counts”, the words “indictment” and “counts” are likely to be foreign to most people unfamiliar with the courts.

It is also the case that the nature of adversarial questioning, albeit inherent to our criminal justice system, can fail to take account of levels of understanding of impaired defendants. There should be provision to recognised this in individual cases, including as advised to the court by relevant expert evidence, such that the nature of questioning, and not just terminology, should be adjusted to match the defendant’s particular cognitive impairments.

Question 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? (Paragraph 6.153)

Yes, we consider that all the possible options have been correctly identified.

Question 4: If consultees do not agree that option 5 is the best option for reform, would they agree with any other option? (Paragraph 6.153)

Not applicable.
**Question 5:** 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? (Paragraph 6.159)

Yes. If option 5 is adopted it will be sensible to allow the jury to find that an unfit accused has done the act and that there are no grounds of acquittal in relation to an act other than the specifically charged offence. We agree this would probably be most relevant in relation to a charge of murder reduced to manslaughter by reason of diminished responsibility. Obviating the need for a hearing that the acquittal was because of mental disorder at the time of the offence would be a sensible way to proceed. The court would then be able to proceed to a disposal in the same way as if there had been a finding that the accused did the act and there were no grounds for acquittal in relation to any other offence. We agree that it may well have no practical effect outside this specific example.

This would also mean that that defence would have to consider defences to all possible offences that may be open on the indictment.

**Question 6:** 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? (Paragraph 7.26)

We agree that there may be circumstances where a person found to have done the act and where there were no grounds for acquittal should be able to request remission for a trial, but we would suggest that this is not likely to happen often.

**Question 7:** 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? (Paragraph 7.44)

No. We believe that there should be separate hearings in relation to an accused who is found to be unfit to plead. Notwithstanding the fact that witnesses will have to give evidence twice, potentially, we consider it would be simply too confusing and difficult for juries to be able to distinguish the types of findings that they would be required to make in relation to co-defendants in such circumstances. Additionally, in our opinion a decision to order a joint hearing would conflict with Part III 30.4 of the Consolidated Criminal Practice Direction which states as follows:

‘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 a 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’.

**Question 8:** 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? (Paragraph 8.37)

Yes.

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. It is our view
that defendants with mental health problems are at a distinct disadvantage in the Magistrates’ Court in comparison to being dealt with in the Crown Court.

Whilst the procedure for establishing insanity in the Magistrates’ court is different from that in the Crown Court, it is helpful that a procedure exists. This is not the case however for those Defendants who are unfit to plead. The piecemeal and inadequate nature of Magistrates’ court procedures has been highlighted by Taylor and Krish in ‘Advising Mentally Disordered Offenders’ (Law Society Publishing, 2nd Edition, Chapter 7).

We consider that a similar test for establishing fitness to the decision making capacity test, should be used in the Magistrates’ court. Further, we are not convinced that ‘it may take considerably more time for matters to be resolved and there might be an undesirable delay in securing treatment for those accused who need it’ (para 8.32). In fact, the existence of a duty psychiatrist scheme (rarely available in the Crown court) in some Magistrates’ courts will mean that solicitors have quicker access to expert advice and a greater possibility of hospital admission if required for their clients.

We urge the Law Commission to make specific proposals in relation to summary proceedings and, that, as far as possible, these should mirror the proposals for the Crown Court. It is clear that equally vulnerable defendants appear in the Magistrates’ court as in the Crown Court and they should be entitled to the same standard of safeguard. Our comments apply equally to the position in the Youth Court.

**Question 9:** Do consultees think that if an accused lacks decision-making capacity there should be a mandatory fact-finding procedure in the magistrates’ court? (Paragraph 8.37).

Yes.

**Question 10:** 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? (Paragraph 8.37)

We believe that the mandatory fact-finding procedure should mirror the provisional proposals 8 and 9.

**Question 11:** Do the matters raised in questions 8, 9 and 10 merit equal consideration in relation to the procedure in the youth courts? (Paragraph 8.68)

Yes, we firmly believe that the matters raised in questions 8, 9 and 10 merit equal consideration in relation to procedure in the youth courts.

**Question 12:** How far if at all, does the age of criminal responsibility factor into the issue of decision-making capacity in youth trials? (Paragraph 8.69)

We believe that the age of criminal responsibility is a very considerable factor in relation to the issue of decision-making capacity in youth trials. The Law Society is of the view that the age of 10 years is far too low, and that there is a strong case to be made for raising it to 14 years, with a system in place for diverting those under that age from the criminal justice system entirely. However, there would still have to continue to be a court system in place to decide whether those under the age of 14
years were guilty or not, and where a child lacked decision-making capacity the same procedure should apply as in an adult court.
Response to the Consultation Paper from the Law Commission on Unfitness to Plead

On behalf of the Legal Committee of the Council of District Judges (Magistrates’ Courts)
City of Westminster Magistrates’ Court
70 Horseferry Road
London SW1P 2AX

1. 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 hearing 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?

Yes, we consider this to be the right approach

2. 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?

We consider that if certain special measures available to witnesses pursuant to the Youth Justice and Criminal Evidence Act 1999 were available to defendants in appropriate cases this could potentially enhance the ability of such defendants to participate effectively in the trial process. We note that Section 33A of the 1999 Act allows defendants to give evidence via video link if the statutory grounds are met and consider that examination through an intermediary (Section 29) and the provision of appropriate aids to communication (Section 30) could be utilized in the same way.

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?

We consider that the paper correctly identifies the options for reform and do not propose any further options.

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

We agree that option 5 represents the best option for reform. However, we raise the question as to whether there is a need for the further hearing envisaged to establish whether any acquittal is on the basis of
mental disorder existing at the time of the offence. This further hearing would be a trial in which the accused could not participate. If the mental element needs to be proved at the initial hearing then the court would be bound to have considered the accused’s mental state at the time of the offence and could make a finding at that hearing as to whether any acquittal was on the grounds of lack of capacity. There will, of course, be practical problems in ascertaining the accused’s mental state at the time of the offence; any psychiatric examination will usually not be contemporaneous and the accused will not give evidence.

In considering the other options we consider that the current procedure needs revision and would not therefore support option1.

The second option (Butler Committee recommendations) could result in dangerous offenders being acquitted and not liable to be sectioned and we would not therefore support this approach.

The Scottish procedure is one that we consider could merit further consideration.

5. 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?

We can envisage circumstances in which this could be worthy of consideration. However, if any reforms are introduced in the Magistrates’ Court as well as the Crown Court this would represent fundamental change in Magistrates’ Courts procedure as alternative verdicts are only available in a very small number of cases.

6. 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?

We consider there is force in the arguments against the accused having a right to request remission for trial. The reformed Section 4A test proposed would require all elements of the offence to be proved and all potential defences considered. There would be obvious difficulties in locating witnesses and, in any such witnesses then recalling events accurately as any subsequent remittal would be likely to be some time after the incident in question. However, we consider that there may be a case for a very limited grounds upon which an accused could seek remittal; for example if new evidence came to light which cast doubt on the original finding.

7. 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?
We consider that the concerns about a joint trial are alleviated by the protective factors envisaged by the reformed section 4A; particularly the need to prove all elements of the offence and the appointment of a representative for the accused. There are clear public interest issues in having a joint trial in such circumstances; not least the benefit to witnesses, delay and costs.

8. 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?

We consider that the new test should apply equally on summary trial. The CP rightly identifies the fact that there is no standard test to be applied in the Magistrates’ Court when determining this issue. However, we consider that if the new test is applied to courts of summary jurisdiction this will greatly increase the number of pre trial hearings and will impact on delay. There is a real issue in the youth court, particularly as to the appropriateness of the disposals available if the court does determine an accused unfit for trial. In many cases it will be plain from the outset that a hospital order will not be an appropriate disposal and yet the court will still be obliged to embark on the section 4A process, with all the attendant stress and anxiety caused to witnesses (who may well be children/young people) and the accused and his/her family. For example, an accused aged 15 with a mental age of six may be charged with a sexual offence. As a result of the charging process Social Services and CAMHS become involved with the young person and his/her family and significant measures are put in place in the community to manage the young person within the community. If the authorities are satisfied that this community package is enduring and appropriate to the risks involved a hospital order is unlikely to be recommended.

We note that Section 24 Domestic Violence, Crime and Victims Act 2004 amends Section 5 Criminal Procedure (insanity) Act 1964 to allow the crown court to make a supervision order on a finding of unfitness to plead; there may be merit in considering a disposal of this nature in courts of summary jurisdiction, particularly the youth court where many such cases do not meet the criteria for a hospital order but may well merit a supervision order.

If the capacity based test is to apply in the magistrates’ court (including the youth court), we would suggest that such cases are only heard by a District Judge (Magistrates’ Courts) due to their potential complexity and the need for judicial continuity in dealing with pre-trial case management issues.

9. Do consultees think that if an accused lacks decision-making capacity there should be a mandatory fact-finding procedure in the magistrates’ court?
The CP alludes to the problem that we have identified above that the disposals available after a fact finding hearing may not be appropriate and that a stay of proceedings is an avenue that may be pursued in the Magistrates’ Courts in such cases. It may therefore be appropriate to provide the court with discretion as to whether a fact-finding hearing is appropriate.

10. 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?

We consider it would be appropriate for the procedure to be essentially the same in both jurisdictions.

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

Yes, however as already noted this would undoubtedly increase the number of pre-trial hearing in the youth courts as it is widely accepted that mental health issues are far more common in young offenders.

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

This is probably a question for the child psychiatrists to answer. However, with the age of criminal responsibility being 10 years of age there will be real issues to be considered as to the decision-making capacity of very young defendants.

Submitted by Gill Allison
District Judge (Magistrates’ Courts)
On behalf of the Legal Committee of District Judges (Magistrates’ Courts)
26th January 2011
27 January 2011

Dear [Name],

RE: UNFITNESS TO PLEAD

My name is Arlie Loughnan. I am writing in response to the Consultation Paper on Unfitness to Plead. Please find my responses to selected provisional proposals and questions enclosed.

Yours sincerely,

[Signature]

Dr ARLIE LOUGHNAN | Senior Lecturer
Faculty of Law
THE UNIVERSITY OF SYDNEY
Rm 527, New Law Building F10 | The University of Sydney | NSW | 2006 | AUSTRALIA
Response to Law Commission CP 197

 Provisional Proposal 1: 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. (Paragraph 3.41)

 The current test for unfitness should be replaced with a broader and more holistic test along the lines proposed. The current test refers to the defendant’s ability to understand the trial proceedings, challenge jurors and instruct lawyers, but it is piecemeal in structure and overly restrictive. The Pritchard criteria for unfitness set a low threshold for a defendant to be found fit to plead. An indication of the low threshold for fitness may be found in the type of disabilities that are encompassed by the criteria for unfitness: while the criteria extend to cover both difficulties of communication and comprehension, in relation to comprehension, they are restricted to defects of cognition. As a result, delusions, mood disorders and other features common to mental illness, and potentially relevant to a defendant’s understanding of the trial process, are strictly excluded from the parameters of the legal inquiry (Grubin 1993: 753). As R M Mackay has concluded, a defendant will be fit even if he or she has only a ‘rudimentary’ understanding of the trial process (1995: 245).

 Provisional Proposal 2: A new decision-making capacity test should not require that any decision the accused makes must be rational or wise. (Paragraph 3.57)

 This proposal reflects the common law and is to be supported. It is clear that the legal question of a defendant’s fitness to plead does not correspond to his or her ability to act in his or her own best interests (R v Robertson [1968] 1 WLR 1767; R v M [2003] EWCA Crim 3452). In Robertson, the Court of Appeal allowed an appeal from a murder trial where a defendant, who was representing himself, was found unfit. The Court of Appeal concluded that, as the trial judge had directed the jury with reference to the defendant’s ability to make a ‘proper’ defence, the jury may have erroneously thought that a defendant who could not act in his or her best interests was unfit (at 1773).

 Provisional Proposal 3: 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. (Paragraph 3.99)

 The legal test for unfitness should provide as much protection to the defendant as possible. Mackay, among other commentators, suggests that the criteria should be expanded so as to amount to a test of ‘decisional competence’, a broader notion than the current test (Mackay 1995: 244-46 and Scottish Law Commission 2004: Paragraphs 4.11-4.19). The type of reform proposed would replace the current, narrow cognitive criteria of unfitness with a thicker notion covering the defendant’s capacity to participate effectively in the trial process.

 The Commission’s proposal usefully draws on the Mental Capacity Act 2005 which provides that a person is unable to make a decision for him or herself if he or she is unable to understand the information relevant to the decision, retain that information, use or weigh it as part of the process of making the decision or communicate the decision (Section 3(1)). The Act also provides that 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’ (Section 1(3)).
Reform in the direction of the civil law standard has also been proposed by the Scottish Law Commission, which reasoned that a test of ‘effective participation’ in criminal trials would meet European Convention on Human Rights standards on a fair trial (2004: Paragraph 4.30). This thicker idea of capacity is also used as a basis for determining competency to stand trial (so called) in the United States (see Maroney 2006).

The development of a more robust set of criteria for a finding of unfitness would ensure that a larger number of defendants would be able to rely on the protection offered by the law on unfitness (Mackay 1995: 245-46). This would be a positive development as what is currently meant to be a protection for defendants with mental illness and intellectual and other impairments is failing to function as such.

_Propositional Proposal 4: 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 the trial which the accused faces. (Paragraph 3.101)_

Allowing judges to determine unfitness to plead in the context of each case has its advantages. This approach would permit judges to take into account factors such as the seriousness and complexity of the charge, the severity and fluctuations in any mental disorder and the nature of the evidence against the defendant (Grubin 1993: 757; see also Winnick 1995: 590-595). Those advocating flexibility in the criteria for unfitness hold that the meaning of unfitness to plead is dependent on the context in which the defendant finds him or herself (Freckelton 1996: 48; Winnick 1995: 590). 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 (Freckelton 1996: 48). Winnick labels this a ‘sliding-scale approach to competency’ (1995: 592). Ian Freckelton suggests that this is how forensic clinicians make determinations of fitness in practice (1996: 48). Freckelton concludes that the criteria for unfitness to plead ‘must have a degree of flexibility about them that recognizes that different intellectual demands are made on the accused in different forensic scenarios’ (1996: 50). The idea of an open-textured requirement for fitness to plead is intuitively attractive in that it grounds the decision about unfitness in all the circumstances of the case, but 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.

_Propositional Proposal 6: 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. (Paragraph 4.31)_

The Criminal Procedure (Insanity and Unfitness to Plead) Act 1991 mandated the use of expert medical evidence in relation to unfitness to plead (and the insanity defence). A requirement that expert evidence from two medical practitioners support a finding of unfitness (and insanity) had been recommended by the Atkin Committee on Insanity and Crime (Command Paper 2005) (1923: 9, 21), the Royal Commission on Capital Punishment (Command Paper 8932) (1953: Paragraph 225), and the Butler Committee (1975: Paragraph 10.41). The Butler Committee reasoned that, in practice, expert evidence is usually adduced (1975: Paragraph 10.41). The Committee seemed to be motivated to make such evidence mandatory because of the weighty consequences of a finding of unfitness: under the 1964
Act, both a finding of unfitness and a successful insanity defence resulted in the indefinite hospitalisation of defendants. Concerns to this effect were also evident is the decision of the European Court of Human Rights in Winterwerp v The Netherlands ((1979) 2 EHRR 387). In relation to the claim that Winterwerp’s right to liberty under Article 5 of the European Convention on Human Rights was violated after he was committed to a psychiatric hospital via an emergency procedure, the European Court stated that a decision to detain people of ‘unsound mind’ should be made on ‘objective medical expertise’ and that the relevant mental disorder ‘must be of a kind or degree warranting compulsory confinement’ (Paragraph 39).

With expert evidence now mandatory, empirical studies indicate that such evidence seems to be crucial to the outcome of an inquiry into unfitness (Grubin 1991: 545; Winnick 1995: 620). However, there also appear to be problems with the use of expert evidence in this context. As Grubin has argued, because ‘being unfit to plead is a not a psychiatric condition’ (1991: 548), and also because unfitness to plead does not have the profile of the insanity defence, there seems to be some confusion about the criteria for a finding of unfitness (Larkin and Collins 1989: 26; Mackay 1995: 225). In their study, Larkin and Collins examined pre-trial psychiatric reports and found that only about one third of them included a statement about unfitness to plead and supported this statement with reference to the legal criteria for such a finding (1989: 30). Similarly, Mackay and Kearns found that only a minority of pre-trial reports they examined explicitly addressed the criteria for a finding of unfitness (2000: 538). There also seems to be some confusion between the criteria for a finding of unfitness to plead and the ingredients of the insanity defence with some experts in Grubin’s study commenting on whether the defendant could distinguish between right and wrong (1991: 543). These empirical findings lend support to Grubin’s claim that psychiatrists use the criteria for unfitness to plead ‘idiosyncratically and arbitrarily’ (1991: 546). As Grubin has suggested, it is possible that those found unfit to plead are little different from ‘the majority of mentally disturbed defendants who come before the courts every year’ (1991: 545; see also Larkin and Collins 1989: 31).

As a result of these shortcomings in current practice, it seems advisable to permit expert evidence on the general effect of that mental disorder or impairment to be admissible.

_Provisional Proposal 8: 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._ (Paragraph 6.140)

_Provisional Proposal 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._ (Paragraph 6.140)

There is no doubt that Section 4A has proved unwieldy – it has proved impossible to neatly quarantine issues to be dealt with in a ‘trial of the facts’. In Antoine, the House of Lords reasoned that Section 4A strikes the right balance ‘between the need to protect a defendant who has, in fact, done nothing wrong, and is unfit to plead’ and ‘the need to protect the public’ in distinguishing between ‘a person who has not carried out the actus reus of the crime charged against him and a person who has carried out an act (or made an omission) which would constitute a crime if done (or made) with the requisite mens rea’ (at 375-76 per Lord Hutton). However, as noted in the Consultation paper, it is clear that injustice has resulted. The reasoning of the House of Lords in Antoine, and the Court of Appeal in Attorney General’s Reference (No. 3 of 1998), precludes an unfit defendant charged with murder from relying on the defence of diminished responsibility because this defence arises...
only where all the elements of the offence have been made out (Antoine at 368). As a result of these decisions, the only kind of defences an unfit defendant can rely on in a ‘trial of the facts’ are defences of accident, mistake or self-defence. In Antoine, Lord Hutton acknowledged that even these defences ‘almost invariably involve some consideration of the mental state of the defendant’ (at 376). To address this ‘difficulty’, Lord Hutton stated that, where there is ‘objective evidence’ of accident, mistake or self-defence, ‘the jury should not find that the defendant did the ‘act’ unless satisfied beyond reasonable doubt on all the evidence that the prosecution has negatived that defence’ (at 376).

Given the unsatisfactory effects of Section 4A, the Commission proposal to replace it 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 is to be supported.

**Provisional Proposal 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. (Paragraph 6.152)

**Provisional Proposal 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. (Paragraph 6.152)

Both of these proposals would represent improvements to the current law and are to be supported. Vesting authority in the judge to determine the need for a ‘further hearing’ at his or her discretion is an appropriate development of this area of the law, and it is expedient that a ‘further hearing’ be identified as a separate but connected fact-finding process as per the proposal. There is a tradition of accepting information about potential unfitness from a range of sources. Either the prosecution or defence may raise the issue of the defendant’s unfitness (Section 4, Criminal Procedure (Insanity) Act 1964). The judge must raise the issue of unfitness if he or she believes it to be an issue and it has not been raised by either party (Podola at 349-50 per Lord Parker). The fact that the defence, the prosecution or the judge may raise the issue of unfitness seems to be a legacy of the historical situation that anyone with knowledge about a defendant’s unfitness could raise the issue at trial. In Dashwood (R v Dashwood [1943] KB 1), the court stated that, when a defendant might be unfit, ‘the court acts in such a case on information conveyed to it from any quarter’, including the defendant, his or her advisors, or the prosecution or an independent person (at 4; see also Walker 1968: 231; CLRC 1963: Paragraph 15; R v H [2003] UKHL 1 at Paragraph 4). In current practice, it is likely that unfitness would be raised by the defence, prosecution or the judge as opposed to an independent person. However, this tradition should be maintained as it provides additional safeguards to the defendant.


Unfitness to plead – Some Responses to the Law

Commission’s Consultation Paper

By R.D. Mackay

Professor of Criminal Policy and Mental Health, Leicester De Montfort Law School, De Montfort University, Leicester

I have already submitted my draft article which deals with a number of issues including the threshold test for unfitness to plead, the “trial of the facts” and a number of other issues. I will not repeat in full these but instead will deal with points not already covered.

Paras 2.60 and 2.61 with regard to the number of unfitness findings being low see my remark in relation to the US position

Although it is difficult to make any real comparisons about the number of unfitness findings, the Guideline estimates that "around 12,000 U.S. defendants are found incompetent to stand trial each year" (Ref. 1, p S55). Accordingly, as a matter of pure speculation, with its population of around 300 million, this estimated 12,000 U.S. findings would mean 40 such findings per million of the U.S. population per year. Thus, even in the unlikely event¹ that the annual number of unfitness findings in England and Wales was currently 100, it would mean that, with a population of some 54 million, this rate in turn would result in only 2 such findings per million of the population, which is less than five percent of the rough U.S. population average. In short, until the Pritchard criteria are revised to incorporate "decisional competence," there is a likelihood that some vulnerable defendants will not fall within the protective "unfitness net" as a result of the threshold’s being set at too low a level.²

I now turn to the Commission’s Proposals and Questions – my responses are in bold.

We provisionally propose that:
(1) 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.

[Paragraph 3.41]

¹ This is now the case. See my empirical study at Appendix C.

The test should be replaced but by modernising and updating the Pritchard criteria and adding a decisional competence limb as suggested in my draft paper.

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

[Paragraph 3.57]

It is the “ability” of D to make rational decisions which matters. This is made clear in the Jersey test, see my draft paper.

(3) 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.

[Paragraph 3.99]

See (1) above.

(4) 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 the trial which the accused faces.

[Paragraph 3.101]

See (1) above.

(5) 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 and where any other reasonable adjustments have been made.

[Paragraph 4.27]

See (1) above.

(6) 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.

[Paragraph 4.31]

Agreed. However, such expert evidence need not be psychiatric as other experts will have role to play here.

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

[Paragraph 5.17]

See my draft paper. I’m not convinced that such an instrument needs to be “psychiatric” as this excludes other types of expertise.

(8) 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.

[Paragraph 6.140]
This seems the best compromise as it will more fully protect the unfit to plead. However, I am not convinced that such a new “hearing” will give Article 6 protection, see my draft paper.

(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.

[Paragraph 6.140]
Agreed but there are possible complications, see my draft paper.

(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.

[Paragraph 6.152]
Agreed.

(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.

[Paragraph 6.152]
Agreed.

(12) 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 medical evidence confirms) that the accused is still unfit to plead, the court should be able to reverse the decision to remit the case.

[Paragraph 7.21]
Agreed.

Para. 7.14 – Data on remission for trial is available from Mental Health Casework Section of the MOJ.

See also at para. 7.16 – 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.

(13) 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.

[Paragraph 7.21]
Agreed.
(14) 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.

[Paragraph 7.59
Agreed.

QUESTIONS

9.2 In addition to the above proposals, we also ask the following questions:

(1) 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 hearing 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?

[Paragraph 4.27
In my view special measures should normally only have relevance for those who are decisionally incompetent rather than foundationaly incompetent, see my draft article.

(2) 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?

[Paragraph 4.31

(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?

[Paragraph 6.153
Agreed

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

[Paragraph 6.153

(5) 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?

[Paragraph 6.159
This is an interesting way of getting round the problem that DR (and loss of control?) is unavailable in the “trial of the facts”. It seems that in such cases the burden of proof is to rest on the accused. However, if there is to be a hearing as to the special verdict then the burden of proof will be on the prosecution (para. 6.136). So if the medical evidence supports both insanity and DR will it not be to D’s advantage to require the prosecution to prove insanity in the hope that the jury will not be satisfied that the acquittal was because of mental disorder, see para. 6.139. In addition, such a procedure, resulting in a DR finding, might mean that the judge would no longer be required to make a restriction order even if all the requirements of the Mental Health Act were met. Or would the initial charge of murder prevent this?
(6) 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?

[Paragraph 7.26]
Consider the following hypothetical case. D is charged with a sexual assault. Shortly afterwards but before the trial he is involved in an accident which renders him unfit to plead. He is unable to give evidence and is found to be “foundationally” unfit. The prosecution is able to satisfy the new section 4A requirements as there is no apparent defence. D is given a supervision order and after treatment he quickly recovers his fitness to plead. He is adamant that he did not commit the offence and objects to the fact that he was put on the sex offenders register. In this connection note the remark of Lord Bingham in R v H when he said:

In the eyes of the public the findings carried the stigma which attaches to the commission of such offences. The Rehabilitation of Offenders Act 1974 and the Sex Offenders Act 1997 applied to findings adverse to the accused as they applied to convictions.

In such a case should D not be permitted to try to clear his name? There is also 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. There also has to be provision made for cases where fresh evidence comes to light indicating that D has a defence but after he has been found unfit and the prosecution has proved its case in the section 4A hearing.

(7) 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?

[Paragraph 7.44]
This should be at the judge’s discretion.

(8) 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?

[Paragraph 8.37]
In principle any reformed test for unfitness to plead should apply to summary proceedings as it is wrong that vulnerable offenders should be less fully protected in the Magistrates’ courts than in the crown courts. But more research is needed to inform the debate on this issue.

(9) Do consultees think that if an accused lacks decision-making capacity there should be a mandatory fact-finding procedure in the magistrates’ court?

[Paragraph 8.37]
In principle this ought to be the case.

(10) 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?
[Paragraph 8.37]
In principle it ought to mirror the proposals in 8 and 9 as failure to do so means that those who are unfit to plead in summary proceedings will not have the same opportunity to be acquitted as those subject to trial in the crown court.

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

[Paragraph 8.68]
Yes

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

[Paragraph 8.69]
If the age of criminal responsibility remains at ten and “decisional competence” is introduced into a reformed test for unfitness to plead then it does seem likely that some juveniles who are currently fit to plead will be found unfit, see para. 8.67. How many is very difficult to predict. This raises once again the issue of “developmental immaturity” see para. 8.63. I note that in “Breaking the Cycle: Effective Punishment, Rehabilitation and Sentencing of Offenders” 2010 the MOJ makes no mention of increasing the age of criminal responsibility. If the age remains at ten then it follows that more juveniles are likely to be found “decisionally incompetent than if it were to be increased to say, twelve years of age.

Impact Assessment of Unfitness to Plead

I have the following comments relating to the above.

Page 8-9 - With regard to my finding that “in approximately 90% of cases an unfit accused was found to have done the act on at least one count” (the actual figure being 88.9%). While this is true I have figures in my earlier empirical studies which reveal that for the years 1992-1996 the figure was 88% but 94% if we exclude the 8 cases where no TOF took place, see [2000] Crim LR at 540 Table 6. For the years 1997-2001 (the uncertain column here concerns the lack of data on whether the TOF was contested not about whether D did the act on which the data are clean) the figure was 87.8% or 91.2% if we exclude the 12 cases where no TOF took place. This might help a little for consistency purposes. In short, I have full data in both these earlier studies as to whether or not the D’s were found to have committed the act. See page 21 at “Risks no 4”. On balance I think the ballpark figure of 90% is about right and is supported by my earlier figures. So my answer to question 2 on page 22 is in the affirmative.

Table 5 at page 9 – while there is no doubt that “the number of patients receiving a restriction order following a finding of unfitness to plead is a very small proportion of the total number of mentally disordered offenders who are admitted to hospital as restricted patients” care must be taken when drawing conclusions from these
statistics. In 2008 there were 484 transfers of those who were “unsentenced and untried” which means that many will still be subject to a trial. With these prisoners they may or may not be convicted and some might even be found unfit to plead. We just don’t know. It might be useful here if the “anecdotal evidence” referred to could be explained as the comments about unfitness to plead at the foot of age 9 are speculative.

Page 14 at section 2 what Vera Baird actually said was “This issue arises in only a small percentage of cases, but in about 90 per cent. of the ones in which it does there is no dispute—both sides experts agree that the person is unfit to plead—yet the current law still requires a jury to be sworn in, which is an utter waste of money”

It’s not clear where she got this figure of 90% from as no source is given. In my earlier empirical research on unfitness to plead I found that from 1992-1996 fitness to plead was disputed in 8% of 125 cases with 13.6% being uncertain, see [2000] Crim LR at 537, Table 4. In my study of cases from 1997-2001 I found 6.7% of 329 cases were contested but with 43.8% being uncertain, see [2007] Crim LR at 535, Table 5. It could be therefore that 10% is an overestimate. It seems also that few “trials of the facts” are contested; see Table 8 of the same paper.
Law Commission

Unfitness to plead: A Consultation paper.

Autism and Asperger syndrome.

Thank you for asking for my views as part of the consultation. I will be brief and confine my comments to those aspects that I feel are most important for this group of individuals. Please do not hesitate to contact me should you require clarification or further assistance.

Declaration of interest.

I am the Director of Research for the National Autistic Society and Research Director for Research Autism, an associated charity. I am also the consultant adviser on autism to the States of Jersey and to the Inspire Foundation of Malta. I am a member of the Guideline Development Group for the National Institute for Clinical Excellence (NICE).

1. General

   a. The fact that a subject has an autistic spectrum condition does not in itself affect either mens rea or fitness to plead. This should be determined on an individual basis for reasons stated in 2 below.

   b. It is important that individuals with autism are seen to have capacity unless determined otherwise.

   c. It should be recognised that although in general the awareness of autism has increased many in the psychiatric profession will still have only limited clinical experience of the condition.

   d. Research has shown that individuals with autistic disorder are vulnerable to misdiagnosis with other psychiatric conditions.

   e. It is important to differentiate between the core features of autistic disorder - i.e. the presence of unusual social development such as rigid repetitive behaviours, alongside an absence of usual social and cognitive development such as problems with intuitive social behaviour and communication that is present from birth - from other symptoms that arise through co morbid psychiatric disorder. It is also important to acknowledge that the core features of autism are life long and tend not to be amenable to intervention.

   f. Such individuals tend not to fulfil requirements of unfitness to plead by reason of insanity. Hospital admission may also be problematic because the disorder is life long and stable and no ‘appropriate medical treatment is available’ for the core condition - although secondary or co morbid psychiatric disorder may well be treatable.

2. Unitary v disaggregated construct of decision making.

   a. A unitary construct seems less useful for the following reasons

      i. Individuals with autistic disorders are a highly heterogeneous group and vary enormously in terms of IQ, communication level, cognitive profile and degree of co morbid psychiatric disorder, the latter thought to be present in around 70% of such individuals, particularly anxiety and depression.

      ii. The profile of skills and deficits makes for particular problems in understanding the condition and responding appropriately. Such individuals may be highly competent in many areas of their lives but impaired in others, typically those where abstract thought or judgement of context is required. It is this juxtaposition of high IQ and ‘socially blind’ behaviour that is at the heart of the disorder.

      iii. It is also likely - even probable that an individual could be capable of understanding the nature, concept and consequences of any act - indeed, may be very remorseful and upset when they realise they have done wrong-
but may be unable to follow normal procedures or proceedings due to their oral nature. Moreover, the odd or rigid social demeanour of subjects and the tendency to highly literal responses to questions may be misinterpreted by police or a jury and prejudicial to the outcome of any such proceedings.

3. **Assessment of capacity**
   
   a. It is important that the assessment is undertaken by two medical practitioners and essential that at least one of whom should be competent in the diagnosis and assessment of individuals with autistic disorder. Often the presence of an autistic condition will not be easily determined unless there is such expertise. This is particularly so where the clinical presentation is subtle, complex or complicated by other disorders.

   b. It is important to understand the persons understanding of the act and any proceedings. This may be overlooked, especially if the individual is of normal or above average IQ. It is assumed they know and understand - when the do not.

4. **Response to questions (9.2 p182)**
   
   1. I agree that this would allow flexibility and a more appropriate response. A code of practice for such special measures would be helpful.

   2. Assessment by at least one specialist in autism. Agree with proposal 6. The proceedings could be improved by reducing the level of extraneous factors e.g. video link or making the proceedings accessible through visual rather than auditory means. The NAS could offer advice on this.

   3. Generally yes. see above

   4. No comment

   5. Yes, subject to safeguards provided by the psychiatric examination.

   6. Yes

   7. Yes

   8. Yes. Fact finding would be most helpful. This can make use of local specialist provision and expertise

   9. Yes- see above.

   10. Yes -should mirror 8 and 9

   11. Yes

   12. As other young persons.

Richard Mills

26 February 2011
Dear Sirs

Consultation on Unfitness to Plead (CP197)

We refer to your Consultation Paper on Unfitness to Plead and would like to give you our comments.

Mind

Mind (National Association for Mental Health) is the leading mental health charity in England and Wales. We work for a better life for those with experience of mental distress and seek to influence and change public attitudes and government policy and practice towards people with mental distress.

Mind’s Legal Unit gives specialist advice on mental health and related law and practice to both members of the public and professionals by telephone, letter and email. We give general advice on legal rights to over 5,000 individuals each year. A substantial number of those who contact us are informal psychiatric patients or have been, or currently are, detained under the provisions of the Mental Health Act 1983 (MHA) in a variety of settings including private facilities, open hospitals and medium secure units.

In addition, we advise numerous non-lawyer advocates supporting patients to assert their rights; the vast majority of these patients are based in psychiatric hospitals. Our conversations with advocates keep us informed of concerns raised by those receiving treatment in hospital, whether detained under the MHA or not.

We are members of the Mental Health Lawyers Association and the Discrimination Law Association.
Our Comments

We are not criminal practitioners. Accordingly, our comments are focused on how to balance the interests of an individual with experience of mental distress who is alleged to have committed a crime with the interests of public protection. For the purposes of this letter we refer to such individuals as “mentally disordered defendants” or “defendants”.

Drawing on experience of work in related areas – disability discrimination, mental health tribunal hearings and work with vulnerable witnesses and victims - we believe that it is important for mentally disordered defendants to play as full a part as possible in any criminal proceedings brought against them, within a framework that can identify when this is not possible, in which case provides a fair and just alternative. Our comments are as follows:

1. Provisional Proposal 1: We can see merit in the proposal that the current *Pritchard* test should be replaced with a new test which assesses the decision-making capacity of the defendant. This test should follow as closely as possible the test for capacity set out in section 1(3) of the Mental Capacity Act 2005. The aim is to enable effective participation in the trial in accordance with the requirements of Article 6 of the European Convention on Human Rights. We agree that the assessment of capacity to participate in the trial should include an assessment of whether an accused will be able to make a decision about all of the elements involved in a trial. It is a particular feature of the Mental Capacity Act that an individual may make an unwise decision, but that this should not be taken as an indication of a lack of capacity in relation to that decision-making process. We feel that it is appropriate to take a similar approach in relation to participation in criminal proceedings. It follows therefore that all appropriate steps should be made to enable the defendant to participate fully in the trial process. Accordingly, we agree that the use of special measures should be extended to such defendants.

2. We acknowledge the practical difficulties in assessing a defendant’s capacity by reference to the potential complexity of a case (referred to as proportionality). We also accept that a seemingly simple case might turn out to be very complicated and vice versa. To take account of this we feel
strongly that there needs to be a strong mechanism for reassessing capacity to participate as the trial progresses. However, where it is quite clear from the outset that a case is likely to be extremely complex, we see no reason why this should not be a relevant factor to consider in a capacity assessment. Therefore, despite the difficulties, we feel that it is important to fair operation of the proposed test for proportionality to be included in the assessment. We feel also that in developing these concepts it will be useful to re-emphasise that this is what is meant by the “capacity test” - which in fact involves an assessment of a number of factors - to help overcome the common misperception that whether or not someone has capacity is a straightforward yes or no issue.

3. A unitary test will look at numerous factors involved in assessing whether a defendant will have capacity to participate. We agree that a unitary (as opposed to a disaggregated) test of capacity would be the preferred test but 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. It is important that a capacity assessment be made as soon as possible in the criminal proceedings. Provided that a truly functional approach is taken and appropriate special measures put into place at the relevant times, we would hope that a large proportion of mentally disordered defendants would be able to continue to participate throughout the trial process. It is, however, important that there be safeguards and robust procedures to allow reassessment of capacity. It might be possible, therefore, that the defendant suffering from obsessive compulsive disorder (Example 3E) might be helped by special measures (see below) to answer a question asked of him by Counsel. Conversely, a defendant suffering from an acute episode of a psychotic condition such as paranoid schizophrenia (Example 3D) might not be able to understand the consequences of pleading guilty even if all special measures were put in place.
4. We have been asked to suggest or put forward possible special measures which could be used to assist a defendant with impaired mental capacity to participate fully in criminal proceedings. In this regard, the provisions of the Equality Act 2010 with regard to reasonable adjustments and the public sector duty under the Disability Discrimination Act 1995 clearly impose duties to accommodate the needs of disabled defendants and witnesses.

- 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.

- 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.

- 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.

5. We consider it important that the issue of capacity be determined as soon as possible. A case management hearing should therefore be held at the earliest appropriate opportunity. Such hearing would give directions as to whether a capacity assessment ought to be made and what special measures should be used, and perhaps also give directions about issues that may indicate a need to reassess capacity. We think that it would be important for a code of practice to be drafted to consolidate the existing relevant principles, take into account any new legal principles and address medical knowledge and practice.

6. As well as a code of practice, we think that it is particularly important that the judiciary and advocates have special training in relation to mental capacity assessments and the use of special measures. Mind has worked with the Crown Prosecution Service on a toolkit for prosecutors and advocates entitled “Achieving justice for victims and witnesses with mental distress”. This may be useful when drafting a code of practice or for training materials. We enclose a copy for your information.

7. We can see the attractiveness of developing a single “tool” to assess “trial” capacity and would welcome any advances to this end. However, by definition, every person is unique and we have concerns that no single test can ever be devised which will cater for all. We think that it is important to identify the main issues with which a defendant will need to cope during the trial process. Any tool which can help in a capacity assessment can be helpful but we do not think that any
particular tool should necessarily be mandatory as, ultimately, the judge will decide the issue. We do, however, consider that the existing law, whereby the opinions of two medical practitioners are required before a finding of unfitness to plead can be made, should remain as this provides protection to the defendant.

8. Provisional Proposal 6: We agree that a defendant who wishes to give evidence should also be allowed to provide expert evidence on the effect that his or her mental impairment might have on his or her demeanour in the witness box. However, we are interested to see responses from criminal practitioners about whether doing so may be counter-productive. We also have experience from other areas that shows how openness about a mental health condition may not lead to the level of understanding expected, and this in turn increased the individual's distress. There is still a good deal of work to be done to reduce stigma in relation to mental health conditions. We would propose mental health awareness training for the judiciary and other court staff. This may assist the trial judge in instructing jurors in his or her summing-up.

9. We would like to hear responses indicating how many vulnerable defendants will be deemed unfit for trial under any new proposals. The aim, of course, ought to be to increase that number where the defendant is genuinely vulnerable despite the availability of special measures and to identify properly when a defendant becomes vulnerable during a trial.

10. The procedure under section 4 of the Criminal Procedure (Insanity) Act 1964 as amended provides for determination of the defendant’s capacity to be tried. It is therefore not a criminal trial. However, the procedure under section 4A which provides for a “trial of the facts” is, in our view, very different and is effectively a quasi criminal trial. We therefore do not agree with the decision in Re H that Article 6 of the European Convention on Human Rights is not engaged and we would hope that this consultation will result in section 4A hearings which safeguard article 6 rights for vulnerable defendants. Moreover, the court can give a defendant an
indefinite restricted hospital order under sections 37 and 41 of the MHA. This is, in fact, a criminal disposal.

11. We agree that the section 4A procedure should be reformed as it does not allow for an assessment of the defendant’s state of mind nor, in many cases, does it allow for a defence to be made to the charge. We therefore agree that as far as possible a trial of all the relevant issues should be held with a jury. If the defendant is found not to have done the act then he or she should be acquitted. If the defendant is found to have done the act then an appropriate disposal can be made (your Provisional Proposal 8).

12. With regard to your Provisional Proposal 9, we can see why, following the acquittal of a defendant after a section 4A hearing, it might be necessary to determine the issue of whether the defendant was suffering from mental disorder at the time of the alleged offence. However, holding a further hearing would create uncertainty for the defendant. We therefore think that the issue of mental disorder should be determined at the original section 4A hearing.

Conclusion

We have not addressed all the questions put in your Consultation Paper as we do not have the appropriate experience in relation to criminal law. However, we are broadly in agreement with those proposals we have commented upon. Please feel free to contact us for any further comments.

Yours faithfully

Pauline Dall
Head of Legal
Mind Legal Unit
My comments refer to the recent Consultation Paper 'Unfitness to Plead'.

I welcome that clarity is made in relation to a system ensuring a fair trial for potentially vulnerable individuals. However, I would like to raise a point with which I disagree:

1. Psychiatrists are the only professional group that is mentioned in relation to carrying out capacity assessments.

Clinical Psychologists can and should be instructed to carry out such assessments. Whilst Psychiatrists may be involved the Mental Capacity Act (2005) specifically mentions also Clinical Psychologists. I would like to argue that Clinical Psychologists are even better placed than Psychiatrist to carry out such as assessments for a variety of reasons:

1. Clinical Psychologists are routinely involved in assessing, formulating and treating mood and cognitive disturbances. These factors should be considered when assessing someone’s capacity more than their formal diagnosis.

2. Whilst Psychiatrist are involved in diagnosis and administering medical treatment, Clinical Psychologists are involved in formulating someone’s difficulties, taking into account a variety of sources of information, such as emotional, cognitive, cultural and psychosocial factors. These knowledge and skills base makes Clinical Psychologists a more suitable professional group in carrying out capacity assessments.

3. Clinical Psychologists are involved in carrying out comprehensive cognitive assessments (whilst Psychiatrists are not). For instance the judicial system routinely relies on Clinical Psychologists’ cognitive assessments to establish a diagnosis of Learning Disability, or to understand the severity of someone’s cognitive disturbance following a brain injury / degenerative condition. Test scores need to be carefully interpreted as a low score does not necessarily prevent someone from being capable of participating in the trial process. It is therefore important that a professional with appropriate training of the most widely used tests of cognitive functioning is asked to make sense of the findings.

4. Furthermore, Clinical Psychologists have more experience than Psychiatrists in supporting patients’ understanding of pros and cons when taking a decision. All steps need to taken in this sense according to the Mental Capacity Act (2005).

5. In summary, Clinical Psychologists are routinely involved in assessing patients' capacity and Clinical Psychologists have a very strong knowledge and experience base to assess someone’s capacity.

On one hand, this Consultation Paper appears to want to modernise the system in place, but on the other hand it does not seem to reflect that in practice a very large number of fitness to plead assessments are indeed already carried out by Clinical Psychologists. I believe that this new document should take the opportunity to clarify this point, to legitimise the expertise Clinical Psychologists bring into the judicial system, rather than Clinical Psychologists having to continue to be instructed under Common Law.
I am available for further discussions of the above points if you feel this is helpful.

Thanks

Yours sincerely

Linda Monaci
Clinical Neuropsychologist, Laurea, PgDip, C.Psychol., C.Sci., AFBPsS
www.monaciconsultancy.com
NATIONAL BENCH CHAIRMEN’S FORUM

A Response to the Law Commission Consultation
Paper 197 - Unfitness to Plead.
A Response to the Law Commission Consultation Paper 197 – Unfitness to Plead.

The National Bench Chairmen’s Forum

The National Bench Chairmen’s Forum is made up of an elected representative from each of seven Regional Forums in England and Wales to which all Bench Chairmen have access and where they can discuss issues of mutual concern, share good practice and develop networks. The National Bench Chairmen’s Forum provides a framework to support the 250 Chairs of Magistrates Benches in England and Wales and a voice at national level so that their views can be effectively taken into account.

Representatives of the National Bench Chairmen’s Forum participate in regular liaison meetings with the Senior Presiding Judge, Chief Executive of HMCS, the Justices Clerks Society and the Magistrates Association, and other key members of the judiciary and administration. The National Bench Chairmen’s Forum is consulted by governmental departments and other bodies in respect of issues that affect the business of magistrate’s courts.

The National Bench Chairmen’s Forum Response to the Consultation Paper.

Introduction

The National Bench Chairmen’s Forum supports the 250 Chairs of Magistrates Benches throughout England and Wales whose jurisdiction and expertise extends to the Adult Magistrates Court and the Youth Court. The National Bench Chairmen’s Forum has therefore limited its response to those questions contained within the consultation paper that are relevant to Magistrates Courts jurisdiction. (Q’s 8-12).

This response encompasses a consolidation of the views received by the National Bench Chairmen’s Forum from its executive.

Q8) 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?

The National Bench Chairmen’s Forum agrees that the capacity based test that has been proposed for trial on indictment should equally apply to summary proceedings both within the Adult Magistrates Court and the Youth Court. The procedure currently in place provided by s37 of the Mental Health Act 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 unfitness to plead. The defence practitioners' overriding responsibility is to act in their clients' 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.

Rule 1.1 of the Criminal Procedure Rule 2010 states that the overriding objective of the code is to deal with criminal cases justly. This includes, amongst other factors, acquitting the innocent and convicting the guilty, dealing with the prosecution and defence fairly, recognising the rights of a defendant, respecting the interests of witnesses and victims, and dealing with the case efficiently and expeditiously. The extension of the capacity-based test to summary proceedings will ensure the accused is tried justly and is entitled to raise the same capacity test irrespective of the jurisdiction in which they are to be tried.

The creation of a capacity-based test will ensure that a clear procedure will be established within the summary jurisdiction. The current procedure is vague and can obstruct case management. Proceedings are often significantly extended whilst the court awaits medical practitioners to produce psychiatric reports on the issue of unfitness to plead. Once produced, the defence will often seek to utilise the report to support an argument that the prosecution should discontinue the case on public interest grounds, rather than to establish the grounds for the making of any order within the Mental Health Act 1983. Only if this is unsuccessful, will the court be requested to hear evidence and proceed to make a hospital order. This obviously creates a delay in the proceedings whilst the defence and crown prosecution consider their position.

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.

We recommend that if the capacity-based test proposed for trial on indictment is to be introduced in summary courts, appropriate investment and support should be provided to services and practitioners whose responsibility it will be to deliver capacity test reports to Magistrates Courts. This will be necessary to safeguard effective case management of such proceedings and minimise the possibility of delay.

Q9) Do consultees think that if an accused lacks decision-making capacity there should be a mandatory fact-finding procedure in the magistrates’ court?

The NBCF agrees that there should be a mandatory fact-finding procedure in the Magistrates’ Court. A formal procedure would provide consistency and significantly
improve the method by which such proceedings are heard within the Magistrates’ Court.

Q10) 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?

The National Bench Chairmen’s Forum agrees that the mandatory fact finding procedure should mirror the provisional proposals at 8 and 9. This would provide the Magistrates Court with an appropriate range of disposals depending upon the outcome of the fact finding hearing, the circumstances pertaining to the accused and the seriousness of the offence.

Q11) Do the matters raised in questions 8, 9 and 10 merit equal consideration in relation to the procedure in the youth courts?

The National Bench Chairmen’s Forum is of the opinion that the matters raised in questions 8, 9 and 10 merit equal considerations in relation to the procedure in youth courts. As explained in question 8 the application of a capacity test is more relevant within the Youth Court. The extended jurisdiction in the Youth Court gives rise to more serious offences being tried than in the Adult Court and the probability of unfitness to plead applications being increased. There are a high proportion of youths before the court who report mental health or learning issues, and whilst these may not lead to a finding of unfitness to plead, it would appear without question that the procedure must be merited in the Youth Court.

The principle aim of the youth justice system, as provided by section 37 of the Crime and Disorder Act 1998, is to prevent offending by children and young people. It is our view that the identification and appropriate disposal of those youths who would fall to be determined by this procedure would enhance this objective.

Q12) How far if at all, does the age of criminal responsibility factor into the issue of decision-making capacity in youth trials?

Following the abolishment of the concept of Doli Incapax in the Youth Court the age of criminal responsibility does not factor into the issue of decision making capacity within Youth Court trials. The National Bench Chairmen’s Forum does acknowledge that the accused 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.
RESPONSE TO THE LAW COMMISSION’S CONSULTATION PAPER 197: UNFITNESS TO PLEAD

On behalf of the National Steering Group with Responsibility for Health Policy on Offenders with Learning Disability

I am responding on behalf of the National Steering Group with responsibility for health policy on Offenders with Learning Disability. The Group is chaired by the Department of Health but draws its membership from other Government Departments and the Third Sector. We have considered the various references to Learning Disability in the text of the Consultation Paper.

Re 1.34 Provisional Proposal 1
We agree with the need to take into account all the requirements for meaningful participation in criminal proceedings, in accordance with the European Convention of Human Rights, and the case law that supports it. In assessing capacity where there is a learning disability, it is essential that the communication skills of the accused, and their ability to communicate effectively, are also taken into consideration.

Re 1.34 Provisional Proposal 2
It is important that the accused fully understands information given, and this is in some way checked where a learning disability may be present. Support should be provided by appropriately qualified practitioners. They should have strong communication skills aimed at people with a learning disability. The use of intermediaries as for vulnerable witnesses appears to be a minimum requirement.

Re 1.34 Provisional Proposals 3 & 4
We agree that there should be a revised single test to assess the decision-making capacity of the accused relevant to all the trial decisions that they may be expected to take. If the accused does not have the capacity to participate fully and effectively in all aspects of the trial (supported as required by special measures and reasonable adjustments), then a ‘fair’ trial does not appear to be feasible.
Re 1.34 Provisional Proposal 5
The availability and scope of special measures and reasonable adjustments must be properly resourced to meet the need. The accused must receive appropriate support to stand trial and fully participate in proceedings. The assistance of special measures and reasonable adjustments must be made an entitlement to the accused in law. The application of the principles of the Disability Discrimination Act would be a good starting point.

Re 1.34 Provisional Proposal 6
The use of expert independent witnesses is supported but there is an attendant risk of different witnesses having conflicting views in this difficult area. Some background for legal professionals would be very useful.

Re 1.34 Provisional Proposal 7
A defined psychiatric test should be available as one part of an assessment process in assessing decision-making capacity.

Re 3.4.2
It is agreed that the presence of a learning disability should not mean an individual is unfit to plead. The test should be ‘can the defendant understand what is going on?’. They must receive specialist support at all stages – ie appropriate adults in police stations and support in court. In addition a defendant’s legal advisors should also have basic skills around communicating effectively with people with a learning disability.

Re 4.4 and 4.10
Defendants with a learning disability should always be considered vulnerable and the Criminal Justice System should respond accordingly – particularly in the spirit of Disability Discrimination legislation which requires that strenuous efforts are made to ensure that a person with a disability is not disadvantaged. This appears particularly relevant for an individual with a learning disability trying to understand the complexities of a journey through the Criminal Justice System.
There is a real danger in conflating learning disability and mental illness. Clearly both conditions can impact on the way the Criminal Justice System should respond. The conditions are, however, different, and the degree and skill base of support will vary. Liaison and diversion will also vary between these groups. It is accepted that co-morbidity provides a particularly difficult challenge but it is a clear responsibility of the legal system to treat each individual appropriately according to their specific needs.

**Re 4.14 and 4.15**

We fully support the recommendations of the Prison Reform Trust which are reflected in the Bradley Report recommendations on supporting vulnerable adults and liaison and diversion.

In particular, we note the need for an easy to use screening tool to be available in the Criminal Justice System as a first indicator of the probability of a leaning disability. We fully endorse the need to specialist support – not just in police custody and the courts – but also in prison and probation services.

We are concerned that the estimated 7% of adult male prisoners do not have access to appropriate adult support for Prison Adjudications or Parole Board Hearings. This is a significant weakness in the ‘fairness’ of the system.

**Re 5.38, 7.13 and 8.66**

The presence of a learning disability means by definition that the individual will have reduced cognitive skill functioning. Their ability to understand and respond to various situations is likely to be more appropriate to a much younger individual than the chronological age of the actual defendant. The Criminal Justice System needs to be cognisant of this and respond accordingly at all stages. We are concerned that the required information that a defendant has a learning disability and also needs additional support does not travel with them through the system. In particular, defendants usually reach prison reception without the relevant information being passed on from the police and courts.

**Re A14 and A15**
We note the new provision of the 2007 Act. It is important to understand and maintain different approaches to mental illness and learning disability. Courts need to be aware of this issue as learning disability is a permanent impairment which cannot be treated in the same way as mental illness.

**Question 1**
We fully agree

**Question 2**
An individual, person centred approach should be adopted, supported by an appropriately qualified practitioner. To ensure that the defendant is able to give both their best evidence and to fully participate in trial proceedings.

**Question 7**
This is not thought to be helpful.

**Question 8**
The capacity test should be the 'standard' for all proceedings.

**Question 9**
It appears to be the best way to serve the needs of the individual and protect the public.

**Question 11**
Not qualified to comment

**General Comments**
The crux is what the 'intellectual' age of the defendant rather than their chronological age. Many offences relating to learning disability have their origins in the fact that the
physical strength and sexual awakening of the individual has outstripped their social maturity.

We appreciate the pressure that courts are under to deal with and dispose of cases quickly. Unfortunately this driver for pace and efficiency makes it hard for the courts etc to identify a learning disability and respond appropriately. There will inevitably be some delay and an extra resource requirement if an individual is to be supported properly. 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.

Thank you for the opportunity to comment

Mark Freeman
Chair – Offender Learning and Disabled Steering Group
New rules to decide who is fit to stand trial consultation

Dear Sir or Madam,

I actually found it quite an interesting read, as I had no idea how things currently worked. It took me a while to decide if it was a good or bad thing from a victim's perspective and I'm still not so sure! I think a lot of the emphasis is upon inclusion of the offender in the process and accommodating the problem of mental illness in a trial rather than it being an absolute reason for avoidance of a trial. It appears on basic information that at the moment the jump from pleading unfitness to stand and being acquitted is two staged (i.e. psychiatric report and this 4a hearing). As far as I can glean there will, under the new proposal, be more stages added to this (i.e. the decision making test as well as the Pritchard test), which I think is good and bad.

I suppose from a victim's point of view it will mean that it will be harder for the offender to get themselves acquitted and even they do have a mental illness (the example they use is schizophrenia I think), if it is proved that they still have adequate decision making abilities they may be able to stand trial. The acknowledgement that decision making ability and mental illness are not mutually exclusive elements is a welcome change for victims. If this ultimately means that a person who may previously been deemed unfit to stand trial is now accepted to acknowledge the consequences of their actions this can only be a good thing for victims. I would suspect that the victim and the family of the victim often feel marginalised in cases where the offender is acquitted on mental health grounds or given a hospital order; there will be some satisfaction for them in the new inclusion of the offender in the trial.

There is a definite sense of the acknowledgement that mental illness is not a preventative issue; that mental health issues (once diagnosed) are no longer entirely mitigating. The lack of cognitive thought is not enough any longer. In that sense the extra stages and checks are good. My comment on this is that in theory this is welcome change, but in practice is this not going to cause further problems with consistency and as always will the extension of this process not create further delays (always unwelcome when you are a victim and their family waiting for the court case to be over!)?

Patrons
Lord Falconer of Thoroton QC; Baroness Harris of Richmond;
Commander David Johnston QPM [Metropolitan Police Retired];
Rt. Rev Seamus Cunningham, Bishop of Newcastle & Hexham
The document speaks of the fact that different cases will require different proportionality. The threshold of capacity of the offender will be different for different cases. Surely this will lead to major issues with consistency; I suspect they are right when they proffer that proportionality will not lend itself to criminal law. If this is the case what will be done about the problem of proportionality? Will a person charged with assault require the same decision making ability as someone accused of murder if they both suffer from the same mental illness?

The idea of increased use of special measures in cases is clearly a necessary one. On a totally practical note, will this not lead to further delays? I suppose the argument would be that the delay whilst waiting for psychiatrists to be available to give expert evidence in a trial will ultimately lead to the right and just outcome. I foresee a situation where cases may be delayed substantially. From an emotive perspective, this is bad for the victim and their family. On the other side of this, I thought it was very good that (as stated in 1.16) there is a proposal to cut out the cyclical problem experienced currently where offenders bounce backward and forth between hospital and court and 4a hearings.

I think that this paper in general assumes that there is a 'desire' on the part of the offender to be an integral and inclusive part of the process and I am not sure practically how that would pan out? However, I think there are some good forward thinking strategies in the document, if the issue of inconsistency does not materialise in practice. It is clear that the Pritchard test alone no longer suffices and the inclusion of a new process is good.

Yours sincerely,

David Hines
Chairman
Law Commission Consultation No: 174 – Fitness to Plead

Attendance:  
Dr Andy Bickle (Consultant Forensic Psychiatrist & Chair)  
Dr Younus Saleem (Consultant Forensic Psychiatrist)  
Dr Sofia Jaffer (Specialist Registrar)  
Dr Mark H Taylor (Consultant Forensic Psychiatrist)  
Dr Najat Khalifa (Consultant Forensic Psychiatrist)  
Dr Nick Larsen (Speciality Registrar)  
Dr Hayley Cooper (Consultant Forensic Psychologist)  
Dr Will Walker (Locum Consultant Forensic Psychiatrist)  
Dr Regan Jonathon (Associate Specialist).

This was a discussion held on 14th January 2011 at the Academic Meeting of the Nottinghamshire Low Secure & Community Forensic Directorate and the meeting was chaired by a member of the Offender Health Directorate working in prison psychiatry. The majority of those present have given several opinions regarding fitness to plead in the previous 12 months.

Introduction and Presentation:

Dr Bickle gave a presentation (attached) which focused on Parts 3 and 5 of the consultation which were felt by him to be the major areas on which those professionals present could give valuable opinions from their experience in the time available. The majority of attendees had been sent the consultation document in advance for their consideration.

Discussion for Submission to LawCom:

The group agreed that effective participation is currently much better protected in US law compared with UK. However, those present agreed that due to our signing up to the Human Rights Act effective participation is now part of UK law. The group agreed that this effective participation is not part of the core assessment of fitness to plead under the Pritchard criteria.
The group felt that many experts’ practice had developed to include consideration of effective participation, but a structured framework around this to assure good practice was lacking.

The group strongly agreed with the Commission’s view that several domains of mental functioning were important to a defendant’s overall fitness to participate effectively in their legal proceedings (including impulse control and experience of reality distortion symptoms), but this breadth of important impairments is not well-detected by applying the Pritchard criteria.

One discussant (a consultant forensic psychiatrist) felt that normal practice was for the emotionally aspect of participation to be left to the expert opinion of a psychologist (as psychiatrists tended to limit themselves to the Pritchard criteria).

The group welcomed the proposal from LawCom that a legal professional – probably a judge – set down all of the potential decisions a defendant might face in the course of proceedings. The group hoped this might extend to all legal issues that needed to be addressed in expert opinion as they agreed the current quality of instructions is often very poor. The group welcomed this approach, but overall felt that the impact of such changes in terms of the detail/length of reports and the number of reports needing to be commissioned had been grossly underestimated.

One discussant was particularly concerned that the proposals did not reduce the availability of ‘interim disposals’ (i.e., 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 4A hearing would lead to more cases being definitively resolved before effective participation could be recovered.

The discussants were divided fairly equally in their view as to whether the new test ought to follow a unitary concept or be a disaggregated test. They were agreed that a disaggregated test would increase the impact of proposed changes in terms of the demand on expert psychiatric opinion still further.

The group felt that greater clarity was required as to identifying which defendants should be subject to any new test. The group felt that one of the major weaknesses of the current system is the triage of defendants into those about whom expert opinion was needed. Whilst the group acknowledged this was a problem not limited to this aspect of criminal medicolegal practice and also that it might be felt this issue was the subject of other political initiatives, nevertheless those present felt current arrangements were very weak and improvements to the legal tests would have at best partial impact unless this other aspect significantly improved so it might properly have received more attention in the Consultation.

This question of introducing a defined psychiatric test divided opinion in discussion. The majority view was that such a test would be restrictive of professional practice without bringing compensatory benefits. However, another argument advanced cogently by one of the more senior clinicians present was that such a test would be beneficial *inter alia* by making the assessment more objective.
There was some surprise expressed that the test might consist of essentially a comprehension exercise rather than psychometric or other testing. There was concern expressed by one psychiatrist that defendants would be ‘coached’ in the tests by lawyers as he believed occurred in the USA.

Some members of the group wanted strong reassurances about who might complete any defined psychiatric test. They felt that in these cash-strapped times in reality a situation might be created where there was pressure for non-psychiatry and non-psychology staff to complete these assessments. The 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.

Another objection to perceived proposal to use Dr Blackwood’s defined psychiatric test was that it appeared to be in a very early stage of development. The group expected that such an important piece of technology as this should be subject to rigorous study and experimenting before it was advocated and some present queried whether this reflected a difference between medical and legal culture. There was some feeling that the Law Commission should not have pinned its colours as strongly as it appeared to have done to a putative technology which appeared to be embryonic and for which there was no scientific data in the public domain. Relatedly, there was a view expressed that this type of development should be independent of legal consultations and should have been completed well before being incorporated into proposals in this way.

More positively in regard of a defined psychiatric test, the group felt it offered a good opportunity for a more rigorous, scientific study of this approach than had previously undertaken.
Dear David,

**Unfitness to plead**

I write in response to the Law Commission’s consultation on this subject. I start from the position that our prisons are disconcertingly full of people who suffer from mental disorders: you have only to keep an eye on the statistics published in the Prison Reform Trust’s Bromley Fact files, or read the Bradley Report (both of which are cited in your Impact Assessment) to see the problem. Over the years, mental hospitals have been reluctant to accept mentally disordered offenders: hence the amendments to the Mental Health Act 1983, enacted in the Mental Health Act 2007, to base civil detention not only on treatability (the efficacy of treatment) but also on the availability of appropriate treatment. How much has really changed in practice is unclear to me.

The big picture is important. For the last 30 years or so the emphasis of many judges, lawyers and academics has been on the personal autonomy of the individual, and we have been reluctant to say that people are not responsible “just” because they suffer from mental illness, disabilities or disorder. But it is now, perhaps, becoming more obvious that recognising people’s autonomy can lead to deeply unfair outcomes. I note in particular the Sentencing Council’s recent consultation on their draft Assault guideline, which wisely asked questions about the impact of both mental illness and lack of maturity in sentencing.

Would your proposals be an improvement on the current law? On balance, I think this is an area which should be codified and it would be useful to replace the common law test of capacity by a statutory test. And, as you say (para 2.43), the common law sets too high a threshold and is inconsistent with modern trial processes.

But to me you raise much bigger questions. Of course those without decision-making capacity should not be prosecuted! So should many other people who are not really blameworthy … could a wider test be formulated? At the moment we rely heavily on the police/CPS discretion not to prosecute, but this seems to me far from ideal. Many of the cases you cite smack of injustice: *Erskine, Murray* etc etc. And whilst Professor Mackay’s evidence is hugely valuable, he cannot and does not look at the cases where ‘unfitness to plead’ proceedings are not initiated. I find it very difficult to do as you wish to do: to look at unfitness to plead without looking at the law of
insanity. Are you making a mistake in drawing a line between the two which therefore will reinforce the existing, contentious, divide? Even more important, how can we look at this subject without looking at civil proceedings which may (or may not) be initiated as an alternative to criminal proceedings? Due process and human rights are as important in civil detention.

Please find attached the outline of a paper I am developing on this subject. It remains an unpolished piece as you will see, but I hope it may contribute to the debate, and serve, with this letter, as my response to the consultation.

Yours sincerely

Nicky Padfield
Unfitness to Plead: the place to find an adequate moral and legal test for saying ‘no trial should happen’?

(Draft and preliminary) thoughts by Nicola Padfield

The Law Commission’s Consultation on Unfitness to plead is a fascinating read, well worth exploring, and raising a huge array of troubling questions.

I: The evidence gathered by the Law Commission

(i) A catalogue of recent cases which should trouble the conscience, or at least which raise as many questions as they resolve. Here I mention just a few:

Erskine [2009] EWCA Crim 1425 (at para 2.76) In this case, it was, as the Court of Appeal said “overwhelmingly clear” that at the time of his trial, some 20 years earlier, there was unequivocal contemporaneous evidence that his mental responsibility for his actions at the time of the killings was substantially impaired. In addition, there was contemporaneous evidence that as a result of his reduced mental acuity, as part and parcel of his illness, the decision not to advance the defence of diminished responsibility was irremediably flawed.

This was the case in which the Lord Chief Justice (LCJ) chose to be very critical of the ‘practice of lengthy citation of authority’, which was neither necessary or desirable. Having reviewed the authorities which had ‘developed a jurisprudential momentum of their own’ (at para 40), the LCJ said that firm measures were immediately required, at least in the Court of Appeal, to ensure that appeals can be heard without an excessive citation of or reference to many of its earlier, largely factual decisions.

The essential starting point, relevant to any appeal against conviction or sentence, is that, adapting the well known aphorism of Viscount Falkland in 1641: if it is not necessary to refer to a previous decision of the court, it is necessary not to refer to it. Similarly, if it is not necessary to include a previous decision in the bundle of authorities, it is necessary to exclude it. That approach will be rigidly enforced.

It follows that when the advocate is considering what authority, if any, to cite for a proposition, only an authority which establishes the principle should be cited. Reference should not be made to authorities which do no more than either (a) illustrate the principle or (b) restate it. Detailed rules are set out in paragraphs II.17 and II.19 of the Consolidated Criminal Practice Direction (paras 74-76).

The Court comments on “a new but increasing tendency” for the appellant, as an explanation for the failure to advance diminished responsibility at trial, to advance

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1 But there are plenty of other harrowing “stories” to explore: Murray [2008] EWCA Crim 1792 (see para 2.80 of the consultation); Moyle [2008] EWCA Crim 3059; [2009] Crim LR 86; Diamond [2008] EWCA Crim 923 (where the the Court of Appeal point out that: On the established test, a defendant is fit to plead in cases where his mental condition may well enable him to advance successfully the plea of diminished responsibility, yet his mental condition is still such that it may also prevent rational or sensible decision making as to the conduct of his defence. Once it is concluded that the defendant is fit to plead, although it may be apparent to everyone else that there is an issue as to whether his decision making is materially affected by his mental condition, he is entitled to refuse to have his mental condition assessed (at para 46)).
fresh evidence to suggest that at the time of the trial, he was either unfit to plead, or virtually so (see para 84) but this “tendency” is not encouraged:

Unless there is contemporaneous evidence to suggest that notwithstanding his plea and the apparent satisfaction of his legal advisers and the judge that he was fit to tender it, and participate in the trial, it will be very rare indeed for a later reconstruction, even by distinguished psychiatrists who did not examine the appellant at the time of trial, to persuade the court that notwithstanding the earlier trial process and the safeguards built into it that the appellant was unfit to plead, or close to being unfit or that his decision to deny the offence and not advance diminished responsibility can properly be explained on this basis (para 89).

Was the Lord Chief Justice right to choose this case to illustrate his message? It was a worrying case, and unsurprising that counsel chose to dig deep. According to the LCJ,

It is obviously desirable, and in accordance with principle, not least the operation of the defendant's personal autonomy, that if it is humanly possible, the defendant should tender his own plea and advance such defence as he wishes to advance, and that he should not be shut out from doing so on the grounds of unfitness. Provided the defendant can understand the proceedings, he will be deemed fit to plead (para 88).

With respect, this emphasis on ‘personal autonomy’ has, as this case shows, its dangers. Erskine was, in the words of his counsel ‘a very strange man’ but he was capable of giving coherent instructions and so they had not pursued his fitness to plead at trial. As reported by the LCJ,

Professor Eastman also examined the issue of the appellant's fitness to plead. He suggested that the appellant was so deluded that he was unable rationally to address the question whether to admit his offences and advance diminished responsibility, or to deny the offences altogether. The evidence would support a suggestion that he was “cognitively” unfit to plead. Professor Eastman addressed some of the difficulties arising from the application of the Pritchard criteria based on a nineteenth century view of mental disorder in the present century (para 119).

So Erskine served 20 years of a mandatory life sentence which everyone seems to agree was wrong. (And where is he today?)

R (Ferris) v DPP [2004] EWHC 1221 (admin) – In May 2000, a woman who was charged with the manslaughter of two of her children was found to be unfit to stand trial. In June 2000, following the usual procedure, another jury presided over by another judge found that had done the acts alleged, killed her children. In May 2001 the responsible medical officer (RMO) at the hospital to which she had been sent informed the Home Office that she was now fit to be tried. In May 2003, following the opinions of all the experts instructed by both prosecution and defence, a jury again concluded that she was unfit to plead (indeed her limitations resulted from organic damage present since birth and it appeared that she would never be fit to be tried). The Administrative Court held that following a second finding of unfitness to plead, it was necessary for a jury (a fourth jury!) to reconsider the issue of whether the accused had committed the actus reus of the offence. (The real outrage in this case was why it was ever necessary to empanel the third jury given that all the experts disagreed with RMO that she was now fit to be tried). It is surely an understatement to say “the mental health of the accused can deteriorate as a result of the stress occasioned by
court proceedings” (at para 149). Of course a court should be able to reverse the decision to remit the case².

**Norman** [2008] EWCA Crim 1810 This case is used to here to illustrate the argument for filling an ‘obvious technical lacuna’ that where a finding under s. 4A is quashed and there has been no challenge to a finding under s. 4 (that the accused is under a disability) there should be a power for the Court of Appeal to order a re-hearing under s. 4A³.

The Law Commission is also deeply (and unsurprisingly) critical of the decisions of the House of Lords in *Antoine* [add ref] and in *H* [2003] UKHL 1. The defendant in *H* was aged 13 when he was charged with two offences of indecent assault on a girl aged 14. Before his trial in the Crown Court (at Bradford) he was examined by psychiatrists instructed on his behalf and on behalf of the Crown, all of whom agreed that he was unfit to stand trial. Yet rather than simply dealing with his case through mental health services, he had to survive two jury trials (and indeed an appeal to the House of Lords). First, a jury was empanelled to decide the question whether he was fit to stand trial, and unsurprisingly, given the psychiatric evidence, they found that he was indeed under a disability and so unfit. Then at a separate hearing a different jury found that he had indeed done the acts alleged against him in the indictment. He was then absolutely discharged on both counts and his father was directed to cause him to be registered as a sex offender⁴. 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 defendant⁵? Here I question the choice of proceedings and the relative role of social workers, psychiatrists, police and CPS. It is somewhat chilling to read the judgment of the House of Lords, in the appeal against the second jury’s verdict, which focuses (perhaps properly, but nonetheless chillingly) on the narrow question under appeal, the applicability or otherwise of Article 6 of the European Convention on Human Rights (the right to a fair trial). There is no discussion of the welfare of the child, and no questioning of why this child was subjected to this heavy-handed criminal justice process.

In contrast, the Law Commission rehearse key decisions of the European Court of Human Rights (*Stanford v United Kingdom* App No 16757/90; *T v United Kingdom* App No 24724/94 and *V v United Kingdom* App No 24888/94 (2000) 30 EHRR 121; *SC v United Kingdom* (2005) 40 EHRR 10 (App No 60958/00)) to conclude that “effective participation requires active involvement on the part of the accused rather than just a passive presence” (at para 2.102).

(ii) The Law Commission’s paper makes good use of the academic and professional literature.

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² Which is the sensible provisional proposal 12 made in this Consultation Paper. Nor should there have to be a fourth jury, subject to the consent of the representative of the accused (provisional proposal 13)
³ Provisional Proposal 14
⁴ For my discussion of the implications of sex offenders’ register, see Padfield, N, ‘Discretion and decision- making in public protection’ in Nash and Williams (eds) *Handbook on Public Protection Protection* (Willan)
⁵ Section 44 of the Children and Young Persons Act 1933 still applies: Every court in dealing with a child or young person who is brought before it, either as an offender or otherwise, shall have regard to the welfare of the child or young person and shall in a proper case take steps for removing him from undesirable surroundings, and for securing that proper provision is made for his education and training. See also s. 9 of the Criminal Justice and Immigration Act 2008.
Well worth a read is Rogers et al’s analysis of twelve interviews conducted by a forensic psychiatrist with senior criminal barristers. The conclusions are both powerful (the authors “gained a strong sense that urgent changes are required”) and intriguing (for example, they point out that a person who pleads not guilty may require greater capacity than the person who pleads guilty (since they need to understand the implications of that plea). Of course, fitness to plead is different to fitness to stand trial, and the level of fitness may vary according to the complexity of the case.

Then there’s Scott-Moncrieff and Vasall-Adams useful article in Counsel magazine which points out that,

> It is astonishing and possibly unlawful, that the civil law test for capacity and the criminal law test for unfitness to plead are contradictory. A person who would not have capacity under the Mental Capacity Act, to take relatively trivial decisions about his life might be found fit to plead in the criminal law context and be expected to make such important decisions as to whether to plead guilty or not guilty.

Many others, of course, have argued against the current rules, particularly that the test is too restrictive.

(iii) Some of the Law Commission’s most interesting evidence is to be found in a series of appendixes:

- Appendix A summarises mental health legislation (usefully – but more could be done to compare routes in to and out of civil and criminal/penal institutions).

- in Appendix B, the Commission reproduces the entirety of a summing up in the repeat “section 4A” of Patrick Sureda in 2008. The Law Commission point out that “it was apparent to the judge (His Honour Judge Jeremy Roberts QC) and the jury that the resurrection of the court proceedings was having a hugely damaging effect on Mr Sureda’s mental health which disintegrated completely as the hearing progressed (see B.3)”. The reader is given plenty of food for thought….

- Appendix C contains very useful data on findings of unfitness to plead

- Appendix D is the Impact Assessment. We learn more details on the best estimate the Commission can make on the impact that their proposals would have – and the best guess seems to be that possible implementation of the proposal would lead to some overall savings. Such exercises are of course fraught with difficulties, and it is difficult to cost such factors as the negative effect on mental health of different

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7 L Scott-Moncrieff and G Vassall-Adams, “Yawning gap: capacity and fitness to plead” Counsel Magazine, October 2006, 14, cited at para3.46 of the Consultation paper

8 See, in particular, Mackay and Brookbanks (2005), Mackay et al (2007)

9 This might have been a fuller description: the Commission does not report that this followed Mr Sureda’s alleged attempt to blind Peter Coonan (the Yorkshire Ripper) in Broadmoor six months earlier, which also resulted in comparable proceedings the next year.
processes, and, indeed, on the comparative costs of prison and hospital (which may or may not be relevant).

II: The proposed solution

The current process is a two stage one:

(i) the trial of the issue whether the suspect is fit to stand trial. The current test for determining fitness to plead dates from 1836\(^{10}\). For the Law Commission, there are two problems with this *Pritchard* test, well summarised at para 3.23:

- it places a disproportionate emphasis on cognitive ability and does not take any or sufficient account of factors such as emotion or volition
- it does not take account of the capacity of the accused to make decisions relating to his or her trial.

The Law Commission therefore propose a new ‘decision-making capacity’ test. They think that this would be used more frequently than the current test (though this feels a little like guess work). Fairer, yes and better. Whether or not it will be used more frequently depends on many factors such as the availability of legal advisers with both time and expertise.

(ii) the section 4A hearing, or the trial of the facts. Did the suspect actually do the crime? It seems ostensibly proper that there should be a formal assessment of this issue since a defendant who is unfit to plead may still be detained under civil powers. But can one always distinguish the ‘conduct’ part of an offence from the fault element? The Law Commission gives several examples: a common one is having an offensive weapon in a public place (s. 1(4) of the Prevention of Crime Act 1953), where the suspect is guilty if he or she intends to use it to cause injury. There are also a number of examples under The Terrorism Act 2000, the Terrorism Act 2006 and the Proceeds of Crime Act 2002 where it “impossible to determine whether the conduct element has been committed without having regard to the mental state of the accused” (at para 6.29). They also point out that in secondary participation cases, it is not possible to ascertain whether somebody is guilty without looking at the accused’s knowledge. Would the law be fairer and work ‘better’ if (as the Butler committee recommended) all the elements of the crime had to be proved at this stage?

It is difficult to assess whether these proposals would be “better” unless we better understand the current system. Most of the reported cases are in relation to exceptional cases (largely murder). Nearly all the barristers in Rogers et al (2009) were concerned about the current ‘unduly cumbersome and time-consuming process’. Here’s the rub: people who are unfit to plead, or morally not truly blameworthy for their ‘crimes’ should not be prosecuted. 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. Rogers et al’s barristers were disconcertingly honest in admitting that ‘unfit’ offenders may often not be identified or are simply overlooked. There may be a significant number of people

\(^{10}\) *Pritchard* (1836) 7 Car. & P. 303
(like Erskine, H and many others) whose are not capable of making decisions and whose decisions are irrational and flawed as a result of mental disorder. Rogers et al quote a barrister saying

‘... One young man that raised anxiety in my mind was 17, from Eastern Europe, and had seen his parents murdered. He had literally lived on his own from the age of 11, on a hillside tending goats. He got an A for intelligence, was deemed fit to plead but there was a huge vacuum in his cultural understanding . . . he could not give evidence because either his answers or the questions asked were being misconstrued. He didn’t have a fair trial . . .’

How could we introduce routine screening for fitness to plead?

- Could we also more obviously ‘balance’ the rights of the mentally disordered such that ‘due process’ does not become unduly burdensome? Can the Law Commission assess this without reviewing in more detail the civil mental health system? While it seems proper that there should be a formal assessment of whether the defendant committed the crime, since a defendant who is unfit to plead may still be detained under civil powers, civil detention also requires strong safeguards.

The discussion so far has focused on what goes on in the Crown Court. The problems which arise in the magistrates’ court, and in the youth court, may be as great. Again, it is difficult to assess the Law Commission’s proposals without much more detailed research on the current problems in practice. The reported cases are often too brief to be really helpful: for example, the Law Commission criticizes the decision in Blouet v Bath and Wansdyke Magistrates Court [2009] EWHC 759 (Admin) but unfortunately the judgement is very brief: we do not learn anything about what the claimant (with Asperger’s syndrome) was alleged to have done, or the offence with which he had been charged. The judgement simply rehearses appropriate procedures. R (Varma) v Redbridge Magistrates’ Court [2009] EWHC 836 (Admin) paints a dreadful picture of the treatment of a man with severe learning difficulties: Mr Justice Oppenshaw orders costs to be paid equally by the CPS and by the magistrates Court:

there was clear evidence that the claimant had learning difficulties of such seriousness that he could not participate in the trial process. Even if that decision [to proceed to trial in the magistrates’ court] was defensible, which it is not, they should never have contested the proceedings beyond the order that Mr Justice Blake, let alone to and including this contested hearing…. (at para 89).

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. Indeed, I wrote in Archbold News\textsuperscript{11} 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? As Professor Andrew Ashworth states, in his commentary to the decision

\textsuperscript{11} See (2007) 5 Archbold News 3-4

what is absolutely clear is that the Strasbourg approach is to give far greater emphasis to the principle of effective participation than the English courts have tended to do….. In most other European countries it would not be possible to prosecute a child of 11, and it is no surprise that the European Court of Human Rights insists on high standards for effective participation and on special arrangements if such cases do go ahead.

For a recent review, see Davies, Z. and McMahon, W. (eds), *Debating Youth Justice: from punishment to problem solving*? (Centre for Crime and Justice Studies 2007, freely available on the net) which argues that the age of criminal responsibility should be raised to 14 with civil childcare proceedings used for children below that age who need compulsory measures of care. The Law Commission more cautiously suggest that “in particular, there may be sound policy reasons for looking afresh at the age of criminal responsibility (at para 8.57). Indeed.

**Conclusion**

An area in which much light needs to be shone. Well done the Law Commission for grasping the nettle!
Dear [Name]

Unfitness to Plead: Consultation Paper no 197

First, 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.

Since I am also broadly supportive of the recommendations, and the line of reasoning you so clearly set out, I am confining my comments to one point only. And it relates to your proposal for a special verdict: provisional proposal 9. Whilst I favour an integrated ‘fact and fault’ hearing and recognise there is a problem where the acquittal is based on the prosecution’s inability to prove the necessary fault element, I am hesitant about the notion that a further hearing could result in a special verdict of an acquittal qualified by reason of mental disorder. This would seem to me to 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. Needing subsequently to get into the murky territory of whether the acquittal is because of mental disorder existing at the time should, moreover, be a sufficient disincentive not to do this, without even raising the potentially discriminatory elements. (It’s too early to tell if the causative elements now in diminished responsibility are likely to prove equally problematic!)

But, my principal reason for opposing this is pragmatic. If the accused is both mentally disordered and dangerous at the time of acquittal then admission to a secure hospital bed will presumably be required, but even in the context of a special verdict this can only be achieved where the mental disorder is of the requisite severity. Yet such an admission could equally be facilitated under the civil sections of the MHA 1983 without the additional tag of a special verdict. Indeed, if admission cannot be justified on grounds of health need (ie be Article 5 compliant with respect to ‘unsoundness of mind’) then there will be no basis for intervening in such a substantial way (the supervision order being sufficiently ‘light-touch’ to make the accused arguably someone about whom a special hearing/verdict would not be justified, and with respect to whom a judge would not agree to holding such a hearing). So I would argue that you obtain the same result (hospital confinement and treatment) without the special verdict.

There is, of course, one difference. Under the current provisions a judge can order admission of an unfit accused found to have committed the act against medical advice – which remains an anomaly, all other admissions to hospital beds requiring clinical support. And one disadvantage to those of a protective mind: discharge from a civil order can be on the grounds of clinical authority alone – there is not the additional safeguard of the restriction order in place. But this latter problem could be addressed through your proposals under 6.155-6.159 in the most serious cases. And probably numerous other matters that you have thought of but I have not!

With best wishes, Jill
Dear [Name]

Re: Unfitness to Plead Consultation Paper

Professor Ormerod sent me a copy of this consultation paper, as I was a participant in 14th December 2009 meeting at the Law Commission offices. I attended as a general adult psychiatrist with an interest in mentally disordered offenders, and as someone who has been closely involved in mental health criminal justice liaison teams. My comments about the paper are strongly informed by this perspective.

The first thing to say is that the paper is well written, so that I managed to understand a number of complex legal issues that are beyond my expertise. I also felt that it was, in general, persuasive with regard to its main proposals. Clearly, a good deal of the content concerns legal procedure, and it is difficult for a clinician to work out what the practical consequences might be, especially with regard to individuals appearing in magistrates courts (which is the bulk of my work with mentally disordered offenders).

There are a number of issues that cause me some concern.

1. The consultation paper does not have clear proposals with regard to summary justice. However, the largest number of mentally disordered offenders pass through this part of the criminal justice system. Whilst one can understand an emphasis in the consultation paper on the most serious offences, nonetheless there are many problems at magistrates courts. I am disappointed at the lack of firm proposals here. I do feel that the same principles should apply in Crown and magistrates courts.

2. I am persuaded by the unitary approach augmented by the provision of special measures, but I have some concerns over the use of mental capacity as set out in the Mental Capacity Act. The problem is that, in practice, the definition is sometimes difficult to use. The elements of mental capacity in the Act do not necessarily correspond to the psychological processes involved in decision making, and the judgement as to whether people are able to, for example, weigh up information can be very difficult to make with objectivity. However, I do believe that a capacity based
approach would be an improvement on the Pritchard test, and I do not have a better proposal.

I am not persuaded of the appropriateness of the recommendation of the mandatory use of a psychiatric ‘test’ to assess capacity. The paper that is cited in the consultation paper (page 76) in support of the use of a ‘test’ (R Cairns et al, British Journal of Psychiatry, 2005, 185, 379) looked at the rate of agreement between two assessors of mental capacity when clinical assessment was augmented by the McArthur Competence Assessment Tool for Treatment. Essentially what the paper shows is that when this tool was used under these circumstances, independent assessors agreed. However, they made a clinical judgement assisted by an instrument. This is not the same as using a capacity ‘test’. 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. I would strongly recommend against the mandatory use of an instrument of this sort. Whilst the use of an instrument, or instruments that might be devised in the future, might be desirable, making this mandatory creates a range of practical and theoretical problems.

3. I have some concerns over the somewhat throw away 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, which leaves me a little nervous. These are conditions where there is an indistinct demarcation between disorder and normality. In some cases there is controversy within psychiatry as to the validity of the clinical construct (i.e. whether these conditions actually amount to syndromes or whether they are simply worrying behaviours). I would like to see further exploration of this issue, as it is likely to be highly contentious amongst general adult psychiatrists. This issue also has a bearing on the provisional proposal 9.1(6) as regards to the admissibility of expert evidence on the general effect of a mental disorder or impairment. These conditions are of highly variable manifestation and I think that there are real problems with disconnecting expert evidence in such cases from the specifics of the individual concerned.

4. The impact assessment seems to me to be of limited value. I cannot work out whether it includes or excludes the impact of inclusion of magistrates courts’ defendants. 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.

5. The consultation paper correctly points to the problem of detection of the possibility of impaired capacity, but offers no solutions other than the proposal that any party in the proceedings can raise the issue. I fear I have no better idea than this, but detection remains a major worry, and in my experience defence solicitors cannot always be relied upon to notice or raise the issue. Indeed, restrictions on legal aid are likely to create an incentive amongst defence solicitors to encourage their clients to plead guilty, but this issue is obviously beyond the remit of the consultation paper.

6. The reform of the Section 4a Hearing is complex, and in the consultation paper is mainly discussed with respect to very serious offences. I am a little uneasy as I am far from convinced that the distinction between the new special verdicts and conviction per se is very meaningful. It is clear that the non-involvement of the accused in proceedings will close off the possibility of some defences. Unfortunately, as with a number of other issues, I do not have a better idea.

RESPONSES TO PROPOSALS AND QUESTIONS:

Provisional Proposals

9.1 (1) Agree
9.1 (2) Agree
9.1 (3) Agree
9.1 (4) Agree
9.1 (5) Agree
9.1 (6) I have some concerns as set out above.
9.1 (7) I disagree with the use of a defined psychiatric ‘test’, as I do not believe that this will prove reliable, practical or robust.
9.1 (8) Agree
9.1 (9) Agree
9.1 (10) Agree
9.1 (11) Agree
9.1 (12) Agree
9.1 (13) Agree
9.1 (14) Agree

Part 9 Questions

9.2 (1) Yes
9.2 (2) No
9.2 (3) Yes
9.2 (4) Agree Option 5 is best
9.2 (5) Yes
9.2 (6) I am not certain about this suggestion, but on balance, probably no.
9.2 (7) I have not come across these circumstances, but on balance, probably yes.
9.2 (8) Yes, given my disagreement with the specific psychiatric test and with the practicality of confining such assessments to doctors only.
9.2 (9) Yes
9.2 (10) These should mirror 8 and 9.
9.2 (11) This concerns youth courts, of which I have no experience.
9.2 (12) This concerns youth courts, of which I have no experience.

I would be happy to provide more information on all of these points or any other issues that might arise.

Yours sincerely

Rob Poole FRCPsych
Professor of Mental Health, Glyndŵr University/Honorary Consultant Psychiatrist, Betsi Cadwaladr University Health Board
Response to the Law Commission’s consultation paper 197: Unfitness to Plead from Prison Reform Trust

Prison Reform Trust

The Prison Reform Trust, established in 1981, is a registered charity that works to create a just, humane and effective penal system. The Prison Reform Trust aims to improve prison regimes and conditions, defend and promote prisoners’ human rights, address the needs of prisoners’ families, and promote alternatives to custody. The Prison Reform Trust's activities include applied research, advice and information, education, parliamentary lobbying and the provision of the secretariat to the all party parliamentary penal affairs group.

The Prison Reform Trust welcomes the Law Commission’s consultation on Unfitness to Plead. We are pleased that a number of publications from the Prison Reform Trust have informed the consultation document. The provisional proposals and questions raised by the consultation are important and, where we are able, we are pleased to respond.

Provisional proposals (PP)

**PP1:** 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.

The Prison Reform Trust (PRT) agrees with PP1, in particular the need to take into account all the requirements for meaningful participation in criminal proceedings, in accordance with Article 6 of the European Convention of Human Rights, and the case law that supports it; and, for children, the United Nations Beijing Rules on juvenile justice. In assessing capacity, it is important that the communication skills of the accused, and their ability to communicate effectively, are also taken into consideration.
PP2: A new decision-making capacity test should not require that any decision the accused makes must be rational or wise.

While PRT agrees with PP2, particular care must be taken to ensure that the accused is properly supported in his or her decision-making. For example, the accused must understand information given to him or her, understand the process they will be subject to, and the consequences of any decisions made. Such support should be provided by one or more appropriately qualified practitioners.\(^1\)

The Royal College of Psychiatrists and The British Psychological Society\(^2\) have produced professional practice guidelines for assessing capacity and best interest decision making, and further investigation with them would be useful.

PP3: 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.

PP4: 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 the trial which the accused faces.

PP3 or PP4: PRT agrees with PP3 – that there should be a revised single test, which assesses the decision-making capacity of the accused by reference to the entire spectrum of trial decisions that he or she might be expected to make. Further, unless the accused has the capacity to participate effectively in all aspects of criminal proceedings – supported, as necessary, by special measures and reasonable adjustments – he or she should be deemed unfit to plead.

PP5: 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 and where any other reasonable adjustments have been made.

PRT agrees in principle with PP5; however, the availability and scope of special measures and reasonable adjustments must first be determined. Wherever possible an individual should receive appropriate support in order to stand trial, and to participate fully in proceedings. If the assistance of special measures and reasonable adjustments are to have any influence on the assessment of whether an individual is

\(^{1}\) Such as a psychiatrist, psychologist, nurse, social worker and speech and language therapist.

fit to plead, the availability and scope of such measures and adjustments must be made an entitlement for the accused in law, and equivalent to that afforded the Crown. For example, section 104 of the Coroners and Justice Act 2009 deals only with defendants giving evidence, which would not be sufficient to ensure either ‘effective participation’ in court proceedings, or to prepare an individual for their trial, such as decisions that must be made ahead of a court appearance. Further:

- Special measures and reasonable adjustments should not be generally specified but based on the assessed need of the accused, undertaken by one or more appropriately qualified practitioners
- Any assessment of decision-making capacity that assumes a degree of support, whether through special measures or reasonable adjustments, must also guarantee, in law, that such support is made available and is paid for by the court
- The onus to ensure that such special measures and reasonable adjustments as may be required are in place should rest with the court, and not with the individual accused or his/her defence
- The ability of the accused to effectively participate should be kept under review and, to safeguard the accused, a procedure for halting the trial, should be put in place
- See also our response to Question 2.

**PP6: 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.**

While PRT agrees in principle with PP6, there are concerns about the prejudice that expert evidence could provoke. Notwithstanding the independence of the expert witness, there can be important differences between the evidence given by different professionals. For example expert evidence called upon by the prosecution might be different to that called upon by the defence; this, in turn, might result in an ‘expert dispute’ rather than any real illumination of the general effect of the mental disorder or impairment upon the defendant. While an understanding of the general effect of the mental disorder or impairment could be invaluable to proceedings – especially where practical examples are given to assist understanding – great care needs to be given to avoid creating prejudice either way.

**PP7: A defined psychiatric test to assess decision-making capacity should be developed and this should accompany the legal test as to decision-making capacity.**

While PRT agrees with PP7, a defined psychiatric test should be viewed as one part of the process to assess decision-making capacity. For example, a defined psychiatric test, accompanied by a clinical interview, would aid the process of
deciding whether an accused is fit or unfit to plead, and help to ensure parity. PRT is pleased to note the work of Dr Blackwood and his colleagues, as described in section 5 of the consultation document, and look forward to hearing more about the proposed test.

**PP8:** 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.

PRT agrees with PP8. In particular, we are pleased to note that in reforming the present section 4A hearing to include all elements of the offence, the rights of the accused would be protected under article 6 ECHR.

**PP9:** 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.

**PP10:** 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.

**PP11:** The special verdict should be determined by the jury on such evidence as has been heard or on any further evidence as is called.

PRT’s understanding is that PP9 – PP11 would apply only if the accused is acquitted because there is no evidence of fault (paragraphs 6.128 – 6.134, CP). 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.

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.

**PP12:** 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 medical evidence confirms) that the accused is still unfit to plead, the court should be able to reverse the decision to remit the case.

**PP13:** 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.

**PP14:** 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.

PRT agrees with provisional proposals PP12, PP13 and PP14.

Questions

**Question 1:** 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 hearing 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?

PRT agrees with Question 1. For further comment on special measures, see our response to PP5 and Question 2.

**Question 2:** 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?

A person centred approach should be adopted to assess the particular needs of the individual defendant, undertaken by an appropriately qualified practitioner. This would ensure that support is tailor-made to the individual, so helping to ensure that he or she is able to give their best evidence and to participate effectively in trial proceedings. Any special measures and reasonable adjustments deemed necessary should be paid for by the court, and should be an entitlement in law. See also our response to PP5.

**Question 7:** 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?

No.

**Question 8:** 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?

Yes; the procedure in the magistrates’ court, including the youth court, should mirror that in the Crown court.

**Question 9:** Do consultees think that if an accused lacks decision-making capacity there should be a mandatory fact-finding procedure in the magistrates’ court?

Yes; there is no rationale for a different approach to justice between the Crown and the magistrates’ court.
Question 10: 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?

If an accused lacks decision-making capacity there should be a mandatory fact-finding procedure in the magistrates’ court, which should mirror PP8. See, however, PRT’s concerns regarding PP9.

Question 11: Do the matters raised in questions 8, 9 and 10 merit equal consideration in relation to the procedure in the youth courts?

Yes; matters raised in Questions 8, 9 and 10 do merit equal consideration in proceedings involving children, and this should apply in both youth and crown courts. Further, due to developmental immaturity of children, additional safeguards should be put in place.

Question 12: How far if at all, does the age of criminal responsibility factor into the issue of decision-making capacity in youth trials?

As cited in this consultation paper, there is significant evidence that children’s developmental immaturity directly affects their capacity for decision-making. Thus, the age of criminal responsibility is a significant factor in the decision-making capacity of children in youth trials in both youth and crown courts. The age of criminal responsibility in England and Wales should be raised and aligned with the European norm of 14 years. Meanwhile, the principle of doli incapax should be re-established, and the Gillick competence assessment, or similar, used in all youth justice proceedings to regularise the protections afforded to children in the parallel jurisdictions of youth and civil/family courts.

Additional points for consideration

In addition to our response to the provisional proposals and questions contained in the consultation paper, we would like to make the following points.

- Pre-sentence: 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.
• Disposal under the Mental Health Act: 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.

Should any clarification on this response, or further information, be required, please contact:

Jenny Talbot
Prison Reform Trust
15 Northburgh Street
London EC1V 0JR

27 January 2011
New rules to decide who is fit to stand trial: response to consultation

Keith J.B. Rix, MPhil, LLM, MD, FRCPsych,
Consultant Forensic Psychiatrist and Part-Time Lecturer, Department of Law, De Montfort University.

Old rules

I believe that the Rules are even older (see my attached paper on Dyson\(^1\) which I am preparing for publication: I have a Powerpoint version of the first part with appropriate illustrations!).

The legal test

I agree that it is important to have the same basis for capacity as in the Mental Capacity Act 2005.

Proportionality

I can see the difficulties with regard to proportionality. As Lord Donaldson said in Re T\(^2\): “The graver the consequences of the decision, the commensurately greater the level of competence is required to take the decision”. Perhaps the answer lies in the approach to the standard of proof and there is something to be learned from the how the higher courts have sought to deal with particularly serious allegations within the civil standard of proof\(^3\).

1.6 is important. Under the present system, consideration has to be given to the effect of the special measures for vulnerable defendants (Practice Direction (Criminal Proceedings): Further Directions) [2007] 1 WLR 1790), the use of a ‘facilitator’ (R v SH [2003] EWCA Crim 1028) and the provisions of s.104 of the Coroners and Justice Act 2009 which adds a new s.33BA to the Youth Justice and Criminal Evidence Act 1999 permitting the use of an intermediary in the case of accused persons under the age of 18 years whose ability to participate effectively is compromised by their level of intellectual ability or social functioning and in the case of accused persons over the age of 18 years who suffer from a mental disorder within the meaning of the Act. 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. This has a parallel in s.1(3) of the Mental Capacity Act 2005.

A defined psychiatric test

\(^{1}\) R v Dyson (1831) 7 Car & P 303

\(^{2}\) [1993] Fam 95; [1992] 4 All ER 649, CA

I agree. There should be a test of decisional competence. If the Commission cannot do better, I recommend that the legal test should be that adopted in Jersey in Attorney General v O’Driscoll. Psychiatrists should be asked to operationalise this as a psychiatric test.

**Overlap with s.35 of the Criminal Justice and Public Order Act 1994**

There is a provision under s.35 of the Criminal Justice and Public Order Act 1994 for the court to refrain from giving the adverse inference direction to the jury in respect of the defendant’s silence at trial if “it appears to the court that the physical or mental condition of the accused makes it undesirable for him to give evidence”.

The Courts differ in the way they approach the relationship between this provision and the provisions for fitness to plead and stand trial. I hope that the opportunity will also be taken to clarify this area of the law.

Grubin (1996) described what appears to have been one of the first cases in which this provision was applied. This was a case in which there did not appear to be any issue with regard to the defendant’s fitness to plead and stand trial, he was not suffering from any form of mental disorder within the meaning of the 1983 Act and no psychiatric diagnosis could be made of mental illness or personality disorder but it was suggested that “his personality was such that under the stress of cross-examination he was likely to become anxious, frustrated and confused, and that this could cause him to behave in an inappropriate manner, with the risk of prejudicing the jury against him …. He had already demonstrated a wide repertoire of behaviours … (any of which), while not being an indication of his guilt or innocence, could distract from the content of his evidence and lead the jury to make inappropriate inferences”. There was also an argument that although he did not suffer from a form of mental disorder, he might appear to do so to a lay individual, as he had appeared to his solicitor and barrister, and this was what the terminology ‘mental condition’ was intended to reflect. The Court stressed that the overriding concern had to be the risk that the jury could misinterpret his behaviour and obtain an inappropriate picture of the defendant and his defence. The defendant did not give evidence on his own behalf and he was acquitted.

It has been suggested by Gray, O’Connor, Williams et al (2001) that there are a number of psychiatric and psychological disorders that may amount to a ‘condition’ within the meaning of s.35(1): “severe mental health problems, learning disabilities, dementia or head injury that may lead to the evidence that they give at trial being misinterpreted by a jury and consequently leading to a potentially biased view being formed of both the defendant and the defence”.

Whereas, in the case reported by Grubin (1995), where the issue addressed by s.35(1) was treated as being separate from the issue of fitness to plead and stand trial, Gray et al (2001) have reported a case in which defence counsel argued that it should be included as a new and additional criterion in the evaluation of fitness to plead and stand trial and in which case both psychiatrists who had been instructed concurred in their opinion that if the Court “considers that ability to give evidence in your own defence is vital for someone to be fit to plead and

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4 [2003 JLR 390]
stand trial, on the basis of his inability to give evidence on his own behalf, (we) consider Mr M unfit to plead and stand his trial”. The defendant was then found unfit to plead and stand trial, on a trial of the facts he was found to have done the act alleged and he was made subject to a guardianship order. Insofar as the evidence of the psychiatrists was that he was unable to give evidence on his own behalf, it could be argued that, in any event, he should have been found unfit to plead and stand trial, as he was incapable of giving evidence on his own behalf, in which case, the s.35(1) provision was unnecessary.

Gray et al (2001) state that since their reported case they have been aware of a small number of other cases in which “the ability to give evidence in one’s own defence had been included in the criteria of fitness to plead and stand trial”. However the ability of the defendant to give evidence on his own behalf is one of the original ‘Pritchard criteria’.

Insofar as, in the case reported by Grubin (1995), the defendant was fit to plead and stand trial, and this included being capable of giving evidence on his own behalf, and s.35(1) refers to the desirability of the defendant giving evidence on his own behalf, it would appear that it is the distinction between ‘capacity’ and ‘desirability’ which is the key to understanding the s.35(1) provision. The cases described by Grubin (1995) and by Gray et al (2001) are of defendants who were going to appear or behave in such a way as to prejudice the jury against them. Not being capable of acting in one’s best interests (R v Robertson\(^5\)) does not make someone unfit to plead and stand trial. Therefore, s.35(1) would appear to be a provision for defendants who have the capacity to give evidence on their own behalf but will probably not, as a result of their ‘mental condition’, act in their best interests.

If this interpretation of the law is correct, these are complementary provisions. Alternatively, it is possible that Parliament intended to use s.35(1) to give a statutory basis for the inclusion of the undesirability of the defendant giving evidence on his own behalf in the rules for fitness to plead and stand trial, in which case the interpretation of the law in the cases reported by Gray et al (2001) would suggest that these are one and the same issue. Having regard to the wording of the statute, i.e. ‘undesirability’ rather than ‘inability’ or ‘incapacity’, this would appear unlikely but I hope that the Commission will clarify this.

The approach does matter: a defendant found fit to plead and stand trial but allowed to benefit from s.35(1) will either be found guilty or acquitted and, if acquitted, the Court’s powers will end there and then. However, if the defendant is found to be ‘under a disability’, because it is undesirable for him to give evidence on his own behalf, he will be subject to the procedure under the CPI(IU)A 1991 and, if found to have done the act alleged, disposal of his case will be in the hands of the Court. It is also worth noting that for the application of s.35(1) there is no requirement as to medical evidence. The Court may apply it on the basis of the evidence of one doctor or a psychologist or even of its own motion. However, if the issue is held to fall within the criteria for fitness to plead and stand trial, there will need to be evidence from two registered medical practitioners including one approved under s.12 of the Mental Health Act 1983 (as amended by the Mental Health Act 1987).

References

\(^5\) [1968] 3 All E.R. 557, CA

One Saturday night in September 1830, at about 8 p.m., William Graham was returning home by a footpath from Wortley to Ecclesfield which in those days was a village on the road from Leeds to Sheffield. On the footpath he met a young woman who was carrying something in her apron. This was about 600 yards from the cotton mill dam. Shortly after this he met Henry Woodhouse who asked him if it had been the deaf and dumb girl who had passed by. He confirmed that it was indeed her. Fanny Guest had also seen the dumb girl go past with something in her apron.

The deaf and dumb girl was Esther Dyson, then aged 23 years. She was of exceedingly good appearance, tall, slender, with light hair and complexion and of a rather pleasing and pensive cast of feature. She lived with her older brother, who was also deaf and dumb. Their parents were both dead. They both worked at the cotton mill and had done for eleven years. The cotton mill later became the paper mill that you see here.

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Esther Dyson’s behaviour was suspicious. Three or four months previously, her next door neighbour, Ellen Greaves, had challenged her about being in the family way. She denied it. A month previously she had challenged her again. This time Esther Dyson reacted angrily and using signs she said that some stuff that she had applied to her throat, inwardly and outwardly, had made her body swell. The neighbour made signs to the effect that Esther Dyson should make some clothes for her child but she responded dismissively and made signs to the effect that she was not with child.
On the Friday, the day before she was seen on the footpath with something in her apron, her neighbour had seen her at about 2 p.m. at the door of her house and she had appeared quite big in the family way. She next saw her on the Saturday morning at about 9 a.m. washing her floor. She appeared pale, languid and weak. She had a flannel tied round her neck. Her neighbour asked her how she was and she motioned to say that she had thrown up a large substance and it had settled her body. The following day, Sunday, the neighbour visited and her brother motioned to the effect that she was in bed very sick. Later in the afternoon the neighbour saw Esther Dyson. She appeared poorly and weak. She suggested her brother should make her some tea and she stayed until she had taken it. The neighbour was in no doubt from her appearance that she had been delivered of a child.

Later on Sunday, James Henderson, the overlooker from the cotton mill, went to the Dysons’ house. Her brother allowed him to see his room and open his boxes. There was nothing untoward. However, there was blood on the floor of Esther’s bed-chamber, some attempt had been made to wipe up the blood and there was blood sprinkled on the wall. There was blood on the bottom of the window. He found two blood-stained aprons and a skirt. Being convinced that something was wrong, the overlooker sent for the vestry clerk and together they searched Esther Dyson’s box and found several articles from which it was evident that they belonged to a person who had been delivered of a child.

James Machin was alerted and with W. Shaw, the parish constable, he commenced a search of the dam beside the cotton mill. Either late Sunday night or on Monday Machin pulled from the dam the headless body of a full-grown baby girl. It was wrapped in a piece of green cloth. The head was found, also wrapped in a piece of green cloth. The green cloth was part of the sofa cover from the Dysons’ house.
Ann Briggs a midwife was shown the body and the head. She was of the opinion that the head had been cut off with a blunt instrument.

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In the meantime, Esther Dyson had been taken to the Ecclesfield Workhouse. The midwife took the body parts to the Workhouse and laid them down beside her. Esther Dyson communicated to her brother that she had not thrown the baby into the dam but merely laid it there. The midwife asked her to explain how she was delivered of the child and she put to her the fact that the child’s head was cut off. On this and subsequent occasions, she insisted that the head had just come off.

The governess of the Workhouse, Sarah Ingham, examined Esther Dyson’s breasts and found a deal of milk in them. Esther Dyson repeated her story about how the head came off. She showed her a knife and put it to her by signs that she had cut off the head but she threw herself to one side and shunned the idea.

Mr. William Jackson, lecturer on anatomy, was summoned. Mr. Jackson, who was a Member of the Royal College of Surgeons, and later one of the first Fellows, went on to lecture in midwifery and he may also have become lecturer in forensic medicine at the Sheffield Medical School. Mr. Jackson found that Esther Dyson had every appearance of having been recently delivered. He was decidedly of the opinion that the head had not been torn or screwed off. He was also in no doubt, from his examination of the baby, that it had been born alive. Mr. Joseph Campbell, a surgeon, also examined mother and child and corroborated Mr. Jackson’s opinion.

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The following Thursday at The Black Bull Inn in Ecclesfield, Mr. B. Badge, Coroner for that district of Yorkshire, conducted the inquest. The body of the child was on full view. The various witnesses gave evidence, the Coroner summed up, the Jury retired and a few minutes later they returned with a verdict of wilful murder. The Coroner then issued a warrant for Esther Dyson’s committal to York Castle for trial at the following Lent Assizes and on a charge of the wilful murder of her female bastard child. The local Sheffield newspaper commented not only on Esther Dyson’s good looks but also on the observation of the coroner that she was very shrewd and cunning.

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It is likely that she walked from Ecclesfield to York where she was remanded in custody in the Women’s Prison, the cells of which, as you see here, now form part of the York Castle Museum.

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At the 1831 York Spring Assizes, held in the 18th century court house which is still in use today, Esther Dyson, was indicted for the wilful murder of her bastard child by cutting off its head. As she had been born ‘deaf and dumb’ the case excited the greatest interest and the galleries were crowded. She was dressed in a coloured silk bonnet, a light calico printed dress and a red cloak. She had the appearance of a respectable female in the lower walks of life. James Henderson, the overlooker from the mill, who had known her for ten years said that he could communicate with her by signs. However, he said that it was impossible to make her understand by signs that she might object to any gentlemen of the jury as she pleased and, although she had been instructed in the ‘dumb alphabet’, she could not put words together. The jury was told that, if they were satisfied that she had not then, from the defect of her faculties, intelligence enough to understand the nature of the proceedings, they ought to find
her not sane. The jury returned a verdict that the prisoner was not sane. Her incapacity to understand the mode of her trial or to conduct her defence was proved. She was ordered to be kept in strict custody until His Majesty’s pleasure was known.

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When Pritchard, who was also ‘deaf and dumb’, was indicted for the capital offence of bestiality a few years later, the trial judge referred to the procedure followed in Dyson. However, the adoption by Parker LCJ, in Podola, of the direction to the jury in Pritchard (Box 1) has made Pritchard the leading case.

The procedure for determining whether an accused is ‘under a disability’ is governed by the Criminal Procedure (Insanity) Act 1964 (‘the 1964 Act’) as amended by the Criminal Procedure (Insanity and Unfitness to Plead) Act 1991 and the Domestic Violence, Crime and Victims Act 2004 (‘the DVCVA’). If the issue is raised by the defence, it bears the burden to establish that the accused is under a disability on a balance of probability; if raised by the prosecution or the judge, it has to be proved beyond reasonable doubt. In practice, it is almost always raised by the defence.

Under the DVCVA, the issue is now decided by a judge alone. According to s. 4(6) of the 1964 Act, the court may not determine the issue except on the evidence (written or oral) of two or more registered medical practitioners, at least one of whom must be approved under s. 12 of the Mental Health Act 1983. Where the medical evidence is unanimous, the medical evidence may be read, but the judge is entitled to reject it and, in which case, as where it is contested, oral testimony will be necessary.

The test is shown in jury (judge) friendly form in Box 2. There are some common misunderstandings about fitness to plead and stand trial (see Box 3).

Assessment is best approached by asking the accused to explain his attendance. His response may indicate that he understands the adversarial criminal proceedings and the nature of the offence with which he is charged. Questions as to plea may reveal whether or not he understands the available pleas and their effects. If pleading not guilty, the accused can be asked to explain why, although, if the assessment is at the request of the prosecution, he may have been advised not to discuss his defence. Then it will be more difficult to decide whether or not he can give instructions. To test understanding of the evidence, it is necessary to put some of the evidence and ask the accused to comment or explain. The issue is case specific (‘a case of this nature’ – Pritchard, “in this case” – Whitefield). There is a world of difference between understanding the evidence in a complex fraud case and understanding the evidence in a shoplifting case. All of this questioning will also shed light on the ability of the accused to give evidence. The case should not be considered in isolation: how the accused conducts the affairs of everyday life will shed light on the abilities needed to understand evidence, give instructions and give evidence.
Cases involving the learning disabled are often the most straightforward. Borderline cases can be problematic. Although it will often be advisable to have the evidence of a psychologist, the test is a legal test and not a matter of I.Q. or performance on some particular psychological test. Cases involving dementia ought to be straightforward but, as with Ernest Saunders in the Guinness case, when the case is over it may be decided that the diagnosis was mistaken. The most difficult cases involve depressive disorders. These often involve hitherto law-abiding professional or business people who are understandably unhappy when charged with an offence such as fraud and fear not just financial and professional ruin but years of imprisonment. It is necessary to take remember that many defendants are unhappy at being prosecuted and are fearful of the outcome but are not under a disability. Memory and concentration impairments severe enough to interfere with understanding evidence, giving instructions or giving evidence are easy to assert. Careful forensic assessment is needed to judge their genuineness. The recollection of a recent event can call into question alleged memory impairment. An admission to spending six hours a day going over statements and documentary exhibits with a solicitor can call into question impairment of concentration. Careful study of medical records and witness statements may reveal evidence inconsistent with the symptoms alleged.

If the accused is found to be under a disability and, on a trial of the facts, is found by a jury to have done the act or made the omission, the court may make a hospital admission order, with or without restrictions on discharge, a supervision order or an order for absolute discharge. If the jury is not satisfied, they must acquit.

Keith J.B. Rix,
Consultant Forensic Psychiatrist,
The Grange, Cleckheaton, and Cygnet Hospital Wyke

Law reports

*R v Berry* (1977) 66 Cr App R 156.

*R v Dyson* (1831) 7 Car & P 303-305.

*R v Podola* [1960] 1 QB 325.

*R v Pritchard* (1836) 7 Car & P 303-305.

*R v Robertson* [1968] 3 All ER 557, CA.

Box 1. The *Pritchard* test.

Is the accused “of sufficient intellect to comprehend the course of proceedings on the trial, so as to make a proper defence – to know that he might challenge [any jurors] to whom he may
object – and to comprehend the details of the evidence, which in a case of this nature must constitute a minute investigation [...]. if you think that there is no certain mode of communicating the details of the trial to the prisoner, so that he can clearly understand them, and be able properly to make his defence to the charge; you ought to find that he is not of sane mind.”

**Box 2. The Pritchard test as operationalised by HHJ Norman Jones, QC, in R v Whitefield (1995) (unreported)**

"Have the defence satisfied you that by reason of the defendant's state of mind it is more likely than not that he is unable to either:

i) instruct his solicitor and counsel so as to prepare and make a proper defence in this case. This applies to his ability to instruct his legal advisers before and/or during his trial; or

ii) understand the nature and effect of the charge and plead to it; or

iii) challenge jurors; or

iv) understand the details of the evidence which can reasonably be expected to be given in his case and to advise his solicitor and counsel of his case in relation to that evidence; or

v) give evidence in his own defence in this case;

If the answer to any one of the above questions be yes then your finding should be that he is under a disability such that he is unfit to plead and stand his trial."

**Box 3. What does not necessarily amount to unfitness to plead and stand trial**

A complete loss of memory for the events at the material time (*Podola*)

Not being capable of acting in one’s best interests (*Robertson*)

Being deluded as to the material facts (*Robertson*)

Having delusions that might lead to an wrong or unwise challenge of a juror (*Robertson*)

Having delusions that might at any moment interfere with a proper action (*Robertson*)

A grossly abnormal mental state and being unable to view actions in any sort of sensible manner (*Berry*)
27th January 2011

Dear Sir/Madam,

A colleague of mine recently mentioned that ‘fitness to plea’ was being reviewed, with the idea that ‘psychiatrists only’ were to be able to do this, and that a standardised version of an assessment was to be undertaken.

The first thing to say is a 260 consultation paper is prohibitive. If you want responses, make the paper a sensible length!

**Psychiatrists only**

As a psychologist, the current rules say you need two psychiatrists and as such, there would be little change. However, my concern is more fundamental, 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 plea.’

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.

info@grahamrogers.org.uk
www.grahamrogers.org.uk
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.

If the aim of the review is to restrict and reduce the number of people able to claim a lack of fitness, and/or the need for support, then ‘psychiatrists only’ would be useful, as their wider community based experiences and training are limited, [and there are not enough psychiatrists (or psychologists) available to do the work currently needed.]

This situation is further restricted even when it comes to the need for support. It is not in the training or experience of a psychiatrist to work out the systems of support required for clients/patients. It takes professionals many years of training and experience to fully understand such systems, as teacher training illustrates.

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?

If the aim is to produce a superficial system whereby ‘boxes are ticked,’ then the idea that an untrained professional try to advise in an area where they lack the training, then such a proposal is excellent. However, I do not think that is what is being proposed.

I should clarify, the aim of this response is not to criticise psychiatrists, but to raise awareness that they are not a panacea to the difficulties highlighted.

In my view, all professional groups have their limitations, including psychologists. In essence, one size does not fit all.

Pritchard (1836)
The Pritchard rules in my view form a good foundation upon which to build when considering the fitness to plea issues. However, they are both restrictive and somewhat arbitrary.

In my view, the notion of ‘understanding’ needs to be set within a ‘daily life’ and community based setting, as this reflects the real world for most people.

Hence, with regard to those with learning difficulties or disabilities, the court currently uses the IQ cut off of 69/70. That is, if you have an IQ of 69 or less, and the other criteria are met, then you can claim, in theory, to have a learning disability and the court will accept that special provision needs to be made.

However, fitness to plea, in my experience requires an IQ score of 60 or less before a court will consider this as a relevant issue. Hence, the defendant is not needing to be in the lowest 2% of the population, but within the lowest 0.5%, often reflecting the adult population with whom psychiatrists typically work.

Understanding and communication:
Further, one needs to understand the language skills of the defendants.

For psychiatrists to work with clients they need to have reasonable expressive and receptive language skills. However, if, as is often found, the defendant has reasonable or good expressive language and appears able to make themselves understood reasonably clearly, they are deemed ‘more able.’ However, this is based on a medical model, as opposed to a socio-educational model.
Hence, in the medical model, being able to talk about your past is important, whereas in a socio-educational model it is how this discussion is related to day to day life and your ability to function socially.

One is based on the abilities within the interview within a clinic based setting, the other about how the interview links to the social world of the person, and how this then conforms to what we know about them. With the latter system, one also looks to see how they respond, knowing that the ‘less able’ in the community learn how to respond, irrespective of genuine understanding.

If one is basing a decision on an interview, then one is severely restricting the options. What one may be assessing is not the interviewee, but the interviewer, and their ability to pick up subtle difficulties hidden using skills developed over many years. After all, those who are less able, and ‘unfit,’ do not want to be seen as such, and therefore work hard over many years to hide the obvious signs.

The ability to address the evidence is always interesting, as it is typically written down. Most psychiatrists do not carry out reading accuracy and reading comprehension tests, and they are not trained to use them. Nor are they are not trained in diagnosing dyslexia or hyperlexia, which is useful to consider as one may underestimate the underlying intellectual ability, while the other typically over-estimates it.

Suggesting that defendants have the evidence read aloud to them by counsel is 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.

A conversation about your own past is easier than a conversation about evidence and the opinions of what others saw, or say they saw, and the implications that such evidence has to you as a defendant in court.

These issues related to the skills and abilities needed to access evidence and the ability to consult with counsel, are not addressed by psychiatrists, as they are not trained to do so and they are relatively unlikely to come up in the interview.

Asking the question, ‘can you read,’ or something similar, could be considered as naïve, as the answer will typically come back as ‘yes,’ irrespective of their true, underlying ability.
Being able to ‘read’ The Sun or The Star is one thing, being able to read court papers is completely different and substantially more complex, with court papers generating an emotional response which will invariably decrease the ability of the low IQ/learning disabled defendant. This ability goes to the support required, not only during the trial, but also in terms of any preparation.

The ability to consult with counsel also has wider social issues. That is, the defendant’s ability to cope with social pressures:

In a case at [REDACTED] the defendant I assessed was told that if I gave evidence on his behalf, his parents would have their brains blown out. (The case when re-listed and re-held, was supported by more than a dozen heavily armed police officers.) Whereas the probability of the parents being shot and killed was in reality, extremely small, the defendant’s ability to manage this social pressure was nil; his IQ was below 69.

In a case coming before another court soon, the teenage defendant is being expected to give evidence which is in effect, against his sister; the person he feels closest too in the world. His IQ is 69, and one needs to ask, will a person with an IQ so low, and under this pressure, where he would also need to give evidence, in effect, against his mother, be able to consult with counsel adequately.

To date he has not cooperated, because he is not intellectually or socially able to do so.

At the hearing to discuss ‘fitness,’ he will be found fit, even though he is patently unable to defend himself, not through choice, but through a mixture of low intellect and complex social factors.

Such social issues are not covered by the psychiatric interview.

**Standardised tests**
Psychiatrists are not trained in delivering standardised tests.

The delivery of such tests is not as easy as people think. If one looks at the ‘MacArthur’ (MacCAT-TA), it was a test developed by a team of professionals, most of whom were psychologists.

This is a reasonable tool, but it is also somewhat subjective and only addresses one type of ‘fitness issue,’ that of learning disability. In my experience in using it, you also need an IQ below 60 to have any impact on the court as too ‘fitness,’ though it is useful in directing the court to where the defendant’s difficulties will lie.
If one were to use standardised tests, which I would recommend, then the fitness issue becomes one for a multi-professional approach; This would immediately increase the people able to advise the court, and ensure that different issues, as noted above could be considered. That is, different sets of limiting factors affecting the defendant in their criminal proceedings could be taken into account.

However, in a time of austerity, one would have to ask if there is the political will to manage such a process.

For some people standardised tests would be of great use, for others, less so.

What would be of assistance to the court?
In my view, a brief IQ test (taking 20-30 minutes) would be helpful. Focusing on an hour long (often much longer to undertake with a learning disabled individual) IQ test is of little benefit, as IQ in and of itself is of limited value.

Anyone with an IQ score below 79 will struggle to some extent in court. Hence, some support will invariably be required, even though many, due to negative school experiences, will try to avoid it.

However, if one considers the fitness issues, the population where this arises (those with low IQ scores) are not typically involved in complex crimes and as such, the focus is more likely than not on social interactions. That is, how does IQ impact on social interactions, such as criminal behaviour?

This, in turn, has implications for how they will then react to the court process.

It is the combination of factors that determine not only their criminal behaviour, but also their fitness to plea and their ability to manage the court process.

If one uses the original Pritchard criteria as the foundation of the fitness argument, then a shift away from intellect, toward social skills would be of use. After all, court is a mixture of the two and not reliant exclusively on one area or the other.

A reading test/s (accuracy and comprehension) would also be of use, as this will enable all sides to understand how reliant the defendant is on their defence counsel for accessing evidence. These typically take 15 to 20 minutes to complete. When done by the side of a short-form IQ
test, it may also begin to indicate issues of reading and learning disability.

Social support needs to be understood from a community point of view. Only a small number of people use the statutory services for support in their daily lives, but many others need this and are often supported by other groups, such as family and friends.

Due to only being notified of this consultation a few days ago, I must stop, but the idea of giving all the responsibility to one professional group, no matter who it is, is bizarre. No one professional group has all the answers or all the skills necessary.

To address the issues required, you need a multidisciplinary approach.

Graham Rogers
Consultant Educational and Child Psychologist
M.Sc., M.Sc., B.Sc., (Hons), PGCE., Dip. REBT., Ad. Cert. REBT., C.Psychol., AFBPsS.
Re: Unfitness to Plead; A Consultation Paper.

Thank you for your letter dated 27th October 2010. In reading your consultation paper it is plain that your team have taken time to consider carefully the many relevant publications and pieces of research, including my own. Having spent a significant amount of time considering the topic myself I would, if I may, like to contribute to the consultation also.

I agree that unfitness to plead, disability in relation to trial and unfitness to stand trial are all unsatisfactory terms that have the potential to both conflate and also not fully encompass the relevant issues. I wonder, however, if a move to use the term ‘decision making capacity’ suffers from some of the same shortcomings, because the ability to make decisions can still be said to be one aspect of an issue that is somewhat broader. Whilst decision making does seem the most important demonstration of ‘effective participation’, it might not for example, encompass the way in which a person’s mental disorder could cause a jury to draw an unfair adverse inference about them. Perhaps the term ‘capacity to participate’ [in criminal proceedings] could be considered more comprehensive.

In relation to the second provisional proposal, I have always found difficulty with the emphasis in law upon there being no requirement for an accused to make decisions that are rational or wise. Watching patients make irrational or unwise decisions at Court has in my experience been one of the most difficult aspects of providing expert evidence, as it must be for lawyers to provide representation. In my view there should also be an emphasis, as with the issue of fitness, upon ‘why’ and not ‘whether’ decisions are irrational or unwise. As set out in my literature review, previous research finds that a large proportion of individuals with no mental disorder nonetheless show impairments in some aspects of ‘capacity to participate’ using instruments such as the FIT-R. I feel 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.

The fifth provisional proposal relates to assistance using special measures. In relation to mentally disordered defendants, as opposed to the young, it is the provision of appropriate breaks and the adaptation of vocabulary/questioning that I have found to be most relevant. I am not aware however of any research that actually examines whether these changes make a real difference in practice. It would be useful to undertake this, if only to understand better the simple issues of how often or how long breaks in proceedings should occur. Psychological research finds that meaningful concentration spans even in the fully mentally well are surprisingly short. I agree that an additional special measure should relate to the giving of evidence as covered to an extent by Section 35(1)(b) of the Criminal Justice and Public Order Act (1994). Medical evidence about the general effect of a person’s mental disorder upon their ability to give evidence could be a useful way of avoiding adverse inference. There may be other changes to evidence or procedure that would be useful in making participation more effective. In the United States, when a person is deemed to lack competence to stand trial ‘CST’, part of their subsequent hospital treatment ‘the restoration of competence’ includes (as I understand it) some elements of training in what they should expect, about the roles of various key players in the Crown Court and so on. I believe that the use of mental health courts, where a team of familiar judges and other legal practitioners would deal with such issues consistently would improve the use of these or any other measures that are introduced.

In relation to the seventh provisional proposal, 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. There are problems that relate to structured psychometric tests of constructs like fitness, risk, IQ, medical diagnosis etc. They can be extremely time consuming. Clinicians can dismiss the findings of tools when a contradictory outcome to their unaided clinical judgement appears. At an international conference of forensic experts in recent years, the American attendees agreed that the many measures in existence there were ‘almost never’ used in practice (even by those who had designed and researched them). The MacCAT-FP, whilst limited, remains a good and broad test of competency based upon sound research. It can provide valid and objective assistance in judgements about ‘Pritchard’ fitness. Unfortunately it is not used: clinicians either do not see its value or are unaware of its existence. I fear that new instrument(s) may not fare much better. Such instruments usually require training and they can be invalidated if used by untrained assessors. There is the issue of copyright and financial recompense: this can affect their take up and impact assessment. It has however been demonstrated that some structured tests do not require expensive medical experts to administer them, which is useful to bear in mind where resources are constrained.

I would like to comment upon the new proposed test. I accept the clearly argued reasons for its proposal and the rejection of a disaggregated approach. My concern is that the new ‘criminal capacity’ test as proposed, is difficult for those inexperienced in working with mentally ill offenders to administer. Specifically, unless it is more explicit (i.e. about what the relevant information is e.g. the consequences of pleading not guilty, deciding to make one response over another during cross examination etc) assessors may revert to the uninformed value judgements that probably occur at present. Unfortunately I think it is necessary to assume, in practice, that a significant number of the experts that courts up and down the country instruct to provide opinions about capacity, actually still
need a significant degree of further guidance that is explicit. The second paper that I authored contains a flow diagram that summarises some of the main aspects (albeit presented together with a discussion of a disaggregated approach). I think that if the Commission recommend a unitary over a disaggregated test (the reasons for which I do appreciate) then there needs to be some greater ‘structuring’ of the way in which experts approach the single capacity test. If it is left simply as it is at present, the test needs to be accompanied by guidance notes or some kind of proforma discussed below. Otherwise the risk, in my view, is that assessors will overlook crucial aspects such as capacity to give evidence. This may be considered simply a training issue for experts, but I believe it is in the interests of courts and defendants not to leave it at that.

It has been my consistent finding that unfit defendants frequently ‘slip through the net’. I believe that the Commission is right to include a consideration of capacity in Magistrates Courts within this consultation. This is for two reasons. Firstly, by far the greatest number of mentally disordered offenders are here, rather than in Crown Courts. They include those who would fail any new test in no different a way to those who have committed more serious offences. Secondly, due to time and resource constraints, the comprehensive assessment of all who might need it would be overwhelming and likely impractical. A possible solution would be to develop a structured proforma, if it were considered that it would not be practical to mandate the use of structured instruments in all expert assessments. This might mirror that sent out by the DVLA to doctors whom they are asking about a patient’s fitness to drive. The pertinent questions would be broken down and clearly set out. The respondent would be forced to consider the elements of ‘decision making capacity’ in a comprehensive and standardised way that corresponded to the underlying research, was succinct and was relevant for the presiding Judge. There are a number of additional elements often omitted from psychiatric reports, such as the likelihood of restoration of fitness with treatment, likely timescale for this etc, and these could be added. I believe that other mental health specialists in and around the Courts (such as Approved Mental Health Practitioners ‘AMHPs’, experienced social workers, forensic psychiatric nurses) could have a role in using such a proforma. This would particularly be the case if it became necessary to screen a wider range of defendants and ‘ration’ the input of experts. It would seem to me that PCMH documentation [and hearings] would be an opportune stage at which to mandate legal representatives to record a consideration of ‘fitness’ or the need to seek mental health assessment/advice. Teaching around this for legal representatives (and also in some elementary aspects of psychiatry) could, I believe, be usefully incorporated into legal training for those pursuing criminal law.

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. 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).

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.

The Commission may also observe (or fear) that a change in the test for unfitness would be likely to catch increasing numbers of non mentally disordered offenders, or indeed those feigning mental disorder. I think that malingered unfitness is another potentially huge problem that might follow revisions to the procedure. As a medicolegal expert I already see this frequently. I think it is necessary for the problems of malingering to be given some thought, whatever the final shape of the new proposals become.

Can I pass the Commission my best wishes in its future work on fitness to plead. Given my special interest in the topic area I would very much like to continue to be involved, if required, and I would be more than happy to attend further events arranged to help take these changes forward.

With kind regards,

Dr Tim Rogers MB BS MRCPsych MSc
Consultant Forensic Psychiatrist
North London Forensic Service
DATE: 02 February 2011

RESPONSE OF: THE ROYAL COLLEGE OF PSYCHIATRISTS

RESPONSE TO: Unfitness to plead

The Royal College of Psychiatrists is the leading medical authority on mental health in the United Kingdom and is the professional and educational organisation for doctors specialising in psychiatry.

We are pleased to respond to this consultation. This consultation was prepared by the College Policy Unit and contributed to by the following faculties:

- General and Community faculty
- Forensic faculty
- Learning Disability faculty

This consultation was approved by: Dr Ola Junaid-Associate Registrar

For further information please contact: [Redacted] on [Redacted] or e-mail [Redacted]
Response to Consultation paper 197, Unfitness to plead

1. General observations

1.1 The response from the College is drawn from the perspectives of forensic, general and community and learning disability psychiatrists. Before we address the questions posed in the consultation paper individually, we make some general observations which express concerns about some of the constructs underpinning the thrust of the consultation paper.

1.2 The Capacity test:

The Royal College of Psychiatrists supports the overall proposals contained within the Consultation paper. Many forensic psychiatrists have recognised the limitations placed upon them by the Pritchard criteria for Fitness to Plead. Despite the recommendations of the Butler Committee in 1975, when the law on Fitness to Plead was reviewed and resulted in Criminal Procedure (Insanity and Unfitness to Plead) Act 1991 which led to changes in the process and sentencing of defendants found unfit to plead, the criteria was not changed. Therefore the current Provisional Proposal number 1, that the current Pritchard Test should be replaced with a new legal test which assesses whether the accused has decision making capacity for trial is one that the College would support.

There is much to commend the general approach of reforming the issue as an assessment of capacity regarding the specific decisions relevant to proceedings. This approach is (increasingly) familiar to psychiatrists who have had to make the issue more central to their practice since the Mental Capacity Act 2005. The move to unify the approaches to capacity issues in criminal and civil law is welcome, not least because it supports there being an overarching concept of capacity which needs to be considered in all areas of life.
However 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 judgement 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.

1.3 Special measures and legal instructions

Reference in the consultation paper to legal professionals preparing more detailed instructions, e.g. with regards to the specific special measures on which opinion is sought, would be warmly welcomed by psychiatrists. This would meet the concerns about introducing this particular test and also improve existing areas of practice. Currently, the quality of instructions to psychiatrists is frequently very poor. 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.

In view of such a position, we would ask the Law Commission to be mindful of the commitment in terms of changing practice and also potentially in resources in order to improve legal instructions in the manner prescribed. Firstly, we would ask the Commission to consider by which mechanism this type of improved instruction would be ensured. Secondly, we would ask that arrangements are made in such a way that this does not extend the time taken to produce a report, which can already be quite lengthy and result in extended periods of remand when we know that around half of prisoners on remand ultimately do not receive a custodial sentence. Extended periods of
remand have significant personal costs to the individual as well as to the public purse. Any proposals to reform the system must make these issues a priority.

1.4 Professional qualifications/background of experts undertaking decision-making capacity assessments

We note the Law Commission’s assertion that relevant experts need to be medically qualified. Certainly psychiatrists have the training and experience to undertake a mental state assessment and to ensure a bio-psycho-social approach to case formulation. The Commission notes that some accused may lack capacity because of a physical condition. It is because only psychiatrists are medically trained prior to their psychiatric training that they have the ability to interpret the complex physical and mental interrelationships of a person’s state of mind. This type of inclusive framework affords a comprehensive opinion in this context of such importance to the individual whose liberty is at stake. Notwithstanding this, the important issue is that the training and experience of the individual expert makes them competent for the task.

We appreciate the Law Commission’s view, and that of the Joint Committee on Human Rights that assessment by a medically qualified professional is likely to be necessary to meet ECHR concerns as per Winterwerp. However, it has been argued that appropriately trained psychologists might meet that test. We are not legal experts and we await a judgment from the European Court of Human Rights to know if that is so. It should be noted that although members of other professions may have responsibility for patients once detained under the Mental Health Act they are not able to provide the required medical expertise to recommend the initial detention. The Mental Health Act retains the requirement to have 2 registered medical practitioners' opinions, one of whom must be approved under section 12 MHA 1983, before a person is detained under the Act, and the Mental Capacity Act 2005 requires one registered medical practitioner's opinion before a person can be deprived of their liberty.
under that Act. Further, if the Secretary of State wishes to recall a person who is conditionally discharged, from a restriction order under the MHA, a report from a psychiatrist is required. It is only when detention is renewed for another period that this requirement is extended to other professions.

We also remain concerned about the ability of the current work force to cope with the possible increase in demand. There are 30,000 capacity hearings/year in the US and 100/year in the UK at present. That could easily become several thousand a year here.

1. Comments on Consultation Questions

Question 1: 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 hearing 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? (Paragraph 4.27)

Yes. The inclusion of the availability of the special measures and how they might be applied would appear to be a logical and necessary development of a new test. Capacity is a contextual faculty as recognised in the MCA 2005 where one of the overarching principles is to make every effort to enhance someone’s capacity. Therefore, it might be argued that a comprehensive assessment of individual capacities cannot be made without consideration of such measures so therefore it should be included in the test.

Anecdotally, this would appear to be in line with the approach increasingly taken by experts under the current law, where the Pritchard criteria is considered alongside what measures might be necessary to ensure they are met.
Where possible an individual should be given the opportunity to engage fully in the legal process to allow them to proffer a defense where at all possible. A continuum approach has the benefit it will allow for flexibility in order to allow this for more individuals.

**Question 2: 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? (Paragraph 4.31)**

People with mental disorder (say severe depression) can be at a great disadvantage in various ways, they may not be able to concentrate on complex evidence e.g. in a fraud trial; they may feel pathologically guilty and give misleading instructions to their lawyers; they may break down completely during the trial as the stresses mount, sometimes in such cases trials are abandoned. An evaluation/assessment of fitness to plead should be supplemented by an evaluation of fitness to be tried together with suggestions as to how the individual who is found impaired can be assisted during the trial in order to allow it to proceed fairly and to completion. It is central that the views of the defendant as to the assistance they need should be sought and adhered to where feasible and compatible with the principles of a fair trial.

Most important however is that the judges and lawyers (especially the prosecution) have had guidance on how to proceed with a person of a particular impairment.

The assessment should be performed by a suitably qualified expert in the relevant mental disorder or relevant impairment of the defendant. (see below) There are three major groups of independent variables: the demands of the process; the person’s ability to engage in the process; and the effect of
additional procedures e.g. special measures on the ability of the defendant to engage in the process. Knowledge of all of these should be a requisite of the assessor.

The procedure should allow the special measures available to defendants to be expanded to those currently available to witnesses. Particularly the process of using an intermediary as a go between through which evidence can be given by the defendant should be more formally acknowledged as an accepted procedural process, very much akin to using a translator.

Due to the varied nature of the mental disorders that give rise to unfitness to plead, the procedure should indicate, that assessors should be experienced in certain specific types of mental disorders, learning disability, autism and where relevant childhood disorders, as these groups may have specific deficits in their abilities that affect the process.

As an example, a College member from the Learning Disability faculty has observed a significant number of individuals being deemed unfit to plead by psychiatrists who have had limited LD experience. However this psychiatrist has found them fit to plead. This may in theory appear to be an issue of core training or the development of clinical skills but in practice it is hard to retain relevant and up to date knowledge and expertise. Therefore we believe that the assessment of these groups should generally be limited to those with ongoing clinical care or recent experience of these groups.

For instance individuals with LD generally may have specific characteristics that affect the legal process such as a slower rate of information processing; difficulty understanding causality; difficulty with abstract concepts; difficulty with multiple concepts; rigid thinking style; difficulty with sequencing events and using concepts of time; working memory deficits; difficulty with non verbally presented information; poor retention of information; and they may be more suggestible and compliant. They will be helped to engage by the
repetition of evidence or the provision of alternative means of evidential presentation to that of the spoken word.

Similarly those with autistic type conditions may have a number of the above features as well as others specific deficits in thinking styles and information processing. If identified in a specialist assessment the above can potentially be compensated for and their effects minimised.

The provision of expert evidence as to the general effect of a mental disorder on presentation understanding or conduct could usefully be supported by the provision of written or AV material, and should be delivered by an expert who is independent of the matter before the court entirely, i.e. not a witness for the defence or prosecution

**Question 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? (Paragraph 6.153)**

The reform of the section 4A hearing is complex, and mainly argued with respect to very serious offences. We have some reservations about this, as we remain unconvinced that the distinction between the new special verdicts and conviction is very meaningful, and the non-involvement of the accused closes some defence options. Pragmatically however, this will probably cause only occasional difficulties, which perhaps could be remedied on appeal.

**Question 4: If consultees do not agree that option 5 is the best option for reform, would they agree with any other option? (Paragraph 6.153)**

The College supports option 5.

However a member of the College submitted the following comments:
“I believe that 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 i.e. Europe and the USA in particular”.

Question 5: 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? (Paragraph 6.159)

Yes

Question 6: 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? (Paragraph 7.26)

We agree that this response should be possible.

However the Secretary of State discretion to refer cases back to the court is only exercised in the most serious of cases, these may be likely to result in indeterminate sentences or lengthy sentences if found guilty. This removes the authority to discharge or release the individual from the sole remit of the Mental Health Tribunal service to that of also the Parole Board, whom have a more restrictive test for discharge/release. This potentially leads to individuals having their liberty restricted for longer in order to protect the public.

It would be unlikely that anyone other than those having a Mental Health Act disposal would avail themselves of this facility due to the risks above. Individuals subject to the Mental Health Act have a right of appeal of their current restrictions of liberty through established Mental Health Tribunals at 6
months, and are unlikely to refer back to court to be subject to the risk of further additional time in custody.

**Question 7:** 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? (Paragraph 7.44)

Yes.

**Question 8:** 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? (Paragraph 8.37)

Yes.

The proposed capacity based test should also apply to proceedings which are triable summarily. Whilst acknowledging that proportionality issue of applying more complex psycho-legal solutions on less serious matters, concerns about applying the same solution in the Magistrates Court would appear to be outweighed by concerns around natural justice and practical considerations about case management.

The seriousness of the charge is unlikely to be a discriminator for the seriousness of mental disorder. It should be a central principle that the psychiatric input should be based on the level of psychiatric need. Making the new test unavailable to offences triable summarily is likely to mean that such an important assessment would not be provided to this type of defendant. Whilst this group would not have the expertise to opine as to whether this was an issue of human rights, it would perhaps seem an unduly arbitrary response to an important psychiatric issue.
The problem is getting adequate and timely psychiatric evidence to the magistrates. If the charge is a summary one the magistrates should have psychiatric reports and if they decide that the accused is under a disability they should hear the facts of the case. This may lead to the charge being dropped. If not then the bench should take advice about disposal and the feasibility of a fair trial at a later date. If the charge is an either way case then it should be promoted to the Crown Court.

**Question 9:** Do consultees think that if an accused lacks decision-making capacity there should be a mandatory fact-finding procedure in the Magistrates’ Court? (Paragraph 8.37)

Yes. As above a fact finding process allows responsibility of committing an act to be addressed.

**Question 10:** 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? (Paragraph 8.37)

This is answered above. It should be limited to the external elements.

**Question 11:** Do the matters raised in questions 8, 9 and 10 merit equal consideration in relation to the procedure in the youth courts? (Paragraph 8.68)

Yes we strongly support the Law Commission on this issue.
Question 12: How far if at all, does the age of criminal Responsibility factor into the issue of decision-making capacity in youth trials? (Paragraph 8.69)

The age of criminal responsibility does play a part in the issue of decision making and the future disposal of the young person on trial.

As the CP acknowledges the law with respect to children who kill in England is very different from that of most other European countries not only because the age of criminal responsibility is exceptionally low but also the doctrine of doli incapax was abolished in 1998. Moreover, the distinction between manslaughter and murder has meant that those convicted of the latter are subject to a mandatory penalty of indefinite detention, with its duration assessed by the Home Secretary and not by the courts or the parole board. This has meant that not only are children who have not yet reached puberty treated as if they were adults, but their handling puts them at a particular disadvantage.

Our opposition to this situation is well stated by one College Member, Professor Rutter as follows.

“First, there is extensive evidence that important developmental changes continue throughout the teenage years. To reduce this to the question of whether children know right from wrong is highly misleading. Even pre-school children appreciate that distinction, although they approach the distinction more in terms of fear of detection and the punishment that will follow, rather than internal justice principles and concern for the victims of wrong acts. During early adolescence young people's thinking tends to become more abstract, multi-dimensional, self-reflective and, in addition, they are able to generate more alternatives in their decision making. There is a marked increase in emotional introspection together with a greater tendency to look back with regret and to look ahead with apprehension. The transition to more
adult modes of thinking does not emerge at any single age but it is clear that it is very far from complete at age 10. It should be added that, as with any aspect of development, there are marked individual differences in which children achieve maturity.

The second consideration is that homicide is rather different from the rest of juvenile delinquency, in terms of the fact that it has not shown the same marked rise over the last half century or so. Nevertheless, homicide and serious juvenile delinquency have much in common.

Third, children who commit homicide are likely to be seriously psychologically disturbed and they have often experienced serious adversity. This means that, usually, they will require residential care in order to receive the intensive psychological treatment that they urgently need. But also it means that, in many cases, rehabilitation is a realisable goal”.

In the College view there is a real need to re-introduce doli incapax and to repeal the provision in the 1998 Act which abolished it. Further discussion of this may need to occur but we suggest that it would be reasonable to assume a lack of capacity below the age of 14 but to reverse the presumption over that age. In either instance it should be open to the courts to decide that in the case of this particular child, with this particular background, with this particular crime, there was capacity below the age of 14 or, alternatively, there was not capacity over the age of 14.
Consultation Proposals

**Provisional Proposal – 1:** 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. (Paragraph 3.41)

Unlike in the Mental Capacity Act, there is no reference in the Consultation paper to the assumed default position for all defendants. That is, in the case of the Mental Capacity Act, it is assumed that an individual has capacity unless that is proved otherwise, using the criteria in that Act. The College believes that it is worth taking the same stance with Unfitness to Plead in that it should be stated clearly that all defendants should be assumed to be Fit to Plead unless that is proved otherwise. We would suggest that this could be incorporated into Proposal 1.

The Proposals around changing the Partial Defences to Murder, particularly Diminished Responsibility, included the requirement that the person was suffering from a mental disorder. The Pritchard Criteria has never stipulated the need for a mental disorder of any type to be present. The College feel that this is an important omission from them and would greatly help in the assessment of Fitness to Plead.

**Provisional Proposal – 2:** A new decision-making capacity test should not require that any decision the accused makes must be rational or wise.

The College would support the fact that any new Decision Making Capacity Test should not require that any decision the accused makes must be rational or wise.
Provisional Proposal – 3: 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.

The issues around proportionality which are discussed in the Consultation paper are ones that forensic psychiatrists frequently face in assessments of a defendant’s Fitness to Plead. 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 particularly if that were a lengthy and complex one. The consultation paper also does not state the Law Commission’s view on the Standard of Proof for Fitness to Plead. Although it is probably implicit that it would remain as, on the Balance of the Probabilities, perhaps the proposal would be further strengthened by explicitly stating it here.

Provisional Proposal – 4: 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 the trial which the accused faces.

The College, on balance, supports this approach. The determination must be case specific and take account of the context, including the seriousness of the outcome. The judge should be guided by expert opinion in this regard.

We accept there is a case for asserting that a disaggregated test could be found unduly complex and should be rejected on pragmatic, rather than theoretical grounds. The potential spectacle of experts who are essentially in
agreement on the primary issue engaging in detailed and costly contention over the finer points of what could potentially be very many capacity issues is unlikely to pass a test of benefit versus cost.

Notwithstanding, there must be concern that a unitary test according to how it is set out in the consultation paper, provides for the unwelcome possibility of a defendant being found unfit to plead/without decision-making capacity with a supporting argument on the relevant capacity from only one expert. This is because in a unitary test experts could agree on overall unfitness to plead/absence of decision-making capacity whilst disagreeing on the nature of that incapacity. This would appear to risk the basis for finding decision-making incapacity being unsatisfactorily tested in the court.

One way forward would be to retain a modified concept of a unitary test by simply insisting that experts must agree on impairment of at least one stated element/aspect of capacity. They could be free to disagree about other capacities, but providing that at least two experts agreed that one of the crucial capacities was impaired, this would re-assure the Court. Without such provision there must exist concern that within a unitary construct a supportive second opinion and the natural justice which goes with such an arrangement would not necessarily be provided before this important finding could be made.

**Provisional Proposal – 5: 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 and where any other reasonable adjustments have been made.**

The College would support this.
Provisional Proposal – 6: 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.

The College would support such a change and perhaps go further in suggesting and say that where a defendant who has a mental disorder, intends to defend themselves in court, then expert evidence should be admitted on the general affect that their mental disorder would have on their ability to defend themselves.

Provisional Proposal – 7: A defined psychiatric test to assess decision-making capacity should be developed and this should accompany the legal test as to decision-making capacity.

There appear to be several cogent arguments against having a defined psychiatric test as per Part 5 of the CP, several of which the Law Commission sets out themselves. Furthermore, a defined test would appear to be made unnecessary by other proposals.

A specific psychiatric test for capacity does not exist in civil law/the Mental Capacity Act 2005. We would argue that rather than leaving psychiatrists unequipped, this allows them the freedom to tailor their professionalism to each individual unique case. Mental disorders are diverse, individuals even more so and the psychiatric testing underpinning the legal capacity test will differ by condition and case. Introducing any defined psychiatric test along the lines suggested would appear to run the risk of creating a burden of rigid and perhaps unnecessary testing. In addition, evidence supporting the notion that a psychiatric test is likely to be impractical lies in the Commission’s own citing of numerous such tests in the United States of America which have proven inadequate.
It would of course be concerning if experts did not address all of the points or capacities at issue. However, the solution to this potential problem lies in the nature and quality of instructions provided to experts. Elsewhere, the consultation paper explains the role of the judge and others in providing instructions regarding detailed aspects of proceedings, including the specific, special measures that might be available (as per Part 4 of the CP). We think the Commission could take confidence that if these capacities are set out in instructions, they would be answered by experts. Moreover, experts are likely to be better prepared for answering these tests owing to their familiarity from civil law and everyday practice.

Further, even if the theoretical arguments about the desirability of a defined psychiatric test were to win the day, there must be real practical concerns about the nature of the specific test under development by Dr Blackwood and colleague in as far as it is described. This test includes a video sequence for defendants to watch. It is difficult to imagine that many establishments would be well positioned to provide facilities for such a test and problems with bringing information technology into prison are notorious.

The inherent problem with having a rigid psychiatric test on this or any other issue is that it will not evolve to reflect developing psychiatric thinking and would gradually become less and less appropriate. One could envisage a situation in which a body of expert opinion (for example meeting a ‘Bolam/Bolitho test’ of responsible medical opinion) asserted that an aspect of the test was no longer relevant or accurate and the consequences including legal appeals that might ensue.

Perhaps a good comparison could be drawn with the recently reformed law around diminished responsibility. The 1959 Homicide Act used terminology for mental disorder or mental factors which, naturally enough, became archaic over time and more difficult to interpret. Whilst acknowledging that this was contained within statute law and the psychiatric test discussed might not
necessarily have the same status, nevertheless, the notion of being hamstrung by rigid definitions is similar.

Finally, it would seem contradictory to endorse an approach that unifies civil and criminal law, whilst containing within it a very important departure in the form statutorily defined psychiatric test. This would impair the clarity which the proposals promise otherwise.

The forensic faculty commented as follows:
“Many senior forensic psychiatrists including those who have undertaken significant research into Fitness to Plead have said that they would feel uncomfortable with the concept of ‘a defined Psychiatric Test’ to assess decision making capacity. It is suggested that introducing a test may give a false idea of scientific validity. Many forensic psychiatrists are aware that there are very few Psychiatric Tests which have both high levels of validity and accuracy. If this were to be a proper scientific test it would need to be clear what both the false positive and false negative rates would be. However, there is no base line to calibrate this test with and who decides whether the test has got it right and how to determine its accuracy? The introduction of a scientific test of this sort then raises the issue of training to administer the test, accreditation for its use which may further complicate matters. It is interesting that no such test has been used in the capacity assessments under the Mental Capacity Act. The arguments put forward in paragraph 5.6 suggests this is because the context is different however the Forensic Faculty do not find that this argument is particularly compelling.

Although the Law Commission quite rightly points out that psychiatrists are inconsistent in their application of the Pritchard criteria, which is quoted from a single study, it is the Faculty’s view that this should not automatically lead to the assumption that a single scientific test would be the answer to this problem. The Faulty would suggest, as it has done for a number of years, that the answer to this issue is rather that the qualifications and expertise of expert
witnesses who are commissioned to undertake this work needs to be more rigorously assessed. The simple answer might be that if more care is taken in the choice of expert, then better assessments of Fitness to Plead might be the result. At the present time Defence and Prosecution Counsel are able to commission any psychiatrist to give an opinion on Fitness to Plead, even if they do not have the specialist knowledge and background of forensic psychiatrists. Perhaps the safest view on this matter is that if a test is developed then Assessors should be free to use the test if they want to but that there should be no expectation that they will have to use it. As the Law Commission states in Paragraph 5.6, Capacity is, in effect, a Clinical decision”.

Provisional Proposal – 13: 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.

The College would support this Proposal but add that it might be worth considering whether the court should make a decision at the time of the unfitness finding about whether there should be a trial, should fitness be regained. This is based on the fact the defining of Unfitness to Plead is meant to postpone a trial not replace it.

Provisional Proposal – 14: 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

Finally, whilst it maybe said that it is not part of the remit of the consultation paper, the College feels that it is worth stating that a trial of a fit defendant is preferable to a Part 4A hearing of an unfit one. Finding someone unfit
therefore should be the last resort, with time given to getting the individual fit before it is reached. This was the situation of many psychiatrists faced in previous years.

February 2011
Dear Sirs:

Thank you for providing us an opportunity to respond to this public consultation. We have tried our best to provide our collective response to the very pertinent (and timely) questions you ask. This letter is signed on behalf of our organization by Dr. Sarkar to whom all further queries should be forwarded. We trust serving this letter to you by email is satisfactory.

We look forward to reading the result of the Consultation Process. We would be glad to be of any assistance to the Commission in this matter in the future.

Yours very truly,
Signed and transmitted electronically to avoid delay

Signature: _______________________________ Date: 27 January 2011

Sameer P. Sarkar, MD, LLM
Diplomate, American Board of Psychiatry and Neurology, Inc.
Consultant in Psychiatry and Forensic Psychiatry
Approved under Section 12(2) of the Mental Health Act 1983
GMC Ref No. 4378976

When a report is signed electronically, the author asserts that a wet-ink copy is held on file of the originator. This version is not encrypted or password protected.

Enclosures: Recent paper by Dr. Sarkar
Commentary on Dr. Sarkar’s paper by Prof. Tom Grisso
LIST OF PROVISIONAL PROPOSALS AND QUESTIONS

PROVISIONAL PROPOSALS

9.1 We provisionally propose that:

(1) 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.

We agree. There should be a new well validated Legal Test based on Clinical Research and Experience.

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

We agree. This capacity test should include at the very least be in congruence with provisions of MCA 2005. The decision so made by a competent adult (or adolescent) need not be rational, or wise, but has to meet the Law Commission’s published criteria for Capacity.

(3) 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.

We agree. However we are concerned that this may imply that the test must be tailor made to suit a particular defendant given his circumstances. This is most likely prove to be cumbersome and impractical as there are as many trial situation as there are defendants. There should be some gradation to take into account the severity of the offense (and the likely sentence) but essentially the test should be to determine if the person is competent to a) participate meaningfully in his trial and b) make decisions surrounding the trial. We believe Buchanan’s proposal is misguided and does not look into the practicalities of real trial.

(4) 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 the trial which the accused faces.
We do not agree. While it is good that judges will determine capacity to stand trial based only on Medical Evidence, judges should not have discretion to decide capacity based on the complexity of the case to move the goalpost of capacity (so to speak). This will lead to some cases of judicial error (taking into consideration that judges may get it wrong) and needless delay and expense of appealing that decision. This is a matter for the Jury and the Judge can at most give direction to the Jury.

(5) 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 and where any other reasonable adjustments have been made.

We agree.

(6) 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.

We agree. It should be incumbent on the judge to then call experts to provide an opinion. It should not be left to the defendant, or prosecutors to call expert evidence.

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

There is already a well validated test used extensively in North America (MacCAT-CA\(^1\)) and its progeny for juveniles called the MacJEN\(^2\). Additionally there is a well validated but less researched tool called ECST-R\(^3\) (Rogers et al). We see no merit in re-inventing the wheel. Research in our view should be commissioned nationally to modify these instruments (if necessary to suit British System) and trial them.

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\(^2\) MacArthur Judgment Evaluation (MacJEN) is a research tool, not in clinical use. Available from the MacArthur Foundation Research Network on Adolescent Development and Juvenile Justice

\(^3\) The Evaluation of Competency to Stand Trial-Revised (ECST-R) is a recently developed competence-assessment instrument that became available for purchase in 2005. The ECST-R is intended for use with adults facing charges in criminal court, including individuals with IQs in the 60 to 69 range. Unlike other assessment instruments, the ECST-R includes scales that screen for feigned or exaggerated mental problems.
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.

We disagree with this. We prefer the option 3 (Abolish the section 4A hearing altogether and allow the accused to stand trial. This would be subject to the proviso that once an accused has been found to lack decision-making capacity, then a legal representative would be appointed by the court to represent his or her interests in the trial) in part. We would like to see that once the accused is declared not competent to stand trial, he should be sent to a psychiatric hospital for treatment for restoration of capacity, regardless of how long it takes. We believe from our extensive experience in Criminal Courts and Forensic Facilities that proving that the accused ‘DID the Act’ is not enough to establish guilt in more serious offenses where mens rea is an issue. Moreover if the defendant is not competent to stand trial, how is he going to refute the prosecution case that he ‘did the act’. The Scottish model we believe in this regard to be punitive and discriminatory by abolishing acquittal. It protects the public but puts a criminal record on the accused which the accused would not have a chance to challenge.

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.

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.

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

See above. We believe the right balance is to remand the case when capacity is restored (provided steps are being taken to restore it). If capacity can’t be restored (such as in Erskine and Sureda (Dr. Sarkar had personally treated both patients while he served at Broadmoor Hospital), they should continue with indefinite detention under s. 48/49. Such cases are happily rare.
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 medical evidence confirms) that the accused is still unfit to plead, the court should be able to reverse the decision to remit the case.

This follows from what we consider the current fault with s. 4A hearing. We believe that if s.4A is abolished, this problem will no longer be an issue.

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.

See above

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.

See above. The 'lacuna' referred to in the relevant paragraph is the only instance where we see there is complications in the proposals we support. We see this as an instance where joint trials should not be held and trials should proceed for each defendant in usual way.

QUESTIONS

In addition to the above proposals, we also ask the following questions:

(1) 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 hearing 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?

Again, this would not be an issue if s.4A hearings are abolished. A person either has capacity to stand trial (at that point, to the charge) or he doesn’t. If he doesn’t, he is ordered to undergo measures to have capacity restored. If he does, he stands trial. The special measures are matter for the Trial judge.

(2) 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?
These are already in practice. We have never came across a case where the Judge refused special measures when it was deemed appropriate by lawyers.

(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?

Please see response to paragraph 8. Our preferred option is to abolish s. 4A altogether and have a Competency to stand trial hearing by jury. If the person is incompetent to stand trial, he is ordered measures to restore competence. When he regains competence (in vast majority of cases) he stands trial in normal way. There is no need (from a practical clinical point of view) to complicate matters.

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

We agree partly with option 3. We reject option 5 as it is not a vast improvement on current muddle. Why acquit? Considering that Insanity acquittees are always remanded to hospital for life (or till cured) what is the point of acquittal? As a matter of common sense, acquittal comes after trial. If the accused with suspected mental illness is stopped at the trial stage from participating any further for reasons of mental illness (which one hopes can be remedied), the question of acquitting would not arise, whether by ‘reasons of insanity (NGRI)’ or ‘Guilty but Insane’ or other insanity practised elsewhere. 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.

The extant arrangements are muddled (with the need for three different legislations to navigate this single issue) is no one since ‘Pritchard’ ever bothered to see capacity as a principle. Now we have MCA 2005 and (although belatedly) the Law Commission has woken up to address the issue, why can’t we strive to make it simple? True that treatment costs of restoring capacity would increase but it is in our view a price one pays for fairness in a civilized society. What benefit has the society seen since s.4A was introduced? Is there an empirical basis to continue with this complicated way? What is the benefit of determining someone ‘guilty but insane’ or NGRI where the end result is the same. The patient goes to hospital for treatment and does not come out till he is safe to do so (in the intractable cases of Erskine and Sureda), the rest gets better and face their action in a properly organized trial.

(5) 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?

This question in our view, in light of the above discussion, should not even arise.
(6) 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?

No. Not until he is deemed competent to stand trial.

(7) 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?

No. See above, with the caveat of joint trial.

(8) 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?

In the interest of fairness, yes.

The Law Commission paper says at 8.33: “In a case where a hospital order is the predicted outcome, there is a danger that the accused's legal representative may be willing to accept that disposal via the section 37(3) route, and by that decision, deny the accused the opportunity for an acquittal.” This is an excellent example of the mischief of s. 37(3) which happily is used very rarely. We do however agree that summary trials are perhaps well served by the current arrangements mostly. However, much of this can be avoided by having Court Clinics contracted (like prisons) to NHS trusts who will ensure that a defendant (summary or otherwise) can get a capacity assessment quickly (takes 50 minutes maximum using a validated tool) once the issue has been raised. The issue could be raised by defense, prosecution or the magistrate.

(9) Do consultees think that if an accused lacks decision-making capacity there should be a mandatory fact-finding procedure in the magistrates’ court?

No. For reasons explained above. The same as in Crown Court. The legal principles are the same regardless of which Court it is in.

(10) 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?

See above.
(11) Do the matters raised in questions 8, 9 and 10 merit equal consideration in relation to the procedure in the youth courts?

Yes. Youth is not just a chronological fact. Young people (as research for the last 15 years, though sadly none in this Country) need more protection, not less. Research of Tom Grisso and his team has consistently shown that Adolescent Adjudicative Capacity in youth are impaired by many factors of which the immaturity of youth is a major one. We attach a recent paper by our Dr. Sarkar with an accompanying commentary by Professor Grisso which debates the conceptual issues.

(12) How far if at all, does the age of criminal responsibility factor into the issue of decision-making capacity in youth trials?
This is a matter for the society to determine where they wish to fix the age of Criminal Responsibility. If our proposal is accepted (i.e. The two stage trial process and assessment of capacity at first stage), it becomes irrelevant where the line in the sand is. If capacity to consent to medical process is on a sliding scale of ‘Gillick’, so should be the Criminal Responsibility. See our objection to a fixed line in sand (in Dr. Sarkar’s paper) and Prof Grisso’s answer. Also see the conceptual objections by Psychologists on the famous APA Flip Flop (paper attached, Oct 2009 in American Psychologist by Steinberg and colleagues). Needless to say this has not yet been validated by solid research and thus needs proper examination.
Helena,

The case I had dealings with was a young man of 20 and an IQ of 84 [i.e. low but not LD], who was persuaded by a [redacted] to drive him & a Learning Disabled Adult around Dorset where the [redacted] would persuade the LD adult to set fire to things. He didn’t understand why he had committed a crime and was in any case so overwhelmingly anxious that he couldn’t pay attention to proceedings or effectively participate [we checked – and this wasn’t faked]. So there was a fitness to plead hearing with a jury and the two psychiatric opinions concurred & he was found unfit to plead – but he was disposed sensibly to community supervision.

To be honest everyone involved in this case knew that the responsible individual was never charged – denied everything & it was the two vulnerable individuals who were in court – so there was unspoken agreement to not punish the least culpable participants & fitness to plead was the mechanism by which we achieved it.

Geoff
Unfitness to Plead

Sense Response

Prepared by:
Kari Gerstheimer
Interim Head of Legal Support Services
Tel. no
101 Pentonville Road,
London
N1 9LG
Executive Summary

- Sense is broadly supportive of the move from the Pritchard test towards assessing a person’s capacity to make decisions.

- Sense is concerned that in making a move towards an assessment of a person’s capacity to make decisions; the separate issue of whether a trial can be made accessible should not be overlooked.

- Sense takes the view that in the event that a deafblind person has such profound sensory and communication impairments that he or she is unable to access the trial in an ordinary manner; and there are no reasonable adjustments (special measures) which can be made which would allow for that individual to be able to access the trial, then the person should be held to be unfit to plea. This is a different issue to whether a person has decision-making capacity. A deafblind person may have the psychiatric or mental ability to follow the proceedings, but because of her dual sensory impairment she may be unable to access the trial.

- In the interests of equality and fairness a deafblind person should not be able to hide behind his or her disability. Sense supports the view that some deafblind people will be able to access the court process effectively and should be supported to do so where appropriate.

- Sense supports the Government’s view that special measures will need to be put in place to allow for some deafblind people to access court proceedings. A suitably qualified person should be appointed to assess what, if any, special measures need to be put in place. Special measures must be tailored to the needs of the individual.

- Sense is gravely concerned that the introduction of a standard psychiatric test of the capacity to make decisions would discriminate against deafblind people who may be psychiatrically stable enough to qualify as having decision making capacity but whose dual sensory impairment coupled with an inability to communicate and receive information may prevent them from being fit to plea or stand trial.

- In the case of deafblind people, psychiatrists may not be suitably qualified people with the relevant skills to make an assessment of capacity because in relation to deafblind people, fitness to plea or to stand trial relates to their inability to communicate and or access information rather than their mental state or mental capacity.
Congenitally deafblind children and children who acquire a dual sensory impairment at an early age commonly develop at significantly slower rate than their non-sensory impaired peers. Accordingly Sense argues that a developmental perspective should be an important factor when assessing whether a child is deemed to be capable of carrying out a criminal act.
About Sense
Sense is the leading national charity that supports and campaigns for children and adults who are deafblind. We provide expert advice and information as well as specialist services to deafblind people, their families, carers and the professionals who work with them. We also support people who have sensory impairments with additional disabilities.

Our services include on-going support for deafblind people and families. These range from day services where deafblind people have the opportunity to learn new skills and Sense-run houses in the community – where people are supported to live as independently as possible. Our communicator guides offer a vital lifeline to deafblind people living in their own homes. We also provide leading specialist advice, for example on education options and assistive technology.

Sense has worked with deafblind people and their families for 50 years. We have established services and campaigned vigorously for change where it is wanted - earning us our worldwide reputation as the leading experts in deafblindness.

About Deafblindness
Deafblindness is a combination of both sight and hearing difficulties. Most of what we learn about the world comes through our ears and eyes, so deafblind people face major problems with communication, access to information and mobility.

There are many causes of deafblindness. These include premature birth, birth trauma and rubella during pregnancy, which can cause babies to be born deafblind. Some genetic conditions result in deafblindness. And any of us can become deafblind at any time through illness, accident or as we grow older. If someone loses their sight or hearing, this is called acquired deafblindness. The commonest cause of combined sight and hearing loss is ageing and the vast majority of deafblind people are older people.

When someone is born with combined sight and hearing difficulties this is called congenital deafblindness. Examples of this include conditions such as congenital rubella syndrome or CHARGE syndrome. People with congenital deafblindness often have additional disabilities – including physical and learning disabilities - and health problems. The problems and challenges facing people with congenital deafblindness can seem daunting. But with the right support, they can achieve a huge amount, and make their own choices about how they want to live their lives.
The deafblind population has been significantly underestimated and is set to rise dramatically. A recent study commissioned by Sense\(^1\) has estimated that there are approximately **356,000** deafblind people living in the UK. This number is projected to rise to **569,000** by 2030.

**What sort of support do deafblind people need?**

Communicator guide support is a lifeline to many people with acquired deafblindness, helping them to remain independent. A communicator guide is a person who provides communication support, and can guide a person thereby enabling a deafblind person to get out and about. A communicator guide would also help a deafblind person to access information in their own home.

People with acquired deafblindness frequently require the additional support of an interpreter in more formal settings such as formal meetings or during court proceedings. The type of interpreter support required would depend on the individual needs of the deafblind person, but may include:- BSL (British Sign Language), hands on BSL, deafblind manual, note taking (the notes may then be read in Braille using a text to Braille machine) and palantypists (this list is not exhaustive).

Congenitally deafblind people commonly require the support of an intervenor. An intervenor is a one-to-one support worker who helps a deafblind person make sense of and interact with the world around them. Intervenors usually work with children or adults who were born with severe visual and hearing impairments and who may also have additional disabilities. Intervenors help people to communicate and receive information. Their role is to enable the individual to benefit from learning and social experiences and to help them have greater access to the local environment. Intervenors work with children in schools, as well as providing support for both children and adults in the home and community environments.

Deafblind people as a group frequently have the highest level of care and or support needs. The Department of Health has recognized that, “the needs of deafblind people are often not identified nor are those in need of community care always in receipt of appropriate services.”\(^2\) This conclusion led the Government to reissue the Deafblind Guidance, “Social care for deafblind children and adults” in June of 2009.\(^3\) This guidance was issued under Section 7 of the Local Authority Social Services Act 1970 and is relevant to all local social services staff.

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\(^1\) A Sense of Urgency The Professor Emerson - Centre for Disability Research (CeDR) 2010
\(^3\) ibid
Sense Response

Provisional Proposal 1

Sense agrees that the current Pritchard test should be replaced and that there should be a new legal test which assesses whether the accused has decision-making capacity for trial.

Sense further agrees that this test should take into account all the requirements for meaningful participation in the criminal proceedings. Sense is concerned however that the consultation paper fails to anticipate or address certain circumstances where a deafblind person would have mental capacity but would be unable to participate meaningfully in the criminal proceedings and would therefore be unfit to plea or stand trial.

The consultation paper refers to a quote from SC v United Kingdom, “Effective participation” in this context presupposes that the accused has a broad understanding of the nature of the trial process and what is at stake for him or her, including the significance of any penalty which may be imposed. It means that he or she, if necessary with the assistance of for example of an interpreter, lawyer, social worker or friend should be able to understand the general thrust of what is said in court. The defendant should be able to follow what is said by the prosecution witness and, if represented, to explain to his own lawyers his version of events, point out any statements with which he disagrees and make them aware of any facts which should be put forward in his defence.⁴

A deafblind person may have the capacity to have “a broad understanding of the trial process and what is at stake” but because of extreme difficulties in accessing information the individual may be unable to understand the “general thrust” of what is said in court, follow what is said by prosecution witnesses or effectively explain his or her version of events”.

This is best illustrated through some examples – see below.

| A is a profoundly deafblind woman. She has acquired deafblindness and so has lived the majority of her life as a hearing sighted person. A former university lecturer, A fully understands the gravity of the court process and the consequences of a finding of guilt and any consequent penalty. Therefore, when A successfully receives information, she has the mental acuity and capacity to process and analyse complex facts. However, whilst A can talk to communicate her side of events, her receptive communication is extremely impaired. A receives deafblind manual but frequently gets confused about the order of words and therefore frequently misunderstands what people are trying to tell her. With her residual eyesight deteriorating month on month she can barely read. It can |

⁴ (2005) 40 EHRR 10 (App No 60958/00) at para 35
take up to 15 minutes to read a short sentence and even then A sometimes reads incorrectly what has been written leading to confusion.

It would be extremely unlikely that A would be able to grasp the general thrust of what was being said in court, follow what was said by the prosecution witness or point out any facts which she did not agree with.

B is a profoundly deafblind young man. He can receive communication in relation to simple themes in a limited way using deafblind manual. However communicating more complex threads of information which might include past tenses or abstract themes can be problematic. Furthermore B finds it very hard to express himself through deafblind manual and prefers to express himself using speech. B’s speech is very difficult to understand as his pronunciation and enunciation is often unclear. Intervenors who work with B on a daily basis are frequently confused by what B wishes to convey.

In this example whilst there is a chance that by employing special measures B may be deemed to have the receptive skills to take part in the court process; B’s impaired expressive communication may mean that his ability to effectively instruct counsel is severely challenged.

The consultation paper sets out several proposals in relation to decision-making capacity at paragraph 3.13.

1) Understanding the information relevant to the decisions that he or she will have to make in the course of his or her trial – the wording of this requirement is problematic in that some deafblind people would have the capacity to understand the information if there was an effective way to communicate the information. However, because of the dual sensory impairment which gives rise to communication difficulties, there may be no effective way for the individual to receive relevant information. For some deafblind people the barrier is the length of time that it takes to receive information. Others experience confusion of words or themes, or difficulty with the present and past tense.

2) Retention of information – some deafblind people may be unable to make notes during the trial process meaning that the amount of information they need to retain is greater than for a hearing sighted person who is able to make notes.

4) Communicating his or her decisions. As explored above, some deafblind people may experience difficulty in making themselves understood – for example they may have a speech impairment, or their deafblind manual may be unclear.

Sense suggests that the problem outlined above may be overcome by assessing decision making capacity separately to assessing an individual's ability to effectively access the trial.
Provisional Proposal 2
Sense agrees with this approach.

Provisional Proposal 3
Sense agrees with this approach.

Provisional Proposal 4
Sense agrees with the approach put forward in the consultation paper. A deafblind person may have sufficient communication and access to information ability to follow simple proceedings, for example for a crime where the act had been caught on a CCTV camera and the main issue was of identification of the accused. However if the proceedings were more complex and involved complex language and evidence then it may be that the same individual would encounter substantial problems in accessing the trial.

At Paragraph 4.15 the Government gives seven recommendations which it would endorse. The third recommendation relates to the need for improved systems for screening and assessing defendants needs. Sense agrees with this recommendation and would like to specifically highlight the need for a specialist assessment carried out by suitably qualified person to determine the needs of the defendant. The uniqueness of deafblindness as a disability has been recognised by the government in statutory guidance issued under Section 7 Local Authority Social Services Act 1970. The Guidance sets out the need for specialist assessments carried out by a suitably qualified person. Sense highly recommends that the same approach is taken in the context of assessing defendants needs.

Provisional Proposal 5
Sense agrees that the availability of special measures which would aid the decision-making capacity of the individual or the ability to access the court proceedings should be considered when the court is assessing an individual’s decision-making capacity and their fitness to plea or stand trial.

Sense firmly believes that in the interests of equality a deafblind person should not be able to hide behind his or her disability. If the individual has the capacity to access the trial proceedings then he or she should be considered fit to plead. If adjustments are required to allow the deafblind person to be able to access the trial then providing those adjustments are made to an adequate and appropriate standard (and where applicable) by a person suitably qualified to make the adjustments, then the deafblind person should be considered to be fit to plea and stand trial.

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5 Social care for deafblind children and adults LAC(DH)(2009)
6 See below at page 10
For example - A deafblind person C is accused of marital rape. C communicates using deafblind manual or finger spelling. Deafblind manual is a very slow form of communication. The court would therefore not only have to provide an interpreter to allow C to access the trial, the court would also need to run at a very slow pace to allow for C to follow the court proceedings and because it is exhausting to receive communication via this method the court would also have to have regular communication breaks. For some deafblind people communication breaks are required at 20 minute to half hour intervals. The court may also have to limit the total length of a daily session. For example some deafblind individuals would struggle to receive more than 3 hours per day of deafblind manual.

We agree with the contention that a person should not be regarded as unable to understand the information relevant to a decision if he is able to understand an explanation of it which is given in a way which is appropriate for his or her circumstances. Some deafblind people use individual forms of communications which have been adapted to best suit their needs. Some deafblind people will only effectively be able to communicate with a very limited number of people as they have developed a unique method of communication with their support worker. In this instance it will be imperative that the individual is able to access information using their preferred person as an intermediary or interpreter.

**Question 1 - Special measures**

Sense agrees 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 hearing 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.

**Provisional Proposal 6**

Sense agrees that 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.

This proposal is relevant for deafblind people. For example, some deafblind people may have limited access to information and consequently may have a limited awareness of the world around them or demonstrate a lack of awareness of certain social norms caused by their dual sensory impairment. For example an individual may know and understand the activities and social constructs which relate to his or her everyday experience of having a family and going to the shops to buy food and clothes, but he or she may not have any knowledge or understanding of more complex social structures such as the structures of democracy or the social norms around the workplace. Further unlike a hearing sighted person a deafblind individual may be unable to judge distances or give evidence on the colour of clothing, or visually detectable facial characteristics. However, a deafblind person’s other senses will be relevant for evidence.
purposes for example a deafblind person may have an enhanced ability to recognise a person by touch or smell and this would need to be explained to the court.

**Question 2** - Other changes to evidence or procedure which would render participation in the trial process more effective for defendants who have decision making-capacity and who are fit to plea and stand trial, but due to a mental disorder or other impairment require additional assistance to participate.

Deafblindness is a very individual disability and deafblind people need very individual and imaginative solutions. The courts need to be able to adapt to the individual needs and intricacies of each individual. However, there are several key points which can be held up to be generally applicable:

- The court should always employ a specifically qualified person to assess what special measures need to be employed for the deafblind individual in question.\(^7\)
- The court will always need to allow time for the court proceedings to go at a suitable pace for the deafblind individual. In some circumstances this could mean that the trial may take substantially more time than an ordinary trial. For example a deafblind person who communicates using deafblind manual is likely to need to rest his or her hands every 20 to 30 minutes for approximately 5 minutes; and depending on the individual, deafblind manual itself may take an extremely long time for expressive and receptive communication.
- The special measures when implemented should be implemented where applicable by a suitably qualified person.\(^8\) For example where a deafblind person can only reasonably be expected to receive information via one or two specific individuals then the court should not proceed unless those individuals are available.

Some relatively common adjustments or special measures that the court may have to make for deafblind people are:

- Ensuring that the room is well lit and that witnesses, legal representation or interpreters are not backlit.
- Ensuring the right kind of interpreter is provided. For example it is not appropriate for a BSL interpreter to provide deafblind manual interpretation without suitable qualifications.

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\(^7\) A specifically qualified person is a person with specific qualifications, competencies and experiences. For more information see the Sense publications: “Deafblind adults’ specialist assessments – are you specifically trained?” and “Specialist assessments for deafblind children and young people – are you specifically trained?” (available on the Sense website)

\(^8\) Note that a person who is suitably qualified to assess the need for special measures may be different from the person who delivers or implements them. A BSL interpreter could deliver BSL interpretation but may be unable to carry out the assessment.
- Allowing the deafblind person to choose their own interpreters.
- Allowing for substantial communication breaks.
- Having a person take verbatim notes so that the deafblind person can request that the proceedings stop whilst he or she catches up by using the verbatim notes.
- Proceedings may need to slow down to allow for all evidence to be presented at a speed at which it can be digested and processed by the deafblind person. For example if the deafblind person can only receive information via a screen where the spoken word is translated into a written word, then the proceedings may have to pause whilst the typist or palantypist catches up with the verbatim transcription.

**Provisional Proposal 7**

Sense is very concerned that a standard psychiatric test will determine capacity but will overlook a person’s ability to access a trial. A psychiatric test will not be relevant to a deafblind person as their unfitness to plea does not relate to psychiatric capacity but to their inability to communicate and access information.

Further, Sense is gravely concerned about the proposal that the people deemed qualified to assess fitness to plea for deafblind people should be doctors and more specifically psychiatrists. A psychiatrist is not the most appropriate person to assess whether a deafblind person is fit to plea and whether he or she is able to access the trial proceedings. The most appropriate person to assess a deafblind person’s fitness to plead would be a deafblind expert.

A medical or psychiatric qualification would infer no expert knowledge of deafblindness. Questions of fitness to plea which relate to deafblindness involve complex assessments of communication and access to information needs rather than psychiatric needs. Sense is concerned that by establishing an absolute requirement for a psychiatric test and a psychiatric medical professional, the provision will discriminate against deafblind people who may have full capacity but because of communication or access to information barriers would be prevented from effective participation in the trial.

Sense suggests that the proposal should be amended to allow for a separate assessment of fitness to plea which relates not to the mental capacity of the individual but instead to their ability to access and effectively participate in the trial proceedings. It is appropriate for a capacity assessment relating to mental health or mental impairment to be carried out by 2 doctors including a psychiatrist. If the fitness to plea relates to a physical or sensory impairment such as deafblindness, then the assessment should be carried out by 2 suitably qualified persons.  

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9 See footnote 7 above.
**Question 12 – Decision making capacity and the age of criminal responsibility**

Sense is of the view that decision making capacity relates to the age of criminal responsibility 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. The current system where a child is automatically deemed to have the decision-making capacity to carry out a criminal act at the age of 10, indirectly discriminates against deafblind children whose grasp of the concepts of right and wrong would generally be achieved at a later age.

Development of congenitally deafblind children is significantly delayed due to the impact of the lack of information received by the distance senses of sight and hearing. Deafblind children miss out on the incidental learning experienced by sighted hearing children and are often misdiagnosed with a learning disability, when in fact it is the presentation of dual sensory loss.

With the right intervention and support many deafblind children are able to become effective communicators and become successful learners. Deafblind children require a multi-sensory approach to learning utilising any residual distance senses and the remaining near senses (touch, taste, proprioception, vestibular and smell). This makes the teaching and learning of concepts a significant challenge, and for children who reach symbolic and linguistic competence, the concepts of right and wrong are often achieved later than expected compared to a hearing-sighted child’s typical development. The development of the awareness of others, perception of self and the relationship between the actions of self on others may all be impacted upon. Age is not a clear cut indicator of a child’s capacity or intention to act, a developmental perspective should be an important factor when assessing whether a child is deemed to be capable of carrying out a criminal act.

Children who acquire deafblindness in childhood or teenage years will have a more developed linguistic system, however they continue to require modifications to access information and further considerations will be required in relation to timings and communication methods. Even with developed language abilities a child with acquired deafblindness, may have experienced significant emotional impact during the diagnosis of their dual sensory impairment. It would not be uncommon for children to have less well matured social emotional skills in comparison to their hearing-sighted peers. Children may experience difficulties with self esteem or emotional resilience.
PREFACE

1. The essential aims of the trial process in England and Wales are as follows;
   (i) To ensure that an accused has a fair trial within a reasonable time
   (ii) To prove that the accused is guilty of the offence with which he is charged
   (iii) To ensure that once convicted, the offender is punished or is provided with such
treatment as may be necessary
   (iv) To ensure the public are protected from future offending through rehabilitation and/or
detention of the offender.

2. The Consultation Paper upon which I have been asked to respond is a lengthy, well
researched and detailed document, that has carefully analysed the present law as it
relates to Unfitness to Plead.

3. This response does not contain the same detail, but I have attempted to concentrate on the
questions raised and consider how they may affect the aims of the trial process. The lack of
detail does not indicate a lack of thought or proper consideration of the issues.

QUESTION 1

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 hearing 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?

1) I agree that the decision making capacity of an accused should be assessed. I assume such
assessment will be conducted by psychiatrists. Counsel should not be involved in such an
assessment and every effort should be made to avoid Counsel being placed in a position
where s/he is asked her/his views on the ability of the accused to provide instructions, follow
proceedings and make decisions regarding his trial (whether rational or not). I fear a
situation arising where a judge asks Counsel questions that will be subject of subsequent challenge.
2) I further agree that a scheme should be constructed that provides for a section 4A hearing of some description. Currently, the Prosecution merely has to establish that the accused 'did the act' ie stabbed the victim. It follows that if an accused 'did the act' he is liable to be detained. 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'.

3) In my opinion, a section 4A hearing should bear closer resemblance to a 'normal' jury trial, namely it should seek to establish:
   a. 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).
   b. 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.
   c. However, they may be cases where the defendant would not have acted as he did but for his mental problems.
   d. 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.
   e. Three issues will therefore require resolution. CP Paragraph 6.129 envisages that a further hearing may be held by a judge alone "If the accused is acquitted (because, for example, there is no evidence of fault) then there may (but would not necessarily be) a further hearing to consider whether or not the acquittal is because of mental disorder existing at the time of the offence". Provisional proposal 9 supports such a proposition.
   f. 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 3 to the judge to determine.
g. However, in some circumstances, it may be inappropriate for a jury to hear the medical evidence, such as envisaged in 6.142-6.151 and Provisional Proposals 10 and 11.

h. For those reasons, I agree that Option 5 is the preferred option for reform subject to the above observations.

**QUESTION 2**
*Can consultees think of another 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?*

An intermediary may be of assistance in some cases.

**QUESTION 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?*

1) I agree with Provisional Proposals 10 and 11 and therefore the answer to Question 3 is 'Yes'.

2) I agree that the CP correctly identifies the options for reform in relation to a section 4A hearing. I do not propose any other options for reform.

3) As indicated above, I agree that option 5 is the best option for reform.

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

As stated above, I agree that option 5 is the best option for reform.

**QUESTION 5**
*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?*

Yes. For all the reasons set out in 6.154 - 6.158.

**QUESTION 6**
*Are there circumstances in which an accused person 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?*
1) I respectfully agree with Provisional Proposal 12 and 13 and their interrelation with Question 6. Once a jury is sure that the defendant has committed the act and that there are no reasonable grounds for an acquittal, he has, effectively, been convicted. A request by him for a remission for trial would amount to an appeal against the finding and a re-run of the issues in front of a different jury.

2) For all the reasons set out in the CP at 7.22-7.26, I cannot envisage any other circumstances in which an accused might request a remission for trial.

**QUESTION 7**

*Should an accused who is found to be unfit to plead (or lack decision making capacity) be subject to the section 4A hearing in the same proceedings as co-defendants who are being tried?*

There may be some cases where it is in the interests of justice for all defendants to be tried in the same proceedings and for a single jury to resolve all issues. Conversely, there may be cases where it is not. Each case should be decided on its merits. Therefore in my opinion, no hard and fast rule should be set out.

**QUESTION 8**

*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?*

1) The lack of authority or published material relating to the present system may reflect the limited number of cases disposed of under the current regime, as opposed to an indication that the present system works quite well (See para 8.36).

2) I suspect that cost may be an issue. Such a procedure in the magistrates' court might increase the cost of summary proceedings. However, I believe that a consistent approach would be beneficial; surely all those accused of crimes who have mental disorders are entitled to the same quality of justice and proceedings, whether they are tried by a High Court Judge and jury, Circuit Judge and jury, by a District Judge alone or by lay magistrates? I suspect that where issues of fitness arise a district judge is usually assigned. It would become the norm if there was such a change to the system. It may therefore be that the cost would not necessarily increase. As a matter of principle, I do not see why the capacity based test should not apply to equally to proceedings that are triable summarily.
QUESTION 9
Do consultees think that if an accused lacks decision making capacity there should be a mandatory fact finding procedure in the magistrates’ court?

Yes

QUESTION 10
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?

I believe that it should mirror the provisional proposals 8 and 9 for the reasons set out above.

QUESTION 11
Do the matters raised in questions 8, 9 and 10 merit equal consideration in relation to the procedure in the youth courts?

Yes.

QUESTION 12
How far, if at all, does the age of criminal responsibility factor into the issue of decision making capacity in youth trials?

1) The age of criminal responsibility should not be factored into the issue of decision making capacity in youth trials. In my opinion, the purpose of the CP should be confined to the issue of unfitness to plead. It is primarily concerned with those who are mentally disordered, and the impact such a disorder has upon the accused's decision making capacity.

2) The decision making capacity of youths is complex and problematic. It will include many external factors such as educational attainment, intelligence, emotional maturity, background, culture, upbringing and many other factors that may affect a decision making capacity, quite separate from any inherent mental disorder. One can envisage a multitude of reports and potential evidence from educational psychologists, behavioural psychologists, child psychologists and the like. If a child is found to lack the decision making capacity, found to have done the act and there are no reasonable grounds for acquittal, he will be subject to a disposal scheme that may not meet his needs. I believe that the issue of unfitness is, and should remain entirely separate from the age of criminal responsibility.
Overall the Law Commission’s consultation paper is a well thought out and reasoned document and I agree with the majority of its proposals. The Pritchard test is out of date and a replacement is long overdue. I only make comments on some of the Provisional Proposals.

Provisional Proposal 1: 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. (Paragraph 3.41)

I agree and think that the definition of decision-making capacity in 3.13 is helpful. I would add however that the CA in the case of R v M John [2003] which approved the trial judge’s directions to the jury that in order to be fit to stand trial at all, D must be capable of doing 6 things namely:

1. Understanding the charges
2. Deciding whether to plead guilty or not
3. Exercising his right to challenge jurors
4. Instructing solicitors and counsel
5. Following the course of proceedings and
6. Giving evidence in his own defence

is far more helpful and appropriate than Pritchard and I have used it when instructing an expert. I would suggest the Law Commission consider adding one or two of these tests (particularly no 6) to the proposed criteria as they are specific to criminal proceedings.

Provisional Proposal 2: A new decision-making capacity test should not require that any decision the accused makes must be rational or wise. (Paragraph 3.57)

I agree, as this is in s1(4) MCA 2005 and was alluded to in R v Robertson [1968]

Provisional Proposal 4: 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 the trial which the accused faces. (Paragraph 3.101)
Obviously the judge should be guided by advice of an expert.

Provisional Proposal 5: 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 and where any other reasonable adjustments have been made. (Paragraph 4.27)

At para 3.13 (1) it is stated that the first proposed test for ‘decision-making capacity’ is ‘to understand the information relevant to the decisions that s/he will have to make in the course of his/her trial. In footnote 17 to this para, it is stated that ‘we would also provisionally propose that as under MCA S3(2), a person should not be regarded as unable to understand the information relevant to a decision if he or she is able to understand an explanation of it given to him or her in a way that is appropriate to his or her circumstances (e.g. using simply language, visual aids or any other means).

In my opinion this is what the Practice Direction (Criminal Proceedings: consolidation) para II.30 was introduced to deal with. For example, para III.30.12 requires the court to ensure, so far is practicable, that the trial is conducted in simple, clear language that D can understand and that cross-examination is conducted by questions that are short and clear. It should also be noted that there is a new provision under s104 Coroner’s and Justice Act 2009 (not yet in force but which will add a new s33BA to the YJCEA 1999) which will allow the examination of D through an intermediary where he suffers from MD or has a significant impairment of intelligence and social functioning and is for that reason unable to participate effectively in proceedings as a witness giving oral evidence. It is anticipated that the intermediary is a person with understanding of D’s difficulties who will communicate to D, in appropriate language, questions put to him and to communicate his answers and to explain such questions or answers so far as necessary to enable them to be understood by D or the person in question.

As a defence solicitor when I have instructed a psychiatrist or psychologist to advise on fitness to plead I invariably ask whether D could participate if suitable trial adaptations were put in place, quoting the relevant sections of the PD and where relevant, the case of R v SH [2003] which raised the use of a facilitator (a situation which s104, referred to above, should remedy when in force). I have had cases where, under the proposed new test at 3.13, my client would have come within some but not all of the criteria. However with the aid of a ‘facilitator’ or certain trial adaptations they were able to participate effectively. It is usually the cases of Ds with a learning difficulty where this is more relevant and it was this lack of statutory provision which prompted s104 CJA. I don’t think that the assessment of decision-making capacity can be completely separated from the question of trial adaptations/ special measures. However the first issue should be whether or not D has decision-making capacity but if D could be rendered capable in the area in which he is deficient by appropriate adaptations then I think it is a valid consideration but only in appropriate cases.
Provisional Proposal 7: A defined psychiatric test to assess decision-making capacity should be developed and this should accompany the legal test as to decision-making capacity. (Paragraph 5.17)

Not being a psychiatrist, I am unsure as to how restrictive a professional would find a defined test to be.

I agree that it should not need to be two s12 doctors. In cases where ‘intelligence’ is an issue it is invariably necessary to instruct a psychologist and indeed I have found that most psychiatrists will not advise on unfitness to plead without the initial assessment by a psychologist e.g. using the W AIS scales.

Provisional Proposal 8: 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. (Paragraph 6.140)

In my opinion option 5 is preferable and fairer to D as there are frequently cases where but for the D’s mental state, s/he would not have committed the offence. ‘Sufficient benefit’ is too narrow a test and the advocate should be able to put forward any reasonable defence.

Question 1: 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 hearing 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? (Paragraph 4.27)

See my response to proposal 5. I do agree with a ‘continuum’ scheme.

Question 2: 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? (Paragraph 4.31)

I find that one of the main stumbling blocks with clients particularly those who have LD is the overall language used in a court setting. Words and expressions which are in everyday usage in the Crown court are really alien to most people outside the criminal justice system, e.g. indictment, count, my friend, my learned friend, the Crown, rebuttal, to name but a few. I am of the view that consideration should be given to reviewing legal terms and language, perhaps in conjunction with the Plain English Campaign, so there is an alternative recognised ‘script’ that can be used to these cases to ensure the D does understand ‘what is happening’ throughout his trial (PD para III.30.11). 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 understanding what the words indictment or count mean! Not to understand the start of their trial is wholly inadequate.
Question 7: 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? (Paragraph 7.44)

No. 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 PART1 of the CPRs and the interests of justice. In my view, there should always be separate trials.

Question 8: 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? (Paragraph 8.37)

Question 9: Do consultees think that if an accused lacks decision-making capacity there should be a mandatory fact-finding procedure in the magistrates’ court? (Paragraph 8.37).

Question 10: 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? (Paragraph 8.37)

Question 11: Do the matters raised in questions 8, 9 and 10 merit equal consideration in relation to the procedure in the youth courts? (Paragraph 8.68)

I think there should be a capacity based test and a fact-finding procedure in the Magistrates’ Court. As a practitioner, the lack of a test of unfitness to plead and procedure in the summary proceedings has proved problematic and as such, Ds are at a disadvantage in comparison to being dealt with in a Crown court. I agree with the summary of potential problems that this lack of procedures raises as outlined in para 8.14. Whilst the procedure for insanity in the Magistrates’ court is different from the Crown court, at least it exists, whereas it does not for unfit Ds. (see Taylor and Krish Advising Mentally disordered Offenders 2nd ed Chapter 7 which highlights the piecemeal and inadequate Magistrates’ court procedures). If one were to adopt a similar procedure for the test i.e. is D unfit (using the decision-making capacity test), if so did he do the act and then disposal, as in the Crown court, I don’t think that the statement that for ‘matters to be resolved … there might be an undesirable delay in securing treatment for those accused who need it’ (para 8.32) is a disadvantage. In my experience the existence of a duty psychiatric scheme in Mags cts (rarely available in Crown court) means solicitors have quicker access to expert advice and more possibility of getting D the help/admission to hospital that may be required.

I am of the view that the Law Commission should make specific proposals in relation to summary proceedings and that as far as possible these should mirror the proposals for the Crown court as to omit the chance to reform this lacuna in the Magistrates’ court where equally vulnerable Ds appear, would be a mistake. My comments are the same for the Youth court.

January 23rd 2010.
Law Commission Consultation on Unfitness to Plead

I do not think it appropriate to comment on the proposals relating to the substantive test to be applied in relation to capacity to stand trial nor in relation to proposals which would extend the procedure into courts of summary jurisdiction, but I hope you will find the following observations on practice and procedure of some help.

By way of preliminary comment, it seems clear to me from a broad overview of the cases brought to the Court of Appeal, Criminal Division, under s15, Criminal Appeal Act, 1968, many of which are reviewed in the Consultation Paper, 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 s4A hearing. Many of the
problems which arose in B & 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. As an aside, 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 (MB [2010] EWCA Crim 1684). The Supreme Court has recently refused the prosecutor’s application for permission to appeal.

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 ss15 & 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.

Dealing specifically with the List of Provisional Proposals and Questions in Part 9, I observe as follows:

9.1(1)-(11) No comment

9.1(12) If this proposal is accepted, I suggest that consideration may need to be given to whether any attendant rights of appeal need to be created and, if so, by whom such rights may be exercised. The unfitness jurisdiction is one which s28(2) Senior Courts Act, 1981, does not exclude from the jurisdiction of the Administrative Court (since it is no longer a matter relating to trial on indictment) and, as a substantial number of cases referred to in the Consultation Paper make clear, the Administrative Court has not been slow to exercise a jurisdiction notwithstanding the explicit rights of appeal contained in ss15 and 16A of...
the 1968 Act. Ferris (referred to at para 6.52) is an example of a case where the appellant might have been better served had she exercised her statutory right of appeal.

9.1(13) Although not specifically within the area with which I am most intimately concerned, it would seem eminently sensible to me that there should be no need to conduct a second trial of the facts. I assume that the existing right of appeal in s15 of the 1968 Act would apply (or be applied) to any second finding of unfitness. But care may be needed to avoid creating a second right of appeal against the original finding on the trial of the facts.

9.1(14) It seems to me vital that the Court of Appeal, Criminal Division, is endowed with the power to remit for rehearing a trial of the facts where it quashes such a finding. The Court has itself noted the lacuna and indicated that it should be rectified on more than one occasion (see eg. Norman and MB). Ferris to which I refer above may also be relevant.

9.2(1)-(5) No comment

9.2(6) If this proposal is accepted, I suggest that consideration may need to be given to whether any attendant rights of appeal need to be created and, if so, by whom such rights may be exercised.

9.2(7)-(12) No comment

I hope the Commission may find these observations of some small assistance.
Law Commission consultation on proposed reforms to the law on unfitness to plead

A response by Victim Support

January 2011

Victim Support is the national charity for people affected by crime. Staff and volunteers offer free and confidential information and support for victims of any crime, whether or not it has been reported and regardless of when it happened. Victim Support works to increase awareness of the effects of crime and to achieve greater recognition of victims' and witnesses' rights. The organisation also operates the Witness Service and the Victim Supportline (0845 30 30 900).
1. Introduction

Victim Support is the national charity for victims of crime. In addition to the general service we provide, Victim Support has extensive experience of supporting victims and other witnesses of crime through the trial process. Our Witness Service operates in every Crown and magistrates’ court in England and Wales, and in 2009-10 supported nearly 270,000 witnesses.

Victim Support fully appreciates the importance to a civilized justice system of ensuring that only those defendants with the capacity to engage meaningfully in the trial process should be subjected to it. We see no worthwhile benefit to victims in undermining a defendant’s right to a fair trial.

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.

Very few victims who report crime see their cases come to court; those who do have a range of reactions, from fear of being cross-examined to exhilaration at the chance to take the stand. Consistently with the longstanding principle of open justice, however, most share the expectation that they will have the opportunity to see the defendant held to account if he is guilty. From this perspective, 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.

More broadly, it is our belief that taking better account of victims’ needs is vital to any meaningful reform of criminal justice. Without the contribution made to the process by victims, from reporting crime to giving evidence, it could not function; furthermore, victims’ experiences have a decisive impact on public confidence in the system. We hope that our observations on this matter will therefore have some weight,

Victim Support’s detailed responses to the provisional proposals and questions set out in this consultation are outlined below.
Provisional Proposal 1: 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. (Paragraph 3.41)

Provisional Proposal 2: A new decision-making capacity test should not require that any decision the accused makes must be rational or wise. (Paragraph 3.57)

Provisional Proposal 3: 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. (Paragraph 3.99)

Victim Support is in agreement with the creation of a new legal test to determine whether the accused has the required decision-making capacity for trial (Provisional Proposal 1). We agree that the quality of his decisions is irrelevant, other than insofar as they may trigger a test of his decision-making capacity (Provisional Proposal 2). We also support the argument that the test should be unitary rather than disaggregated (Provisional Proposal 3), as we feel that the latter has the potential not only to undermine legal certainty, but to create a degree of complexity, and practical difficulties such as delays, that could effectively render the trial inaccessible to victims and the public.

We nevertheless believe that the test envisioned in the consultation paper posits an excessively high threshold for establishing decision-making capacity, especially in relation to the defendant’s memory and his ability to communicate.

Paragraph 3.13 lists four the provisional criteria for establishing decision-making capacity: in summary, the ability to a) understand relevant information, b) retain the information, c) use the information and d) communicate decisions based on the information. These are broadly delineated, and we accept each in principle, but we have reservations about the level of capacity that will be required on each head, as indicated by the specific examples.

We believe that Examples 3B and 3F fail to demonstrate inadequate decision-making capacity for trial, although we of course recognise that depression and autism are both serious conditions (and may of course be more relevant for one of the other criteria, such as understanding). These particular examples, however, which relate to retention of information and communicative ability, fail to reflect the extent to which the ordinary person relies on the advice and intervention of their legal representatives, not to mention the extent to which memory lapses and problems communicating are widespread difficulties which may affect an extremely high proportion of defendants.
In our view, a general difficulty with memory retention, as present in Example 3B, is unlikely to negate a fair trial; we believe this would only be the case where the difficulty is so severe, or so specific, that the defendant cannot instruct counsel, as appears to be the case in 3C. There is surely a spectrum of memory impairment, along which a defendant experiencing the ordinary degradation of memory associated with ageing, and one with advanced Alzheimer's disease, might represent the extremes. Up to a certain point on this scale, we would expect the defendant’s legal representatives to be able to remedy the fault.

In 3F, we do not accept that autism would in most cases present sufficient difficulties with communication (as opposed to understanding or weighing information) to negate the necessary decision-making capacity for a trial. Again, we feel that the relationship between the defendant and his legal representatives is at the heart of the defendant’s meaningful participation: if he can be induced to instruct counsel, even in the form of answering binary questions, then it would appear that he is as able to stand trial as most defendants.

We also believe that 3E is a borderline case, in which special measures may be appropriate rather than an outright finding of no capacity, as discussed below.

In short, we feel that of the four criteria in Paragraph 3.13, 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. We suggest that more detail of the requisite level of capacity on each separate head should be forthcoming.

**Provisional Proposal 4:** 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 the trial which the accused faces. (Paragraph 3.101)

We do not support this proposal, on the basis that neither defendants nor victims are responsible for the fact that some cases, and some areas of the criminal law, are more complex than others. It is unjust to both that the treatment of a criminal charge should be so dependent on what that charge happens to be. We believe a standardised test, provided an appropriate level of requisite capacity is set for each of the four criteria, is the fairer option.

In relation to what that level should be, we note at Paragraph 3.65 the example given to illustrate how a disaggregated approach would work in practice: that the defendant who is found competent for some elements of the trial process may be found to lack capacity if he does not understand “that his or her bad character might be revealed under the provisions of section 101(1) of the Criminal Justice Act 2003 if certain accusations are made by him or her”. We respectfully observe that it is unrealistic to require such an understanding in order to establish capacity; we believe there are many highly competent members of the public who would fail to
grasp this highly challenging concept, and that it is the role of legal representatives to advise the best course of action in such circumstances.

Furthermore, victims and other witnesses are exposed to a similar risk under s.100(1), with no legal advocate of their own and no safeguard to ensure that they understand the damage this may do to their lives and reputations.

We would hope that this discrepancy would not be increased by a test of capacity which requires the defendant to understand such complex elements of the law, as we do not accept that such an understanding is necessary to effective participation.

**Provisional Proposal 5: 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 and where any other reasonable adjustments have been made. (Paragraph 4.27)**

It follows from our estimation of the importance of a trial to the victim that we support the use of special measures and any other reasonable means to ensure that the fewest possible defendants are prevented from standing trial.

Again, however, we would value more clarity around the level of decision-making capacity required, this time to trigger consideration of special measures. Returning to the examples given in Chapter Three of the consultation paper, we would suggest that Example 3E, involving a defendant with obsessive compulsive disorder (OCD) 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.

We would also agree with the observation in the consultation paper that special measures, which have been a significant innovation for all eligible witnesses including defendants and victims, nevertheless bring their own dangers, especially those of inconsistent making and granting of applications. Any legal change in this area should be accompanied by a greater focus on the practical implementation of special measures, including training; we would be extremely sympathetic to any effort of this kind.

**Provisional Proposal 6: 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. (Paragraph 4.31)**

We have no objection to this provisional proposal.

**Provisional Proposal 7: A defined psychiatric test to assess decision-making capacity should be developed and this should accompany the legal test as to decision-making capacity. (Paragraph 5.17)**
We are in support of this provisional proposal as being likely to inspire confidence in victims and the wider public than a legal test without psychiatric input.

**Provisional Proposal 8:** 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. (Paragraph 6.140)

Our only comment on this proposal is that the public understanding of the nature and purpose of s.4a hearings are of course considerably lower than that of standard trials. If this provisional proposal is implemented, we hope that the Law Commission will consider recommending greater efforts by statutory agencies to educate the public in this regard.

**Provisional Proposal 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. (Paragraph 6.140)

We have no objection to this provisional proposal.

**Provisional Proposal 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. (Paragraph 6.152)

We have no objection to this provisional proposal.

**Provisional Proposal 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. (Paragraph 6.152)

We have no objection to this provisional proposal.

**Provisional Proposal 12:** 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 medical evidence confirms) that the accused is still unfit to plead, the court should be able to reverse the decision to remit the case. (Paragraph 7.21)

We have no objection to this provisional proposal.

**Provisional Proposal 13:** 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. (Paragraph 7.21)

We have no objection to this proposal.

Provisional Proposal 14: 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. (Paragraph 7.59)

We have no objection to this provisional proposal.
Question 1: 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 hearing 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? (Paragraph 4.27)

As indicated above, we do agree but we envision that the key points along the continuum, i.e. the level of capacity at which a section 4a hearing or trial with special measures is ordered, will need to be explored in more detail.

We also believe as stated that different levels of capacity (or different points along the continuum) are required for each of the four heads of the proposed test; specifically that criteria (1) and (3) should carry a lower threshold than (2) and (4).

Question 2: 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? (Paragraph 4.31)

We suggest additional training for legal representatives, or indeed the creation of specialist counsel to take on such work.

Question 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? (Paragraph 6.153)

We have no other options to propose.

Question 4: If consultees do not agree that option 5 is the best option for reform, would they agree with any other option? (Paragraph 6.153)

We agree, but would echo the point made in response to Provisional Proposal 8: that any such change should be accompanied by moves to educate the public, perhaps particularly about the meaning of the special verdict.

Question 5: 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? (Paragraph 6.159)

We have no comment on this question.
Question 6: 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? (Paragraph 7.26)

We have no comment on this question.

Question 7: 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? (Paragraph 7.44)

We have no comment on this question.

Question 8: 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? (Paragraph 8.37)

Given that victims of cases tried summarily have no lesser an interest in seeing justice fully done, we do.

Question 9: Do consultees think that if an accused lacks decision-making capacity there should be a mandatory fact-finding procedure in the magistrates’ court? (Paragraph 8.37)

On the basis that victims should not be faced with the prospect of receiving no finding at all as to whether a wrong was done to them, we do.

Question 10: 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? (Paragraph 8.37)

As with Question 8, we believe that for the sake of consistency of justice, it should mirror Provisional Proposals 8 and 9.

Question 11: Do the matters raised in questions 8, 9 and 10 merit equal consideration in relation to the procedure in the youth courts? (Paragraph 8.68)

As with Questions 8 and 11, we believe that for the sake of consistency of justice, they do.

Question 12: How far if at all, does the age of criminal responsibility factor into the issue of decision-making capacity in youth trials? (Paragraph 8.69)

We have no comment to make on this question.
Dr Eileen Vizard’s Response to the Law Commission’s

Unfitness to Plead Consultation Paper

27.1.11

Preliminary Comments

I am a Consultant Child & Adolescent Psychiatrist with a special interest in children who are defendants. For over 30 years I have worked with children and young people who appear before the criminal courts facing very serious charges such as rape, abduction and murder. I have taught, published and researched widely in this field (See the selection of some relevant publications).

I am making this response to the CP as an expert in child & adolescent forensic psychiatry, as an academic at UCL and also as a Trustee of the Michael Sieff Foundation, a child care charity.

As part of my work, I prepare reports for the criminal courts on the Fitness to Plead of children and adolescents facing serious charges and I give expert evidence in these cases. I gave evidence in the Bulger case, on the issue of Doli Incapax, having assessed Robert Thompson. Some of my psychiatric findings in relation to Thompson were referred to in the ECHR judgment on that case. Recently I assessed one of the two boys who abducted and seriously injured two other children, the Doncaster/Edlington case and I gave evidence in that case.

I am also asked to prepare reports on youths facing criminal charges where there are doubts about their fitness to plead. However, given the known significant prevalence of learning disability in juvenile delinquent populations (Bladon et al 2005; Vizard et al 2007) I am surprised at how few of these requests are made compared with the significant number of pre-sentence requests I receive to assess the level of risk the same youths pose. At a Law Commission Conference on Fitness to Plead in 2009, it was noted that relatively few findings of Unfitness to Plead are made in UK courts in relation to adults. At that Conference little information was available about the prevalence of Unfitness to Plead findings for juveniles but they were thought to be uncommon.

In fact, when my colleagues and I do the pre-sentence reports on the same delinquent youths (already been convicted for the index offence), 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 (Bladon et al 2005; Vizard et al 2007). In such cases, none of these matters have been previously noted or queries raised during the earlier court proceedings and therefore none of these youths were seen for a
fitness to plead assessment. This raises the question of how many potentially unfit to plead juvenile delinquents are already slipping through the net.

A key issue arising in my forensic child psychiatry practice is the lack of any proper, scientifically validated test of juvenile adjudicative competence or fitness to plead which is accepted for use in the UK.

Rather, experts assessing children for fitness to plead are instructed to address the elements of the updated Pritchard criteria. However, the relevance of the Pritchard criteria to modern legal and psychiatric practice has been raised by the present Law Commission consultation document (Law Commission, 2010, 2.106). The Pritchard criteria have also been widely criticised by clinicians and academics on various grounds including inconsistent application of the criteria (Grubin 1991; Mackay & Kearns 2000), the application of varying standards of competence required depending on the seriousness of the charge being faced (Rosenfeld & Ritchie 1998; Buchanan 2006) and the need for both conceptual and procedural changes (Rogers et al 2008).

In the review I undertook for the Royal College of Psychiatrists in 2006 on Child Defendants the dilemmas posed for the assessing clinician dealing with a developmentally immature child defendant are discussed and alternative assessment frameworks are proposed (Vizard 2006, pps 43-48 and elsewhere). At the time of writing this response to the Law Commission’s consultation paper, there is still no agreed assessment framework for fitness to plead which can be used by clinicians dealing with child defendants although there are assessment models in use in the USA and elsewhere which could easily be adapted for use in the UK courts with juveniles (Grisso 2000).

The law in relation to Unfitness to Plead is extremely complex (at least to a non lawyer such as me) and it is clear that there has been dissatisfaction with the Pritchard criteria almost from their inception in 1836. However, in relation to Unfitness to Plead and juvenile defendants, in my view, the law as it stands is completely ‘Unfit to Plead’ on the whole issue of juvenile adjudicative competence. In that sense, I agree entirely with the main thrust of the Law Commission’s present Consultation Paper that ‘…..the (Pritchard) test is outdated and inconsistent with modern psychiatry.’ (p. 1, note 3.).

However, if the Law Commission’s proposals in relation to a new decision making capacity test for fitness to plead in juveniles are accepted and put into practice in years to come, there will be further ramifications, many of which are discussed in the Consultation Paper in relation to the age of criminal responsibility (8.58 – 8.69, pps 175-179).

Central to much of this discussion about childrens’ decisional competence is the concept of ‘developmental immaturity’ which is a key concept in the field of child mental and physical health but one which is almost unknown within the UK legislation. However, it is important to note that, in their review of murder in 2006, the Law Commission did recommend that
‘developmental immaturity’ could be a separate defence to a charge of murder but this was not adopted by the government (8.61-8.66, pps 176-178). The Royal College of Psychiatrists and I (in separate submissions) pressed for this change to be incorporated citing the overwhelming scientific evidence in relation to childrens’ developmental immaturity.

Developmental immaturity is a linking concept (from a legal perspective) between fitness to plead and the age of criminal responsibility. This is why the present CP quite correctly discusses the issue of developmental immaturity within the section on the age of criminal responsibility. It is my view and the view of the majority of professionals working with children that the age of criminal responsibility is too low by a significant amount and that is should be raised in line with other jurisdictions in Europe and elsewhere.

There are also a number of outstanding legal and welfare matters in relation to child defendants who are also subjects of Care proceedings (see my appended presentation to the Criminal Bar Association 2010). These problems are more than just procedural issues.

The failure to envisage the offending child as a whole person who may be both dangerous but also vulnerable and a ‘child in need’ in terms of the Children Act 1989 has never been addressed by the UK legal system and may constitute a breach of that child’s human rights on a number of levels. This situation has meant that the child as an offender is dealt with quite separately from the very same child as a subject of care proceedings. There are many duplications of assessments running alongside a complete lack of any agreed method for communication between lawyers and experts in the criminal and family courts (see my appended presentation to the Criminal Bar Association 2010).

In July 2010 I published a letter in the Times with 33 other senior signatories calling for a review of the age of criminal responsibility (letter appended). Our letter cited some of the more recent neuroscientific evidence on childrens’ brain development as definitive proof that all children are ‘developmentally immature’ at age 10 years old. Furthermore, research shows that juveniles appearing before the criminal courts at a young age suffer from significantly higher levels of neurocognitive difficulties including learning disability and psychiatric disorders than ordinary children (Vizard et al 2007). Taking all this into account, the argument proposed by neuroscientists and clinicians working with young delinquents is that child defendants should not be expected to have the decisional competence to make reliable judgments about their pleas to charges, about instructing their solicitors or about the conduct of their own defences.

In conclusion, it is my view that a new test is for decisional competence in relation to fitness to plead in juveniles is essential. However, if or when such a test is put into practice in the criminal courts (and assuming that this new test is applied consistently according to agreed guidelines) 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. If this
supposition is correct, it will again raise the question of the current very low age of criminal responsibility in the UK and will add to the evidence that it needs to be raised significantly.

I have expanded on this and related points in my recent response to the Law Commission’s Eleventh Programme of Law Reform Consultation Paper. In that response I am suggesting that the Law Commission should consider a full review of the age of criminal responsibility, in line with recommendations from many organisations including the Royal College of Psychiatrists (Vizard 2006), the Prison Reform Trust (2010) and the All Party Parliamentary Group for Children (APPG) (2010). I append my response to the Law Commissions Eleventh Programme of Law Reform, to which I will allude in some of my answers to the current CP.

I am very willing to attend the Law Commission in person to give evidence on all of these issues if that would assist the Consultation process. I have also appended various papers and presentations which I hope will be helpful to supplement my response to this CP.

Dr Eileen Vizard FRCPsych

Consultant Child & Adolescent Psychiatrist
Clinical Director NSPCC National Clinical Assessment & Treatment Service (NCATS)
Honorary Senior Lecturer UCL
Alexandra Ciardi House
7-8 Greenland Place
London
NW1 OAP
PART 9
LIST OF PROVISIONAL PROPOSALS AND QUESTIONS

PROVISIONAL PROPOSALS

9.1 We provisionally propose that:

(1) 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. [Paragraph 3.41]

I agree with this proposal. However, in relation to children and young people facing a criminal trial, the new legal test must be based on developmental principles and it must be firmly research evidence based. The implementation of the test should be monitored to ensure that only appropriately trained child mental health practitioners apply the test and that they do not deviate from the recommended procedures.

(2) A new decision-making capacity test should not require that any decision the accused makes must be rational or wise. [Paragraph 3.57]

I agree with this in relation to adults. However, in relation to children and young people, it should be remembered that young children may often make unwise or irrational decisions from which they learn as part of growing up – i.e. ‘learning from experience’. That is partly why the Children Act 1989 stipulates that Parental responsibility (PR) should rest with the child’s parents until age 18 years old so that an adult person who can make rational decisions can protect the child from the adverse consequences of his often impulsive choices. With adults who have capacity and who still make foolish or irrational decisions, it is fair to say that they knew what they were doing when they made that decision and they must then take the consequences.

However, with children their natural developmental immaturity means that their brains are not yet fully developed. Those regions, such as the frontal lobes, which are thought to be implicated in evaluating future consequences are not mature enough to help the young child to make balanced and farsighted judgments about his own best interests.

In our letter to the Times (appended) we summarised the neuroscience in relation to this issue as follows:

‘First scientific research has demonstrated that significant psychological and neurobiological development takes place throughout adolescence. Crucially, at age 10, children show marked immaturity in a network of frontal brain regions implicated in social cognition, planning, perspective taking and evaluating future consequences. This psychological and neurodevelopmental immaturity is such that the capacities of a child of ten are not comparable to an older adolescent or adult.’ (The Times 7th July 2010).

(3) 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.

[Paragraph 3.99]

I agree.

(4) 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 the trial which the accused faces.

[Paragraph 3.101]

I agree. However, I do not think that this should include placing the burden upon the Judge alone to decide if the adult defendant is disabled to the extent that he requires a formal fitness to plead assessment. That decision should presumably be made by the defence lawyers with the court’s agreement. The extent of any relevant disability should then be evident from the assessment the results of which should be made available to the Judge.

(5) 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 and where any other reasonable adjustments have been made.

[Paragraph 4.27]

I agree.

(6) 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.

[Paragraph 4.31]

I agree. In fact, in my view, it is wholly unacceptable that any defendant with a known or suspected mental disorder or impairment should be allowed to give evidence without such an expert assessment since his disorder or impairment might lead him to incriminate himself or to give misleading evidence unwittingly.

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

[Paragraph 5.17]

I strongly agree with this suggestion. However, see my previous comments about the need for a new test for juvenile decisional competence which is rooted in the scientific evidence on child development including brain development in the context of the general developmental immaturity which naturally characterises every child.

(8) 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.

[Paragraph 6.140]

I agree.
(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.  
[Paragraph 6.140]

I agree.

(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.  
[Paragraph 6.152]

I agree.

(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.  
[Paragraph 6.152]

I agree.

(12) 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 medical evidence confirms) that the accused is still unfit to plead, the court should be able to reverse the decision to remit the case.  
[Paragraph 7.21]

I agree.

(13) 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.  
[Paragraph 7.21]

I agree.

(14) 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.  
[Paragraph 7.59]

I agree.

QUESTIONS

9.2 In addition to the above proposals, we also ask the following questions:

(1) 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 hearing 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?  
[Paragraph 4.27]
I agree.

(2) 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?
[Paragraph 4.31]

Perhaps the presence of an Intermediary trained in mental health would be useful for those defendants suffering from a mental disorder or from an impairment. In relation to children who are defendants, it is my view that an Intermediary trained in child development and in mental health should always be present, even if the child or young person has been found fit to plead.

(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?
[Paragraph 6.153]

No comment

(4) If consultees do not agree that option 5 is the best option for reform, would they agree with any other option?
[Paragraph 6.153]

No comment.

(5) 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?
[Paragraph 6.159]

Yes, I agree.

(6) 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?
[Paragraph 7.26]

No, because (if I have understood this correctly) if they are fit to plead and found guilty I assume that they can always appeal the finding at a later date.

(7) 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?
[Paragraph 7.44]

Yes, I believe that this could save time and might avoid the cost of an extra hearing.

(8) 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?
[Paragraph 8.37]

Yes. I believe that it should be the same test in both sets of proceedings.
(9) Do consultees think that if an accused lacks decision-making capacity there should be a mandatory fact-finding procedure in the magistrates’ court?

[Paragraph 8.37]

Yes.

(10) 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?

[Paragraph 8.37]

It should mirror provisional proposals 8 & 9.

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

[Paragraph 8.68]

Yes, definitely.

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

[Paragraph 8.69]

A great deal. Please see my earlier comments. Also please refer to the publications appended which address this issue in much more detail.
Dr Eileen Vizard Selection of Relevant Publications


Other References


