



**Law
Commission**
Reforming the law

Unfitness to Plead: Appendix C Issues Paper Responses

13 January 2016

THE LAW COMMISSION

UNFITNESS TO PLEAD: ISSUES PAPER RESPONSES

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APPENDIX C

ISSUES PAPER RESPONSES

GUIDE TO RESPONSES

These are the responses to the Law Commission's Issues Paper on Unfitness to Plead. Details of the project, as well as the Issues Paper, can be found at <http://www.lawcom.gov.uk/project/unfitness-to-plead/>.

The responses are in alphabetical order. Some responses have their own internal page numbers but for ease of reference we have paginated the combined responses throughout at the top centre of each page.

We have also included a summary of the Law Commission Symposium on Unfitness to Plead held on 11 June 2014 at the School of Law, University of Leeds.

Response of Anonymous (Academic and Intermediary)

PART 2: THE LEGAL TEST

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

YES: NO: OTHER:

Further Question 3 Do consultees consider that incorporating an exhaustive list of decisions for which the defendant requires capacity into a reformed legal test for unfitness to plead would assist in maintaining the threshold for unfitness at a suitable level? (2.42)

AGREE: DISAGREE: OTHER:

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

YES: NO: OTHER:

Further Question 5 Do consultees agree that a diagnostic threshold would be unlikely to assist in maintaining the threshold of unfitness at a suitable level? (2.44)

YES: NO: OTHER:

Further Question 6 Do consultees think that it would be helpful to have a statutory presumption that all defendants are fit to be tried until the contrary is proved? (2.46)

YES: NO: OTHER:

Further Question 7 Do consultees agree that a finding that a person lacks capacity shall remain valid unless and until the contrary is established on the basis of the evidence of two suitably qualified experts? (2.48)

YES: NO: OTHER:

Further Question 9 Do consultees consider that making the test one of capacity for effective participation “in determination of the allegation(s) faced” would introduce a desirable element of context into the assessment? (2.68)

YES: NO: OTHER:

Further Question 11 Do consultees agree that the difficulties surrounding unrepresented defendants cannot be addressed by amendment to the legal test itself? (2.88)

YES: NO: OTHER:

PART 3: SPECIAL MEASURES

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

AGREE: DISAGREE: OTHER:

I have considerable experience in working with vulnerable defendants to assist their communication during criminal proceedings, and without a shadow of a doubt, their ability to effectively participate, and therefore receive a fair trial, would be severely diminished without the help of an intermediary. Often they do not understand the court process, the legal terminology, the charges, the sentence and the rules outlined in their sentence, information conveyed through their barrister, and the legal implications of some of their decision making. A large part of my work is dedicated towards helping vulnerable defendants understand all of the above. I can say with 100% certainty that they would not be capable of understanding and making important legal decisions without our help. A hypothetical example in practice could be where a vulnerable defendant is provided with the opportunity to avoid a custodial sentence by pleading guilty to a lesser charge. On the plus side they could avoid 'jail time' but this decision could also hold many negative outcomes too (e.g. sex offender register). They may not understand what some of the outcomes mean when stated by their barrister and instead could focus their decision on avoiding prison. An intermediary would have to spend a considerable period of time explaining in detail the possible outcomes stated by the barrister (but also being careful not to indicate what they think would be the best outcome. They must remain impartial). After this, the defendant can then make their own decision, based on their own needs, with the intermediary satisfied that the defendant's decision was informed by the information provided. Without this kind of assistance many vulnerable defendants would be making decisions without a full appreciation of the legal implications. This would not be fair.

PART 4: ASSESSING THE CAPACITY OF THE ACCUSED

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

AGREE: DISAGREE: OTHER:

PART 5: PROCEDURE FOR THE UNFIT ACCUSED

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

YES: NO: OTHER:

Further Question 18 Do consultees consider that the determination of facts procedure for the accused who lacks capacity should be made discretionary following the finding of unfitness, to allow for discontinuance of the proceedings, and diversion out of the criminal justice system into health or related services in appropriate cases? (5.33)

YES: NO: OTHER:

Further Question 21 Do consultees consider that the special verdict should be made available to the jury on their initial consideration of the facts? (5.54)

YES: NO: OTHER:

Further Question 23 Do consultees consider that the determination of facts in relation to a defendant found to lack capacity could be dealt with by a judge sitting without a jury? (5.60)

YES: NO: OTHER:

Yes because the judge may have expertise in dealing with these types of cases and have the knowledge and experience to make a correct decision.

Further Question 24 Do consultees agree that a representative, appointed by the court to put the case for the defence, should be entitled to act contrary to the defendant's identified will and preferences, where the representative considers that to do so is necessary in the defendant's best interests? (5.64)

YES: NO: OTHER:

PART 7: REMISSION AND APPEALS

Further Question 31 Do consultees agree that where there has been a finding that a defendant had "done the act or made the omission," he or she should be entitled to request remission for trial on regaining capacity, where recovery is confirmed by the opinions of two experts competent to address the defendant's particular condition? (7.43)

YES: NO: OTHER:

Further Question 32 Do consultees consider that the rights of appeal vested in the unfit defendant should be exercisable by his or her legal representatives? (7.48)

YES: NO: OTHER:

PART 8: UNFITNESS TO PLEAD IN THE MAGISTRATES' AND YOUTH COURTS

Further Question 34 Do consultees consider that, where the defendant's capacity is in doubt, it would be preferable for his or her capacity to be determined in the magistrates' court, and, if the defendant is found to lack capacity, that all further proceedings against him or her should remain in that court? (8.76)

YES: NO: OTHER:

Further Question 35 (in the alternative) Do consultees alternatively consider that such a case should be sent to the Crown Court for determination of capacity and, if the defendant is found to lack capacity, that all further proceedings against him or her should remain in that court? (8.77)

YES: NO: OTHER:

Further Question 36 Do consultees agree that capacity procedures in the summary courts should be applicable for all criminal offences? (8.83)

AGREE: DISAGREE: OTHER:

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

YES: NO: OTHER:

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

YES: NO: OTHER:

Further Question 43 Do consultees agree that there should be mandatory specialist training on issues relevant to trying youths, for all legal practitioners and members of the judiciary engaged in cases involving young defendants? (8.114)

YES: NO: OTHER:

Further Question 44 Do consultees consider it appropriate for there to be initial screening for mental health issues for all defendants under 14 years of age, to be conducted by mental health professionals?. (8.119)

YES: NO: OTHER:

Further Question 47 Do consultees agree that the following disposals should be available to the magistrates' court on a finding that the defendant has "done the act or made the omission," or where a special determination has been arrived at:
(a) a hospital order (without restriction);
(b) a supervision order;
(c) an absolute discharge? (8.135)

YES: NO: OTHER:

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

YES: NO: OTHER:

Response to Consultation on Unfitness to Plead (UF2P) Law Commission Symposium

24th July 2014

Background

1. I write this as a personal submission, although I am part of a large team of defendant intermediaries and have canvassed their opinion at a recent meeting.
2. I attended the Symposium on 11th June and appreciated the complexity of the issue and learned much from the presenters, contributions and informal discussions in breaks.
3. I do not have any legal training, and recognise that in some instances, the complexity is beyond my ken, but I hope my perspective is a useful contribution.
4. I am a Registered Intermediary, trained by the Ministry of Justice to work with vulnerable witnesses. However this training is not aimed at working with defendants as no such scheme currently exists.
5. I have been trained by Communicourt Ltd, starting in September 2011, to work specifically with defendants, and now provide training, supervision and support to a team of 15 full time employed intermediaries who work solely with defendants.
6. Communicourt Ltd is the largest agency providing this service and currently takes more than 60 referrals a month from across England and Wales. We have worked in over 100 courts (crown, magistrates and family), and have data on over 250 cases.

Comments

1. I think 'Fitness' needs to be related to the type of case. At a simplistic level, involvement in a case of 'harassment', heard in the magistrates court for a half day trial, does not demand the same level of understanding, ability to instruct or plea bargaining as a case of rape. Some of the factors that affect this may include:
 - a. Whether there are co-defendants
 - b. Whether the case is historical
 - c. Whether there are several counts on the indictment
2. Psychiatric reports:
 - a. My experience is that if two reports agree, the prosecution requests a third, all of which seems a poor use of resources and particularly unfair on defendant who has to go through many hours of assessment, whilst still considered innocent.
 - b. The inconsistency of conclusions in these reports may well be related to the variability of the defendant in his presentation.
 - c. In addition, it is an opinion that is being sought, and each psychiatrist has different opinions, but it sometimes seems as if the disagreement means one of them is incompetent. Adversarial law but non-adversarial psychiatry?
 - d. I agree that if reports stated conditions and difficulties, the judge would be a better person to decide on UF2P. Psychiatrists do not generally have experience of sitting through a full trial and understanding the demands placed on a defendant by the legal world.

- e. We have many cases where psychiatric or psychological reports conclude that ‘with the assistance of an intermediary’ the defendant is fit to stand trial. This is a big issue for us. Intermediary assessments are commissioned to advise if we can assist the defendant. In some cases we conclude that, even with the most experienced intermediary, this defendant will not be able to understand or participate in his trial. On some occasions, judges have read our reports and still signed a booking form for our attendance. When we attend a Ground Rules Hearing and say the defendant will not cope, the judge says ‘well just do your best anyway’. This is asking us to be the sticking plaster – and not appropriate.
 - f. We have some ideas about the levels which dictate that we cannot assist, which have developed over the past 3 years. For example Auditory Working Memory of 2 key words is not sufficient to participate in our view.
 - g. Intermediaries are the only professionals (except interpreters) who sit in the dock with defendants. We attend trials in many different courts with very different judges and regimes and have a perspective on what level of ability the defendant needs to participate.
 - h. Intermediaries are not expert witnesses, but some courts are asking us to perform this function. As part of Communicourt, we have the resources in the team of people who are trained as expert witnesses, and in some instances, we have taken on a commission (quite separate from the intermediary role). I suppose one of the issues around this is whether a Speech and Language Therapist (SLT) would be a suitable expert witness in communication relating to fitness to stand trial, if additionally trained in the court proceedings. (All Communicourt intermediaries are SLTs too.)
3. Intermediary involvement is often seen as an additional cost. We have experience that this is sometimes not the case. For example:
- a. When a defendant hasn’t understood the evidence against him, and is pleading not guilty, an intermediary has been able to explain the evidence and he has changed his plea, thereby avoiding the costs of a trial, etc.
 - b. When a defendant is being offered plea-bargaining, it is quite complex to understand. Often, when an intermediary has made it comprehensible, the defendant has accepted, and again saved court time and money.
 - c. At the very start of a case, solicitors often have difficulty taking instruction with defendant, and the assistance of an intermediary shortens the process.
 - d. I have attended a trial, that would ‘simply not have progressed’ (words of a barrister) without my involvement, as the paranoid schizophrenic would have disrupted proceedings with continuous talking and not managed emotionally.
4. What is effective participation?
- a. I think there are cases where I have seen barristers prefer to have someone who is vulnerable and on the edge of being UF2P, as it means they can manage without taking too much instruction.
 - b. Perhaps it’s easy to say ‘tactical decisions don’t need defendant to understand’ as a way of being able to avoid the time it takes to get defendant to understand.
 - c. Many defendants don’t give evidence. Our statistics show 40% do not take the stand. Section 104 (CJA 2009) suggests the involvement of intermediaries for giving evidence only. However, as we know, the decision to give evidence is often made an hour beforehand. And without the assistance of an intermediary, the defendant

may not be able to participate in the decision. My experience is that the idea of public speaking is enough to put them off, and only sensitive support will help them. And of course if they haven't understood their trial, how can they prepare for giving evidence. Unworkable in short.

5. Deviate from traditional processes in court:

- a. To accommodate a vulnerable defendant, in order that he /she will be fit to participate, requires special measures. There has been considerable expansion of these measures in recent years, and the involvement of an intermediary often results in further adjustments eg
 - i. Allowing defendant to sit in well of court
 - ii. Allowing defendant to enter the court room before anyone else (to manage phobia of crowded rooms)
 - iii. Allowing intermediary to distract defendant for periods of trial that are not relevant eg legal arguments relating to co-defendants. This may include playing noughts and crosses, drawing games, using stress toys / blu-tac to relieve stress, etc
 - iv. Allowing intermediary to visit defendant in cell during break in cross-examination
 - v. Reducing the repetition of questioning by co-defendant counsel
 - vi. Allowing the defendant to have a practice at standing in the witness box during a trial break / adjournment with the assistance of the intermediary
 - vii. Allowing prosecuting counsel to discuss their planned questions with an intermediary prior to cross-examination.
 - viii. Allowing an intermediary to signal to the judge when a break is required.
- b. It seems to me that the intermediary role is pushing some of the boundaries of traditional court procedure. Where will this end? I hope there is more to come to make courts more appropriate for these vulnerable defendants. As these boundaries move, maybe F2P criteria need to adjust accordingly?
- c. Co-defendants – 40% of our cases involve other defendants, many of whom are not vulnerable. Adapting trials to suit our client can be difficult in these circumstances. I wonder if there is scope to suggest someone is F2P if their case is severed from the other defendants and heard in a different way? I can think of a few examples where my client has had to attend a very long trial (in one case 14 weeks) when his involvement was very minor, probably a magistrates court issue on its own. For an medically or psychiatric unwell defendant this can be extremely stressful and almost abusive in nature. Sitting in a crowded dock on an uncomfortable chair, for weeks of talking about other defendants, without understanding (or actual need to participate) is not, in my opinion , fair justice.

That's all I can add for them moment. [REDACTED]

Paula Backen
Registered Intermediary and Intermediary for Defendants
Communicourt Ltd

Response of Nigel Barnes, Legal Practitioner (Criminal Solicitor)

PART 2: THE LEGAL TEST

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

YES: NO: OTHER:

Further Question 2 Do consultees consider that an effective participation test, framed around the *John M* criteria (set out at paragraph 2.3 above), with an additional decision-making capacity limb, represents the most appropriate formulation for such a combined legal test? Or do consultees favour another of the formulations set out at paragraph 2.28 above and, if so, why? (2.34)

YES: NO: OTHER:

Further Question 3 Do consultees consider that incorporating an exhaustive list of decisions for which the defendant requires capacity into a reformed legal test for unfitness to plead would assist in maintaining the threshold for unfitness at a suitable level? (2.42)

AGREE: DISAGREE: OTHER:

the list should not be exhaustive, however a list of such decisions as relevant factors will assist in the process and make judicial decision more transparent.

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

YES: NO: OTHER:

Further Question 5 Do consultees agree that a diagnostic threshold would be unlikely to assist in maintaining the threshold of unfitness at a suitable level? (2.44)

YES: NO: OTHER:

Further Question 6 Do consultees think that it would be helpful to have a statutory presumption that all defendants are fit to be tried until the contrary is proved? (2.46)

YES: NO: OTHER:

i take a pragmatic view on this - i cannot see any other approach being workable.

otherwise there is too great a danger of the process being unwieldy and abused.

Further Question 7 Do consultees agree that a finding that a person lacks capacity shall remain valid unless and until the contrary is established on the basis of the evidence of two suitably qualified experts? (2.48)

YES: NO: OTHER:

however related to this issue is how you deal with revolving door, repeat defendants - if possible information obtained and rulings made in case one should at the least provide the starting point for subsequent or parallel cases

Further Question 8 Do consultees agree that disaggregation of capacity to plead and capacity for trial is undesirable? (2.59)

YES: NO: OTHER:

Further Question 9 Do consultees consider that making the test one of capacity for effective participation "in determination of the allegation(s) faced" would introduce a desirable element of context into the assessment? (2.68)

YES: NO: OTHER:

but subject to the comments above in Q7 - work needs to be done to ensure that the whole process is not so case specific that each case requires entirely separate assessments and reports.

Further Question 10 Do consultees agree that the United Kingdom's obligations under the UNCRPD and the ECHR can properly be accommodated in the manner outlined in paragraphs 2.80 to 2.82? (2.83)

YES: NO: OTHER:

i am very uneasy about the current and proposed models in this context but am realistic enough to accept that because of the issue of dangerous behaviour and risk to the public it will not be politically acceptable remove any preventative disposals from unfit defendants.

however if possible the nature of the courts findings and sanctions and the recording of them in respect of unfit defendants should be clearly distinguished from criminal findings and sanctions and be seen more in the context of civil orders made in parallel to the civil mental health jurisdiction.

Further Question 11 Do consultees agree that the difficulties surrounding unrepresented defendants cannot be addressed by amendment to the legal test itself? (2.88)

YES: NO: OTHER:

Such defendants must in my view have representation if possible and the right should be kept under continuing review for those defendants who may at any stage decline representation. at the first stage the duty solicitor rules have to be amended to cover all defendants for whom fitness is a live issue.

the problem of defendants who refuse representation cannot be addressed by amendments to the test

PART 3: SPECIAL MEASURES

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

AGREE: DISAGREE: OTHER:

however we should guard against this leading to an implicit assumption that all fitness issues can be resolved in this way.

this needs to be a statutory presumption to preserve the presumptions of innocence and right to a fair trial

PART 4: ASSESSING THE CAPACITY OF THE ACCUSED

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

AGREE: DISAGREE: OTHER:

i am concerned that if the requirement was reduced to one expert opinion there would be a greater risk of maverick/ controversial decisions and more frequent appeals and applications to reopen issues of unfitness.

but see Q14 below

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

AGREE: DISAGREE: OTHER:

there needs to be restriction on professional qualifications of experts - i would suggest at least one s12 RMP and either a second one or a suitably qualified and experienced psychologist.

ideally both sets of professionals would undergo specific training on the revised test and its application (with 3 yearly refreshers) which should enable more efficient, focussed, concise and expeditious report writing and ultimately less expensive reports and reduction in cost to the public purse.

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

AGREE: DISAGREE: OTHER:

i hope that with further imaginative thinking a solution can be found (sorry i have no magic quick fix!)

the situation cannot be left this way

otherwise D1 - clearly unable to give instructions or engage. has advocate who raises issue of impossibility of fair trial. in some cases the court will have no alternative but to either exclude all the evidence because D1 cannot challenge it or to stay the proceedings.

one option may be to adopt at least in part the proposal of HHJ Goss QC and appoint an RMP to sit with the Judge at least in some circumstances - open court adjudication of the issue on the evidence of the behaviour and responses on the defendant (perhaps in the context of engaging the Defendant in standard dialogue / questioning in open court unrelated to the case in question - in effect an open court assessment of engagement and functioning - leading to the court making a provisional determination either way following which the Ds options are:

1. accept the provisional determination
- 2 agree to full assessment in the usual way

also my suspicion is that most Defendants who are intransigent in refusing to consent to assessment do so because of what is usually a mistaken belief that a finding of unfitness results in more draconian outcomes - the pre 1989 act myths. there is a public education need which should be addressed in this context.

PART 5: PROCEDURE FOR THE UNFIT ACCUSED

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

YES: NO: OTHER:

however with this caveat.

CPS policy at present when there has been a finding of unfitness is to seek to reopen the case if / when the D becomes fit to plead

there should not be a double jeopardy risk of :

- 6 months delay then a finding of unfitness
- after further time lapse CPS seeking to reopen

therefore the 6 month window should in effect be a cap on the delay before the final determination of fitness which will be a bar to the issue being reopened in relation to that case.

Further Question 17 Do consultees consider that it would be appropriate to extend the maximum period of a section 36 MHA 1983 remand to hospital for treatment to 24 weeks in these circumstances? (5.25)

YES: NO: OTHER:

Further Question 18 Do consultees consider that the determination of facts procedure for the accused who lacks capacity should be made discretionary following the finding of unfitness, to allow for discontinuance of the proceedings, and diversion out of the criminal justice system into health or related services in appropriate cases? (5.33)

YES: NO: OTHER:

Further Question 19 Do consultees consider that public protection concerns arising in relation to an acquitted, but dangerous, unfit defendant could be adequately met by the use of civil powers under section 3 or 7 MHA 1983? (5.44)

YES: NO: OTHER:

i believe very strongly that this has to be the correct framework and that if it is felt that the current civil powers are inadequate the civil legislation should be reviewed

Further Question 20 Do consultees consider that on a determination of the facts, any defence should be left to the jury, after discussion with the advocates, where there is evidence on which a jury properly directed might reasonably find the defence made out or the essential element of the offence unproven? (5.50)

YES: NO: OTHER:

but with qualification that this should be a rare exception

it follows from a finding of unfitness that in most cases:

- there can be minimal determination of mens rea
- as far as possible indictments will need to be amended to reflect this - eg and aggravated arson being put to the jury as simple arson
- it is entirely inappropriate for the D to give evidence - by doing the jury will be given the impression that he / she can engage in the trial process, follow the proceedings etc

however it may be appropriate for the Defendant (or indeed the Judge / DJ) to call evidence which is capable of rebutting any part of the prosecution case.

assaults and self defence are particularly difficult- however my provisional view is that such issues will have to be dealt with on a case by case basis with the presumption being that leaving such a defence to the jury will be exceptional

Further Question 21 Do consultees consider that the special verdict should be made available to the jury on their initial consideration of the facts? (5.54)

YES: NO: OTHER:

this is an extraordinarily complex issue

the following are some points but not exhaustive:

- the complexity of the process expected of the jury if the answer were yes goes far beyond the typical consideration of expert evidence by jurors
- i have grave unease about the concept a a special verdict - there will be factual situations where this makes no sense
- if the answer to 19 is as above is this procedure necessary?

but above all - the D has been found unfit to be tried - he/ she is not in a conventional criminal trial - it is artificial to try to separate the 2nd and 3rd verdicts

i do not accept that it would be necessarily be normal or necessary

Further Question 22 Do consultees agree that it is not necessary for the judge to retain the discretion, in cases of exceptional prejudice, to order a second stage process for the consideration of the special verdict, in the manner envisaged in Provisional Proposal 9? (5.56)

YES: NO: OTHER:
 please see answer to 21 above

if the special verdict is to remain an option there should be discretion for the judge to decide (after representations from the parties) how this is best achieved on the facts of the particular case and in the light of the particular difficulties the Defendant has

Further Question 23 Do consultees consider that the determination of facts in relation to a defendant found to lack capacity could be dealt with by a judge sitting without a jury? (5.60)

YES: NO: OTHER:
 this would be entirely inappropriate and would be counterproductive - it may well lead to more defendants refusing to cooperate with having report prepared etc

Further Question 24 Do consultees agree that a representative, appointed by the court to put the case for the defence, should be entitled to act contrary to the defendant's identified will and preferences, where the representative considers that to do so is necessary in the defendant's best interests? (5.64)

YES: NO: OTHER:
 the law society and bar council need to address this issue and give professional advice in the light of such legislation as may result from these proposals.

the presumption should be that the advocate chosen by the defendant should retain conduct of the case. therefore the usual professional rules apply. however if for instance it becomes clear that a D lack capacity and is unfit because of organic damage which results in him/ her making demonstrably false statements but believing them to be true the advocate must have discretion as to how he/ she may deal with clients instructions. in such a case it would not be appropriate to take instructions on the facts in any event.

PART 6: DISPOSALS

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

YES: NO: OTHER:

the courts hands must not be tied because of resource problems. therefore the infrastructure must be in place to oversee any disposal ordered by the court.

there is a major issue with complex factors relating to funding and expertise which impact on who is best placed to supervise such orders - it is for the Ministry to provide resources however in such cases it may be that the presumption should be supervision by a health professional - perhaps a CPN with special training.

Further Question 26 Do consultees consider that it would be appropriate and effective to expand the power of supervision orders under section 5 of the CP(I)A to include recall of a supervised person to hospital, as available under section 17E-F of the MHA 1983? (6.21)

YES: NO: OTHER:

without some sanction/ teeth courts will be reluctant to use such orders. however great care needs to be taken to ensure that the powers are not too wide, unduly punitive and do not encourage back door "sentencing"

Further Question 27 Do consultees consider that there are any other enhancements of the powers available under supervision orders which would be beneficial? (6.22)

YES: NO: OTHER:

see q26

perhaps limited powers to impose restrictions on movements and curfews (primarily on breach but in limited cases in the first instance orders) may assist in ensuring:

- courts are not put off imposing supervision orders because of lack of sanction
- the sanction are tailored to improve compliance (eg residence to ensure contact with CPNs etc)

PART 7: REMISSION AND APPEALS

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

YES: NO: OTHER:

please see above under the issue of extending the time

however there does need to be provision for the exceptional case of:

- very serious offences / actions
- Ds who may be manipulating the process to escape criminal sanctions

perhaps limit the power to specified offences (per dangerous offender provisions)

Further Question 29 Do consultees consider that the power to remit an accused for trial should only be exercisable by the Crown where the judge has ruled, following the section 4A hearing, that it is in the public interest for remission to be available should the defendant regain capacity? (7.35)

YES: NO: OTHER:

Further Question 30 Do consultees agree that the Crown's power to remit defendants for trial upon their recovery should not be limited in time? (7.38)

YES: NO: OTHER:

but only subject to the qualifications above - for less serious offences the power to adjourn for 6 months for recovery should suffice

Further Question 31 Do consultees agree that where there has been a finding that a defendant had "done the act or made the omission," he or she should be entitled to request remission for trial on regaining capacity, where recovery is confirmed by the opinions of two experts competent to address the defendant's particular condition? (7.43)

YES: NO: OTHER:

i anticipate that this would be rare - one would hope that the disposals under the unfitness process would usually be less draconian than after conviction after trial

this would preserve an important right for defendants who were prepared to take the risk which should be made explicit and within the courts powers to impose whatever sentence would have been imposed at the original trial (subject to the court taking into account any intervening events / disposals)

Further Question 32 Do consultees consider that the rights of appeal vested in the unfit defendant should be exercisable by his or her legal representatives? (7.48)

YES: NO: OTHER:

PART 8: UNFITNESS TO PLEAD IN THE MAGISTRATES' AND YOUTH COURTS

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

YES: NO: OTHER:

this is a complex specialist area in which it is important to seek:

- consistency of decisions
- consistency of approach to repeat offenders

a limited number of DJs should be "ticketed" after specialist training to become seized of all cases where the issue of unfitness is raised. the mechanism should be:

- the papers are passed asap (within 7 days normally) to the nominated regional DJ or their deputy
- the DJ will either make directions immediately or convene a case management meeting (ideally by video conference with the advocates)

Further Question 34 Do consultees consider that, where the defendant's capacity is in doubt, it would be preferable for his or her capacity to be determined in the magistrates' court, and, if the defendant is found to lack capacity, that all further proceedings against him or her should remain in that court? (8.76)

YES: NO: OTHER:

the current PBV and MOT procedure suggests the following would be appropriate for EW offences:

- plea invited - no plea indicated - court informed there is a live issue of fitness
- venue determined in the usual way - however following MOT guidelines in cases of complex MH issues it may be that this will be a factor affecting the courts decision and Jurisdiction will be declined
- if mags say SST - the case is adjourned for fitness to be determined
- if determined by DJ to be unfit - magistrates (DJ) hears the case (although ideally he/ she should sit with two lay JJs for the fact finding hearing) and case remains in the magistrates court
- if D is found to be fit - the right to elect Cr Ct or consent to summary trial is put in the usual way
- there should be the usual rights of appeal to the crown court in relation to fitness and facts however this will be heard on the basis of existing medical evidence unless there is good cause for the Cr Ct to grant leave to allow further medical evidence (to reduce unnecessary appeals)
- if a defendant elects crown court trial - he/ she can only seek to reopen fitness at the Cr Ct if the Judge grants leave and there are grounds to believe that the issue should be reopened

(on this latter area i would like more time to reflect - i suspect there is scope for fine tuning the options here)

if MOT proceeds without fitness being raised in the magistrates court and the D elects or the mags Decline - there need to be parameters within which the D will be allowed to raise the issue of fitness in the crown court - otherwise all potentially unfit Ds may be tempted to elect Cr Ct

summary only matters will always stay in the mags and IO matters will be addressed at Cr CT

Further Question 35 (in the alternative) Do consultees alternatively consider that such a case should be sent to the Crown Court for determination of capacity and, if the defendant is found to lack capacity, that all further proceedings against him or her should remain in that court? (8.77)

YES: NO: OTHER:

see above

in an ideal world perhaps but this could result in an unjustifiable burden on the court

if magistrates have to determine capacity for SO offences it makes no sense to deprive them of the power to do so in less serious EW offences.

Further Question 36 Do consultees agree that capacity procedures in the summary courts should be applicable for all criminal offences? (8.83)

AGREE: DISAGREE: OTHER:

absolutely

there can be no conceivable justification for doing otherwise

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

AGREE: DISAGREE: OTHER:

Conditional discharge should be available.

also please see comments above about enforcement and conditions on supervision orders

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

YES: NO: OTHER:

there should be a single test applicable in all courts - however i agree with the comment in the issues paper about application of the test in summary courts

Further Question 39 Do consultees consider that there are any adjustments to the test, or the procedure, for defendants lacking capacity that would materially improve the prospects of the court identifying those adults with capacity issues? (8.92)

AGREE: DISAGREE: OTHER:

procedure needs to be addressed

if possible the liason and diversion team should see all Ds or at least obtain sufficient information about the case to identify whether they should be seen

the initial screening should include a question as to whether there are any indications that because of any cognitive or functioning problem that may lack capacity or need special measure.

magistrates and DJs need training and to be encouraged to raise the issue of their own volition if they have concerns

here is the slide I presented at UNN on 9 July

- Apply same test as in Crown Court (whatever that turns out to be)
 - Ensures guidance from established cases will assist
 - Ensures that on appeal the Crown Court parties will be familiar with the test
 - Ensures transparent fairness between jurisdictions and limit incentive to incur additional costs of cr ct trial
 - Maximises scope for increasing awareness and developing expertise among advocates, experts and judiciary
 - Fairness and Article 6
- Creative use of CPR will address many of the concerns eg:
 - Refer to Duty Solicitor for initial advice if court form the view there may be issue (will require change to scope of duty solicitor provision)
 - Refer (possibly after initial screening when court alert to issue) to DJ (possibly with specific training / qualifications)
 - DJ may list for mention for appropriate orders to be made
 - Specialist advocates?

the duty solicitor scheme needs to be changed to recall the entitlement where the court agree it is appropriate for the DS to advise and represent for the first hearing

courts must be willing to stand down / adjourn for such issues to be explored if there are concerns

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

YES: NO: OTHER:

Further Question 41 Regardless of the position in the Crown Court, do consultees agree that, in the summary courts, the tribunal should have a discretion whether to proceed to the determination of facts hearing following a finding that the defendant lacks capacity? (8.102)

AGREE: DISAGREE: OTHER:

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

YES: NO: OTHER:

please see comments in cr ct section above

in less serious cases this becomes even less justifiable and unnecessarily complex and potentially punitive

Further Question 43 Do consultees agree that there should be mandatory specialist training on issues relevant to trying youths, for all legal practitioners and members of the judiciary engaged in cases involving young defendants? (8.114)

YES: NO: OTHER:

there is an extensive body of evidence about the lack of capacity of many youths in the CJ system -

a fundamental review is required but in the meantime all involved - prosecutors, defence advocates and court clerks and magistrates/ DJ need much more detailed training about developmental and functioning issues of young people and how to relate to them

Further Question 44 Do consultees consider it appropriate for there to be initial screening for mental health issues for all defendants under 14 years of age, to be conducted by mental health professionals?. (8.119)

YES: NO: OTHER:

see above

Further Question 45 Do consultees agree that the provisional reformed test proposed for the Crown Court at paragraph 2.34 above is suitable for application to young defendants without adjustment? (8.126)

YES: NO: OTHER:
subject to the provisions in 43-44 being in place

Further Question 46 Do consultees agree that the summary courts should have the power to commit a defendant to the Crown Court for the imposition of a restriction order, but should not have the power to impose one themselves? (8.130)

YES: NO: OTHER:

Further Question 47 Do consultees agree that the following disposals should be available to the magistrates' court on a finding that the defendant has "done the act or made the omission," or where a special determination has been arrived at:
(a) a hospital order (without restriction);
(b) a supervision order;
(c) an absolute discharge? (8.135)

YES: NO: OTHER:
why should not a conditional discharge also be available?

Further Question 48 Do consultees consider that the non-penal requirements of a youth rehabilitation order should be available as part of a youth supervision order, following a finding that a young person has "done the act or made the omission," or where a special determination has been arrived at? (8.138)

AGREE: DISAGREE: OTHER:
please give it a different name

we must not confuse sentences on conviction with these quasi criminal disposals

on a related issue - what is the position with the Rehabilitation of Offenders Act - and how are such disposals to be dealt with - if possible they should have minimal effect on future employment etc

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

YES: NO: OTHER:
 subject to the same comments as for adults above

Further Question 50 Do consultees agree that a new right of appeal should be created from any determination or disposal imposed under a reformed capacity procedure, which would mirror the right to appeal against conviction or sentence under section 108 Magistrates' Courts Act 1980? (8.143)

AGREE: DISAGREE: OTHER:
 seen above

the right to appeal amounts to a right to a rehearing

there fore all issues will be reconsidered if D wants to challenge a determination that he / she is fit - no change therefore required there

the same rights should apply to any fact finding hearing and disposals for those found unfit to plead

OTHER COMMENTS

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

Additional Personal Response to Law Commission's Consultation on 'Unfitness to Plead: Issues Paper'

(24/7/14)

I was pleased to attend the symposium at Leeds Law School in June 2014. May I say I found this an extremely interesting and stimulating event that benefited from the diversity of professionals gathered?

The programme for the day was impressively filled I felt that inevitably this meant that some issues could not be explored in open questioning. In part I respond here to make points I would have liked to have heard discussed or would have liked to have heard discussed in more detail. In addition, I thought I would expand upon my comments from the floor concerning disposal after findings of unfitness.

I shall try to avoid repeating responses already made at the meetings I chaired at The Wells Road Centre Academic Meeting, Nottingham and at the Nottinghamshire Healthcare NHS Trust Offender Health Consultant Peer Supervision Group.

Further Question 5: Do consultee's agree that a diagnostic preferably would be unlikely to assist in maintaining the threshold of fitness at a suitable level?

I would disagree with no diagnosis being included in the assessment of a defendant deemed unfit to plead, although not merely because I believe this would undermine the threshold of unfitness (especially by making provisions easier for malingerers), but also for other reasons.

With regard to maintaining diagnostic threshold, it is my view that diagnosis provides an important safeguard against malingerers and otherwise is a safeguard against incompetent assessments. Although there is currently no diagnostic requirement set down, in practice I expect that most, if not all, assessments positively identifying unfitness contain diagnoses as they are completed by medics.

In mental health, diagnoses are almost invariably made at the present time on the basis of clinical syndromes, that is to say collections of symptoms or signs that co-occur in a recognisable, characteristic manner and develop in a similar manner over time. Therefore, by requiring a well-recognised diagnosis, the unfit defendant is assessed to have a presentation matching one of these disorders, making it more difficult for unfitness to be simulated with self-report of symptoms that may seem plausible a manifestation of mental disorder to a lay person, but would not to a competent professional. I would like to draw the Commission's attention here to the approach of recognised tools for detecting simulated symptoms, such as the Miller Forensic Assessment of Symptoms Test (M-FAST). These generally operate by detecting over-endorsement of superficially-plausible psychiatric symptoms (in the case of the M-FAST, psychotic symptoms), which nevertheless are atypical of authentic mental disorder. I believe this exemplifies the value of evaluating characteristic signs or symptoms (i.e. diagnoses) and not merely the supposed functional impairment that might flow from them (in this case, unfitness to plead).

My second point in response to this question concerns the development of disorder over time/prognosis. We know that defendants may be unfit to plead on only a temporary basis and a question commonly asked of experts concerns the prospect for fitness to be regained. I would assert that diagnosis is not merely a classification or a presentation at any particular time or sample point, but actually is valuable information about the defendant's prognosis and therefore the likelihood of their regaining fitness (as well as, indeed, the interventions likely

required for them to regain fitness). For example, individuals with stress reactions with psychotic features, individuals with drug-induced psychosis and individuals with schizophrenia may present with almost indistinguishable symptoms and signs and any particular sample point, but their progression over time (and indeed the aetiology of their presentation) would be extremely different. I would assert that it would be extremely helpful for the court in deciding whether to adjourn for fitness to be regained to know if an individual is psychotic and unfit to plead merely owing to the temporary effects of psychoactive substances rather than severe, chronic psychotic mental illness that was unlikely to remit. Again, I believe that currently this evidence is often given as a consequence of assessments being done by medics. Perhaps, there would actually be an argument for setting this down formally so it is done both consistently and robustly?

Finally, I would be uncomfortable with the divergence from other mental law and psychiatric practice that would appear to be represented by allowing this special capacity (fitness to plead) to be evaluated in isolation from the underlined cause. In particular, I have in mind the Mental Capacity Act 2005 with the requirement for there to be 'an impairment of, or a disturbance in the functioning of, the mind or brain'. I would say that MCA 2005 has been well-accepted and embraced by mental health professionals and to develop unfitness to plead with such major conceptual difference would not seem valid to many healthcare professionals.

Further Question 13: Do consultee's agree that in any reformed unfitness test it would be unnecessary for the requirement for two registered medical practitioners, one duly under section 12, to remain?

My understanding from the Issues Paper and from the symposium is that the proposal is not merely that two registered medical practitioners will not be required for the unfitness test, but that not a single medical practitioner would potentially be required with some suggestion that other professionals such as psychologists and nurses might undertake this role satisfactorily. I found that at the symposium we heard only one side of this debate that may simply have owed to limits of time or the idea being unopposed, but dare I suggest it might also have been a result of those psychiatrists present of having been unduly timid in speaking against in what appeared to be the prevailing tide.

I have to say that I was disappointed with my own Royal College's responses to the 2010 consultation that would seem to support this change and whilst I acknowledge it being made, I disagree. My first criticism has developed from my response to Further Question 5 (above). I would have said that if you believe, as I do, that diagnosis is essential in these cases this is tantamount to saying that this assessment of medical practitioner, or more specifically a psychiatrist, is required, in principle. This is because, as I believe the British Psychological Society accepts, diagnosing remains preserve of the medical profession.

I would support this assertion and also make other points by referring to the structure/function of mental health services, from which mental health expert witnesses draw their authority and clinical expertise that forms the basis for them being experts. Psychiatrists as medical professionals with very broad training are uniquely positioned to integrate information about biological factors, psychological factors and social factors into the formulation diagnosis of patients, commonly referred to as the 'bio-psycho-social model'. This is in no way to diminish the expertise of other professions who very often have specialist expertise that psychiatrists do not (the example of neuropsychologist's contribution to diagnosing intellectual disability with psychometric testing of intelligence). However, it is the case that a psychiatrist, often at the head of multidisciplinary teams, 'synthesises' the views of the team by weighing up completing factors to produce a coherent formulation that hopefully acknowledges all factors or at least attempts to do so.

Indeed, psychiatrists will often request colleagues from other professions to complete specialist assessments so they may use this information in developing the team's formulation, which includes their diagnosis. Using the same example, where intellectual disability may be an important clinical consideration, psychologists might complete psychometric testing of intelligence, but it would be the role of the psychiatrist to integrate this information with other information.

Therefore, I would suggest that something of a false opposition may have been set up between Ideally, I would suggest that rather psychiatric assessments should always be required, but it should be easier for psychiatrists in the court to have commissioned additional psychological assessments to assist their understanding in particular cases. However, I am not ignorant for the need for these reforms to observe budget restraints.

I would like to make one further point about the benefit of fitness to plead assessments being completed by medics. As one such expert, I occasionally institute treatment with medication to improve the chances of the defendant of being fit to plead and participating effectively in the legal process. I admit that this is not a very frequent occurrence, but for example I have either prescribed myself or gained the agreement of medical colleagues to prescribe tranquilising medication around the time of court appearances to overcome defendants' abnormal, disabling anxiety of a defendant and have adjusted patients' antipsychotic medications so that psychotic symptoms were remitted to the extent that fitness to plead is safeguarded. I do not believe could not be done unless the professional assessing fitness to plead is also a prescriber (they would not be able to prescribe or advise another prescriber persuasively) and whilst, as I say, it is not a common occurrence, I do believe it is useful sometimes. I appreciate that this is not synonymous with medical expertise, but non-medical prescribers in mental health are few and far between and have no doubt that fewer still will have the expertise or inclination to assess the fitness of defendants.

I appreciate that some non-medical fitness assessments could result in referrals for subsequent psychiatric assessments (not merely when hospital orders need to be considered), perhaps even of the issue for prescribing during legal process, but am concerned as to how these cases would be selected and would also suggest that this would lead to further delays in cases being processed.

Next, question 14: do consultee's agree that the evidence of two expert witnesses, competent to address the defendant's particular condition, should be minimal requirement for a finding of lack of capacity?

Briefly, I would have reasonable confidence that the adoption of Single Joint Experts could be sufficient and the expertise of two experts is not required, at least not always. I would appreciate that the Law Commission must be mindful to budget and the age of the austerity in which we find ourselves. I would suggest that the adoption of Single Joint Experts in a fitness assessment would help to allay concerns about resource implications if medical practitioners are still required to complete all assessments.

Disposals

Although not a direct response to the questions in Part 6, I would like to explain upon my comments at the symposium concerning disposal. I do so from the perspective of a psychiatrist working at a local prison where remand prisoners and newly-sentenced prisoners are detained. I believe this has afforded an interesting perspective from which to view the capacity of prisoners for living in custody.

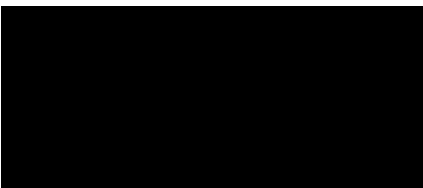
In my view, the availability of only hospital orders, supervision orders and absolute discharge is problematic and the limited range of disposals available and unhelpfully influences earlier considerations, in other words, causes the 'tail to wag the dog'.

At the symposium I was struck and moved by the comments made by Mr Hines of the Victims' Association, Mr x, that findings of unfitness are not infrequently regarded as a defendant 'getting off'. I find this an extremely unfortunate perception, but an understandable one. I do not think that this would be addressed by providing Community Treatment Orders as alternative disposals.

As I made commented from the floor, I think there is an implicit, but incorrect, assumption that unfitness to plead equates exactly in all cases with unfitness to be detained in custody. Capacity to be detained in custody without unduly adverse consequences must surely be dependent on range of other factors (for example, prisoners ability to follow rules within institution, physical infirmity, the prospects of relapse and prospect of self-harm) not only those elements of whichever test of fitness to plead is adopted, in fact not necessarily these. I think that once this is appreciated it is possible to see that not all defendants who are unfit to plead are necessarily also unfit to be detained in custody (and, of course, may be no less culpable than the ordinary offender, eg if their mental disorder developed after the offence).

On the whole, I feel that the current threshold for fitness to plead is too high, but understand the concerns about the threshold being lowered and would respectfully suggest that perhaps at least some of these concerns come be allayed by thinking about disposal radically.

Perhaps if a few defendants were seen by the public to be unfit to plead, but nevertheless detained in custody (providing this is also supported by expert evidence), then perhaps the question of unfitness itself could be regarded objectively and less emotionally that I fear it is at times. I think this would help unfitness to be justly available to more defendants, especially those who may be incapable of interacting with the rarefied atmosphere of court with the social demands and intellectual challenge this could involve. Here I am thinking in particular of defendants with mild or borderline intellectual disability or milder autistic spectrum conditions. These type of presentations do not usually warrant inpatient treatment and the core disorder is unlikely to change, which appears to me to put the sentencer in a difficult position when defendant is shown to have been responsible for a serious offences.



Dr Andrew Bickle

MBChB, BMedSc, MRCPsych, DipMedSc(Dist), LLM(Dist)

Consultant Forensic Psychiatrist & Hon (Consultant) Assistant Professor



**The British
Psychological Society**
Promoting excellence in psychology

British Psychological Society response to the Law Commission

Unfitness to Plead

About the Society

The British Psychological Society, incorporated by Royal Charter, is the learned and professional body for psychologists in the United Kingdom. We are a registered charity with a total membership of just over 50,000.

Under its Royal Charter, the objective of the British Psychological 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". We are 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 British Psychological Society is an examining body granting certificates and diplomas in specialist areas of professional applied psychology.

Publication and Queries

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 inquiry. Please direct all queries to:-

[REDACTED]
The British Psychological Society, 48 Princess Road East, Leicester, LE1 7DR
[REDACTED] [REDACTED]

About this Response

This response was led for the British Psychological Society by:

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With Contributions from:

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We hope you find our comments useful.

[REDACTED]
David J Murphy CPsychol
Chair, Professional Practice Board

British Psychological Society response to the Law Commission

Unfitness to Plead

| | <ul style="list-style-type: none"> • How should special measures to enhance the defendant's ability to participate in trial be fairly incorporated into the test for unfitness? |
|----|--|
| 1. | <p>Comments:</p> <p>Liaison and Diversion services could play a more prominent role in the provision of support for defendants with a view to enhancing engagement in the trial process</p> <p>There is a clear role for Registered Intermediaries for defendants (currently only formally for witnesses). The Registered Intermediary could enhance a defendant's effective engagement with the trial process but the Registered Intermediary is not a single solution to enhancing a fair trial, i.e. provision of a Registered Intermediary would not address capacity issues. The distinction between enhancing effective engagement and decision-making capacity must be explicit; the role of the Registered Intermediary must be clearly defined and explicit. Defendants could have access to a Registered Intermediary/special measures at the pre-trial stage, where important legal decisions are made. It needs to be made clear whether access to a Registered Intermediary should always be on advice of a recommendation from an expert report.</p> <p>Various assessment instruments are and have been developed to evaluate mental aptitude and fitness to plead. A standard compendium of accepted tests should be agreed upon between those professionals the court approves to assess individuals for capacity to plead. These tools might form one component of a standardised test for fitness to plead. Various assessors of capacity, such as psychologists and psychiatrists (through a working group appointed by the British Psychological Society and Royal College of Psychiatry) should agree upon a standardised battery of assessment tools which can be applied by clinical professionals when assessing capacity at the behest of the legal authorities.</p> <p><i>Through an agreed assessment process clinical professionals can document 'best practice standards' as well as compulsory measures to fulfil the requirement to consider special measures. This would enable support to be provided to those defendants who have difficulty engaging with the trial process but who fall short of a lack of sufficient or satisfactory capacity.</i></p> <p><i>Therefore, in response to consultation question 12 relating to a statutory entitlement for defendants to have support of a Registered Intermediary, this special measure would be in line with a focus on functional capacity for trial proceedings and the context of the individual in the court proceedings.</i></p> <p>Qs 13&14:</p> <p><i>In consideration of the relaxing of the evidential requirement, it is clear that Psychology has grown and become more prominent in the legal process since the introduction of the Criminal Procedure (Insanity) Act in 1964, to which the evidential requirements relates. Psychologists are increasingly asked to assess people's capacity to make legally significant decisions and are well-placed to do so, given their understanding of cognitive and social processes involved and their training in the application of standardised as well as non-standardised assessment measures.</i></p> <p><i>Therefore, in response to consultation questions 13 and 14, clinical practitioners including psychiatrists and psychologists considered by the Court to be adequately qualified and with sufficient experience may provide testimony regarding assessment and fitness to plead.</i></p> <p>Clinical practitioners including psychiatrists and psychologists considered to be adequately qualified by the Court and with sufficient experience may provide testimony regarding</p> |

| | |
|----|--|
| | <p>assessment and fitness to plead.</p> <p>Provisional Proposal 7: A defined psychiatric test to assess decision-making capability should be developed and this should accompany the legal test as to decision-making capability.</p> |
| | <ul style="list-style-type: none"> • Should the procedure in the magistrates' and youth courts mirror that in the Crown Court? |
| 2. | <p>Comments:</p> <p>Assessment of fitness to plead should extend from Crown Courts to Magistrate and Youth Courts.</p> <p>Magistrates and legal professionals should receive mental health and learning disability awareness training. In the case of Youth Courts, lawyers and judges should receive specific training in working with children and young people.</p> <p>The procedure of assessment of fitness to plead in Youth Courts should be specific to children and young people. A Youth Court differs from a Magistrate's Court. More serious offences are heard in the Youth Court and there are benefits to the judicial process and vulnerable people for trials to be held in a Youth Court rather than being referred to a Crown Court.</p> <p><i>The processes should be consistent throughout all courts. In the youth courts due consideration should be given to the attainment of development milestones in relation to capacity. An agreed group of assessment instruments would include 'youth' versions with confounding and consideration for cognitive age-related normative data. There is no requirement for reference to 'psychiatry' or 'psychology' specifically. A neutral label like 'standardised test of fitness to plead' on the basis that it is implicit within this terminology that it is an assessment of cognitive functioning which is in line with the function of the test for the purposes of the Court. Furthermore, a reference to a 'psychiatric assessment' perhaps discriminates against professional membership and potentially devalues the strong multidisciplinary contributions to the assessment of fitness to plead.</i></p> |
| | <ul style="list-style-type: none"> • What should the process be for dealing with a defendant when he or she has been found unfit to plead? |
| 3. | <p>Comments:</p> <p>A process or list of conditions should be documented to highlight the clear differences, as well as complements, between an individual's legal capacity and legal rights (specifically, Article 12 of the European Convention on Human Rights). The clinicians' knowledge and sensitivity to human rights with disabilities must be paramount when assessing capacity. This idea draws on the concept of (e.g.) 'in the best legal interests' of a detained patient in Mental Health Review Tribunals.</p> |
| | <ul style="list-style-type: none"> • At a hearing to deal with a defendant found unfit, what issues should be considered by the court? |
| 4. | <p>Comments:</p> |

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| | <ul style="list-style-type: none"> • What options should the court have in dealing with unfit defendants? |
| 5. | <p>Comments:</p> <p>Discussions held at the Law Commission's Unfitness to Plead Symposium, held at Leeds University on 11th June 2014, regarding adults:</p> <p>Existing options are a hospital order, absolute discharge or a supervision order. There seems to be little in between indefinite hospitalisation and an absolute discharge.</p> <p>An argument presented by Dr Tim Rogers, Consultant Forensic Psychiatrist at the Symposium, that supervision orders are limited in effectiveness because there is not sufficient substance/meaning applied to the orders. Argument to extend community treatment orders. In many cases, the order will be for medication. However, there are implications here for psychologically-informed interventions in the community.</p> <p>Possibility of expanding the use of s35 assessment to a prolonged community assessment for learning disability and autistic spectrum, where longer-term assessment of functional capacity and effective engagement is required.</p> <ul style="list-style-type: none"> • <i>There is potentially an escalation of issues related to consent with community treatment orders.</i> • <i>Engagement and motivation. If people are motivated to engage then a benefit of the intervention might be a reduction in recidivism for some people. However, a mandated intervention could be harmful for some people.</i> • <i>In line with the Risk, Needs, Responsivity principles (Andrews, 1995), it might be that people who are assessed as a high risk of harm to self/others receive a hospital order and a higher level of intervention than would be warranted by a community treatment order. Where it might be expected that someone were assessed as a lower risk of harm to self/others and, therefore, in receipt of a low level of intervention.</i> <p>References Andrews, D. (1995) The Psychology of Criminal Conduct and Effective Treatment. In J. McGuire (ed.) <i>What works: Reducing reoffending</i>. Chichester: Wiley.</p> |

End.

Response of Dr Penelope Brown, Health Professional (Consultant Forensic Psychiatrist)

PART 2: THE LEGAL TEST

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

YES: NO: OTHER:

While I agree that the test for FTP should incorporate both the defendant's decision-making capacity and the need for effective participation in the court process, I find the term "capacity for effective participation" confusing. The term "capacity" is often used as short-hand for "mental" or "decision-making capacity", as determined by the test set out in the MCA. My understanding is that "effective participation" incorporates a number of decision-making capacities as well as other factors such as the presence of special measures/intermediaries etc.

Further Question 2 Do consultees consider that an effective participation test, framed around the *John M* criteria (set out at paragraph 2.3 above), with an additional decision-making capacity limb, represents the most appropriate formulation for such a combined legal test? Or do consultees favour another of the formulations set out at paragraph 2.28 above and, if so, why? (2.34)

YES: NO: OTHER:

I am unclear how the John M criteria fulfil the requirements for an "effective participation" (EP) test. In para 2.9, you highlight how the current Pritchard test does not fully align with a test for EP. I assume this means the current "John M criteria" also do not fully align with a test for EP.

I also am unsure whether "capacity for effective participation" is the same as Bonnie's "foundational competence". My reading of the issue is that the John M test represents "foundational competencies" and the SC v UK test represents "effective participation". Perhaps the John M (foundational comp) + a test for DMC (decisional competency) = effective participation. But I do not think John M alone is an adequate test for EP (as you suggest yourselves in para 2.9) This may just be a minor issue of semantics, but I find the current proposal unclear.

I wonder whether a better option would be to follow option 3 in para 2.29, and use the test for EP as set out in SC (possibly incorporating some of the John M criteria), and add a test for DMC. However, as a caveat, I think the test should be kept as simple as possible.

Further Question 3 Do consultees consider that incorporating an exhaustive list of decisions for which the defendant requires capacity into a reformed legal test for unfitness to plead would assist in maintaining the threshold for unfitness at a suitable level? (2.42)

AGREE: DISAGREE: OTHER:

In my opinion, the statutory test should be kept as simple as possible, in a similar manner to the MCA test for DMC. Further clarification of all the decisions for which a defendant requires capacity could perhaps be included in a code of practice or similar supporting document rather than in the test itself. There are a huge number of decisions that could potentially be added to the list, which could complicate the test. For example, if some decisions on the list are not relevant in an individual's case (e.g. giving evidence in their own defence), would the individual still need to have capacity to make those decisions to be fit?

One option would be to follow the Scottish model, and list only the most important decisions, but allow for "any other relevant decisions" to be included.

Further Question 4 Do consultees consider that a reformed test should explicitly refer to a "satisfactory" or "sufficient" level of capacity for effective participation? (2.43)

YES: NO: OTHER:

I support this proposal in theory, but there is likely to be further confusion as to what a "satisfactory" level of capacity is. I am not convinced adding this wording would clarify the threshold for fitness.

Further Question 5 Do consultees agree that a diagnostic threshold would be unlikely to assist in maintaining the threshold of unfitness at a suitable level? (2.44)

YES: NO: OTHER:

I do not feel a diagnostic threshold is necessary, and having one would risk rendering the test incompatible with the UNCRPD.

Further Question 6 Do consultees think that it would be helpful to have a statutory presumption that all defendants are fit to be tried until the contrary is proved? (2.46)

YES: NO: OTHER:

This would keep the test in line with the civil test for mental capacity.

Further Question 7 Do consultees agree that a finding that a person lacks capacity shall remain valid unless and until the contrary is established on the basis of the evidence of two suitably qualified experts? (2.48)

YES: NO: OTHER:

This proposal seems contradictory to the above- that capacity should always be presumed.

There are cases in which a defendant may be assessed by the psychiatrist as being unfit to plead at that moment in time, but the psychiatrist is of the opinion that the defendant could be fit in the future (e.g. after 3 months of treatment). In such cases, the court might find the defendant unfit but recommend a period of treatment before a final decision on fitness, or s4a hearing, takes place (eg at a later court hearing).

In my opinion the presumption of "fitness" should still apply at the later date, and the evidence of 2 qualified experts should still be used to determine unfitness, rather than to "prove" fitness.

I am also concerned that finding a person lacks capacity/is unfit to plead until proven otherwise is contrary to Art 12(4) of the UNCRPD- safeguards relating to the right to exercise legal capacity should apply for the shortest time possible

Further Question 8 Do consultees agree that disaggregation of capacity to plead and capacity for trial is undesirable? (2.59)

YES: NO: OTHER:

It should be made clear that Fitness to Plead and Fitness to Stand Trial are one in the same thing. There is currently a lot of confusion surrounding this in practice.

Further Question 9 Do consultees consider that making the test one of capacity for effective participation "in determination of the allegation(s) faced" would introduce a desirable element of context into the assessment? (2.68)

YES: NO: OTHER:

Like a capacity assessment in civil contexts, I agree that an assessment of fitness to plead should be made in relation to the trial at hand rather than "any criminal proceeding", but I have reservations about making it too specific to the complexity of the trial as this could render the threshold for fitness for complex trials too high.

Further Question 10 Do consultees agree that the United Kingdom's obligations under the UNCRPD and the ECHR can properly be accommodated in the manner outlined in paragraphs 2.80 to 2.82? (2.83)

YES: NO: OTHER:

In my opinion, more should be done to enable defendants to undergo full trial rather than a trial of facts. This could be achieved by incorporating a question into the assessment of fitness that considers whether the individual is likely to become fit within a reasonable period of time (e.g. 3, 6 or 12 months) with treatment. If the answer is yes, then a final decision on fitness should not be made until that period of treatment has ended, in the hope that the defendant could become fit and undergo full trial. The trial of facts should only go ahead if it is clear that "fitness" cannot be restored or achieved.

Further Question 11 Do consultees agree that the difficulties surrounding unrepresented defendants cannot be addressed by amendment to the legal test itself? (2.88)

YES: NO: OTHER:

I think it would be a missed opportunity not to consider how to deal with defendants who refuse counsel here. Perhaps "capacity to refuse counsel" or "capacity to represent oneself" can somehow be added to the list of competencies needed to be fit to plead, e.g. in a Code of Practice. If "fitness to plead" takes into consideration all of the decisions needed to face criminal proceedings, then representing oneself is one of the relevant decisions. It is possible that someone would be fit to plead if they have legal representation, but not fit if they refuse it. The assessment must be context specific (as noted above).

PART 3: SPECIAL MEASURES

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

AGREE: DISAGREE: OTHER:

As a psychiatrist who assesses fitness to plead, I would want to know exactly what special measures are available in the case and how they would assist the defendant. It would be helpful for intermediaries to work alongside psychiatrists, or to be present at an assessment for fitness to plead, so that it is clear what the roles and limitations of the intermediaries are. How practical this would be, and how costly, is not clear.

PART 4: ASSESSING THE CAPACITY OF THE ACCUSED

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

AGREE: DISAGREE: OTHER:

However, what provisions are being made to ensure that the evidential requirement for detention in hospital will be met when the assessment of FTP is not carried out by two medical practitioners?

If one or both of the FTP assessors are non-medical, there is a risk of incurring great extra costs by instructing additional medical practitioners to give evidence regarding the appropriateness of hospital admission.

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

AGREE: DISAGREE: OTHER:

As noted below in relation the Magistrates' court, there is an argument for having only one practitioner make a judgement on unfitness, as this is what happens in the case of incapacity in civil settings under the MCA. However I do not think this is adequate in criminal settings.

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

AGREE: DISAGREE: OTHER:

Beyond using the existing provisions of the MHA (ie if the defendant meets the criteria for detention in hospital under the MHA, the court could order the defendant to hospital under s35 or 36 as appropriate) there is no clear alternative for dealing with such individuals

PART 5: PROCEDURE FOR THE UNFIT ACCUSED

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

YES: NO: OTHER:

I agree with this principle, although have concerns that 6 months might not be an adequate time period for some defendants to regain/achieve capacity/fitness. Studies in North America have shown that 75-90% of defendants are successfully "restored" to competence to stand trial within 6 months (e.g. Zapf & Roesch 2011, Pinals 2005) but a more recent study has found that in many cases it takes longer, with a plateau at about 2 years (Morris & DeYoung, JAAPL 2014). In my opinion there should be an option of prolonging the time period (perhaps to 2 years, but at least to one year maximum) to ensure as many defendants can be made fit to plead as possible. This could follow the current procedure for extending detention in hospital/CTO under the MHA- ie with a review every 6 months in the first year and annually thereafter.

I am unclear whether the purpose of the time delay is to purely treat a mental disorder or to specifically try to render the defendant fit. While doing the first is likely to help with the second, I am aware of psychoeducation programmes in North America which are specifically designed to "restore competence" and include teaching about the criminal process etc. Would the use of such programmes be advocated in this country, and how would they be funded if so?

I am also unclear what provisions are available to ensure compliance with treatment designed to regain capacity for defendants who do not meet the threshold for inpatient admission under the MHA. Would there be some sort of supervision or community treatment order available at this stage of proceedings? Could receiving treatment be part of bail conditions? Would it be possible for defendants to remain in prison on remand while attempts are made to regain capacity/fitness?

Further Question 17 Do consultees consider that it would be appropriate to extend the maximum period of a section 36 MHA 1983 remand to hospital for treatment to 24 weeks in these circumstances? (5.25)

YES: NO: OTHER:

As mentioned above, what provisions would be available if the defendant no longer required treatment in hospital?

Further Question 18 Do consultees consider that the determination of facts procedure for the accused who lacks capacity should be made discretionary following the finding of unfitness, to allow for discontinuance of the proceedings, and diversion out of the criminal justice system into health or related services in appropriate cases? (5.33)

YES: NO: OTHER:

Further Question 19 Do consultees consider that public protection concerns arising in relation to an acquitted, but dangerous, unfit defendant could be adequately met by the use of civil powers under section 3 or 7 MHA 1983? (5.44)

YES: NO: OTHER:

Further Question 20 Do consultees consider that on a determination of the facts, any defence should be left to the jury, after discussion with the advocates, where there is evidence on which a jury properly directed might reasonably find the defence made out or the essential element of the offence unproven? (5.50)

YES: NO: OTHER:

Further Question 21 Do consultees consider that the special verdict should be made available to the jury on their initial consideration of the facts? (5.54)

YES: NO: OTHER:

Further Question 24 Do consultees agree that a representative, appointed by the court to put the case for the defence, should be entitled to act contrary to the defendant's identified will and preferences, where the representative considers that to do so is necessary in the defendant's best interests? (5.64)

YES: NO: OTHER:

I agree with this, but feel that a determination of what is in the best interests of the defendant needs to be made by a group of people with an interest in the well-being of that defendant rather than just their representative, in the same way that best interests decisions are made under the MCA.

PART 6: DISPOSALS

Further Question 26 Do consultees consider that it would be appropriate and effective to expand the power of supervision orders under section 5 of the CP(I)A to include recall of a supervised person to hospital, as available under section 17E-F of the MHA 1983? (6.21)

YES: NO: OTHER:

There would need to be clarity as to what process is being used to then detain the individual in hospital- would the individual need to be assessed for s2 or s3 MHA at the point of recall and how would this happen? At what point is the individual deemed suitable for detention- at the point of recall or at a subsequent assessment? On what grounds could they be detained while the assessment takes place?

When recalling to hospital under s17 MHA, the patient has already been detained and remains liable to detention under s3, however patients under supervision orders may not (most likely will not) have recently been detained in hospital.

Recall to hospital also might not be appropriate in many cases. In my experience, the majority of unfit defendants given supervision orders are those with learning disability for whom hospital admission is rarely appropriate. Therefore I am unclear to what extent the proposed provision of "recall to hospital" will be used. However I am unsure what other sanctions could be imposed on an individual who breaches their supervision order. More information is needed about which conditions of supervision orders are breached. I am unaware of any empirical evidence showing the extent of the problem with regards to breaching supervision orders.

Further Question 27 Do consultees consider that there are any other enhancements of the powers available under supervision orders which would be beneficial? (6.22)

YES: NO: OTHER:

See above. I think the extent of the problem needs to be identified.

PART 7: REMISSION AND APPEALS

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

YES: NO: OTHER:

Further Question 29 Do consultees consider that the power to remit an accused for trial should only be exercisable by the Crown where the judge has ruled, following the section 4A hearing, that it is in the public interest for remission to be available should the defendant regain capacity? (7.35)

YES: NO: OTHER:

Further Question 30 Do consultees agree that the Crown's power to remit defendants for trial upon their recovery should not be limited in time? (7.38)

YES: NO: OTHER:

Further Question 31 Do consultees agree that where there has been a finding that a defendant had "done the act or made the omission," he or she should be entitled to request remission for trial on regaining capacity, where recovery is confirmed by the opinions of two experts competent to address the defendant's particular condition? (7.43)

YES: NO: OTHER:

Further Question 32 Do consultees consider that the rights of appeal vested in the unfit defendant should be exercisable by his or her legal representatives? (7.48)

YES: NO: OTHER:

PART 8: UNFITNESS TO PLEAD IN THE MAGISTRATES' AND YOUTH COURTS

Further Question 36 Do consultees agree that capacity procedures in the summary courts should be applicable for all criminal offences? (8.83)

AGREE: DISAGREE: OTHER:

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

AGREE: DISAGREE: OTHER:

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

YES: NO: OTHER:

Further Question 39 Do consultees consider that there are any adjustments to the test, or the procedure, for defendants lacking capacity that would materially improve the prospects of the court identifying those adults with capacity issues? (8.92)

AGREE: DISAGREE: OTHER:

A screening test, based on the criteria for determining capacity/fitness to plead, could be made available so that legal professionals are able to assess more reliably whether a psychiatric assessment is needed.

Training for all professionals involved would be essential.

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

YES: NO: OTHER:

I agree that the same evidential requirement should apply at both Crown and Magistrates' courts, however I have real concerns about the impact this would have on resources. It is time-consuming and expensive to get two medical reports for court, although this is being addressed to some extent by broadening the professional roles who can give evidence on fitness to plead. It is also worth noting that the test for fitness/capacity to plead differs from that of a civil test for mental capacity in that the latter does not require evidence from more than one practitioner to determine that an individual lacks capacity.

Assuming two professionals are required to provide evidence as to fitness/capacity to plead, has consideration been given as to whether the two professionals assessing fitness/capacity need to be independent of one another? When a patient is detained under s2 or s3 of the MHA, only one of the medical examiners can be on the staff of the hospital to which the patient is admitted. Would this same need for independence be required in a test for fitness, especially if the outcome of the assessment is detention in hospital?

Further Question 41 Regardless of the position in the Crown Court, do consultees agree that, in the summary courts, the tribunal should have a discretion whether to proceed to the determination of facts hearing following a finding that the defendant lacks capacity? (8.102)

AGREE: DISAGREE: OTHER:

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

YES: NO: OTHER:

Further Question 45 Do consultees agree that the provisional reformed test proposed for the Crown Court at paragraph 2.34 above is suitable for application to young defendants without adjustment? (8.126)

YES: NO: OTHER:

I share concerns raised by others that using a capacity-based test similar to that in the MCA is not appropriate for individuals aged under 16 years. The MCA test in civil settings is not applicable to those aged under 16 because the test does not consider developmental age or immaturity, therefore it seems counter-intuitive to use such a test for individuals aged under 16 in criminal proceedings. There is also a risk of conflating developmental immaturity with mental health problems, especially if the assessment is carried out by a mental health professional.

If the same test is to be used in adults as in children aged under 16 then in my opinion careful consideration needs to be given as to its appropriateness, reliability and validity in the younger age group.

Further Question 46 Do consultees agree that the summary courts should have the power to commit a defendant to the Crown Court for the imposition of a restriction order, but should not have the power to impose one themselves? (8.130)

YES: NO: OTHER:

Further Question 47 Do consultees agree that the following disposals should be available to the magistrates' court on a finding that the defendant has "done the act or made the omission," or where a special determination has been arrived at:

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

YES: NO: OTHER:

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

YES: NO: OTHER:

OTHER COMMENTS

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

In my opinion, the main problem with the current criteria for fitness to plead lies not so much in the wording of the criteria but more in the way they have been interpreted by the courts over the years. The other problem is that it is not clear exactly what the criteria are, and psychiatrists apply too few, too many, irrelevant or just arbitrary criteria when determining fitness.

Putting a clear and concise test for FTP in statute will go a long way to standardising the way psychiatrists (and other professionals) assess it and improving the current problems. The more simple the test, the easier it will be to apply, but it is crucial that there is a clear code of practice supporting the legislation to assist professionals with more complex cases.

There are a couple of issues that have not been discussed in this paper that I would like to raise:

1. Giving evidence at FTP hearings

I have been involved in a case in which the defendant was asked to give evidence in his own "Fitness to Plead" hearing. This seemed unusual and in many ways unethical, and I am not aware of this happening in any other case. To my knowledge there is nothing in the current law preventing a defendant from being asked to give evidence at their own FTP hearing. I think this is something that needs consideration in case it occurs again in the future.

2. Police cautions

While police cautions are not technically classed as convictions, in some circumstances they must be disclosed and can prevent future employment eg in healthcare or legal settings.

I am aware of a case in which an individual accepted a police caution without fully understanding the implications of it due to a mental disorder, and on regaining health and capacity became aware that this would have a serious negative impact on their employment. While this may be beyond the scope of the current consultation, there are a lot of similarities between fitness to plead, and "fitness to be cautioned". Is this something that has been considered?



School of Law

***Centre for Evidence and Criminal Justice
Studies***

Response to

**Unfitness to Plead
An Issues Paper**

(Law Commission, 2 May 2014)

Introduction and Contact Details

This response was prepared by Natalie Wortley (Principal Lecturer and Deputy Director of the Centre), Ann Creaby-Attwood (Senior Lecturer) and Dr. Arlie Loughnan Associate Professor, University of Sydney. It is submitted on behalf of the Centre for Evidence and Criminal Justice Studies at the School of Law, Northumbria University.

Our response was drafted following a two-hour seminar run by the Centre for the purpose of discussing the issues paper. The seminar was attended by over 20 academics and practitioners. Those present at the seminar included: members of the judiciary (Circuit Judges); practising barristers and solicitors (including members of the Crown Prosecution Service); members of a mental health liaison team, including a specialist forensic nurse; and academics in law and other disciplines. The intention was that information provided and ideas contributed by our members prior to, during and subsequent to this session would assist us in producing a balanced response to some of the questions set out in the issues paper 'Unfitness to Plead'.

Our response does not deal with all of the questions raised by the issues paper but focuses on Parts 2, 5, 6 and 8, which were discussed at our seminar.

We do not identify those persons who participated in the seminar as the Chatham House Rule applied during our discussions.

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Part 2

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

We agree. A reformulated legal test for fitness to plead should incorporate decision-making capacity and capacity for effective participation. Unfitness to plead is a protection for the criminal defendant, and, to be adequate, the test for unfitness must recognise, and expressly take into account, both effective participation and decision-making capacity.

As the Commission notes, the reference to ‘decision-making capacity’ is drawn from the civil law (IP 2.7), and its incorporation into the criminal law is desirable. The legal test for unfitness should provide as much protection to the defendant as possible. Professor Ronnie 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 (R Mackay 1995 *Mental Condition Defences in the Criminal Law*: 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 moral core of the test for unfitness is effective participation. The criminal trial is a process in which the accused is meant to participate in a meaningful way: as a process of argument and judgment, the trial is meant to be held *with* a person and his or her participation is ‘central’ to the meaning of the trial (R A Duff (1986) *Trials and Punishments* p35). This is the reason why it is (generally) in the best interests of the defendant to have a normal trial if possible. Unfitness provisions do not just exempt an individual from trial and punishment; they also expose him or her to kinds of coercion to which others are not liable. Depending on the outcome of a ‘trial of the facts’, an unfit accused may be detained. This is a reason for keeping unfitness provisions appropriately drawn – neither overly narrow nor overly broad.

Further Question 2: Do consultees consider that an effective participation test, framed around the *John M* criteria (set out at paragraph 2.3 above), with an additional decision-making capacity limb, represents the most appropriate

formulation for such a combined legal test? Or do consultees favour another of the formulations set out at paragraph 2.8 above and, if so, why?

We agree. The *John M* criteria represent the most appropriate formulation, for the reason identified by the Commission - because they are an updated version of the *Pritchard* criteria (IP 2.31) and have been met with approval in a number of quarters.

Further Question 3: Do consultees consider that incorporating an exhaustive list of decisions for which the defendant requires capacity into a reformed legal test for unfitness to plead would assist in maintaining the threshold for unfitness at a suitable level?

The current test for unfitness should be replaced with a broader and more holistic test. 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. This proposal maintains the common law approach of focusing on the individual capacities that an accused requires to participate in a criminal trial and is oriented around understanding and using information that is relevant to the decisions he or she will need to make. But the advantage of a broad and singular test of 'effective participation', combined with decision-making capacity, is that such enumeration may not be necessary for the test to operate in a satisfactory way.

However, one of our members drew our attention to a study which has shown that broad legal standards governing the assessment of capacity under the Mental Capacity Act 2005 (MCA) are not routinely applied in practice. In this context it has been suggested that more specific legal standards are required (see Emmett, Poole, Bond & Hughes, 'Homeward bound or bound for a home? Assessing the capacity of dementia patients to make decisions about hospital discharge: Comparing practice with legal standards' *International Journal of Law and Psychiatry* 36 (2013) 73-82).

Further Question 4: Do consultees consider that a reformed test should explicitly refer to a "satisfactory" or "sufficient" level of capacity for effective participation?

This approach would reflect the idea that fitness is not synonymous and does not require perfect 'engagement and comprehension', and would mirror the approach taken in civil competency proceedings (IP 2.37). We do not feel strongly about this

proposal, as we are not convinced that the absence of such a qualitative reference to date has proved problematic.

Further Question 5: Do consultees agree that a diagnostic threshold would be unlikely to assist in maintaining the threshold of unfitness at a suitable level?

Some of our members were concerned about the lack of a diagnostic threshold. It was pointed out that, in the context of the Mental Capacity Act 2005 (MCA), the existence of a diagnostic test prevents eccentric decisions from falling within the ambit of the MCA. For example, if someone was under the extreme influence of another person, they might make unwise decisions but they would not be found to lack capacity for that reason alone.

Others argued that the core of the test is effective capacity, not clinical diagnosis, as it is properly understood to be based on an idea of meaningful participation (as discussed above). The mental states that can give rise to unfitness are not the central concern of the provision. As Professor Don Grubin writes, being unfit to plead is not a psychiatric condition (Grubin, D. 'Unfit to Plead in England and Wales, 1976–1988 A Survey' (1991) 158 *British Journal of Psychiatry* 540; p548).

Further Question 6: Do consultees think that it would be helpful to have a statutory presumption that all defendants are fit to be tried until the contrary is proved?

At common law, each individual coming before a criminal court is presumed to be fit to plead (*R v Podola* [1960] 1 QB 325), that is, they are presumed to have the requisite cognitive, moral and volitional capacities required for effective participation in the criminal process. It is not clear that a statutory presumption would make a meaningful difference to the treatment of unfit defendants.

Further Question 7: Do consultees agree that a finding that a person lacks capacity shall remain valid unless and until the contrary is established on the basis of the evidence of two suitably qualified experts?

We agree.

Further Question 8: Do consultees agree that disaggregation of capacity to plead and capacity for trial is undesirable?

We agree. As a procedural provision, unfitness has been analysed beneath broad rationales for criminal procedural rules such as threat to the integrity of the justice system or unfairness to the accused (see, for instance, D Chiswick (1992) 'Psychiatric Testimony in Britain: Remembering your Lines and Keeping to the Script', *International Journal of Law and Psychiatry* 15(2), 171-177; I Freckelton (1996) 'Rationality and Flexibility in Assessment of Fitness to Stand Trial' 19(1) *International Journal of Law and Psychiatry* 39-59). But it is the functional significance of a plea in the medieval era, and the position of the accused as an informational resource for the court in the subsequent 'accused speaks' trial era, that provides a more accurate explanation of the development of the law (see further A Loughnan (2012) *Manifest Madness: Mental Incapacity in Criminal Law* p71-72).

Further Question 9: Do consultees consider that making the test one of capacity for effective participation "in determination of the allegation(s) faced" would introduce a desirable element of context into the assessment?

We think that the test does not need to be adjusted as it already incorporates consideration of the nature of the proceedings. Please also see response to further question 38.

Further Question 10: Do consultees agree that the United Kingdom's obligations under the UNCRPD and the ECHR can properly be accommodated in the manner outlined in paragraphs 2.80 to 2.82?

We agree that the first priority of the criminal justice system must be to safeguard the Article 6 rights of defendants. For the reasons explained below, we think that it may not always be possible to reconcile respect for a defendant's personal autonomy with his or her Article 6 rights. An advocate may have to act contrary to a defendant's identified will and preferences in order to protect the defendant's best legal interests (see our response to further question 24, below).

Further Question 11: Do consultees agree that the difficulties surrounding unrepresented defendants cannot be addressed by amendment to the legal test itself?

We agree. We think that the difficulties surrounding unrepresented defendants are best dealt with via non-statutory initiatives, rather than via adjustments to the legal test. We think that the training of magistrates, district judges and legal representatives is key in this regard. Please also see our response to further question 39.

Part 5

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

The consensus amongst our members was that it would be desirable to delay the fact-finding procedure where there is a realistic prospect that the defendant may regain capacity. The consequent delay would mean the defendant would be awaiting the outcome of proceedings for a longer period, with all of the attendant stress and anxiety that entails. However, as the Commission noted in its Issues Paper (IP), the primary goal is to enable a defendant to have a full trial where possible (IP 5.22). A delay where there is a prospect of the defendant regaining capacity is in furtherance of that goal.

The delay would also have an impact on victims/witnesses. We think that it is also in the public interest and in the interests of victims/witnesses for a full trial to take place where possible. Our members noted that a finding that the defendant did the act or made the omission and there are no grounds for acquittal, or an acquittal qualified by reason of mental disorder, is unlikely to be regarded by victims/witnesses as having the same status as a conviction. As a result, there may be reduced individual and public concern about a delay in these circumstances.

The next issue is what the maximum period of the delay should be. In its Consultation Paper, the Law Commission suggested that the procedure in New South Wales (NSW) might be an 'adequate solution' to the problems identified (CP 6.79). In NSW, it is possible to adjourn proceedings in which a defendant appears unfit: he or she is then assessed by the Mental Health Review Tribunal (MHRT). Under the Mental Health (Forensic Provisions) Act 1990, the Tribunal must, as soon

as practicable after the person is so referred, determine whether, on the balance of probabilities, the person will, during the period of 12 months after the finding of unfitness, become fit to be tried for the offence (s.16). If a defendant is likely to become fit to plead in 12 months, the court has several powers, including granting bail and ordering treatment, if appropriate (s.17). If the defendant is unlikely to become fit to plead in 12 months, and the DPP does not advise that the matter will be discontinued, the court must hold a 'special hearing' (i.e. a fact-finding hearing).

In New South Wales, in general, having the MHRT as part of the process works well. However, after a recent review, *People with cognitive and mental health impairments in the criminal justice system*, and due to concern with delays, the NSW Law Reform Commission recommended that the MHRT be involved only if the unfit defendant is likely to become fit within 12 months (Recommendation 6.1, *Criminal Responsibility and consequences*, Report 138, May 2013). No change to the timeframe for MHRT review/adjournment of the proceedings – up to 12 months – was recommended.

In England and Wales the First Tier Tribunal (Mental Health) (known as the Mental Health Tribunal (MHT)) is concerned in the main with determining whether the statutory criteria for continued detention or liability to recall are made out in respect of those subject to the Mental Health Act 1983 (MHA) and who are eligible to have their case considered by the MHT. Bearing in mind the composition of the MHT, it would seem to be well equipped to have its role extended to consider the issue of whether a defendant is likely to become fit to plead within a given timescale. The hearings the MHT is presently concerned with usually take place at the hospital where the patient is detained. This may make it more likely the defendant will be able to participate in any MHT hearing convened to consider the issue of whether he or she is likely to become fit to plead within a given timescale, assuming that the intention is to hold a hearing which the defendant can attend. The defendant is likely to be already detained in the hospital (perhaps pursuant to s.36) and evidence could be given at the hearing by his or her Responsible Clinician (RC). Delays associated with the listing of MHT hearings have reduced considerably over recent years, reflective of Article 5(4) obligations. The listing system introduced by HMCTS in May 2013 has resulted in further efficiency. In respect of those detained under s.3 MHA 1983 for example, the aim is for hearings to be listed within 5 to 8 weeks of the date of receipt of the application by the Tribunal service, with the necessary reports for the hearing produced within this timescale. A similar listing system with appropriate

timescales could be introduced for a new role or function in relation to unfitness to plead. Reports would already have been prepared for the unfitness to plead hearing, so a hearing within a shorter time frame ought to be possible.

We were told that the reason for proposing delaying the determination of the facts procedure for a maximum period of six months is that, in England and Wales, there will very often have been significant delays before a finding of unfitness is made. We would prefer that any new provision specified the maximum period between the sending of the case to the Crown Court and the determination of the facts procedure (rather than specifying the maximum period following the finding of unfitness). The total period of delay is relevant because a defendant who is unfit to plead will often be receiving treatment prior to the finding of unfitness. We also wonder whether there is any merit in requiring regular reports to the court from those treating the defendant during the six month period. This would ensure that, if it became apparent that the defendant would not recover capacity within the requisite period, the court could move more swiftly to a fact-finding hearing. Alternatively if the defendant regained capacity quickly, it might be possible to bring forward the trial date. It is notable that, in the review of procedures in NSW, the Law Reform Commission also received submissions to this effect, including one recommending that the court set a date for the 'special hearing' or trial one year from the initial fitness inquiry (NSWLRC *Criminal Responsibility and consequences*, Report 138, May 2013, [6.27]).

Finally, we wonder how the power to delay the fact finding hearing would be exercised if the question of unfitness to plead was raised at the close of the prosecution case, as is permitted by s.4A. It would usually be inappropriate to delay the proceedings once witnesses have given evidence. We do not consider this to be a reason for rejecting this proposal but we think there is a need for clarity about the position in such cases.

Further question 17: Do consultees consider that it would be appropriate to extend the maximum period of a section 36 MHA 1983 remand to hospital for treatment to 24 weeks in these circumstances?

Most of our members thought it would be appropriate to extend the maximum period of a s.36 remand to 24 weeks. Treatment in hospital would be likely to benefit the defendant, and possibly assist his or her recovery to fitness. Concerns were raised about the availability of hospital beds and the ability to provide services sufficiently

promptly to enable a defendant to regain capacity within a six month period. One of our members noted that pressure in hospitals generally means that there are already insufficient hospital beds and delays in providing certain services to patients, such as treatment by psychologists. Clearly, detaining more people for longer has financial implications, although we understand that it is envisaged that the six month period will be a maximum and that some defendants will not need to be detained in hospital if the judge decides there should be a delay prior to the determination of the facts procedure.

Some of our members thought it inappropriate to extend the maximum period of a s.36 remand to hospital without giving the defendant the right to apply to be discharged. Currently a patient detained under s.3 MHA 1983 can appeal against his or her detention to the MHT within the first 6 months of their detention. A patient detained under a hospital order under Part 3 of the MHA 1983, e.g. s.37, cannot appeal against their detention to the MHT until 6 months have elapsed from the making of the s.37 detention order. A defendant cannot apply to the MHT for discharge when detained under s.36. If s.36 detention is extended to up to 6 months after which the defendant becomes subject to detention under Part 3 of the MHA he or she could potentially have been detained for 12 months without the right of appeal to the MHT against the detention order. If s.36 detention is to be extended to up to 6 months, consideration should be given to a review procedure, if not by the MHT then by the court, to give the defendant the opportunity to argue for discharge from the s.36 detention order by the court which imposed it.

As an alternative to s.36, it was suggested that it might be preferable to use s.35 alongside s.3. The difficulty with this suggestion is that discharge from s.3 detention can be ordered by the patient's nearest relative (on 72 hours' notice and subject to the barring provisions in s.25 MHA), by the Responsible Clinician, by the Hospital Manager and/or by the MHT. If the defendant were to be discharged from the s.3 order, there would no longer be a power to treat, which could affect the likelihood of the defendant regaining capacity.

Further question 18: Do consultees consider that the determination of facts procedure for the accused who lacks capacity should be made discretionary following the finding of unfitness, to allow for discontinuance of the

proceedings, and diversion out of the criminal justice system into health or related services in appropriate cases?

This proposal is more radical than it first appears to be. Where there is a finding of unfitness and the prosecution agrees that it is not in the public interest to proceed to a fact-finding hearing, there is no difficulty: the prosecution will offer no evidence and the defendant can be diverted out of the criminal justice system into health or social care services. At present the decision as to whether it is in the public interest to proceed is ultimately for the prosecution and not for the trial judge. In exceptional circumstances, the trial judge could stay the proceedings as an abuse of process if the case could be brought within one of the existing abuse of process categories. The proposal in further question 18 is radical because it would give the trial judge the power to discontinue the proceedings on public interest grounds.

It is not suggested that the trial judge would have the power to enter an acquittal. Thus, if the defendant was to recover his or her capacity, the prosecution could try the defendant in the usual way. We wonder whether the prospect of facing a criminal trial is something that would be likely to hinder recovery. This is something that medical professionals might wish to comment upon.

Even though this proposal would give trial judges unprecedented powers, our members agreed that the determination of the facts procedure should be discretionary. Charges may be minor and it may not be in the interests of justice or the public interest to have a fact-finding procedure when justice would be served by diverting the defendant out of the criminal justice system and into appropriate health services and/or social care services. As the Issues Paper notes, there have already been instances where judges have declined to proceed with s.4A hearings, on the basis that it was not in the public interest to do so, and where the prosecution has offered no evidence following a finding of unfitness (IP 5.30). This shows that discretion is clearly necessary.

Judicial discretion in this respect should be guided or 'framed' by a non-exhaustive list of factors to be taken into account in determining not to proceed to a determination of the facts, including the seriousness of the offence, impact on victims, and interests of the defendant (see IP 5.31). While the criteria for making such a determination may substantially mirror other judicial powers, it is to articulate the frame for such a determination in relation to unfit defendants specifically. Without casting doubt of the efforts of judges in this respect, we believe such guidance is

important for the legitimacy of the process. Framing the decision-making in this way is also likely to assist victims and witnesses in their participation in the criminal process.

As a safeguard, we think that a decision to discontinue proceedings should be categorised as a terminating ruling and the prosecution should have a right of appeal.

Further question 19: Do consultees consider that public protection concerns arising in relation to an acquitted, but dangerous, unfit defendant could adequately be met by the use of civil powers under section 3 or 7 MHA 1983?

The Law Commission suggests that an acquitted but unfit defendant who presents a public protection concern will be a rare occurrence (IP 5.41). As the IP notes, there are several advantages to reliance on civil powers in these cases, including avoiding the need for a special verdict, that hospitalisation is realised where necessary, and medical professionals rather than judges determine the treatment of the unfit defendant (IP 5.39).

While there are also disadvantages to this approach (including reliance on the availability of a bed in an appropriate facility), some of our members thought it desirable to rely on civil powers in relation to an acquitted but dangerous unfit defendant (s.3 or 7, Mental Health Act 1983).

We note that this proposal has implications for the retention of biometric data. As with unfitness to plead, the regime for the retention of biometric data aims to strike a balance between the rights of individuals and public protection (see *Protection of Freedoms Act 2012: how DNA and fingerprint evidence is protected in law*, Policy Paper, Home Office, 4 April 2013, at 1.2). If there is a bare acquittal, biometric data would usually be retained for 3 years. In contrast, a finding of not guilty by reason of insanity is treated as a conviction for the purposes of the biometric data retention provisions and the defendant's DNA will be retained indefinitely if the offence is a recordable offence. Similar considerations concerning acquittals arise in relation to the disclosure of information about the offence for the purpose of Disclosure and Barring Service checks (previously CRB checks).

Further question 20: Do consultees consider that on a determination of the facts, any defence should be left to the jury, after discussion with the

advocates, where there is evidence on which a jury properly directed might reasonably find the defence made out or the essential element of the offence unproven?

When a defendant is unfit, it is likely that he or she will not be able to give evidence himself or herself (IP 5.46). This raises challenges for the availability of certain defences (i.e. where there is 'sufficient evidential basis' for them) that depend on evidence from the defendant him or herself.

It is in the interests of justice that, where a jury properly directed might find the defence made out, or an essential element of the offence unproven, the judge should leave that issue to the jury. Unfit defendants must be placed as far as possible in the same position as fit defendants, and thus must be given the same opportunities to be acquitted. As the IP recognises, the issue of defences for unfit defendants places an 'invisible burden' on the trial judge (IP 5.47), but it is in the interests of the rights of the unfit defendant, and, thus, in the interests of justice.

In relation to this issue, our practising members thought it important for consideration to be given to the role of the advocate in relation to defences that have not been put forward by the defendant.

In *R v Swinbourne* [2013] EWCA Crim 2329, the defendant was charged with four counts of rape. He had "severe learning difficulties" and was found unfit to plead. The jury found that he had 'done the act' in relation to two counts. The defendant and complainant were known to one another. The prosecution case was that while visiting the complainant's house, the defendant had dragged the complainant out of her kitchen, forced her to put on a nightdress, and dragged her into the bathroom where he raped her anally. He then dragged her into the bedroom where he raped her vaginally. The defendant's DNA was recovered from semen on the back of the nightdress. The defendant was interviewed and denied that any sexual activity had taken place. He contended that the complainant had made up the allegations. On appeal, the Court of Appeal held that the defendant's interview should not have been put before the jury given that his mental condition at the time of interview was the same as his condition at the time he was found unfit to plead. The defence submitted that the admission of the interview had "set the battle lines" and effectively prevented the jury from considering consent as an issue. The Court held that, because the defendant's case throughout had been that he never had sexual contact with the

complainant, his representative was bound to present the case in accordance with those instructions and could not explore the issue of consent:

“If the defendant is capable of giving coherent instructions that are not suggested, on a credible basis, to be unreliable, defence counsel should present the case in accordance with those instructions rather than investigate potential or speculative defences, particularly if they are inconsistent with the accused's instructions” (at 26).

The Court of Appeal went on to say that, *“although this appellant has been described as a volatile individual, who contradicts himself, is sometimes implausible, and engages in fantasies, it has not otherwise been asserted that his [contention that no sexual intercourse took place] was unreliable because of his disability”* (at 26).

Following *Swinbourne*, the question is this: in what circumstances will an advocate be entitled to explore an element of the offence, or a defence, if it has not been raised by the accused? Where the accused cannot give coherent instructions, the position is straightforward as the advocate must then test the evidence. However, unfitness to plead is a continuum and an unfit defendant may be able to give coherent instructions at least some of the time.

Where a defendant is fit to plead, the advocate will be able to discuss his or her instructions in greater detail and, crucially, could challenge those instructions where appropriate. It is unlikely to be possible or appropriate for an advocate to challenge someone who is unfit to plead in this way. The effect of *Swinbourne* is, therefore, that the more unfit a person is, the better able his or her advocate is to test *all* of the elements of the prosecution case and to suggest alternative hypotheses. Where a defendant is able to give some instructions, *Swinbourne* suggests a far more restricted role for the advocate.

We recognise that putting a case contrary to the defendant's instructions involves overriding his or her personal autonomy (see our response to further question 24, below). We think the duties of the advocate in this regard are in need of clarification, particularly as it is suggested that the judge's decision as to what defences should be left to the jury should follow a discussion with the advocates.

Further question 21: Do consultees consider that the special verdict should be made available to the jury on their initial consideration of the facts?

Our members agreed unanimously that the option of returning a special verdict should be open to the jury on their initial consideration of the facts. One of our

members pointed out that complex directions are given to juries routinely, such as directions on the drawing of inferences from failure to answer questions in interview. As the IP notes, juries are competent to consider evidence going to the facts, and evidence going to mental disorder which might have been suffered by the defendant at the time of the alleged offence (IP 5.53). Juries are capable of following complex routes to verdict and jurors could put medical evidence out of their minds at the initial consideration of the facts, although our members doubted whether that would be required in practice. The single-stage process does not represent a potential injustice to the defendant and has the advantage of expediting the process, which would benefit both defendants and victims.

Further question 22: Do consultees agree that it is not necessary for the judge to retain the discretion, in cases of exceptional prejudice, to order the second stage process for the consideration of the special verdict, in the manner envisaged in Provisional Proposal 9?

Those attending our seminar were unable to think of any circumstances in which such exceptional prejudice might arise. We do not think it is necessary for the judge to retain the discretion, in cases of exceptional prejudice, to order a second stage process for the consideration of the special verdict, for the reasons outlined above in response to further question 21.

Further question 23: Do consultees consider that the determination of facts in relation to a defendant found to lack capacity could be dealt with by a judge sitting without a jury?

This is a controversial issue and our members were not in agreement on this issue. Some agreed that the determination of facts in relation to a defendant found to lack capacity could be dealt with by a judge sitting without a jury. Others were opposed to this proposal. We present both sides of the issue here in an attempt to properly represent all members.

As is well-known, a 'trial of the facts' was included in s.4A of the Criminal Procedure (Insanity and Unfitness to Plead) Act 1991. This change was prompted by concern about unfit defendants being held for long periods where they may have been acquitted had they been fit to plead. The introduction of s.4A rendered unfitness a more specialised and complex legal provision (while leaving the criteria for a finding

of unfitness intact) (see further A Loughnan, *Manifest Madness: Mental Incapacity in Criminal Law*, OUP 2012, 95-98). For the courts, the main issue in relation to this procedure is whether the defendant 'did the act or made the omission charged' and the precise meaning of that phrase. Now that the scope of 'did the act or made the omission charged' has been settled, it is appropriate to consider the procedure for a 'trial of the facts'.

Until 2005, juries decided the issue of unfitness. But, as unfitness is associated with the trial process, the Auld Report recommendations advocated a change in procedure (ibid., 98-99) It has been noted that the general trend over time in the law of unfitness is increasing formalisation, reflecting the close association between unfitness and the progress of the trial (ibid., ch2 and ch4).

Our members who agreed that the fact-finding hearing could take place before a judge alone pointed out that unfitness is a procedural issue, and like other procedural issues, properly within the purview of the judge. It was accepted, however, that the main disadvantage of transferring this role to the judge is the possible reduced public 'buy in' to the decision-making (i.e. the legitimacy of criminal processes). There may already be a perception that it too easy for defendants to 'get off' by using mental incapacity defences, so the issue of legitimacy should not be underestimated. However, it might be thought worth paying this 'price' for the advantages of efficiency presented by a judge-alone process. For those who thought that the fact-finding hearing could take place before a judge alone, the fact that judges must give reasons for their decisions was regarded as particularly important.

Others were strongly opposed to transferring the determination of facts to the judge from the jury and regarded it as an "extraordinarily controversial" proposal. They felt that the role of the jury is important for the legitimacy of the process as far as both the defendant and the victim/witnesses are concerned. It was pointed out that there are many cases that cannot be re-tried, even if the defendant regains capacity, as they involve young or vulnerable witnesses and victims.

As to the factors set out at IP 5.57, those who opposed this proposal suggested the following:

- (1) delays in proceedings are most often caused by lack of available courts or facilities rather than by juries;
- (2) juries are capable of following expert evidence and complex routes to verdict;

- (3) cases in which a fact-finding procedure for an unfit accused has to take place alongside a full trial of co-defendants are “vanishingly rare” and do not justify this step;
- (4) the fact that most s.4A hearings are not contested is wholly irrelevant; jury trial is a fundamental right and to remove it from those who are unfit to plead is a significant step.

Our members who oppose this proposal did not view the requirement for judges to give reasons for their decisions as an advantage which justifies the removal of juries from the fact-finding process. One of our members suggested that this argument was dangerous as it could be used to justify the removal of juries *per se*.

In summary, the views of our members on this issue were polarised.

Further question 24: Do consultees agree that a representative, appointed by the court to put the case for the defence, should be entitled to act contrary to the defendant’s identified will and preferences, where the representative considers that to do so is necessary in the defendant’s best interests?

The first issue here is whether the court should be required to appoint an advocate in all cases. Our view is that the court should have the power to appoint a representative to put the case for the defence if the defendant is unrepresented (which we think must be an extremely rare scenario). In addition, where the defendant has instructed a legal representative, it may be necessary for the court to have the power to formally accept that person if it subsequently transpires that the defendant did not have the capacity to instruct a representative. This would avoid difficulties about whether the representative has been validly instructed. We do not think that the court should always be required to appoint an advocate following a finding of unfitness to plead for the following reasons.

The Law Commission has said that the current procedure “works well” (CP 6.3) but our members were not convinced that the Commission is correct. There are a number of Court of Appeal judgments which demonstrate that the appointment of a legal representative does not always happen in practice (see, e.g. *R v O’Donnell* [1996] 1 Cr App R 285; *R v Egan* [1998] 1 Cr App R 121; *R v McKenzie* [2011] EWCA Crim 1550; *R v MB* [2012] EWCA Crim 770). In a response to the CP, the Registrar of Criminal Appeals said that it is “rare indeed” for overt consideration to be given to the appointment of a person to put the case for the defence. Several of our

members provided anecdotal evidence suggesting that, in practice, courts do not routinely appoint advocates following a finding of unfitness to plead.

It is s.4A(2) of the 1968 Act which requires the court to appoint a person to put the case for the defence. The s.4A procedure was introduced by the 1991 Act, which followed the Report of the Butler Committee. The Butler Committee recognised that one difficulty was “that of validating the appointment of a legal representative” (*Report of the Committee of Mentally Abnormal Offenders*, p157). However, the Butler Committee recommended that, where counsel had been instructed, “*the court should be able to accept this representative. If there is none the court may appoint one*” (ibid., p157). The Committee does not appear to have envisaged that a court should have a power to appoint a new representative where one has already been instructed. Similarly, the intention behind the subsequent legislation was to ensure that a defendant who was found unfit to plead would be represented at the trial of the facts (see, e.g., *Hansard* (HC), 1 March 1991, vol 186, col 1275).

In *R v Norman* [2008] EWCA Crim 1810, the Court of Appeal emphasised that the person appointed “*should not necessarily be the same person who has represented the defendant to date*” (para.34). It should be “*the right person for this difficult task*” (para.34), such as “*someone experienced in mental health issues*” (para.24).

There are a number of practical difficulties that may arise if this approach is taken. As is acknowledged by the Law Commission, cases of unfitness to plead are still relatively rare (CP 2.60), so it is not clear how advocates are to obtain the experience and expertise contemplated in *Norman*. In addition, the question of fitness to plead may be deferred to the close of the prosecution case. Practically speaking, if the defendant is found unfit to plead after the trial has commenced, the judge has no real option but to appoint the existing advocate as a new advocate would not have heard the evidence.

Some of our practising members queried whether representing someone who is unfit to plead is the “very difficult task” that the Court in *Norman* suggested. It could be argued that the difficult task is taking instructions from, and advising, someone who may be unfit to plead, identifying whether the issue of unfitness to plead needs to be explored, instructing experts and deciding at what stage of the trial unfitness to plead should be raised. All of these issues arise *before* the question of unfitness to plead is determined. The Advocacy Training Council (ATC) has argued that there should be compulsory training for all advocates in dealing with vulnerable witnesses and

defendants (see *Raising the Bar*, ATC, 2011). We agree and would add that training in issues relating to unfitness to plead should be an essential part of such training (and we note that any mention of unfitness to plead is absent from the ATC's aforementioned Report). We find it difficult to understand why the training of pupil barristers in forensic accountancy continues to be compulsory, while the ATC's recommendations have not been adopted.

Our practitioner members also raised concerns about the difficulties that could be caused by replacing the defendant's advocate with a new advocate following a finding of unfitness. By that stage, the defendant will probably have had numerous conferences and attended several hearings with his or her legal representative. To replace that person with someone the defendant has never met could potentially be catastrophic for an unfit accused. It might also be extremely difficult to explain why the defendant's new advocate was being appointed by the court. This could be perceived by a defendant as being unfair and as depriving them of their own legal representative. We considered how this might be perceived, for example, by a defendant suffering from a psychopathic disorder with delusions of persecution.

It has been argued that it is necessary for the court to appoint an advocate to represent the defendant because this ensures that the advocate is independent and can act in the best interests of the defendant (and not necessarily in accordance with instructions) (CP 6.3). We think this argument is misconceived. The core duties of all advocates include maintaining independence and acting in the best interest of each client (see, e.g. The Bar Code of Conduct CD2 and CD 4).

Further question 24 is concerned with the defendant's identified will and preferences. If the defendant has instructed someone to represent him or her, we think that choice ought to be respected. Accordingly, we do not think that it is desirable or necessary for the court to have a duty to appoint an advocate following a finding of unfitness in all cases. Our members who have conducted research into the position in other countries could not identify any other jurisdictions where this is a requirement. We would suggest that, instead, there is merit in the approach that is taken by the MHT. Under rule 11 of the Tribunal (First-Tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008, if a patient has not appointed a legal representative, the Tribunal may do so where the patient lacks the capacity to appoint a representative but the Tribunal believes that it is in the patient's best interests for the patient to be represented.

Whether an advocate is instructed by the defendant or appointed by the court, the real difficulty lies in determining what it means to act in the defendant's best interests and in what circumstances the legal representative can (and should) pursue avenues of enquiry that he or she has not been instructed to pursue. As discussed above, we have concerns about the constraints that are currently imposed upon advocates in this regard (see the discussion of *R v Swinbourne* in our response to further question 20, above). We agree with the Law Commission that the advocate should generally be entitled to explore all possible avenues which may lead to an acquittal (CP 7.23). Where the defendant expressly indicates that he or she does not wish to put forward a particular defence, the advocate must undertake a balancing exercise involving consideration of the defendant's personal autonomy, his or her best interests and his or her capacity to make such a decision.

It is important to clarify what is meant by 'best interests'. It is necessary to distinguish best interests in this context from the best interests test under the Mental Capacity Act 2005, which encompasses wider issues and best clinical interests. Advocates must act in the *legal* best interests of the defendant. Difficulties may arise if defendant gives instructions that are not in his or her best legal interests. The Law Society's advice to solicitors representing clients before mental health tribunals is helpful in this regard (see *Representation before mental health tribunals*, The Law Society, 30 September 2011). In such cases solicitors are required to balance the prejudice that may be caused to the client's case against the weight that can appropriately be given to his or her will and preferences. The closer the defendant is to having capacity, the greater the weight that must be attached to their wishes (*ibid.*, para.5.2.2).

Part 6

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

Our members were not aware of supervising officers being unwilling to undertake supervision.

Further question 26: Do consultees consider that it would be appropriate and effective to expand the power of supervision orders under section 5 of the CP(I)A to include recall of a supervised person to hospital, as available under section 17E-F of the MHA 1983?

One of our members described supervision orders as “toothless” disposals. Our judicial members viewed a supervision order as being akin to an absolute discharge. A supervision order cannot be enforced through the courts and there is no sanction for failure to comply with a treatment requirement.

Although a supervision order follows a finding that the defendant did the act or made the omission charged, it must be the case that a hospital order was not required at the point of disposal. Further question 26 asks whether there should be a power to compulsorily detain and treat a person who has failed to comply with the requirements of a supervision order. (We query the use of the term ‘recall’ in this context. A person who is subject to a supervision order will not necessarily have been subject to detention under the MHA 1983. The term ‘recall’ presupposes that there is an order for detention which is still operational). This proposal could be seen as ‘punishment’ for non-compliance with a supervision order. The purpose of detention in hospital is to facilitate treatment and this focus should not be confused with punishment issues. In any event, if the grounds for compulsory detention are made out, it seems likely that detention under s.3 of the MHA 1983 will follow, with all of the safeguards and protections of Part IV of the Act. There are, therefore, objections in principle to the use of ‘recall’ for non-compliance and there is a query over whether it is necessary.

Some of our judicial members felt that a defendant ought to be brought before the court if he or she breached a supervision order, with the court having the power to make a hospital order if the statutory criteria under s.37 are met at this point. The Law Commission proposes that mens rea and defences should be considered at the fact-finding hearing and it was felt that this would provide the necessary justification for bringing a defendant back before the court. It was pointed out that a hospital order would not be compulsory in these circumstances as the judge could consider the defendant’s circumstances and reasons for non-compliance, and the statutory criteria for detention under s.37 would also have to be met. However, acknowledge

that this procedure may not be necessary having regard to the likelihood that, if a hospital order is appropriate, the defendant will have been detained under s.3

Further question 27: Do consultees consider that there are any other enhancements of the powers available under supervision orders which would be beneficial?

We discussed the possibility of requiring a defendant to attend court regularly for review of a Supervision Order. The benefits of reviewing Drug Rehabilitation Requirements (DRRs) imposed as part of a Community Order are generally accepted. However, it was pointed out that this is probably because of the sanctions that are available if the defendant does not comply with a DRR. More onerous conditions may be imposed or the defendant can be sentenced to imprisonment. In view of therapeutic jurisprudence, draconian measures for a mentally vulnerable person may be open to criticism.

Part 8

Further question 33: Do consultees agree that it would be unnecessary for capacity determinations and fact-finding hearings to be reserved to district judges? If not, why not?

We think that capacity determinations and fact-finding hearings should be conducted by district judges and, preferably, by designated district judges with special training. In *R v Norman* [2008] EWCA 1810, the Court of Appeal urged courts to ensure that defence advocates who appear at fact-finding hearings have experience and expertise in these types of case. It is incongruous to suggest that the tribunal does not require particular experience and expertise.

If capacity decisions and fact-finding hearings were to be conducted by designated district judges, this would promote consistency. We suggest that it is also likely to speed up the proceedings and result in fewer appeals, which might go some way towards offsetting the increased cost.

Further question 34: Do consultees consider that, where the defendant's capacity is in doubt, it would be preferable for his or her capacity to be

determined in the magistrates' court and, if the defendant is found to lack capacity, that all further proceedings against him or her should remain in that court?

Further question 35 (in the alternative): Do consultees alternatively consider that such a case should be sent to the Crown Court for determination of capacity and, if the defendant is found to lack capacity, that all further proceedings against him or her should remain in that court?

In many cases where an issue arises concerning a defendant's fitness to plead, the magistrates' court could decline jurisdiction as the case may involve "complex questions of fact or difficult questions of law" (Criminal Practice Directions, [2013] EWCA Crim 1631, 9A.2). However, we do not think that all cases involving issues of fitness to plead should be sent to the Crown Court. The offence may be minor or the defendant's mental health issues might not be particularly complex.

If the magistrates' court accepts jurisdiction and the district judge finds that the defendant is unfit to plead, we think that further proceedings could remain in the lower court. If the magistrates' court declines jurisdiction and the Crown Court finds that the defendant is unfit to plead, we think the proceedings should remain in the Crown Court.

Further question 36: Do consultees agree that capacity procedures in the summary courts should be applicable for all criminal offences?

Yes.

Further question 37: For non-imprisonable offences, do consultees agree that the available disposals should be limited to a supervision order and an absolute discharge?

It has been suggested that a conditional discharge should also be available. However, the purpose of a conditional discharge is to ensure that a defendant does not commit a further offence during the specified period. If a defendant commits an offence during the period of a conditional discharge, he or she can be re-sentenced for the original offence.

It is unclear what the purpose of a conditional discharge would be in the case of an unfit defendant. If he or she engaged in criminal conduct during the period of the conditional discharge and was found to have 'done the act or made the omission',

there are two possibilities: (1) he or she might still be unfit to plead, in which case a supervision order could be imposed for the new 'offence' if appropriate; there would be no need to re-visit the disposal for the original offence; (2) If he or she was now fit to plead, a Supervision Order would no longer be necessary, so again there would be no need to reconsider the original disposal.

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

We think that the test does not need to be adjusted as it already incorporates consideration of the nature of the proceedings.

Further question 39: Do consultees consider that there are any adjustments to the test, or the procedure, for defendants lacking capacity that would materially improve the prospects of the court identifying those adults with capacity issues?

We think that the identification of adults with capacity issues depends on non-statutory initiatives, rather than requiring adjustments to the test or the procedure. Liaison and diversion schemes and the training of magistrates, district judges and legal representatives are key in this regard.

Further question 40: Do consultees agree that it is appropriate to have the same evidential requirement in the summary courts as in the Crown Court?

We agree with the proposal to require evidence from two experts competent to address the condition of the defendant. Our members could not see any justification for distinguishing evidential requirements in the summary courts from those in the Crown Court if this change is made.

Further question 41: Regardless of the position in the Crown Court, do consultees agree that, in the summary courts, the tribunal should have a discretion whether to proceed to the determination of facts hearing following a finding that the defendant lacks capacity?

For the reasons we identify in our response to further question 18, above, we are in favour of giving Crown Court judges the discretion to decline to proceed to a fact-finding hearing. We agree that such discretion is even more important in the summary courts as the charges are more likely to relate to minor offences.

We note that Home Office guidance to prosecutors in relation to mentally disordered offenders is inconsistent (compare, for example, the tone of Home Office Circulars 66/90 and 12/95) and there is, therefore, a risk of inconsistent decision-making by prosecutors when considering the public interest in this type of case. We think that a district judge should be able to decide that it is not in the public interest to proceed to a fact-finding hearing. A decision to this effect could be appealed by the prosecution by way of case stated or judicial review in an appropriate case.

Further question 42: Do consultees agree that in reaching its determination on the facts, the tribunal in the summary courts should be able to reach a special determination of acquittal because of mental disorder existing at the time of the offence?

Our members had differing views on this issue. Some considered that a special determination introduced an element of unnecessary complexity. Others could see no justification for distinguishing the summary courts from the Crown Court in this regard, particularly having regard to potential public protection concerns.

Further question 43: Do consultees agree that there should be mandatory specialist training on issues relevant to trying youths, for all legal practitioners and members of the judiciary engaged in cases involving young defendants.

We agree with this proposal. It may not be feasible to require adults suffering from mental disorder to be represented by advocates who have had specialist training because it may not be possible to identify in advance whether specialist representation is required. The position is entirely different for children because age can be ascertained at the point of instruction. The increased likelihood that effective participation issues will arise in the youth court makes specialist training essential.

Further question 44: Do consultees consider it appropriate for there to be initial screening for mental health issues for all defendants under 14 years of age, to be conducted by mental health professionals?

We think there ought to be screening in all cases but we recognise the resource implications of this proposal. Mandatory screening is particularly important for defendants under 14 years of age because of the greater prevalence of psychiatric disorders and learning disabilities, as well as natural developmental immaturity.

Further question 45: Do consultees agree that the provisional reformed test proposed for the Crown Court at paragraph 2.34 above is suitable for application to young defendants without adjustment?

We agree that the proposed test would encompass the *Gillick* criteria and the issues identified in Grisso's framework.

Further question 46: Do consultees agree that the summary courts should have the power to commit a defendant to the Crown Court for the imposition of a restriction order, but should not have the power to impose one themselves?

We agree. Where the hearing takes place in the summary jurisdiction, it should remain possible for a restriction order to be imposed if that is necessary. However, a restriction order is not a 'penalty' that should be available to the magistrates' court having regard to the severe nature of such an order (Metcalf & Ashworth, 'Trial: Criminal Procedure Insanity Act 1964 ss.4 and 4A' [2003] Crim LR 817). The power to commit to the Crown Court is a sensible solution.

Further question 47: Do consultees agree that the following disposals should be available to the magistrates' court on a finding that the defendant has "done the act or made the omission", or where a special determination has been arrived at:

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

Yes. We can see no difficulty in the fact that the disposals are the same in both courts (subject to restriction orders only being available in the Crown Court).

Further question 48: Do consultees consider that the non-penal requirements of a youth rehabilitation order should be available as part of a youth

supervision order, following a finding that a young person has “done the act or made the omission”, or where a special determination has been arrived at?

In principle, we can see no objection to this approach as such requirements could potentially offer much needed additional support for youths. We presume that it is not being suggested that there would be any sanctions for non-compliance with such a requirement.

Response of Professor Penny Cooper, Academic (Roehampton Law School)

PART 3: SPECIAL MEASURES

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

AGREE: DISAGREE: OTHER:

**Response from Prof. Penny Cooper, Kingston University London
24th July 2014**

I have read the comments of David Wurtzel (sent 23rd July 2014 by email) and I do not wish to duplicate that which David has already put so well. I have a few things to add which may be helpful.

Desirable? Yes.

Without an intermediary some defendants are not able effectively to participate in proceedings. It is quite wrong in principle that there is no statutory entitlement.

David Wurtzel gave an example of a trial and re-trials at the Bailey where a pair of intermediaries acted; the defendant had Asperger Syndrome, an autism spectrum condition. For research purposes I observed significant portions of the second and third trials. In that case the expert evidence identified that an intermediary would (1) help the defendant prepare for his trial (e.g. familiarisation visits etc.) (2) provide support for the defendant during the trial (e.g. monitoring his anxiety levels and prompting him to employ anxiety management techniques) and (3) assist two-way communication between the defendant and other participants in the legal process.

In *R (on the application of AP) v Secretary of State for Justice* [2014] EWHC 1944 (Admin) it was said:

'there are likely to be two roles during a trial for which an intermediary is fitted. The first is founded in general support, reassurance and calm interpretation of unfolding events. The second requires skilled support and interpretation with the potential for intervention and on occasion suggestion to the Bench associated with the giving of the defendant's evidence.' [34]

I respectfully and strongly disagree with the next paragraph in that decision:

‘The first is a task readily achievable by an adult with experience of life and the cast of mind apt to facilitate comprehension by a worried individual on trial. In play are understandable emotions: uncertainty, perhaps a sense of territorial disadvantage, nervousness and agitation.’ [35]

The Old Bailey case referred to above provides an example of the sort of situation where it is certainly not the case that ‘an adult with experience of life’ would have been enough for the defendant. Asperger Syndrome is a life-long complex communication disability with a variety of symptoms, some are obvious and some are subtle and easy to miss; symptoms differ according to the individual and the situation he or she finds herself in. Furthermore there is a wealth of academic research to show the links between this particular learning disability and mental health issues; in a court hearing the intermediary would also need to be alert to the defendant’s actual or potential mental health issues. If an intermediary is required for communication there is almost certainly a lot more ‘in play’ than ‘understandable emotions’.

Even if simply having ‘an adult with experience of life’ and a capacity to sooth vulnerable defendant anxieties were adequate, one wonders how it would be practical to bring in an intermediary at the moment the decision is taken by the Defence to call the defendant. Should the intermediary be kept on standby? When and how would the intermediary (who would presumably have already assessed and built rapport with the defendant before the trial) re-establish rapport? Would the intermediary be given the opportunity (as she ought) to check that the defendant’s communication needs have not changed now that the defendant is mid-way through a stressful trial and about to be cross-examined? Would the intermediary be given the opportunity to ascertain the key vocabulary in the trial? Would the intermediary have the opportunity to discuss (as is good practice) with trial advocates how best to conduct the examination and cross-examination? And if the intermediary is for only the defendant’s testimony who will help the legal team communicate with the defendant and take instructions? In short, it is simply not fair on anyone, particularly the defendant, that an intermediary is merely parachuted in for testimony.

It is no surprise that Lord Carlile’s ‘Independent Parliamentarians’ Inquiry into the Operation and Effectiveness of the Youth Court’ (June 2014) recommended that:

‘Section 104 of the Coroners and Justice Act 2009 should be brought into force by the Ministry of Justice and be extended, by means of new legislation, to enable child defendants to have an intermediary to provide communication support throughout their case and not just for the giving of evidence.’ (page 31)

It is significant that judges, who are as acutely aware as anyone of the scant court resources, usually appoint an intermediary for more than just the defendant’s evidence. My most recent intermediary survey shows that out of 64 reported defendant intermediary appointments only 1 was just for just the defendant’s testimony (see P Cooper (2014) Highs and Lows: The 4th Intermediary Survey, forthcoming).

Practicable?

The most up to date information I have from the MoJ (telephone call 21st July 2014) regarding RIs in England and Wales is that in June 2014 there were (from police and the CPS) in total 263 requests for a witness intermediary and only 53 RIs currently active i.e. available to take new referrals. Demand had doubled compared to approximately eighteen months ago and supply has shrunk. This may be partly on account of the fact that some RIs are taking on defendant work (as unregistered intermediaries); this usually last far longer than a witness role so they are then not available to take RI witness appointments.

`The Bradley Report five years on' by the Centre for Mental Health (2014) reported on progress since Lord Bradley's 2009 review of the support offered to people with mental health problems and people with learning difficulties in the criminal justice. The 2014 report noted:

`A joint inspection in January 2014 focusing on learning disabilities found that, even where courts were minded to give support to vulnerable defendants, "Accredited and registered intermediaries were not always available to support vulnerable defendants with learning disabilities during the trial process" (pg 28 - Criminal Justice Joint Inspection, 2014). (page 20)

`Bradley five years on' also recommended that `all courts should hold registers of Intermediaries', funding arrangements for intermediaries `need to be clarified' and the ` same arrangements that are available for vulnerable witnesses should be applied to vulnerable defendants without any further delay' (page 31)

Registered?

Currently the witness legislation (s29 YJCEA 1999) and the not yet in force defendant legislation (S 104 CJA 2009) refers to `intermediary' not Registered Intermediary.

`Registered' is preferable for a number of reasons. For example Registered Intermediaries have the guidance and the protection of MoJ (and DoJ in NI) procedural guidance, training, CPD, feedback and complaints procedures etc.

I have recommended that the MoJ carries out an urgent evaluation of RI demand and supply. The experience of the current DoJ NI pilot of Registered Intermediaries should help them scope the demand; NI Registered Intermediaries operate for witnesses and defendants.

The Council of H.M. Circuit Judges

Response to the Law Commission's consultation on Unfitness to plead

"An Issues Paper"

The Council of H.M. Circuit Judges represents over 600 Circuit Judges sitting in the Crown court of England and Wales. Their experience as judges was preceded by substantial careers as barristers or solicitors and many have spent most of their working lives in the criminal courts at all levels. Some have and continue to serve on the Mental Health Tribunal are accustomed to determine issues related to the most serious of mental health conditions. It is upon the basis of this experience that our views are expressed. The views expressed are those of the Criminal Sub-Committee. We refer to and adopt the submissions made by the Committee in the earlier response. These were prepared by His Honour Judge Robert Atherton the then Chairman who has very extensive experience of Mental Health Tribunal sittings. The Committee also wishes to place on record its appreciation of the work of Judge Atherton who has also been responsible for drafting this response.

We find ourselves in broad agreement with most of the proposals. Before setting out our response to the specific questions we think it right to make certain general observations.

1. Unfitness to plead should be regarded as an exceptional course and that all measures (e.g. intermediaries) should be taken to enable a defendant to participate in a trial if at all possible. Many defendants may have mental health issues in varying degrees but very few are truly unfit.
2. The Pritchard criteria are obsolete. They date back to 1836 when criminal procedure was very different from today. To give just a few examples, many offences were capital, a defendant had only recently acquired the right to be represented by counsel and it would be another 60 years before a defendant was able to give evidence.

Further questions

9.1 Do consultees agree that a reformed legal test for fitness to plead should incorporate a consideration of both decision-making capacity and the capacity for effective participation?

Response

We agree.

9.2 Do consultees consider that an effective participation test framed around the John M criteria, with an additional decision-making capacity limb, represents the most appropriate formulation for such a combined legal test? Or do consultees favour another of the formulations set out at paragraph 2.8 above and, if so, why?

Response

We favour an adaptation of the test in *R v John M*. It is clear that reference to the ability to challenge a juror is obsolete but the other criteria remain valid and a suitable adaptation could be made. The test has worked reasonably well thus far and the alternatives promise no significant improvement. One has to be careful not to pitch the level at which a defendant is to be determined as

unfit with the result that it removes a substantial number of defendants from the trial process. Unfitness to plead is a finding which should be avoided if it is possible to do so in the interests of the defendant and the general public.

9.3 Do consultees consider that incorporating an exhaustive list of decisions for which the defendant requires capacity into a reformed legal test for unfitness to plead would assist in maintaining the threshold for unfitness at a suitable level?

Response

In our response to the consultation paper we indicated the minimum decisions which are necessary. We adhere to that submission.

9.4 Do consultees consider that a reformed test should explicitly refer to a “satisfactory” or “sufficient” level of capacity for effective participation?

Response

Essentially, both words are so difficult to apply that it may not be satisfactory to apply either word. A case will depend on its own facts and such words may introduce consideration of the particular circumstances of the case and the decisions which are required to be made. We have no strong views as to the appropriateness of one word against the other.

9.5 Do consultees agree that a diagnostic threshold would be unlikely to assist in maintaining the threshold of unfitness at a suitable level?

Response

We agree.

9.6 Do consultees think that it would be helpful to have a statutory presumption that all defendants are fit to be tried until the contrary is proved?

Response

We agree that it would be helpful in that it would clarify the starting point in any determination of the issue. The common law position is that a defendant is presumed to be fit to plead and stand trial unless and until the contrary is proved. If new statutory provisions are to replace the existing common law rules, this should appear in the statute for the avoidance of any doubt.

9.7 Do consultees agree that a finding that a person lacks capacity shall remain valid unless and until the contrary is established on the basis of evidence of two suitably qualified experts?

Response

We agree. It would seem to be the logical progression from our answer to the previous question.

9.8 Do consultees agree that disaggregation of capacity to plead and capacity for trial is undesirable?

Reponses

We agree. This was the view we expressed in our response to the original consultation and we are not persuaded to change it now.

9.9 Do consultees agree that making the test one of capacity for effective participation “in determination of the allegation(s) faced” would introduce a desirable element of context into the assessment?

Response.

We consider that the difficulties pointed out in Paragraph 2.60 may well arise. However, it may have the advantage of allowing some defendant to be tried when a rigorous application of “in criminal proceedings” may exclude them on the basis of their unfitness.

9.10 Do consultees agree that the United Kingdom’s obligations under the UNCRC and the ECHR can properly be accommodated in the manner outlined in paragraphs 2.80 to 2.82?

Response

We agree.

9.11 Do consultees agree that the difficulties surrounding unrepresented defendants cannot be addressed by amendment to the legal test itself?

Response.

We agree.

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

Response

We are concerned that the present legal position may be incompatible and in contravention of the ECHR. We do not consider that the present system which is dependent upon the use of the Criminal Court rules is appropriate. It should be a properly organised and funded scheme provided by statute.

We have repeatedly expressed the view that it is essential that the facility of an intermediary should be available to a defendant who is under a disability not only in order to give evidence but throughout the case. This means not only during the hearing but also for proper preparation. We regard it a more than desirable but may be the only way in which a defendant is able properly to understand and to participate effectively in a case. At present registered intermediaries are not available for a defendant though they are for a

prosecution witness. There is no good reason for this distinction. We are conscious that resources are limited but that is no reason to give priority to one party to the exclusion of the other. The Divisional Court has recently criticised this in OP v. Secretary of State for Justice (13.6.14) where it was held that if a defendant does not have a registered intermediary there is inequality or arms and perceived unfairness in the trial process. This is a welcome decision.

9.13 Do consultees agree that in any reformed unfitness it will be necessary for the requirement for two registered medical practitioners, one duly approved under section 12 to remain?

Response

We are very well aware of the difficulties of finding a medical expert who is able or willing to prepare a report. This is undoubtedly due to a number of reasons of which a significant one is the level of remuneration being provided. It is not uncommon to find that there is a delay in the case progressing because an estimated fee has been rejected and a considerably smaller sum has been offered. On occasions that leads to the expert declining to prepare the report. The consequences are that a hearing is delayed, court time may be wasted and the court's lists being further burdened.

The medical circumstances which lead to an issue of unfitness vary widely. It may be due to acute psychotic episode or to chronic personality disorder or to developmental reasons. Although the present statutory requirements which require two registered medical practitioners of whom one is duly approved under section 12 could enable a medical expert to be selected who whilst qualified under statute in reality is not dealing within his or her expertise, we find that solicitors are well aware of the need to seek the opinions from those with the appropriate expertise. Sometimes we find that the second opinion appears to be scarcely more than a rubber stamp of the main report. That may however be an unfair comment which emanates from the fact that often the second opinion needs only be short. This is particularly the position where a second opinion is required for the purposes of a Section 41 order.

9.14 Do consultees agree that the evidence of two expert witnesses competent to address the defendant's particular condition, should be the minimum requirement for a finding of lack of capacity?

Response

We agree with this suggestion. The gravity of the decision to be taken and its possible consequences justifies the continued requirement for two experts. It is however essential that this should not be simply "a rubber stamp exercise" by the second expert.

9.15 Do consultees consider that there is any alternative appropriate mechanism to address the difficulty presented by a defendant whose capacity is in doubt, but who refuses expert assessment?

Response

This is a very difficult problem but one which, thankfully, in practice rarely occurs. We are given to understand that it should not be thought that an expert assessment can never be made unless the patient has been interviewed by an appropriate medical expert. There are many ways in which the medical opinion can be formed even though it must be preferable for the expert to have had the advantage of discussing the issues with the defendant. For example, a defendant may have been placed on a medical wing of a prison where observations may be carried out by suitably qualified nursing staff from which a report could be obtained. We canvass whether this would constitute a breach of the UNCRPD obligations.

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

Response

We consider that, whilst this could be a useful additional power, in practice its use may be rare. Clearly it would supplement the present powers to delay the determination of the issues and the opportunity for treatment. In practice, the listing of cases is such that the two issues are dealt with so that the determination of the mental condition is followed immediately by the fact finding exercise. There is always a substantial delay between the issue being first raised before the court and such hearing as it is likely that reports will not be quickly available but a listing date is given as soon as possible after the case is transferred to the Crown Court. Where it is thought that treatment may be effective so as to enable a defendant to be tried, in practice that would lead to an adjournment to enable that to be carried out. The court would be minded to follow that approach rather than have a hearing of unfitness which in the event may become unnecessary. Thus in our view the proposal would probably only apply where for some specific reason the two hearings were to be separated by any substantial time.

9.17 Do consultees consider that it would be appropriate to extend the maximum period of a section 36 MHA 1983 remand to hospital for treatment to 24 weeks in these circumstances?

Response

We consider that this should follow from our submission in answer to Question 9.16

9.18 Do consultees consider that the determination of facts procedure for the accused who lacks capacity should be made discretionary following the finding of unfitness, to allow for discontinuance of the proceedings, and diversion out of the criminal justice system into health or related services in appropriate cases?

Response

We agree with this in principle. The circumstances in which it would apply are essentially those set out in the consultation. We are not clear how the suggestion that the accused, or the defence representative should be entitled to put the Crown to proof of the allegation if they wish would work. By definition the defendant will have been found not to be able to participate in the trial but it is suggested he or she may be able to make a decision which may require a complainant to give evidence. We suggest that rather than a right to require the Crown to proceed, any representation made on behalf of the defendant should be a matter to which the court should have regard when deciding whether to order the discontinuance.

9.19 Do consultees consider that the public protection concerns arising in relation to an acquitted, but dangerous unfit defendant could be adequately met by the use of civil powers under section 3 or 7 MHA 1983,

Response

We see no practical alternative although we are concerned about the effect of this on public confidence in the criminal justice system.

9.20 Do consultees consider that on a determination of the facts, any defence should be left to the jury, after discussions with the advocates, where there is evidence on which a jury properly directed might reasonably find the defence made out or the essential element of the offence unproven?

Response

We would favour this possibility and agree with the application of the “invisible burden” principle where the defence is a real as opposed to a fanciful or speculative possibility.

9.21 Do the consultees think a special verdict should be available to the jury on their initial consideration of the facts?

Response

We think it desirable for all issues to be decided at one session.

9.22 Do consultees agree that it is not necessary for the judge to retain the discretion, in cases of exceptional prejudice, to order a second stage process for the consideration of a special verdict, in the manner envisaged in Provisional Proposal 9?

Response

We acknowledge that such a procedure is likely to be rare. That however does not mean that it should be removed. We adhere to our original submission.

9.23 Do consultees consider that the determination of facts in relation to the defendant found to lack capacity could be dealt with by the judge sitting without a jury?

Response

We acknowledge that this is essentially a matter for public debate as it involves issues as to the right to trial by jury. In our view there are many hearings of the facts which are little short of formalities. Nevertheless, even when one may think that is the position, a jury sometimes returns an unexpected finding. A majority of the sub-committee would, broadly speaking, support this amendment. The decision relating to unfitness was originally one for a jury and the change to provide it to be a decision for a judge seems to have worked well. We are unaware of any significant number of complaints that decisions

have been inappropriate. We acknowledge that those decisions are ones which are based upon expert evidence. Nevertheless often they require a careful weighing of conflicting evidence.

We consider that the objection based upon the apparent loss of jury trial is properly met by the fact that it is not a decision which attributed criminal liability. If the defendant becomes fit to stand trial the right to a jury trial would persist.

A minority of the sub-committee (including the Chairman) dissents from this proposal. They see it as a further erosion of jury trial on the grounds principally of cost and convenience. The minority is not persuaded that this can be equated to a "Newton" hearing because the jury returns a general verdict as to whether the offence has been proved but the precise interpretation of the facts has always been a matter for the judge. Where a jury can determine the issue the judge is not entitled to make his/her own determination. If the change proposed in 9.20 takes effect the defendant should be entitled to have the defence assessed by a jury in exactly the same way as in a normal trial. Otherwise he/she is at a disadvantage as compared with a defendant who is not unfit.

9.24 Do consultees agree that a representative, appointed by the court to put the case for the defence, should be entitled to act contrary to the defendant's

identified will and preferences, where the representative considers that to do so is necessary in the defendant's best interests?

Response

We think that this should be allowed. It should be recorded that the advocate is taking this step and the reasons for his or her decision and the expressed will and preference of the defendant must be stated fully and clearly before the advocate proceeds. It will then be possible for the judge to assess the position and point out any matters which the advocate has omitted or to which, possibly has attached too much or too little weight. We also think that the advocate should be under an obligation to inform the judge that he/she is taking this course.

9.25 Do consultees consider that the requirement for the supervising officer to be willing to undertake supervision of an unfit accused poses such problems in practice that it needs to be amended?

Response

This is not a problem in practice. At the time a supervision order is made, there are usually reports available which have already raised the issue of consent by the appropriate authority and, if not already resolved, is resolved at the hearing. It is very difficult for the authority present to state in open court that

they are unwilling to carry out such supervision. It is also comparatively uncommon for the court to have to make an order with conditions for in-patient treatment and according the possibility of difficulty arising in practice is happily presently unlikely.

9.26 Do consultees consider that it would be appropriate and effective to expand the power of supervision orders under section 5 of the CP (I) A to include recall of a supervised person to hospital as available under section 17E-F of the MHA 1983

Response

We acknowledge the appeal of there being a power of recall where the supervision order included a requirement for treatment. However, the consequences need to be carefully considered. Under the Section 17 MHA procedure, by virtue of Section 68(7) the Hospital Managers are required to notify the Mental health Tribunal so that the case may be re-considered. Is it envisaged that there would be such a reference? If so, is it to be to the Mental Health Tribunal or back to the Crown Court which made the order? The Tribunal's specific composition is to enable the issues which arise to be determined by a panel with relevant experience. Can a Circuit Judge without such experience or unsupported be the appropriate forum? These are practical

issues which may lead to the conclusion that the occasions on which it would arise do not merit the complex framework which it may require.

9.27 Do the consultees consider that there are any other enhancements of the powers available under supervision orders which would be beneficial?

Response

We have no suggestions to make.

9.28 Do consultees agree that the power of the Crown to remit a recovered defendant for trial should be statutorily extended to cover all defendants found to have done the act or made the omission?

Response

We propose to deal with Questions 9.28. 9.29. 9.30 together.

9.29 Do consultees consider that the power to remit an accused should only be exercisable by the Crown where the judge has ruled, following a section 4A hearing, that it is in the public interest for remission to be available should the defendant regain capacity?

9.30 Do consultees agree the Crown's power to remit defendants for trial should not be limited in time?

Response

The potential effect on the recovery of a defendant who is suffering from a disability which has led to a finding of unfitness and consequential order of having to return to court must be a significant concern. The power to remit should therefore be used carefully.

Logically, the existence of the power of remission should not depend upon the type of disposal made. However, it must be highly relevant to the exercise of that power. One type of case in which it may be proper to order a remit is that given as an example in Paragraph 7.30 namely where there is a subsequent similar allegation and the earlier case becomes relevant as bad character. It seems to us that it may be unfair to require a judge to rule that remission may be permitted. Likewise, the converse applies. It may be unfair to rule that remission may not occur. It may be that judges would err in favour of allowing for remission. The decision whether the case should be remitted may depend upon the factual situation at the time remission is being considered and a ruling at the earlier stage may be premature. We suggest that one possible solution would be to provide that there should be no remission without the leave of the court and that application would be made at the time following recovery and good reason being shown for a trial. We also suggest that judges should have the power to rule that remission is not in the interests of justice, having regard, to among other factors, the lapse of time.

9.31 Do consultees agree that where there has been a finding that a defendant had “done the act or made the omission”, he or she should be entitled to request remission for trial on regaining capacity, where recovery is confirmed by the opinions of two experts competent to address the defendant’s particular condition?

Response

We agree

9.32 Do consultees consider that the rights of appeal vested in the unfit defendant should be exercisable by his or her legal representative?

Response

We agree.

9.33 Do consultees agree that it would be unnecessary for capacity determinations and fact finding hearings to be reserved to district judges?

Response

There is no reason to believe that because the case is one which is properly within the jurisdiction of the Magistrates’ court, the issue relating to unfitness will be any easier or less complex than a case within the Crown Court’s jurisdiction. It has been concluded, and we agree that it is a proper conclusion

that this issue should be dealt with in the Crown Court by a judge alone. One reason for that change was the acceptance of the complexity of issues which arise. We are of the view that it would be appropriate for such issues to be dealt with in the summary courts by a district Judge rather than a bench of Justice of the Peace.

Furthermore, it seems to be accepted that if jurisdiction was extended to all who sit in the Magistrates' Court there would have to be some training. It would be a very expensive project and, given the infrequency of such issues, probably not one which would justify the expense. We do not consider that the problem of listing of cases is one which is insuperable. There is inevitably a delay in obtaining the necessary reports. Provided the issue is raised and noted, it should not be difficult to arrange the sitting of a District judge to accommodate such a hearing.

9.34 Do consultees agree that where that defendant's capacity is in doubt, it would be preferable for his or her capacity to be determined in the magistrates' court and, if the defendant is found to lack capacity, that all further proceedings against him or her should remain in that court?

Response

The responses to Question 9.34 and 9.35 are given together.

9.35 (in the alternative) do consultees alternatively consider that such a case should be sent to the Crown Court for determination of capacity and, if the defendant is found to lack capacity, that all further proceedings should remain in that court?

Response

We acknowledge that there will be some who will argue that there are too many cases in the Crown Court which could have been dealt with in the Magistrates' courts and determine these questions on financial basis. We consider such an approach is inappropriate. If a person may lack the capacity to elect trial by jury, one should not assume that if he or she had capacity they would consent to trial in the magistrates' Court. Moreover the arbitrary denial spoken of in Paragraph 8.71 could be avoided by ordering the case be heard at the Crown Court for all purposes.

9.36 Do consultees agree that capacity procedures in the summary courts should be applicable for all criminal offences?

Response

We agree.

9.37 For non-imprisonable offences, do consultees agree that the available disposals should be limited to a supervision order and an absolute discharge?

Response

We consider that an absolute discharge should also be available.

9.38 Do consultees agree that a legal test which has regard to “the determination of the allegation(s) faced” would allow sufficient effect to be given to the accessible and more straightforward nature of summary proceedings?

Response

We consider that the legal test sufficiently includes a consideration of the defendant’s ability to understand and participate in the determination of the issues raised.

9.39 Do consultees consider that there are any adjustments to the test, or the procedure, for defendants lacking capacity that would materially improve the prospects of the court identifying those adults with capacity issues?

Response

Providing the present proposals to roll out the Liaison and Diversion scheme are carried forward, we consider that they should adequately identify the defendants with capacity issues. That scheme should lead to identification of those arrested who have a history of mental health issues. The observation by police officers, especially custody officers, defence solicitors including those involved in the Duty Solicitor scheme should lead to screening. Often the court staff, especially the ushers are able to alert the court. Some cases speak for themselves that the person alleged to have committed it is likely to have mental health issues. This should provide a comprehensive scheme.

9.40 Do consultees agree that it is appropriate to have the same evidential requirement in the summary courts as in the Crown Court?

Response

We agree.

9.41 Regardless of the position in the Crown Court do consultees agree that in the summary courts, the tribunal should have a discretion whether to proceed to the determination of fact hearing following a finding that the defendant lacks capacity?

Response

We agree.

9.42 Do consultees agree that in reaching its determination on the facts, the tribunal in the summary courts should be able to reach a special determination of acquittal because of mental disorder existing at the time of the offence?

Response

We agree.

9.43 Do consultees agree that there should be mandatory specialist training on issues relevant to trying youths, for all legal practitioners and members of the judiciary engaged in case involving young defendants?

Response

We agree.

9.44 Do consultees consider it appropriate for there to be initial screening for mental health issues for all defendants under 14 years of age, to be conducted by mental health professionals?

Response

We would support this proposal. It is however linked to another issue which has not been considered recently namely the issue of the age of criminal responsibility.

9.45 Do consultees agree that the provisional reformed test proposed for the Crown Court at paragraph 2.34 above is suitable for application to young defendants without adjustment?

Response

We agree.

9.46 Do consultees agree that the summary courts should have the power to commit a defendant to the Crown Court for the imposition of a restriction order but should not have the power to impose one themselves?

Response.

We agree. The consequences of a restriction order are so serious that they should be imposed only by the Crown Court judiciary. They often involve difficult issues relating to the balance between the freedom of the person and the safety of the public. The risk assessment is not work which the magistracy regularly carry out. The procedure for review and release are not known to the magistracy and education on these topics would not be a cost effective exercise.

9.47 Do consultees agree that the following disposals should be available to the magistrates' court on a finding that the defendant has "done the act

or made the omission² or where a special determination has been arrived at:

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

Response

We agree.

9.48 Do consultees consider that the non-penal requirements of a youth rehabilitation order should be available as part of a youth supervision order, following a finding that a young person “has done the act or made the omission” or where a special determination has been arrived at?

Response

9.49 Do consultees agree that a defendant against whom there has been a finding in the magistrates’ court or youth court that he or she “has done the act or made the omission² should be entitled to request remission for trial upon regaining capacity, where recovery is confirmed by the opinion of two experts competent to address the defendant’s particular condition?

Response

We agree.

9.50 Do consultees agree that a new right of appeal should be created from any determination or disposal imposed under a reformed capacity procedure, which would mirror the right to appeal against conviction or sentence under section 108 Magistrates Courts Act 1980?

Response

We agree.

His Honour Judge Andrew Goymer

Chairman, Criminal Sub-Committee, Council of HM Circuit Judges

25th. July 2014

Response of the Crown Prosecution Service

PART 2: THE LEGAL TEST

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

YES: NO: OTHER:

The test would be compatible with the MCA 2005, the ability to make a decision in relation to the proceedings and Article 6 ECHR, the ability to effectively participate.

Further Question 2 Do consultees consider that an effective participation test, framed around the *John M* criteria (set out at paragraph 2.3 above), with an additional decision-making capacity limb, represents the most appropriate formulation for such a combined legal test? Or do consultees favour another of the formulations set out at paragraph 2.28 above and, if so, why? (2.34)

YES: NO: OTHER:

The John M approach is preferred, having evolved through application in the criminal courts.

Further Question 3 Do consultees consider that incorporating an exhaustive list of decisions for which the defendant requires capacity into a reformed legal test for unfitness to plead would assist in maintaining the threshold for unfitness at a suitable level? (2.42)

AGREE: DISAGREE: OTHER:

There is concern that a test formulated to encompass decision making capacity might set the threshold for unfitness too low and render a very much larger number of defendants incapable of being tried. Accordingly, demarcating decisions so that capacity does not require an ability to engage with the more complex decisions would be welcomed.

Further Question 4 Do consultees consider that a reformed test should explicitly refer to a "satisfactory" or "sufficient" level of capacity for effective participation? (2.43)

YES: NO: OTHER:

The level of capacity is that observed in the case of *SC v UK*, that is, a 'broad understanding' of the proceedings and 'general thrust' of the evidence; a perfect level of engagement and comprehension of the process would be too high a level.

Further Question 5 Do consultees agree that a diagnostic threshold would be unlikely to assist in maintaining the threshold of unfitness at a suitable level? (2.44)

YES: NO: OTHER:

There would be difficulties in isolating a diagnostic category which was able to capture all potential conditions which might give rise to unfitness.

Further Question 6 Do consultees think that it would be helpful to have a statutory presumption that all defendants are fit to be tried until the contrary is proved? (2.46)

YES: NO: OTHER:

In line with our response to the consultation paper, we think this would be helpful; as the Court of Appeal observed in R v Ghulam, there is no evidential requirement for finding a defendant fit to plead.

Further Question 7 Do consultees agree that a finding that a person lacks capacity shall remain valid unless and until the contrary is established on the basis of the evidence of two suitably qualified experts? (2.48)

YES: NO: OTHER:

There is clearly a need to set out a procedure to address this situation, as the Court of Appeal has described this as "an unsatisfactory lacuna in the law". We also agree with the suggested balance of probabilities test to be applied by the court.

Further Question 8 Do consultees agree that disaggregation of capacity to plead and capacity for trial is undesirable? (2.59)

YES: NO: OTHER:

The CPS is in agreement with the LC that disaggregation of capacity decisions into capacity to plead and capacity for trial may not be desirable. Support for this approach is focussed on the perceived practicality that it affords and the fact that it would be less likely to lead to delay. However, there are clear difficulties, as set out in the Issues Paper. In particular, allowing a substantially impaired defendant to plead guilty despite lacking capacity for trial is troubling.

Further Question 9 Do consultees consider that making the test one of capacity for effective participation “in determination of the allegation(s) faced” would introduce a desirable element of context into the assessment? (2.68)

YES: NO: OTHER:

The ability to participate would be taken into account by the trial judge in keeping with the principles of understanding the ‘general thrust’ of the evidence. Adding a further complication to assessing the fitness of a defendant, by anticipating complexities that may arise in multi handed or cut-throat cases, would not be necessary or straightforward. The context is relevant to the management of a fair trial but it is undesirable that the same defendant may, at the same time, be fit to be tried on some matters and not on others. Who would be qualified (in terms of procedural knowledge) to express an opinion on this?

Further Question 10 Do consultees agree that the United Kingdom’s obligations under the UNCRPD and the ECHR can properly be accommodated in the manner outlined in paragraphs 2.80 to 2.82? (2.83)

YES: NO: OTHER:

There is a clear tension between the suggested approach to the issue of mental capacity and the denial of legal capacity as a result. We agree with the LC's view that our obligation in the first instance must be to the ECHR.

Further Question 11 Do consultees agree that the difficulties surrounding unrepresented defendants cannot be addressed by amendment to the legal test itself? (2.88)

YES: NO: OTHER:

It is difficult to foresee what amendment could be made to the legal test to address these difficulties. A separate legal test for unrepresented defendants would not be desirable. Is one possible solution for courts to ask for expert reports on the occasions when the court is concerned about a defendant's capacity - subject to the concerns raised at paragraphs 4.25 and 4.26 in respect of a defendant who refuses consent to obtaining an expert's assessment?

PART 3: SPECIAL MEASURES

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

AGREE: DISAGREE: OTHER:

The CPS recognises the value of the intermediary role in enabling effective participation and would agree to an entitlement as was required in the circumstances. Furthermore, the CPS agrees that resource implications should not be a reason for not using an intermediary and on a practical point would encourage the registration of greater numbers of suitable qualified intermediaries.

PART 4: ASSESSING THE CAPACITY OF THE ACCUSED

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

AGREE: DISAGREE: OTHER:

We recognise that expertise other than purely psychiatric will often be required for decision making capacity and effective participation requirements. We also note that the proposal has an in-built safeguard in relation to the evidential requirement for the making of a hospital order, restriction order or a treatment requirement as part of a supervision order, which will remain the same.

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

AGREE: DISAGREE: OTHER:

We are concerned that this may go too far and suggest that at least one of the experts should be a registered medical expert. If there is no requirement for any expert medical opinion the procedure for a defendant charged with a serious offence could involve a complete separation of the fitness issue (determined potentially on opinions from, for example, an occupational therapist and a social worker) from the disposal issue (at which point a registered medical practitioner may reach an opposite conclusion). What is the court to do then, with the defendant who has been found unfit but for whom no disposal is recommended?

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

AGREE: DISAGREE: OTHER:

We recognise the LC's difficulty in identifying an appropriate mechanism to address this difficulty.

PART 5: PROCEDURE FOR THE UNFIT ACCUSED

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

YES: NO: OTHER:

The caveat for agreeing to adjourn the case for a maximum of 6-months must be unless there is a significant detriment to the victims and /or witnesses. For instance if the victim or witness had a vulnerability or was a child, the process may be more appropriately expedited rather than delayed.

Furthermore, if the defendant was in custody and subject to custody time limits (CTL) and the case was delayed, a mechanism for suspending or extending the CTL would need to be in place.

Further Question 17 Do consultees consider that it would be appropriate to extend the maximum period of a section 36 MHA 1983 remand to hospital for treatment to 24 weeks in these circumstances? (5.25)

YES: NO: OTHER:

This is a practical response to an agreement to the proposal in Q16. Similarly, a CTL provision would be required.

Further Question 18 Do consultees consider that the determination of facts procedure for the accused who lacks capacity should be made discretionary following the finding of unfitness, to allow for discontinuance of the proceedings, and diversion out of the criminal justice system into health or related services in appropriate cases? (5.33)

YES: NO: OTHER:

This would build in a further opportunity for diversion out of the CJS. The CPS already considers diversion as part of the public interest stage of the full code test.

Further Question 19 Do consultees consider that public protection concerns arising in relation to an acquitted, but dangerous, unfit defendant could be adequately met by the use of civil powers under section 3 or 7 MHA 1983? (5.44)

YES: NO: OTHER:

Too many risks would be introduced by reliance on civil orders alone. For instance, the release of a patient from hospital can be on clinical grounds alone and admission for treatment would be dependant on bed availability. Overall, we consider that the special verdict procedure is a preferable mechanism by which to address public protection concerns.

Further Question 20 Do consultees consider that on a determination of the facts, any defence should be left to the jury, after discussion with the advocates, where there is evidence on which a jury properly directed might reasonably find the defence made out or the essential element of the offence unproven? (5.50)

YES: NO: OTHER:

In our response to the consultation, we raised concerns about the proposal to allow the jury to consider the mental element of the offence. However, we recognise support from stakeholders for the proposal, as outlined in the the Issues Paper. If the jury is to consider the fault elements of the offence, we agree that it should also consider any defence, where there is sufficient evidence to do so as outlined in the question and explained at paragraphs 5.45-5.48 of the Issues Paper.

Further Question 21 Do consultees consider that the special verdict should be made available to the jury on their initial consideration of the facts? (5.54)

YES: NO: OTHER:

A two stage process would be cumbersome and an additional hearing would have an adverse effect on all involved. Therefore, the proposal that the special verdict is available to the jury at the 'first stage' is preferable.

Further Question 22 Do consultees agree that it is not necessary for the judge to retain the discretion, in cases of exceptional prejudice, to order a second stage process for the consideration of the special verdict, in the manner envisaged in Provisional Proposal 9? (5.56)

YES: NO: OTHER:

Although it is difficult to foresee instances of exceptional prejudice in a single stage process, a discretion could be retained to order a second stage process, as there may be some such "rare cases", as the council of HM Circuit Judges suggested.

Further Question 23 Do consultees consider that the determination of facts in relation to a defendant found to lack capacity could be dealt with by a judge sitting without a jury? (5.60)

YES: NO: OTHER:

We agree with the LC's proposal in that it would be less time consuming and that a judge would be able to analyse expert evidence more effectively and follow the more complex routes to a verdict, if the single stage process was adopted. Furthermore, a judge would be better equipped to deal with a section 4A hearing at the same time as a full trial of codefendants.

Further Question 24 Do consultees agree that a representative, appointed by the court to put the case for the defence, should be entitled to act contrary to the defendant's identified will and preferences, where the representative considers that to do so is necessary in the defendant's best interests? (5.64)

YES: NO: OTHER:

The best interests of the unfit defendant should be represented.

PART 6: DISPOSALS

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

YES: NO: OTHER:

We recognise that there may be an issue with the current system, in which an order can be regarded as necessary, but where compliance is effectively voluntary. However, the Issues Paper indicates there may not be sufficient instances of such problems to justify an amendment to the power to impose supervision orders.

Further Question 26 Do consultees consider that it would be appropriate and effective to expand the power of supervision orders under section 5 of the CP(I)A to include recall of a supervised person to hospital, as available under section 17E-F of the MHA 1983? (6.21)

YES: NO: OTHER:

An alignment of civil and criminal powers is desirable. As the Issues Paper suggests, the coercive effect of the power would need to be balanced against its effectiveness in protecting the unfit person and the community.

Further Question 27 Do consultees consider that there are any other enhancements of the powers available under supervision orders which would be beneficial? (6.22)

YES: NO: OTHER:

We have no further suggestions.

PART 7: REMISSION AND APPEALS

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

YES: NO: OTHER:

It is sensible to extend this power beyond just those defendants who are detained under a hospital order, with a restriction order in place.

Further Question 29 Do consultees consider that the power to remit an accused for trial should only be exercisable by the Crown where the judge has ruled, following the section 4A hearing, that it is in the public interest for remission to be available should the defendant regain capacity? (7.35)

YES: NO: OTHER:

We do not agree that the judge is best placed to assess which defendants should be remitted for trial. The decision whether to prosecute is one for the prosecutor, applying the full Code Test. However, if it is considered appropriate to impose judicial oversight of this decision, a statutory obligation could be imposed on the Crown to apply to a judge for permission to remit particular cases.

Further Question 30 Do consultees agree that the Crown's power to remit defendants for trial upon their recovery should not be limited in time? (7.38)

YES: NO: OTHER:

We agree there should be no time limit imposed on the Crown's power to remit. The Crown would take into consideration the seriousness of the offence, the impact on the victim and the views of the victim when considering whether to remit defendants.

Further Question 31 Do consultees agree that where there has been a finding that a defendant had "done the act or made the omission," he or she should be entitled to request remission for trial on regaining capacity, where recovery is confirmed by the opinions of two experts competent to address the defendant's particular condition? (7.43)

YES: NO: OTHER:

While acknowledging the factors that give rise to this proposal we are concerned about the impact on victims and witnesses. Furthermore, if there is no time limit, a defendant could wait many years after being discharged from an order, to then apply for a retrial, either at the cost of distress to the victim or tactically, knowing that the victim is no longer available to give evidence.

Further Question 32 Do consultees consider that the rights of appeal vested in the unfit defendant should be exercisable by his or her legal representatives? (7.48)

YES: NO: OTHER:

We broadly agree with the LC's proposal; legal representatives should be able to exercise the defendant's rights of appeal, provided that they have ascertained instructions insofar as that is possible; proper reflection has been given as to the defendant's identifiable will and preferences; and that an appeal is not in conflict with the protection of the defendant's best interests.

PART 8: UNFITNESS TO PLEAD IN THE MAGISTRATES' AND YOUTH COURTS

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

YES: NO: OTHER:

The CPS does not believe that these cases should be restricted to only being before a district judge. Lay magistrates are supported by legally trained advisors. In addition, lay magistrates already deal with complex legal issues and expert evidence, including the imposition of hospital orders.

Further Question 34 Do consultees consider that, where the defendant's capacity is in doubt, it would be preferable for his or her capacity to be determined in the magistrates' court, and, if the defendant is found to lack capacity, that all further proceedings against him or her should remain in that court? (8.76)

YES: NO: OTHER:

The magistrates' court is able to determine capacity and facts and therefore, the simpler procedure is to allow the magistrates to undertake this exercise.

Further Question 35 (in the alternative) Do consultees alternatively consider that such a case should be sent to the Crown Court for determination of capacity and, if the defendant is found to lack capacity, that all further proceedings against him or her should remain in that court? (8.77)

YES: NO: OTHER:

As suggested in the Issues Paper, this process is cumbersome and likely to involve greater delay, as well as having resource implications.

Further Question 36 Do consultees agree that capacity procedures in the summary courts should be applicable for all criminal offences? (8.83)

AGREE: DISAGREE: OTHER:

A system that is consistent for all offences is desirable. Where there is a compelling mental health issue it should be part of the CPS's public interest consideration. Consequently, alleged offenders accused of minor criminal offences may be diverted from the court system. We agree therefore that it is not envisaged that an unmanageable number of findings of lack of capacity would result. Additionally, this proposal would make available the disposal of a supervision order for non-imprisonable matters.

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

AGREE: DISAGREE: OTHER:

Community orders would not be appropriate as well as impractical. Supervision orders are non-punitive and would be a proper way of disposing with non-imprisonable offences.

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

YES: NO: OTHER:

In agreement with the LC, this would allow experts and magistrates to factor into their assessments the accessible and more straightforward nature of proceedings in the summary courts.

Further Question 39 Do consultees consider that there are any adjustments to the test, or the procedure, for defendants lacking capacity that would materially improve the prospects of the court identifying those adults with capacity issues? (8.92)

AGREE: DISAGREE: OTHER:

We agree that adequate screening is needed to identify defendants with capacity issues in the summary courts. The process should avoid language such as 'mental health assessment to avoid labelling defendants, particularly young offenders. We have not identified any specific procedural adjustments to facilitate identification in addition to those suggested in the Issues Paper.

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

YES: NO: OTHER:

There is no logical basis for distinguishing the requirement for expert evidence in the different jurisdictions.

Further Question 41 Regardless of the position in the Crown Court, do consultees agree that, in the summary courts, the tribunal should have a discretion whether to proceed to the determination of facts hearing following a finding that the defendant lacks capacity? (8.102)

AGREE: DISAGREE: OTHER:

It is desirable that there is consistency with the Crown Court procedure. The opportunity to divert defendants out of court proceedings is even more relevant in the magistrates' court, because of the less serious nature of much of the offending and the lesser likelihood that a defendant will pose a danger to the public.

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

YES: NO: OTHER:

It is desirable to have consistency of procedures and available determinations between the Crown Court and the magistrates' court.

Further Question 43 Do consultees agree that there should be mandatory specialist training on issues relevant to trying youths, for all legal practitioners and members of the judiciary engaged in cases involving young defendants? (8.114)

YES: NO: OTHER:

We agree with the proposal. It will assist practitioners to identify defendants with capacity issues.

Further Question 44 Do consultees consider it appropriate for there to be initial screening for mental health issues for all defendants under 14 years of age, to be conducted by mental health professionals?. (8.119)

YES: NO: OTHER:

It reflects the consultation responses which raised which raised concern about the developmental maturity of very young defendants and the effect of this on their capacity. However, the question refers to "mental health issues"; capacity issues may be a more appropriate term. We would also sound a note of caution. A presumption that those under 14 who are accused of criminal offences require screening should be considered in the context of childhood: many children are likely to find this confusing, humiliating and offensive. That is particularly likely to be so where co-defendants fall outside the age range for presumptive screening. The operation of any such proposal will need great care and sensitivity.

Further Question 45 Do consultees agree that the provisional reformed test proposed for the Crown Court at paragraph 2.34 above is suitable for application to young defendants without adjustment? (8.126)

YES: NO: OTHER:

The test would be applicable and there is no reason to adjust it to take into account the age of the defendant nor jurisdiction of the youth court. we note in particular that the LC has assessed and compared it in relation to the Grisso test, described as "the most comprehensive formulation of the capacity to participate for juveniles". Its conclusion is that the proposed reformed test includes all elements of the Grisso test save two which do not appear to be so intrinsic to effective participation as to justify amending the proposed reformed test for the youth court.

Further Question 46 Do consultees agree that the summary courts should have the power to commit a defendant to the Crown Court for the imposition of a restriction order, but should not have the power to impose one themselves? (8.130)

YES: NO: OTHER:

The power for a summary court to impose a restriction order would not currently be in keeping with the general sentencing and disposals available to the summary courts. However, should summary courts receive enhanced powers of sentencing, advocated in the CJA 2003, this may have to be reviewed.

Further Question 47 Do consultees agree that the following disposals should be available to the magistrates' court on a finding that the defendant has "done the act or made the omission," or where a special determination has been arrived at:
 (a) a hospital order (without restriction);
 (b) a supervision order;
 (c) an absolute discharge? (8.135)

YES: NO: OTHER:

We agree that disposals should be equalised across all courts, so an absolute discharge should be an available option in the magistrates; court.

Further Question 48 Do consultees consider that the non-penal requirements of a youth rehabilitation order should be available as part of a youth supervision order, following a finding that a young person has "done the act or made the omission," or where a special determination has been arrived at? (8.138)

AGREE: DISAGREE: OTHER:

This could have a number of benefits which could be tailored to young defendants, such as an education requirement or a drug treatment requirement.

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

YES: NO: OTHER:

We have the same concerns that we raised in response to Question 31, above. These apply even more strongly to summary proceedings. While we acknowledge the factors that give rise to this proposal we are concerned about the impact on victims and witnesses.

Further Question 50 Do consultees agree that a new right of appeal should be created from any determination or disposal imposed under a reformed capacity procedure, which would mirror the right to appeal against conviction or sentence under section 108 Magistrates' Courts Act 1980? (8.143)

AGREE: DISAGREE: OTHER:

This would in effect be an extension of the right under section 45 of the Mental Health Act 1983, combined with Court's powers under section 48 of the Senior Courts Act 1981).

A Response to the Unfitness to Plead An Issues Paper 2 May 2014

The response to the above paper is structured around the questions summarised in Part 9 of the Report. The views expressed are those of the author alone and are restricted to the Crown Court setting.

The Legal Test

Q1. & Q2 I agree that a defendant should have capacity to make decisions and effectively participate in their trial and that these evaluations should be included in any legal test. I also agree that retaining and expanding John M to include a decision making capacity limb represents the most appropriate formulation.

Q3 I agree that incorporating the exhaustive list of decisions as outlined in 2.36 would assist in maintaining appropriate thresholds.

Q4 I agree there should be a reference to sufficient or satisfactory level of capacity for an effective participation. This would be a useful guide to those undertaking assessments to bear in mind when they formulate their opinion and it injects realism into the process.

Two questions arise with regard to intermediaries. Firstly might a Court find formally a satisfactory or sufficient level of capacity conditional on an intermediary attendance? This of course would have resource implications where the fair trial was tied to the presence of an intermediary.

Secondly, might it be argued that the fitness issue turns on an intermediary's report as it might be relevant to the determination of sufficient capacity? This would draw intermediaries into the area of expert witness in an unfitness process. Intermediaries have to date taken the view that they cannot act as expert witnesses as it compromises their neutrality.

In my view the capacity approach potentially changes the role of the intermediary as it is the intermediary who makes the recommendation for an intermediary, thereby implying that the defendant potentially lacks capacity without one.

Q5. A diagnostic threshold is not to the point as capacity is the issue rather than diagnosis.

Q6 I agree with a statutory assumption of fitness as it may be a potentially important protector of liberty.

Q7 If the defendant is not formally fitted by a court after a finding of unfitness, and they are not subject to a restriction order, and they are discharged from mental health services with no subsequent court process establishing their fitness, then this might have implications for any future arrest and investigation process. It could argued at the time of any future arrest they had been previously found unfit by a Court and that as the decision had never been reversed by any formal hearing or weighing of the evidence they remained unfit albeit in new proceedings.

Q8 Disaggregation has been a practical approach that has allowed defendants to reach guilty pleas when it is *speculated* they may not cope with a full blown trial. It is a process that is good for defendants as they can get on with treatment and working towards their eventual release as they do not then face returning months or years later with all the additional risk of relapse, with the inherent huge costs to the health budget and court budget.

It is good for victims and witnesses as they have a line drawn under the proceedings and are not left with facing a trial reoccurring years later.

If there is the additional use of intermediaries this would further facilitate the defendant in being able to appropriately instruct counsel. Disaggregation acknowledges that being unfit for a full blown trial may not indicate any lack of decisional capacity in reaching a considered position on any proposed plea. It makes the trial process compatible with UNCRPD because it upholds the autonomy of the defendant. There is the additional protection of Goodyear indications if a complicated sentencing process might emerge from the plea. This is my favoured position

Q9 This proposal may address my concerns around the proposal to dispense with disaggregation as it may allow sufficient flexibility for a defendant charged with homicide to enter a plea to diminished without a trial even if there are concerns around fitness issues which would impinge upon a trial process.

Q10. I agree

Q11 I agree

Special Measures

Q12 I agree with statutory entitlement to an intermediary. The role with regard to defendants is complicated and it is complicated because an intermediary may be doing more than assisting with communication, they may also be acting as emotional support, and proactively treating the defendant as defined by the MHA 1983 (see sec 145) during the trial process.

The involvement with the defendant may be far reaching in long trials. It's a role that can stretch into advocacy and therefore sustaining neutrality may be practically difficult.

It will mean that a Judge not only has Prosecution Counsel and Defence Counsel to deal with, but a third person who will potentially see their role as protecting the interests of the defendant by proactively advocating during the proceedings accordingly. Specific training for intermediaries assisting defendants may be necessary and thought might be given to the way that assisting a defendant is different from say assisting a witness. Judiciary and Counsel might usefully consider how lines of communication during the trial process are defined so that the neutrality of the intermediary during the trial process is protected and concerns raised by an intermediary are resolved through the Court's directions protecting the Court's autonomy.

As to the practicality of the proposal to use intermediaries this is more difficult as there are insufficient intermediaries for trials at the present time and they are increasingly being applied for by defence teams. The proposed changes will significantly increase the need for intermediaries. Consideration should be given to the range of people who may fall within the category of requiring an intermediary and what particular training and skills would be necessary for the intermediary to effectively assist the defendant.

Where there are significant communication difficulties a skilled speech and language therapist may be required, where emotional support is needed and there are no communication issues then a less skilled individual may suffice. Legislating will at least start to recognise the reality on the ground, i.e. that intermediaries are becoming a de facto aspect of a fair trial process for some defendants. Legislation in the longer term may lead to a more systematized approach to the use of intermediaries.

Are Intermediaries covered by legal privilege would be a further question?

Assessing the Capacity of the Accused

Q13. I agree the unfitness process could call on other experts, and I agree psychologists are the obvious other discipline to be included. Where there were differing disciplines addressing the issue of fitness in a single defendant, such as psychologists and psychiatrists, then the Court would need in the trial process to tease out the evidence / expertise that was most pertinent to the issues bearing on fitness. In my view the normal trial of issue process would be sufficient to examine evidence from differing experts going to the same issue of unfitness. At a practical level this already occurs where Psychologists and Psychiatrists may both be giving evidence in diminished cases as well as unfitness cases. Judges are therefore already well accustomed to determining trials of issue on the basis of evidence from differently qualified professionals.

If psychologists are used more extensively there will be an increase in costs as the assessment process is practically more time consuming than an assessment carried out by a psychiatrist. (It has been my experience that psychologist reports have been more costly.) If a capacity approach is adopted then there is likely to be an increase in the use of psychologists and of additional costs accordingly.

Extending the special expert role beyond psychologists would require a rigorous approach to training to ensure that robustness was not lost. Nurses and Social workers for example may be suitable professionals if given appropriate training. However there may be particular difficulties with nurses as they are working in medicine, and therefore unlikely to be more qualified than say psychiatrists or psychologists. This could be an issue where a nurse appeared for one party in a contested fitness case and a sec 12 approved psychiatrist or a clinical psychologist for the other party.

However a screening process could be implemented as the first stage of examining the issue of fitness where initial concerns had been raised around a defendant's mental health issues. Well trained clinical nurse specialists and social workers might fulfil a useful role in this scenario and offer useful advice to the Court as to whether a full fitness to plead assessment was necessary in a given case. I have on rare occasions provided such reports to Counsel and the Court. It has never prevented moving to the next stage of section 12 approved psychiatric assessments and reports on fitness to plead if parties felt they really needed to do so. On occasions it has obviated the need for such assessment.

Q14 I agree two special expert witnesses should be necessary to find lack of capacity/unfitness.

Q15 Where a defendant refuses an assessment and where there are concerns from the Court's point of view over the capacity of the defendant, if these were formally noted in the trial process, it might assist a seriously ill defendant at a later date to appeal in cases where further psychiatric evidence emerges that suggests unfitness at the time of the trial.

Procedure for the Unfit Accused

Q16 a delay of up to 12 months should be allowed for assessing and treating patients who are unfit. This would accommodate complex psychiatric cases facing serious criminal charges where it is desirable to allow for a longer time frame for the defendant to recover. A period of up to 12 months gives the Court greater flexibility. There will be court and health savings in the long run where defendants are helped to become fit in order to undergo trial.

Q17 Sec 36 should be extendable to up to 12 months and should also be useable in cases where the charge is murder.

This would give to Courts a greater degree of control in terms of case managing their trial processes, especially in homicide cases where they are often dependent on sec 48 MHA - the Secretary of State's powers of transfer from prison to hospital.

For example, if there were a change in legislation, early in proceedings a Judge or defence counsel could order a report addressing fitness and whether there needed to be a transfer from prison to hospital on an updated sec 36.

This report could be provided by the Responsible Clinician / NHS bed provider or an independent expert who later referred the case to the appropriate bed provider for a second opinion. This would speed up admission to hospital. It would also introduce greater flexibility into the system.

Currently, the Court in homicide cases, is left using sec 35 MHA 1983 to get someone into hospital for an assessment and the R/C is left using a sec 3 MHA civil section to add a treatment component alongside the sec 35 etc. Of course the sec 35 it can only last 12 weeks maximum and then one looks to the MOJ to agree sec 48 transfer if the defendant needs to remain in hospital. Cumbersome! It is also the fact that the MOJ will refuse some sec 48 medical recommendations where they believe that the Doctor has not made out the need for *urgent* transfer to hospital.

Q18 I agree the additional flexibility to allow for discontinuance would be useful in some cases and would save court costs. There would need to be some sort of criteria that would define what sorts of cases ought to be discontinued and which cases should proceed.

Q19 Civil powers under section 3 would be practically difficult as they require not simply the medical recommendation but also the agreement of an AMP 5.37. AMPs may react against the idea that they are there to provide a sec 3 MHA so a Court can divert from the Criminal Justice system. (Unless it is anticipated that the application by the AMP would be dispensed with and the Court could make such an order with simply two medical recommendations.)

The other thing to bear in mind is General Psychiatrists may well balk at a discontinuation via a sec 3 of a person who had committed a violent offence. They may feel they are being asked to manage the risks under civil section which are more appropriately managed under Part 3 of the Act by their forensic colleagues. A key to the process would be careful engagement with the treating team and finding out their views before proceeding. A psychiatric equivalent of Goodyear indication!

I think a psychiatric assessor as per 5.42 maybe feasible where you have a Court diversion team at the Crown Court. Civil sections and assessments for civil sections are undertaken at Magistrates' Court and people are diverted from Court where these teams exist and where

there is acute psychosis. In any given case there would be no guarantee of an outcome in terms of the civil section.

Q20, Q21, Q22

Considering these questions en bloc I would think that if the proposal summarised in Q20 becomes the norm then a jury should be able to consider the special verdict when the facts are initially considered (Q21). At the same time there should be available a two stage process where there is in the view of the Judge a case of exceptional prejudice.

Q23, 24 I think a jury should determine the facts. I think it is a conflict of interest for a Judge to determine the facts, who at the same time has found the defendant unfit, who at the same time determines who shall be the appointed Counsel at the trial, when also that Counsel at the trial, at the same time, is not required to follow the defendants preferences! (This would not look good in a terrorist case! Or any case where the defendant may in any event be paranoid about judicial processes!)

I agree counsel appointed by the Court should be free to over ride the defendant's preferences, this is especially important where defendants are highly psychotic and Counsel need discretion to protect their clients. It may also be in some cases that Counsel is at risk of violence from highly disturbed clients.

Disposals

Q25 I think a supervising officer should be required to act voluntarily in what are in effect community orders. I think those who may be considered as supervising officers should also include a broader group of mental health professionals such as Community Psychiatric Nurses, Occupational Therapists, Psychologists, for example and not just Social Workers. This would increase the pool of people who can undertake this role. Health and Social Care in any event are increasingly becoming a unitary system and this change would recognise this reality.

Q26 I think CTOs should be an option as long as they are imposed when the defendant is already under section. I would be hesitant about giving such far reaching powers to the Court if the person concerned had not been detained under section prior to the imposition of the orders. So where the person has been detained under section 3 and where at the time of the disposal they no longer require detention in hospital due to recovery then a disposal incorporating 1983 MHA 17E-F would make sense.

Q27 A court should be able to request an update on the fitness to plead of the supervised patient where the case is referred back by the mental health services because there has been a failure to cooperate as per the Court supervision order. If the defendant is found fit there would be the option of trying the case in the normal way.

Remission and Appeals

Q28,29 I see the real problem with this proposal as practicable, though in principle one cannot see why the Crown should not try a case where a non 37/41 defendant recovers. One can also see one may want to draw a line under minor cases through a direction by a Judge that continuance would not be in the public interest, though I assume the Crown could appeal the issue of public interest in exceptional circumstances.

My question is what would be the process for obtaining an updated report on fitness? Would it be a legal duty for the R/C to provide this? If so General Adult Psychiatrists with busy case loads may regard it as yet another additional burden if they are expected to keep the Crown / Court informed on the progress of the defendant's fitness. It is complicated by the fact that there may be a change of R/C. Modern mental health care is covered by differing specialist teams and therefore a patient may move between R/Cs. For example have a different R/C when in hospital compared with when in the community.

Current experience on sec 37/41 cases where the MOJ formally requests an update every year on the issue of fitness from the R/C suggests this is not straight forward. Reports on fitness can be ambivalent, discussions about what constitutes remission by the Secretary of State may arise etc. These difficulties will multiply with non sec 41 cases in my view and hard pressed criminal justice services and health services may find it difficult to deliver. It would require a civil service team similar to the Mental Health Case Work Section to manage these orders.

Q30 I agree the Crown should in principle be able to remit defendants without limit of time but only if defendants have a right of remission for trial.

Q31 I agree a defendant should also be able to request remission for trial.

Q32 I agree the defendants rights of appeal should be exercisable by his or her legal representative.

Charles de Lacy

Clinical Nurse Specialist

Central and Northwest London NHS Foundation Trust

July 10th 2014.



JUDICIARY OF
ENGLAND AND WALES

MASTER EGAN QC
REGISTRAR OF CRIMINAL APPEALS

Professor David Ormerod QC
The Law Commission
1st Floor Tower
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25th July 2014

Dear David

Unfitness to Plead – An Issues Paper

I was delighted to have the opportunity of participating at the Symposium which took place at the University of Leeds on 11 June and I now write to make some limited additional observations on the Further Questions raised in the Issues Paper. My observations are directed essentially at Further Question 32:

“Do consultees consider that the rights of appeal vested in the unfit defendant should be exercisable by his or her legal representatives?”

May I firstly observe that Rights of appeal, and the necessity for changes to those which currently exist, are dependent upon the decisions which are reached as to the changes which ought properly to be made to unfitness proceedings in the Crown Court – specifically, those areas addressed by Further Questions 12 to 24.

Although one of the primary objects of the unfitness procedure is to *protect* the unfit defendant from conviction, it goes without saying that a person found unfit and to have done some act which would otherwise have the consequence of criminal liability should be entitled to challenge those findings. And he or she must also have the right to challenge the disposal of the case made following those findings.

Appeals against the Judge's determination that the defendant is unfit are very rare indeed. Almost all applications lodged under s15, Criminal Appeal Act, 1968, relate to the jury's findings on the trial of the facts.

Three issues arise:

1. Whose is the right of appeal?

It may seem obvious that it is that of the unfit defendant but that raises a logical difficulty: how can a person who has been found lacking in capacity to participate in a conventional trial

(whatever the substantive test) be considered nonetheless to have the capacity to challenge what happened in the court below by formulating and instituting appellate proceedings?

There is no doubt that the “person appointed to put the case for the defence” has *authority* to lodge an application for leave to appeal (Antoine [1999] 2 Cr App R 225) but what happens if he or she determines not to do so or neglects or fails to do so when there may be arguable grounds? How does the unfit defendant (who, by definition, lacks decision-making capacity) prosecute an appeal in such circumstances? Perhaps the answer lies in endowing the Court of Appeal with an explicit power to appoint such a person (similar, perhaps, to the power to approve a person to carry on a deceased person’s appeal – s44A, Criminal Appeal Act, 1968)? But it should be noted that the Court has in one appeal (Norman [2008] EWCA Crim 1810) taken the view that it already has such power.

It must be remembered that whether or not a person is fit or unfit (whatever test is applied) may vary from time to time. Such is acknowledged by Further Question 16. Plainly, I would suggest, it would be inappropriate to remove from a defendant his right to apply for leave to appeal once he had recovered. But this must be viewed in the light of the matters canvassed by Further Questions 28 to 31 since an appeal might be rendered of no practical utility by the exercise of powers of remission for substantive trial (but see Brooks [2010] EWCA Crim 1684).

2. In which forum should the appeal proceed?

Presently, although there are statutory rights of appeal against both the findings of unfitness and of the facts and against the disposal ordered, it seems the Court of Appeal, Criminal Division, and the Administrative Court have a concurrent jurisdiction.

The reason is simple: s28(2), Senior Courts Act, 1981, only excludes from the supervisory jurisdiction of the High Court matters relating to trial on indictment – and the trial of the facts is not such a trial.

This has given rise to anomalies. As Ferris [2004] EWHC 1221 (Admin) shows, it could be disadvantageous to the unfit defendant. Had Mrs Ferris (or the person appointed on her behalf) exercised her right of appeal under s15, Criminal Appeal Act, 1968, instead of applying to the Divisional Court, she could not have been remitted to the Crown Court for any further hearing: CACD’s powers were limited to quashing the finding and directing her acquittal. However this is likely to be of academic interest as it seems to be agreed by everyone that that limitation on CACD’s powers should be removed.

Equally, although the prosecutor or the unfit defendant may apply to the Administrative Court, rights of appeal under the 1968 Act are confined solely to the unfit defendant. Possibly some decisions ought to be challengeable by either, for example the new decisions posited by the following Further Questions:

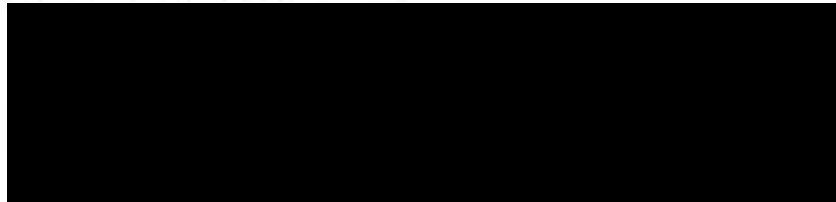
Further Question 16 (delay of determination to permit of the possibility of recovery)
Further Question 18 (discretion to proceed to the trial of the facts)

Further Question 29 (discretionary remission for trial).**3. Funding**

The costs incurred by the person appointed to put the case for the defence in the Crown Court are paid out of Central Funds without the need for any order of the Court (Part IIIA, Costs in Criminal Cases (General) Regulations, 1986). Antoine determined that the costs of an appeal by the person appointed should also be covered by Central Funds. The advantage of this to the unfit person is that his case is put without the need for any consideration of his means (and it is worth remembering that legal aid is no longer available to persons of (relatively modest) means).

But an order of the Court of Appeal is probably required – s16(4), Prosecution of Offences Act, 1985. And this can only be made if the appeal is successful. No clear statutory authority permitting the making of an order for payment of costs out of Central Funds where an application or appeal is unsuccessful has been identified. It should not be forgotten that there is now close scrutiny of public expenditure on defendants and applicants, particularly where the offences are gross or the Press regard the subject as undeserving. I am of the opinion that this is a lacuna in our powers and should be addressed.

I hope these observations are of assistance.



MICHAEL EGAN QC

Response of Faculty of Forensic and Legal Medicine

PART 2: THE LEGAL TEST

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

YES: NO: OTHER:

The Faculty agrees that a reformed test needs to address capacity in the context of entering a plea of guilty or not guilty; and separately, capacity to participate effectively in the trial process. However, FFLM draws attention to the potential benefits of triage in the context of the second domain. All adults are (and should continue) to be presumed to have capacity, unless the contrary is objectively demonstrated. Capacity is decision specific and context sensitive. Adults should be considered in three domains; as 1) Full Capacity; and thus able to a) plea and b) direct their defence. This right extends to making foolish or unwise decisions, or, indeed dishonest or malicious decisions, for which they bear full responsibility, and for which they may be challenged and held responsible. Secondly, 2) Incomplete Capacity: an adult who for example is able to express a plea, but who might not have the capacity to follow a trial in all its elements or challenge evidence unaided. We believe that those who legally represent the individual are best placed to advise on a case by case basis whether as a matter of fact, it is possible to offer a defence, or a plea of mitigation in relation to any guilty matter. There are two elements contained within this proposition. Firstly, that a defendant might be able to exercise capacity, by being supported by an intermediary, or by the use of simple language or aids to memory. Secondly, the defendant and his/her legal advisor may be able to agree instructions, which do not require the defendant to extend his or her powers beyond their capacity. The caveat must surely be that no person could be considered fit to stand trial, if a competent legal advisor informs the Court in good faith that instruction is impossible. Thirdly, Specific Lack of Capacity. In this instance, the individual lacks such capacity which would be reasonably necessary to ensure a fair trial, and measure of support fall short of remedying that deficiency.

Further Question 2 Do consultees consider that an effective participation test, framed around the *John M* criteria (set out at paragraph 2.3 above), with an additional decision-making capacity limb, represents the most appropriate formulation for such a combined legal test? Or do consultees favour another of the formulations set out at paragraph 2.28 above and, if so, why? (2.34)

YES: NO: OTHER:

The Faculty views with some concern, the implications of *John M* in respect of rational thought. We are of the view that there is a difference between characteristics such as stubbornness, bias, ignorance and indeed deliberate dishonesty which may be unreasonable, but still rational, (albeit through the particular lens of the defendant's self interest, prejudice or conceit), and irrationality, which, to a clinical mind, reveals a deficit in capacity. However, the threshold is high; and it appears to us to be for either defendant to demonstrate that at the relevant time, s/he had an objective, clinically recognised cause of irrationality, (similar to the test in the Coroners and Justice Act). Additionally, it seems to us prudent that the Court should also be able to raise the issue of the rationality of the defendant, particularly in those cases which have a hallmark of bizarre or vexatious conduct.

Further Question 3 Do consultees consider that incorporating an exhaustive list of decisions for which the defendant requires capacity into a reformed legal test for unfitness to plead would assist in maintaining the threshold for unfitness at a suitable level? (2.42)

AGREE: DISAGREE: OTHER:

The Faculty considers exhaustive lists to be both exhausting and potentially inexhaustible. We can foresee snowballing costs and complexities arising out of challenge and counter challenge, leading to costly and exhaustive proceedings, with little benefit to either the process of Justice or the needs of the parties to such matters, whether they be defendants, witnesses or victims.

We respectfully draw the attention of the Law Commission to the existing paradox of the CPS seeking reports on capacity, before making charging decisions, in the case of detained mental health patients and assaults on staff or minor criminal damage. It is impossible to issue a report on capacity, until a specific charge has been formulated. To do otherwise, would be to enter a fishing expedition.

Further Question 4 Do consultees consider that a reformed test should explicitly refer to a "satisfactory" or "sufficient" level of capacity for effective participation? (2.43)

YES: NO: OTHER:

The Faculty is of the view that the essence of the threshold of the test is fairness; and that as such it is contextual for each case. Where the defence contests fairness, **the Court** must surely be **satisfied**, that a **sufficient** level of participation has been achieved, the benefit of any doubt being afforded to the defendant.

Further Question 5 Do consultees agree that a diagnostic threshold would be unlikely to assist in maintaining the threshold of unfitness at a suitable level? (2.44)

YES: NO: OTHER:

The Faculty anticipates that none of the clinical bodies consulted would equally be able to set an absolute diagnostic threshold to such an issue; hence our view that it is desirable, wherever possible, for a single court appointed expert to assist the Court on matters of capacity. "Single" in this sense could equally refer to a panel of two experts, writing a joint report for the Court.

Further Question 6 Do consultees think that it would be helpful to have a statutory presumption that all defendants are fit to be tried until the contrary is proved? (2.46)

YES: NO: OTHER:

This is essential. To do otherwise would be to create a very contentious and difficult situation. All defendants over 18 years should be presumed to have capacity.

The Faculty notes and supports the views of our sister colleges, in respect of children's rights as defendants, and equally supports in principle, the raising of the age of criminal responsibility.

Further Question 7 Do consultees agree that a finding that a person lacks capacity shall remain valid unless and until the contrary is established on the basis of the evidence of two suitably qualified experts? (2.48)

YES: NO: OTHER:

Capacity is decision specific and context sensitive. We would respectfully refer the Law Commission to the cohort of decisions (mainly in complex obstetric cases) made in respect of cases where capacity is very compromised.

We view with caution the concept of "experts" in capacity, which seems to be a problematic area. The Faculty supports the concept of professionals with expertise in the issues surrounding capacity law and practice.

Further Question 8 Do consultees agree that disaggregation of capacity to plead and capacity for trial is undesirable? (2.59)

YES: NO: OTHER:

No. Please see above.

Further Question 9 Do consultees consider that making the test one of capacity for effective participation “in determination of the allegation(s) faced” would introduce a desirable element of context into the assessment? (2.68)

YES: NO: OTHER:

The Faculty believes this would be potentially helpful; and crystallise the issues. However, we would wish to ensure that this did not lead to convoluted charging decisions.

Further Question 10 Do consultees agree that the United Kingdom’s obligations under the UNCRPD and the ECHR can properly be accommodated in the manner outlined in paragraphs 2.80 to 2.82? (2.83)

YES: NO: OTHER:

The Faculty has always been at the forefront of supporting the rights of detained persons and the duties of those who hold them in custody, under the ECHR, and we would welcome any steps to strengthen those provisions.

However, the Faculty cannot at this stage comment on this particular issue, without recourse to specialist legal advice. We welcome strengthening of Human Rights; we are unable to determine at this point whether the effect of the changes would be so interpreted.

Further Question 11 Do consultees agree that the difficulties surrounding unrepresented defendants cannot be addressed by amendment to the legal test itself? (2.88)

YES: NO: OTHER:

The Faculty is of the view that the Courts should take positive and assertive action to protect the interests of mentally vulnerable defendants, by requiring reports from single court appointed experts, on matters of capacity in questionable circumstances.

PART 3: SPECIAL MEASURES

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

AGREE: DISAGREE: OTHER:

The Faculty would greatly welcome an extension of the registered intermediary scheme and recommends research to explore the best practice and evidence base. We are of the view that a wider range of intermediaries might be involved and recruited. However, we sound a note of caution in terms of cost, length and complexity of case management and the possibility of perceived stigma (juries may discount defendants who require such assistance).

We are certain that the proper implementation of such a scheme will cost many millions of pounds.

PART 4: ASSESSING THE CAPACITY OF THE ACCUSED

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

AGREE: DISAGREE: OTHER:

The Faculty, mindful of the *Winterwerp* criteria, believe that at least one registered medical practitioner must be involved in the process, but welcome the participation of other disciplines to the task.

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

AGREE: DISAGREE: OTHER:

There may be many cases where a single Court appointed expert could testify; subject to appeal by either the Crown or the Defence, as many cases are not at all contentious. For example, an elderly person with Alzheimer disease who crashes a car, may only require an opinion from their regular Old Age Psychiatrist.

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

AGREE: DISAGREE: OTHER:

The Faculty respectfully reminds the Law Commission of the provisions of s35 of the Mental Health Act, for this purpose; it would be helpful to extend the power to a requirement for an individual to attend a clinic or hospital for examination as a day patient, as well as the power to remand.

PART 5: PROCEDURE FOR THE UNFIT ACCUSED

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

YES: NO: OTHER:

The Faculty is aware of cases where capacity has recovered in days and other cases where capacity has returned after 4 or more years. Six months has no magical significance.

Where the alleged offence involves serious risk to life or limb (arson, serious interpersonal violence and serious sexual offences) the Faculty favours the retention power of recall to court at a later date.

Further Question 17 Do consultees consider that it would be appropriate to extend the maximum period of a section 36 MHA 1983 remand to hospital for treatment to 24 weeks in these circumstances? (5.25)

YES: NO: OTHER:

The Faculty believes that the process of assessment should proceed efficiently and that extended periods of assessment may simply delay decision making.

Further Question 18 Do consultees consider that the determination of facts procedure for the accused who lacks capacity should be made discretionary following the finding of unfitness, to allow for discontinuance of the proceedings, and diversion out of the criminal justice system into health or related services in appropriate cases? (5.33)

YES: NO: OTHER:

The Faculty favours compassionate diversion into mental health care where possible, but the caveat is that this must not become a disposal which places the public at risk, the victims in despair and the Courts in disrepute.

Further Question 19 Do consultees consider that public protection concerns arising in relation to an acquitted, but dangerous, unfit defendant could be adequately met by the use of civil powers under section 3 or 7 MHA 1983? (5.44)

YES: NO: OTHER:

The Faculty believes that a hospital order with restrictions is the appropriate disposal for a dangerous but incapacitated defendant.

Further Question 20 Do consultees consider that on a determination of the facts, any defence should be left to the jury, after discussion with the advocates, where there is evidence on which a jury properly directed might reasonably find the defence made out or the essential element of the offence unproven? (5.50)

YES: NO: OTHER:

This is a difficult question. The Faculty believes that the underpinning meme is justice, fairness and proportionality. We would support the prerogative of the trial judge to direct a jury in accordance with best practice and best evidence, whilst retaining jurisprudential responsibility towards a fair trial. The Faculty has great confidence in the Judiciary, particularly in this respect.

Further Question 21 Do consultees consider that the special verdict should be made available to the jury on their initial consideration of the facts? (5.54)

YES: NO: OTHER:

It appears rational, that the Jury should be able to make such a decision.

Further Question 22 Do consultees agree that it is not necessary for the judge to retain the discretion, in cases of exceptional prejudice, to order a second stage process for the consideration of the special verdict, in the manner envisaged in Provisional Proposal 9? (5.56)

YES: NO: OTHER:

The Faculty agree that the trial judge must retain that said discretion.

Further Question 23 Do consultees consider that the determination of facts in relation to a defendant found to lack capacity could be dealt with by a judge sitting without a jury? (5.60)

YES: NO: OTHER:

The Faculty support jury trial; but we can envisage many cases where the finding of fact and the application of a hospital order could be made, with so much less distress to all parties, particularly victims (who are often related to defendants in such cases).

Further Question 24 Do consultees agree that a representative, appointed by the court to put the case for the defence, should be entitled to act contrary to the defendant's identified will and preferences, where the representative considers that to do so is necessary in the defendant's best interests? (5.64)

YES: NO: OTHER:

The Faculty supports the "*best interests*" doctrine in the context of incapacitated defendants. However, best interests does not equate to merely "*best legal interests*", rather, a holistic interpretation, which would protect both the individual, and the public.

PART 6: DISPOSALS

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

YES: NO: OTHER:

The Faculty believes that the responsibility should lie with the relevant NHS Trust, to provide adequate and safe supervision for any such unfit person. This is in effect the current situation for Social Services Departments.

The Faculty strongly supports the right of individual clinicians to exercise clinical judgment, and not to be coerced into taking personal responsibility for dangerous patients, without the necessary resources and professional autonomy, to undertake the tasks properly. We believe current arrangements do put clinicians at risk, and so would question whether services are yet at a point where this is feasible.

Further Question 26 Do consultees consider that it would be appropriate and effective to expand the power of supervision orders under section 5 of the CP(I)A to include recall of a supervised person to hospital, as available under section 17E-F of the MHA 1983? (6.21)

YES: NO: OTHER:

The Faculty is of the view that the power of recall for CTO has very little real effect in the majority of cases, as beds are not readily available to enact recall.

However, in principle, it could be a valuable tool. An easier option would be to permit a CTO and s5 order to run simultaneously.

Further Question 27 Do consultees consider that there are any other enhancements of the powers available under supervision orders which would be beneficial? (6.22)

YES: NO: OTHER:

The Faculty would welcome statutory restrictions of the possession of weapons, including an absolute ban on the handling of firearms.

PART 7: REMISSION AND APPEALS

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

YES: NO: OTHER:

The Faculty envisages this will be used sparingly, but it is a potentially useful power.

Further Question 29 Do consultees consider that the power to remit an accused for trial should only be exercisable by the Crown where the judge has ruled, following the section 4A hearing, that it is in the public interest for remission to be available should the defendant regain capacity? (7.35)

YES: NO: OTHER:

This would reduce uncertainty and lift a cloud from the minds of genuine recovered patients.

Further Question 30 Do consultees agree that the Crown's power to remit defendants for trial upon their recovery should not be limited in time? (7.38)

YES: NO: OTHER:

Yes, there is no reason to have a time limit, on the most serious and dangerous of defendants.

Further Question 31 Do consultees agree that where there has been a finding that a defendant had "done the act or made the omission," he or she should be entitled to request remission for trial on regaining capacity, where recovery is confirmed by the opinions of two experts competent to address the defendant's particular condition? (7.43)

YES: NO: OTHER:

The Faculty would favour a case by case appeal system, to avoid repeated and querulous attempts to recast the past.

Further Question 32 Do consultees consider that the rights of appeal vested in the unfit defendant should be exercisable by his or her legal representatives? (7.48)

YES: NO: OTHER:

PART 8: UNFITNESS TO PLEAD IN THE MAGISTRATES' AND YOUTH COURTS

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

YES: NO: OTHER:

Further Question 34 Do consultees consider that, where the defendant's capacity is in doubt, it would be preferable for his or her capacity to be determined in the magistrates' court, and, if the defendant is found to lack capacity, that all further proceedings against him or her should remain in that court? (8.76)

YES: NO: OTHER:

The Faculty agrees that where possible, dealing with the issues at the lowest level of the Court system is desirable, but it may engender so unpredicted effects. For example the provisions of s 35 of the MHA are different for the lower and higher court and equally, the Magistrates Court has access to hospital orders via the *Kesteven* route.

Again, some cases may be better passed up to the Crown Court, but many could indeed be dealt with at the lower tier.

Further Question 35 (in the alternative) Do consultees alternatively consider that such a case should be sent to the Crown Court for determination of capacity and, if the defendant is found to lack capacity, that all further proceedings against him or her should remain in that court? (8.77)

YES: NO: OTHER:

Further Question 36 Do consultees agree that capacity procedures in the summary courts should be applicable for all criminal offences? (8.83)

AGREE: DISAGREE: OTHER:

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

AGREE: DISAGREE: OTHER:

The Faculty considers that, as in *R V Birch*, a hospital order is defined as not being a punishment, it can see no reason why, (if a hospital order is the most appropriate disposal in all of the circumstance) it should not apply in any event

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

YES: NO: OTHER:

Further Question 39 Do consultees consider that there are any adjustments to the test, or the procedure, for defendants lacking capacity that would materially improve the prospects of the court identifying those adults with capacity issues? (8.92)

AGREE: DISAGREE: OTHER:

The Faculty is of the view that the procedure will inevitably require refinement in practice, to achieve the aims of justice.

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

YES: NO: OTHER:

Further Question 41 Regardless of the position in the Crown Court, do consultees agree that, in the summary courts, the tribunal should have a discretion whether to proceed to the determination of facts hearing following a finding that the defendant lacks capacity? (8.102)

AGREE: DISAGREE: OTHER:

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

YES: NO: OTHER:

The presence of mental disorder and the connection between the act and the mental disorder needs exploration. In other words, the mere presence of mental disorder does not in any sense exculpate an offence.

Further Question 43 Do consultees agree that there should be mandatory specialist training on issues relevant to trying youths, for all legal practitioners and members of the judiciary engaged in cases involving young defendants? (8.114)

YES: NO: OTHER:

Further Question 44 Do consultees consider it appropriate for there to be initial screening for mental health issues for all defendants under 14 years of age, to be conducted by mental health professionals?. (8.119)

YES: NO: OTHER:

The Faculty notes with concern the number of youths brought to court under the age of 14 years. We support the examination of such children, by experienced and qualified child psychiatrists, assisted by a multi-disciplinary team. We do not support assessment in isolation by non-medically qualified staff.

Further Question 45 Do consultees agree that the provisional reformed test proposed for the Crown Court at paragraph 2.34 above is suitable for application to young defendants without adjustment? (8.126)

YES: NO: OTHER:

The Faculty is of the view that the above proposals are entirely unsuitable for application to persons under the age of 18 years, and that an entirely separate examination of the needs of children is required.

Further Question 46 Do consultees agree that the summary courts should have the power to commit a defendant to the Crown Court for the imposition of a restriction order, but should not have the power to impose one themselves? (8.130)

YES: NO: OTHER:

The Faculty considers that the assurances given by to Parliament in respect of the use of restriction orders at the inception of the Mental Health Bill in 1982 are still valid.

Further Question 47 Do consultees agree that the following disposals should be available to the magistrates' court on a finding that the defendant has "done the act or made the omission," or where a special determination has been arrived at:
 (a) a hospital order (without restriction);
 (b) a supervision order;
 (c) an absolute discharge? (8.135)

YES: NO: OTHER:

Further Question 48 Do consultees consider that the non-penal requirements of a youth rehabilitation order should be available as part of a youth supervision order, following a finding that a young person has “done the act or made the omission,” or where a special determination has been arrived at? (8.138)

AGREE: DISAGREE: OTHER:

The Faculty agrees, subject to our concerns, which we share with our sister colleges, in respect of the current circumstance of youth justice.

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

YES: NO: OTHER:

Further Question 50 Do consultees agree that a new right of appeal should be created from any determination or disposal imposed under a reformed capacity procedure, which would mirror the right to appeal against conviction or sentence under section 108 Magistrates’ Courts Act 1980? (8.143)

AGREE: DISAGREE: OTHER:

Response of Forensic Psychiatrists South West Yorkshire NHS Foundation Trust

PART 2: THE LEGAL TEST

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

YES: NO: OTHER:

We are of the view that when clinicians apply the current legal test they should also include an assessment of capacity to effectively participate in proceedings. We are of the opinion that a literal interpretation of the existing criteria, with regard only to an individual's intellectual capacity to understand those issues, cannot and should not be separated from the ability to make decisions based on that understanding. Any effective assessment of 'Fitness to Plead' should incorporate this and in fact many 'Fitness to Plead' assessments already, pragmatically, incorporate assessment of capacity despite the existing law.

Capacity has to be considered when assessing an individual's decision making ability, having said that, separating intellectual understanding from decision making capacity is somewhat artificial and we would have concerns that enshrining this artificial separation in statute would lead to confusion and uncertainty and almost certainly lead to an unnecessary reduction in the threshold for Unfitness. When we assess fitness to plead and articulate our findings we also comment on capacity.

We acknowledge that there is wide variation in applying this test currently, such that some clinicians have a limited understanding of the concept of 'Fitness to Plead' and that others adhere strictly to the literal, intellectual understanding of the criteria interpretation, favoured by the Courts (including the Court of Appeal) and do not include decision making capacity in their assessment of fitness to plead. We are of the view that this could be improved by producing guidance and training for those that undertake fitness to plead assessments.

Additional guidance could take the form of a Code of Practice accompanying any new statute, with written examples in order to illustrate how the John M criteria should be applied, which would incorporate an approach that required an ability to make decisions based on an adequate understanding of the current criteria.

In our experience, currently the legal test can be applied too stringently or literally such that an individual who has delusional beliefs that affect their global decision making ability can be found fit to plead when they should not have been as this clearly affected their ability to participate effectively in the trial process. We think that this is, and should remain, a matter for psychiatrists and the Court to interpret. In the lower courts in our experience capacity is pragmatically considered which we support.

We think that there is no need for changes to be made to the statutory criteria themselves and that the threshold for fitness to plead is at an appropriate level. We feel that the approach taken by the Court of Appeal in the past, in favouring the existing criteria is based on a sound understanding of the consequences of radical change which would inappropriately reduce the threshold which would have major cost and time implications. We would be concerned about this.

Further Question 2 Do consultees consider that an effective participation test, framed around the *John M* criteria (set out at paragraph 2.3 above), with an additional decision-making capacity limb, represents the most appropriate formulation for such a combined legal test? Or do consultees favour another of the formulations set out at paragraph 2.28 above and, if so, why? (2.34)

YES: NO: OTHER:

We do not think that it is necessary to add a decision-making capacity limb in statute, as capacity should be assessed if the current test is applied in a more sophisticated way.

We are concerned that there would be a risk of introducing vagueness if a generic capacity test were to be introduced as assessing capacity is decision specific.

We find the John M criteria very useful. In our experience the courts at a higher level do not recognise decision making capacity when considering fitness. Whilst we appreciate the sound reasoning behind this approach, we believe this is too literal an interpretation of the criteria.

Further Question 3 Do consultees consider that incorporating an exhaustive list of decisions for which the defendant requires capacity into a reformed legal test for unfitness to plead would assist in maintaining the threshold for unfitness at a suitable level? (2.42)

AGREE: DISAGREE: OTHER:

We think that an exhaustive list would be unworkable. In our experience a person may be fit to plead at the beginning of the trial but throughout the course of the trial they will be bombarded with information.

In some situations the Judge has asked if the Defendant would be capacitous in a particular situation, this can be useful as capacity is a decision specific issue.

We are of the view that if an exhaustive list of decisions were incorporated it would not necessarily follow that there would be uniformity in the use of such a list.

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

YES: NO: OTHER:

This could be made clear in the accompanying Code of Practice.

Further Question 5 Do consultees agree that a diagnostic threshold would be unlikely to assist in maintaining the threshold of unfitness at a suitable level? (2.44)

YES: NO: OTHER:

We are of the view that this issue should be brought in line with the Mental Capacity Act and that unless there is an impairment of the mind or brain the defendant cannot be unfit to plead. In most cases that psychiatrists are involved in, this impairment would be a mental disorder. If there is no reference to mental disorder or impairment it could lead to people who hold profound political or religious views being found unfit to plead. For example an individual whose religious or political views mean that they do not recognise the authority of the Court.

Further Question 6 Do consultees think that it would be helpful to have a statutory presumption that all defendants are fit to be tried until the contrary is proved? (2.46)

YES: NO: OTHER:

PART 3: SPECIAL MEASURES

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

AGREE: DISAGREE: OTHER:

We are of the view that it is desirable that defendants have a statutory entitlement to the support of a registered intermediary. It would be useful for their role to be clarified. We are of the view that the Judge should identify what the registered intermediary's role should be within proceedings.

PART 4: ASSESSING THE CAPACITY OF THE ACCUSED

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

AGREE: DISAGREE: OTHER:

We are of the view that it remains necessary that the unfitness test requires two medical practitioners, one approved under Section 12 for a number of reasons.

A medical practitioner assessing fitness to plead has knowledge of both mental disorder and treatment, such that they can find the defendant unfit now because of a mental disorder but that they will be fit in the future with treatment X. An allied health professional although they may have knowledge of mental disorder is not an expert in diagnosis and treatment.

Medical practitioners have a very stringent level of oversight and regulation of their practice via the GMC. No other allied health professional has a comparable overseeing body. This oversight ensures that the registered medical practitioner's practice meets a certain standard, thereby protecting the defendant and providing assurance of the probity of their practice.

In Court if one witness were a Section 12 approved, registered medical practitioner and the other witness were an allied health professional there may be a difference in the weighting given to their evidence given that a registered medical practitioner is an expert in mental disorder.

Separating assessment of fitness to plead from disposal would finally lead to duplication of assessment. For example, a psychologist may be able to comment on fitness to plead but would not be able to offer an opinion on disposal and a psychiatrist would then have to assess the same defendant. This duplication of assessment would evidently have a cost implication.

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

AGREE: DISAGREE: OTHER:

Although it would appear to be 'fairer' to have two witnesses, making this the minimum and extending it to the Magistrates Court would have enormous cost and time implications.

We are of the view that if the minimum requirement were to be reduced to one expert witness, that the expert witness would have to be instructed by the Court rather than the Defense or the Prosecution. Although a witnesses' duty remains to the Court at present it would be essential that the Court instructed the witness to protect the evidence. There would also be implications on the standard of proof if there were only one witness which would need clarification.

We also discussed the maximum number of witnesses. The cost of high profile cases can escalate quickly as the number of expert witnesses increases when both the prosecution and defence compete for 'strength of arms' without necessarily increasing the clarity of the case

PART 5: PROCEDURE FOR THE UNFIT ACCUSED

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

YES: NO: OTHER:

We are of the view that this is 'fair' and maximises the defendant's prospects of participating in their trial which is evidently desirable.

Further Question 17 Do consultees consider that it would be appropriate to extend the maximum period of a section 36 MHA 1983 remand to hospital for treatment to 24 weeks in these circumstances? (5.25)

YES: NO: OTHER:

This again would maximise the defendant's prospects of participating in their trial which is evidently desirable.

Further Question 19 Do consultees consider that public protection concerns arising in relation to an acquitted, but dangerous, unfit defendant could be adequately met by the use of civil powers under section 3 or 7 MHA 1983? (5.44)

YES: NO: OTHER:

We are of the view that should the defendant be in need of civil powers due to mental disorder at any point through the proceedings that this should be the course taken not purely on the basis of them being acquitted and dangerous.

We would be concerned if the threshold for fitness to plead were reduced such that defendants were being found unfit to plead but did not meet the criteria for detention in hospital.

Further Question 23 Do consultees consider that the determination of facts in relation to a defendant found to lack capacity could be dealt with by a judge sitting without a jury? (5.60)

YES: NO: OTHER:

We are of the view that a Jury should be used in the determination of the facts. Although determination of the facts does not lead to a 'conviction' this is in all but name, as the defendant would have to declare this finding and in some cases defendants are subject to the Sex Offenders Register. The Judge will also have seen all the papers which could prejudice their decision.

PART 6: DISPOSALS

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

YES: NO: OTHER:

We are of the view that placing a requirement or duty on a local authority or probation to undertake supervision would strengthen the current provisions. This could operate in a manner similar to the duties placed on organisations to co-operate in Multi Agency Public Protection Arrangements (MAPPA).

Further Question 26 Do consultees consider that it would be appropriate and effective to expand the power of supervision orders under section 5 of the CP(I)A to include recall of a supervised person to hospital, as available under section 17E-F of the MHA 1983? (6.21)

YES: NO: OTHER:

We are of the view that defendants should not be made subject to supervision and recall if they have never been detained in hospital. Defendants who have not required detention in hospital do not require such stringent supervision.

In order to justify the power of recall to hospital it is essential that it can be demonstrated that an individual's mental illness is of a nature to require recall to hospital. Without ever having required admission to hospital there is no evidence that the individual's illness is of such a nature. We would be very concerned if defendants were being subject to the power of recall and supervision in this manner. The primary function of such powers is to protect the individual from harm and treat their illness, without an established nature of mental illness this would be an overly severe option that would in essence use recall to hospital purely for public protection.

Further Question 27 Do consultees consider that there are any other enhancements of the powers available under supervision orders which would be beneficial? (6.22)

YES: NO: OTHER:

It may be of benefit to consider whether individuals who are found unfit could be subject to the provisions of MAPPA under their supervision order. A multi agency approach may aid the supervision of such individuals.

Response of Rudi Fortson QC, Legal Practitioner (Barrister and Visiting Professor of Law, Queen Mary University of London)

PART 2: THE LEGAL TEST

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

YES: NO: OTHER:
Subject to my answer to Q2

Further Question 2 Do consultees consider that an effective participation test, framed around the *John M* criteria (set out at paragraph 2.3 above), with an additional decision-making capacity limb, represents the most appropriate formulation for such a combined legal test? Or do consultees favour another of the formulations set out at paragraph 2.28 above and, if so, why? (2.34)

YES: NO: OTHER:

It is questionable whether it is prudent to specify as an element of the legal test for 'unfitness to plead', the defendant's 'decision-making capacity' given (a) the absence of a workable psychiatric test for these purposes, (b) that the precise meaning of 'decision-making capacity' is obscure, and (c) that 'decision-making capacity' may already be implicitly required under the Pritchard test (as updated by John M). Although those two judicial decisions are not the 'last word' on unfitness to plead, they do provide the most satisfactory starting point for reform. It is submitted that there is no reason to go further than to specify that the Court, when considering the Pritchard/John M criteria, may have regard of the extent to which the defendant's capabilities are deficient in the areas of (a) understanding, (b) appreciation, (c) reasoning, and (d) expressing a choice (e.g., the ACED factors, but applying an ordinary meaning to each) when determining whether or not the defendant is unfit to plead.

Further Question 3 Do consultees consider that incorporating an exhaustive list of decisions for which the defendant requires capacity into a reformed legal test for unfitness to plead would assist in maintaining the threshold for unfitness at a suitable level? (2.42)

AGREE: DISAGREE: OTHER:

It is submitted that a slightly modified version of section 53F of the Criminal Procedure (Scotland) Act 1995 provides a workable test for determining fitness to plead. Section 53F encapsulates the Pritchard criteria as updated in John M. The section includes physical as well as mental conditions. Subsection (2)(b) is an important provision for at least two reasons. First, one cannot accurately predict all circumstances that will confront a Court where the issue of unfitness to plead is raised. Secondly, the subsection provides scope for advances in psychiatry and medicine to be accommodated within the legal test.

Further Question 4 Do consultees consider that a reformed test should explicitly refer to a "satisfactory" or "sufficient" level of capacity for effective participation? (2.43)

YES: NO: OTHER:

I have mixed feelings about adding qualifiers of this sort. Of the two, I prefer "sufficient" noting that the judgment of the ECtHR in SC v UK refers to D having a "broad understanding" of the nature of the trial process. That said, participation is either effective or it is not. Standards may change as reflected in judgments handed down by either the domestic courts or by the ECtHR or under treaty.

Further Question 5 Do consultees agree that a diagnostic threshold would be unlikely to assist in maintaining the threshold of unfitness at a suitable level? (2.44)

YES: NO: OTHER:

Further Question 6 Do consultees think that it would be helpful to have a statutory presumption that all defendants are fit to be tried until the contrary is proved? (2.46)

YES: NO: OTHER:

Further Question 7 Do consultees agree that a finding that a person lacks capacity shall remain valid unless and until the contrary is established on the basis of the evidence of two suitably qualified experts? (2.48)

YES: NO: OTHER:

I answer "yes" with this clarification.

There should be evidence from two experts, competent to speak to the defendant's condition, that he or she no longer lacks capacity. However, reaching such a decision "on the BASIS of the evidence of two....experts" is NOT the same as saying that the court shall not make that decision UNLESS two experts are of the opinion that D no longer lacks capacity. It is for the judge to make the decision whether D is fit to plead or not - informed by the evidence of two experts.

Further Question 8 Do consultees agree that disaggregation of capacity to plead and capacity for trial is undesirable? (2.59)

YES: NO: OTHER:

One needs to be careful here. A requirement that a trial be broken down fully, with the issue of unfitness to plead being considered in relation to each stage, would (even if the test were framed as a unitary test) would be undesirable and unnecessary. However, that is not to say that there may not be cases where D was fit to stand trial but later becomes unfit at the date of (eg) confiscation proceedings. There must always be the power to keep matters under review in accordance with basic principles of a fair trial.

Further Question 9 Do consultees consider that making the test one of capacity for effective participation "in determination of the allegation(s) faced" would introduce a desirable element of context into the assessment? (2.68)

YES: NO: OTHER:

I see no difficulty with the words "in criminal proceedings" which is all embracing including proceedings that are essentially civil in nature but heard in "criminal proceedings".

Further Question 10 Do consultees agree that the United Kingdom's obligations under the UNCRPD and the ECHR can properly be accommodated in the manner outlined in paragraphs 2.80 to 2.82? (2.83)

YES: NO: OTHER:

Yes, provided that the statute makes it clear that the Court must have regard to the rights, will and preferences of the defendant. The overarching consideration is that a defendant has a fair trial. There are also wider interests of justice considerations. However, some brake is needed to avoid shifting too far to what is sometimes styled a "guardian substituted decision making paradigm". There would be obvious policy and practical difficulties about vesting judges with (e.g.) a discretionary power to appoint a legal representative for a defendant whom the court feels is acting unwisely or irrationally by reason of poor decision-making skills. The most that a court can do is to give such defendants as much support and advice as it feels that it properly can do

Further Question 11 Do consultees agree that the difficulties surrounding unrepresented defendants cannot be addressed by amendment to the legal test itself? (2.88)

YES: NO: OTHER:

PART 3: SPECIAL MEASURES

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

AGREE: DISAGREE: OTHER:

Issues Paper: 3.20 --- agree.

PART 4: ASSESSING THE CAPACITY OF THE ACCUSED

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

AGREE: DISAGREE: OTHER:

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

AGREE: DISAGREE: OTHER:

I answer "yes" with this clarification.

There should be evidence from two experts, competent to speak to the defendant's condition, that he or she lacks capacity to be fit to plead. However, reaching such a decision "on the BASIS of the evidence of two....experts" is NOT the same as saying that the court shall not make that decision UNLESS two experts are of the opinion that D lacks capacity. It is for the judge to make the decision whether D is fit to plead or not - informed by the evidence of two experts.

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

AGREE: DISAGREE: OTHER:

All that the Court and practitioners can do is to give as much encouragement to D as possible to undergo an assessment, explaining the reasons for doing so, and giving D as much support as is reasonably practicable.

PART 5: PROCEDURE FOR THE UNFIT ACCUSED

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

YES: NO: OTHER:

It is in everyone's interest that proceedings are tried in the usual way if at all practicable consistent with the principles of a fair trial.

Further Question 17 Do consultees consider that it would be appropriate to extend the maximum period of a section 36 MHA 1983 remand to hospital for treatment to 24 weeks in these circumstances? (5.25)

YES: NO: OTHER:

Further Question 18 Do consultees consider that the determination of facts procedure for the accused who lacks capacity should be made discretionary following the finding of unfitness, to allow for discontinuance of the proceedings, and diversion out of the criminal justice system into health or related services in appropriate cases? (5.33)

YES: NO: OTHER:

Further Question 19 Do consultees consider that public protection concerns arising in relation to an acquitted, but dangerous, unfit defendant could be adequately met by the use of civil powers under section 3 or 7 MHA 1983? (5.44)

YES: NO: OTHER:

I have no experience of s.3 or s.7 orders to be able to say from a practitioner's perspective whether the exercise of such powers would be preferable to a special verdict procedure. However, civil powers do not always carry greater procedural safeguards for the person against whom they are exercised than would be available to a defendant in criminal proceedings. Presumably, even if an acquittal was not qualified (for whatever reason) the powers under s.3 and s7 would remain available to those empowered to exercise them.

Further Question 20 Do consultees consider that on a determination of the facts, any defence should be left to the jury, after discussion with the advocates, where there is evidence on which a jury properly directed might reasonably find the defence made out or the essential element of the offence unproven? (5.50)

YES: NO: OTHER:

Yes. It is reasonable to expect that acquittals that are both erroneous and profoundly contrary to public interest (following a determination of facts under a revised s.4A-type procedure) would be relatively rare. In the event that experience shows this not to be the case, it would be open to the Legislature to consider the introduction of rules similar to those enacted in Part 10 of the CJA 2003.

Further Question 21 Do consultees consider that the special verdict should be made available to the jury on their initial consideration of the facts? (5.54)

YES: NO: OTHER:

Further Question 22 Do consultees agree that it is not necessary for the judge to retain the discretion, in cases of exceptional prejudice, to order a second stage process for the consideration of the special verdict, in the manner envisaged in Provisional Proposal 9? (5.56)

YES: NO: OTHER:

I agree with the Commission that it is difficult to give examples where there would be exceptional prejudice that warrants a second stage process (Issues Paper 5.55). However, life has a tendency to expose anticipation as misplaced optimism.

Further Question 23 Do consultees consider that the determination of facts in relation to a defendant found to lack capacity could be dealt with by a judge sitting without a jury? (5.60)

YES: NO: OTHER:

The competence of judges to determine questions of fact is not in doubt. What is in issue is whether it is appropriate to remove trial by jury (which, under the Commission's proposals, would entitle fact-finders to have regard to a wider range of issues/defence than at present) from a defendant who is unfit to plead. A defendant who later recovers may seek to remit for trial (if such a power is afforded to him or her) on the basis that the result would or may have been different had the matter been tried in the ordinary way by a jury. It is doubtful that such a basis for remission for trial would succeed.

Further Question 24 Do consultees agree that a representative, appointed by the court to put the case for the defence, should be entitled to act contrary to the defendant's identified will and preferences, where the representative considers that to do so is necessary in the defendant's best interests? (5.64)

YES: NO: OTHER:

It is submitted that in s.4A-type proceedings, a legal representative is not to be lightly criticised for taking decisions on a defendant's behalf which, while typically respecting the 'supported decision-making paradigm', may exceptionally (in the exercise of competent judgment) be contrary to the will of a defendant in order to avert injustice to him or her. In medicine there are often defined and well-established correct procedures for carrying out (e.g.) surgery, but the course of a trial is rarely routine or even predictable. There are professional standards which lawyers must observe. However, a legal representative is not incompetent merely because he or she puts forward the client's version of events that may not only be implausible, but absurd. Equally, a legal representative is unlikely to be held to have acted unprofessionally by taking a decision which was well-reasoned, notwithstanding that the client preferred a different decision to have been made. In each case, the matter is one of judgment exercised by the practitioner 'in the field', and there is no guarantee that two competent legal representatives – both acting correctly – would have made the same decision. Accordingly, "the State" needs to be careful not to mandate the terms on which it regards a defendant as being "properly represented".

PART 6: DISPOSALS

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

YES: NO: OTHER:

Further Question 26 Do consultees consider that it would be appropriate and effective to expand the power of supervision orders under section 5 of the CP(I)A to include recall of a supervised person to hospital, as available under section 17E-F of the MHA 1983? (6.21)

YES: NO: OTHER:

This is an issue beyond my expertise.

PART 7: REMISSION AND APPEALS

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

YES: NO: OTHER:

Granting a general power to remit a defendant for trial would introduce into the process a degree of uncertainty for defendants, witnesses, and victims, in terms of when they can expect 'closure' in relation to the offence charged. In practice, requests made by the Crown to remit for trial are likely to concern the alleged commission of a serious offence by the defendant. Accordingly, in order to introduce a degree of predictability into the process, a case can be made for restricting requests to remit either (a) to offences specified by statute (e.g., specified "serious offences", subject to modification by Statutory Instrument), or (b) by way of guidelines in which criteria for remission for trial at the Crown's request are spelt out. The former is to be preferred as it provides a degree of independent oversight and control.

Further Question 29 Do consultees consider that the power to remit an accused for trial should only be exercisable by the Crown where the judge has ruled, following the section 4A hearing, that it is in the public interest for remission to be available should the defendant regain capacity? (7.35)

YES: NO: OTHER:

And see the answer to Q28.

Further Question 30 Do consultees agree that the Crown's power to remit defendants for trial upon their recovery should not be limited in time? (7.38)

YES: NO: OTHER:

Delay in making the application to remit (or lapse of time between the initial trial / determination of the facts and the application to remit for trial, is a relevant factor when the Court is considering whether remission for trial is in the interests of justice.

Further Question 31 Do consultees agree that where there has been a finding that a defendant had "done the act or made the omission," he or she should be entitled to request remission for trial on regaining capacity, where recovery is confirmed by the opinions of two experts competent to address the defendant's particular condition? (7.43)

YES: NO: OTHER:

Further Question 32 Do consultees consider that the rights of appeal vested in the unfit defendant should be exercisable by his or her legal representatives? (7.48)

YES: NO: OTHER:

PART 8: UNFITNESS TO PLEAD IN THE MAGISTRATES' AND YOUTH COURTS

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

YES: NO: OTHER:

NO REPRESENTATIONS ARE MADE BY ME IN RESPECT OF PART 6 BECAUSE 'UTP' IN THESE COURTS IS BEYOND MY PROFESSIONAL EXPERIENCE.

OTHER COMMENTS

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

Detailed elaboration of the above responses will be found in a Chapter that I have written entitled "Reforming Unfitness to Plead for Adults in the Crown Court - A practitioner's perspective" -- publication pending - 'Mental Condition Defences and the Criminal Justice System; Perspectives from Law and Medicine' (Ben Livings, Alan Reed and Nicola Wake (eds)., Cambridge Scholars Publishing).

Response of Karina Hepworth, Health Professional (Senior Nurse Specialist, Learning Disabilities)

PART 2: THE LEGAL TEST

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

YES: NO: OTHER:

Further Question 2 Do consultees consider that an effective participation test, framed around the *John M* criteria (set out at paragraph 2.3 above), with an additional decision-making capacity limb, represents the most appropriate formulation for such a combined legal test? Or do consultees favour another of the formulations set out at paragraph 2.28 above and, if so, why? (2.34)

YES: NO: OTHER:

Further Question 3 Do consultees consider that incorporating an exhaustive list of decisions for which the defendant requires capacity into a reformed legal test for unfitness to plead would assist in maintaining the threshold for unfitness at a suitable level? (2.42)

AGREE: DISAGREE: OTHER:

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

YES: NO: OTHER:

Further Question 5 Do consultees agree that a diagnostic threshold would be unlikely to assist in maintaining the threshold of unfitness at a suitable level? (2.44)

YES: NO: OTHER:

Further Question 6 Do consultees think that it would be helpful to have a statutory presumption that all defendants are fit to be tried until the contrary is proved? (2.46)

YES: NO: OTHER:

Further Question 7 Do consultees agree that a finding that a person lacks capacity shall remain valid unless and until the contrary is established on the basis of the evidence of two suitably qualified experts? (2.48)

YES: NO: OTHER:

Further Question 8 Do consultees agree that disaggregation of capacity to plead and capacity for trial is undesirable? (2.59)

YES: NO: OTHER:

Further Question 9 Do consultees consider that making the test one of capacity for effective participation “in determination of the allegation(s) faced” would introduce a desirable element of context into the assessment? (2.68)

YES: NO: OTHER:

Further Question 10 Do consultees agree that the United Kingdom’s obligations under the UNCRPD and the ECHR can properly be accommodated in the manner outlined in paragraphs 2.80 to 2.82? (2.83)

YES: NO: OTHER:

Further Question 11 Do consultees agree that the difficulties surrounding unrepresented defendants cannot be addressed by amendment to the legal test itself? (2.88)

YES: NO: OTHER:

PART 3: SPECIAL MEASURES

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

AGREE: DISAGREE: OTHER:

PART 4: ASSESSING THE CAPACITY OF THE ACCUSED

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

AGREE: DISAGREE: OTHER:

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

AGREE: DISAGREE: OTHER:

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

AGREE: DISAGREE: OTHER:

This is a difficult area, I have recently managed to commission an assessment prior to court as I was concerned about the person's capacity, he refused to attend the appointments despite everyone's best efforts to get him there. He is now being assessed in custody by the health/CAMHS team. Unless a person is seriously mentally ill in which there are alternative pathways to go down you cannot force the assessment on someone who refuses.

PART 5: PROCEDURE FOR THE UNFIT ACCUSED

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

YES: NO: OTHER:

That time would be useful in being able to assess more fully the person's needs and if treatment is needed say if the person has an undiagnosed medical condition then following treatment the person may be able to regain capacity to be tried.

Further Question 17 Do consultees consider that it would be appropriate to extend the maximum period of a section 36 MHA 1983 remand to hospital for treatment to 24 weeks in these circumstances? (5.25)

YES: NO: OTHER:

It can take some time to be able to assess the person's needs fully. Initial presentation may not give the overall picture and in my experience teasing out mental health, learning disability, neurological/head injury or physical health needs takes many appointments. It can also take time to access appropriate records which will add to the assessment formulation.

Further Question 18 Do consultees consider that the determination of facts procedure for the accused who lacks capacity should be made discretionary following the finding of unfitness, to allow for discontinuance of the proceedings, and diversion out of the criminal justice system into health or related services in appropriate cases? (5.33)

YES: NO: OTHER:

Further Question 19 Do consultees consider that public protection concerns arising in relation to an acquitted, but dangerous, unfit defendant could be adequately met by the use of civil powers under section 3 or 7 MHA 1983? (5.44)

YES: NO: OTHER:
sorry not sure given my level of knowledge

Further Question 20 Do consultees consider that on a determination of the facts, any defence should be left to the jury, after discussion with the advocates, where there is evidence on which a jury properly directed might reasonably find the defence made out or the essential element of the offence unproven? (5.50)

YES: NO: OTHER:

Further Question 21 Do consultees consider that the special verdict should be made available to the jury on their initial consideration of the facts? (5.54)

YES: NO: OTHER:

Further Question 22 Do consultees agree that it is not necessary for the judge to retain the discretion, in cases of exceptional prejudice, to order a second stage process for the consideration of the special verdict, in the manner envisaged in Provisional Proposal 9? (5.56)

YES: NO: OTHER:

Further Question 23 Do consultees consider that the determination of facts in relation to a defendant found to lack capacity could be dealt with by a judge sitting without a jury? (5.60)

YES: NO: OTHER:

Further Question 24 Do consultees agree that a representative, appointed by the court to put the case for the defence, should be entitled to act contrary to the defendant's identified will and preferences, where the representative considers that to do so is necessary in the defendant's best interests? (5.64)

YES: NO: OTHER:

PART 6: DISPOSALS

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

YES: NO: OTHER:

Further Question 26 Do consultees consider that it would be appropriate and effective to expand the power of supervision orders under section 5 of the CP(I)A to include recall of a supervised person to hospital, as available under section 17E-F of the MHA 1983? (6.21)

YES: NO: OTHER:

Further Question 27 Do consultees consider that there are any other enhancements of the powers available under supervision orders which would be beneficial? (6.22)

YES: NO: OTHER:

PART 7: REMISSION AND APPEALS

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

YES: NO: OTHER:

Further Question 29 Do consultees consider that the power to remit an accused for trial should only be exercisable by the Crown where the judge has ruled, following the section 4A hearing, that it is in the public interest for remission to be available should the defendant regain capacity? (7.35)

YES: NO: OTHER:

Further Question 30 Do consultees agree that the Crown's power to remit defendants for trial upon their recovery should not be limited in time? (7.38)

YES: NO: OTHER:

Further Question 31 Do consultees agree that where there has been a finding that a defendant had "done the act or made the omission," he or she should be entitled to request remission for trial on regaining capacity, where recovery is confirmed by the opinions of two experts competent to address the defendant's particular condition? (7.43)

YES: NO: OTHER:

Further Question 32 Do consultees consider that the rights of appeal vested in the unfit defendant should be exercisable by his or her legal representatives? (7.48)

YES: NO: OTHER:

PART 8: UNFITNESS TO PLEAD IN THE MAGISTRATES' AND YOUTH COURTS

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

YES: NO: OTHER:

Further Question 34 Do consultees consider that, where the defendant's capacity is in doubt, it would be preferable for his or her capacity to be determined in the magistrates' court, and, if the defendant is found to lack capacity, that all further proceedings against him or her should remain in that court? (8.76)

YES: NO: OTHER:

Further Question 35 (in the alternative) Do consultees alternatively consider that such a case should be sent to the Crown Court for determination of capacity and, if the defendant is found to lack capacity, that all further proceedings against him or her should remain in that court? (8.77)

YES: NO: OTHER:

Further Question 36 Do consultees agree that capacity procedures in the summary courts should be applicable for all criminal offences? (8.83)

AGREE: DISAGREE: OTHER:

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

AGREE: DISAGREE: OTHER:

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

YES: NO: OTHER:

Further Question 39 Do consultees consider that there are any adjustments to the test, or the procedure, for defendants lacking capacity that would materially improve the prospects of the court identifying those adults with capacity issues? (8.92)

AGREE: DISAGREE: OTHER:

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

YES: NO: OTHER:

Further Question 41 Regardless of the position in the Crown Court, do consultees agree that, in the summary courts, the tribunal should have a discretion whether to proceed to the determination of facts hearing following a finding that the defendant lacks capacity? (8.102)

AGREE: DISAGREE: OTHER:

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

YES: NO: OTHER:

Further Question 43 Do consultees agree that there should be mandatory specialist training on issues relevant to trying youths, for all legal practitioners and members of the judiciary engaged in cases involving young defendants? (8.114)

YES: NO: OTHER:

Further Question 44 Do consultees consider it appropriate for there to be initial screening for mental health issues for all defendants under 14 years of age, to be conducted by mental health professionals?. (8.119)

YES: NO: OTHER:

mental health AND learning disabilities, they are two distinct areas of practice and expertise and in my experience there would be more likely higher numbers regarding learning disabilities than mental health needs.

Further Question 45 Do consultees agree that the provisional reformed test proposed for the Crown Court at paragraph 2.34 above is suitable for application to young defendants without adjustment? (8.126)

YES: NO: OTHER:

young people's needs and presentations are very different to adult presentations, chronological age and development will need to be considered in context however the reformed test should be suitable for young defendants.

Further Question 46 Do consultees agree that the summary courts should have the power to commit a defendant to the Crown Court for the imposition of a restriction order, but should not have the power to impose one themselves? (8.130)

YES: NO: OTHER:

Further Question 47 Do consultees agree that the following disposals should be available to the magistrates' court on a finding that the defendant has "done the act or made the omission," or where a special determination has been arrived at:
 (a) a hospital order (without restriction);
 (b) a supervision order;
 (c) an absolute discharge? (8.135)

YES: NO: OTHER:

Further Question 48 Do consultees consider that the non-penal requirements of a youth rehabilitation order should be available as part of a youth supervision order, following a finding that a young person has "done the act or made the omission," or where a special determination has been arrived at? (8.138)

AGREE: DISAGREE: OTHER:

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

YES: NO: OTHER:

Further Question 50 Do consultees agree that a new right of appeal should be created from any determination or disposal imposed under a reformed capacity procedure, which would mirror the right to appeal against conviction or sentence under section 108 Magistrates' Courts Act 1980? (8.143)

AGREE: DISAGREE: OTHER:

OTHER COMMENTS

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

I am going to highlight a case [REDACTED]

[REDACTED] a young person aged [REDACTED]

[REDACTED] assaulted a member of his family [REDACTED]
[REDACTED]

Managers in the YOT were concerned about his welfare needs following concerns from the appropriate adult which resulted in the YOT providing a service to him. Referrals were made to ourselves as health professionals regarding the possibility of mental health and or learning disability needs. Over several appointments we considered that there were probably both mental health needs and a significant learning disability, we used the Five factor model, the Hayes Ability Screening Index and or skills as nurses to come to this conclusion. We were extremely concerned about his presentation and consequently his ability to have any understanding of the CJ process.

We looked to our commissioners for funding to find the appropriate person to assess these needs further and managed to find a psychologist with expertise in forensic learning disability services. By this time [REDACTED] [REDACTED] was picked up by CAMHS [REDACTED] they were unable to do the assessment we hoped would consider [REDACTED]'s capacity so went ahead with the commissioned assessment.

[REDACTED] Further assessments resulted in the outcome that [REDACTED] is clearly unable to understand why he is in the CJS and would need a specialist placement.

The solicitor requested a psychiatric assessment, I was concerned that [REDACTED] had had several assessments, he clearly was confused by them all and wondered why he had so many appointments to attend. If the assessment we had commissioned could be used then the psychiatric report wouldn't have been needed and would have saved [REDACTED] the anxiety of repeated assessments and would have been less expensive to complete.

Normally we would not have met [REDACTED] until he had come through on an order, what would have happened to him if we hadn't seen him? Maybe the solicitor would have recognised that there was something wrong or he may just have been seen as difficult or reticent.

One of the other difficulties has been how we ethically engage in this case especially when [REDACTED] is not on an order and he was asking why he needed to attend appointments.

This case is one of many young people we see with complex overlapping needs, it takes time to unravel them and I worry that a one off screening will not have favourable outcomes though I know we need to start somewhere. Professionals also need access to information systems to help have an understanding of need and previous involvement in services.

UNFITNESS TO PLEAD:

RESPONSE TO ISSUES PAPER

PART 2: THE LEGAL TEST

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

Further Question 2: Do consultees consider that an effective participation test, framed around the *John M* criteria (set out at paragraph 2.3 above), with an additional decision-making capacity limb, represents the most appropriate formulation for such a combined legal test? Or do consultees favour another of the formulations set out at paragraph 2.8 above and, if so, why?

RESPONSE:

The aim is that those charged with criminal offences should be tried by the normal trial process unless unfit to enter a plea or to stand trial. It is important not to set the bar too low. With respect, the test previously put forward as Provisional Proposal 1, and referred to in para 2.12, is likely to set the bar too low, for two reasons: (1) the requirement of an ability to “retain that information” should be limited to the period of time necessary to retain the information in order to make decisions during the trial; (2) the reference to “weighing” information begins to incorporate an ability to make *objectively sensible* decisions, which cannot be the test. The conflict identified in para 2.8 arises because the aim is to protect a defendant against a finding of unfitness, and consequent denial of the full trial process, in circumstances where he/she or she is in truth able to stand trial.

As to para 2.4, I do not agree that the ability to challenge a juror is now of less significance, following the removal of the former right of peremptory (and, it may be, capricious) challenge. The right of challenge is now limited to a challenge for cause, but that is precisely the area in which a defendant’s fitness to exercise the right of challenge is most important.

It seems to me that there is no conflict between the criteria stated in John M and the criteria stated in SC v UK, and that the test could be formulated along the following lines:

A defendant should be found unfit to plead, and/or to stand his/her trial, if – taking into account all such assistance as is available to the defendant - any of the following is beyond his/her capability:

- A broad understanding of the nature of the charge(s) and evidence against him/her
- A broad understanding of the trial process and of the possible penalties if convicted
- An ability to decide, in the light of his/her understanding of the charge(s) and evidence, whether to plead guilty or not guilty
- An ability to identify and communicate any cause for challenging a juror
- An ability to give instructions to his/her legal representatives about the account which he/she wishes to put forward in his/her defence
- An ability to follow the general thrust of the evidence as it is given
- An ability to decide whether he/she wishes to give evidence and to do so if he/she wishes.

Further Question 3: Do consultees consider that incorporating an exhaustive list of decisions for which the defendant requires capacity into a reformed legal test for unfitness to plead would assist in maintaining the threshold for unfitness at a suitable level?

RESPONSE:

Any attempt to produce a comprehensive list is likely to become an unnecessary straitjacket: the circumstances of cases vary infinitely, and I see no advantage in attempting to formulate, in the abstract, a list of every decision which might arise in any case.

Further Question 4: Do consultees consider that a reformed test should explicitly refer to a “satisfactory” or “sufficient” level of capacity for effective participation?

RESPONSE:

No. Such a test would raise more questions than it answered, and might arguably lead to many defendants being found unfit.

Further Question 5: Do consultees agree that a diagnostic threshold would be unlikely to assist in maintaining the threshold of unfitness at a suitable level?

RESPONSE:

I agree.

Further Question 6: Do consultees think that it would be helpful to have a statutory presumption that all defendants are fit to be tried until the contrary is proved?

RESPONSE:

I agree that there should be a presumption that a defendant is fit to plead and to stand trial (though the judge should have the power to identify an issue as to this, and to require the prosecution to investigate that issue).

Further Question 7: Do consultees agree that a finding that a person lacks capacity shall remain valid unless and until the contrary is established on the basis of the evidence of two suitably qualified experts?

RESPONSE:

I agree, provided there is no presumption of fitness. If such a presumption is introduced, then it will apply if there is a withdrawal of the evidence which justified the earlier finding of unfitness.

In any event, I think it unlikely that this issue will arise very often. Omara [2004] EWCA Crim 431 was decided before s4 of the Criminal Procedure (Insanity) Act 1964 was amended by the Domestic Violence, Crime and Victims Act 2004, and therefore at a time when the issue of unfitness was determined by one jury, and the s4A finding was determined by a second jury. In the unusual circumstances of that case, the two stages in Omara were separated by 11 months. It is difficult to see how such circumstances could arise now. In practice, the issue of fitness is likely to be decided on the date set for trial, and will be followed either immediately, or after only a short adjournment, by either a jury trial or a s4A hearing as appropriate.

Further Question 8: Do consultees agree that disaggregation of capacity to plead and capacity for trial is undesirable?

RESPONSE:

I think it is important to retain the distinction between fitness to plead and fitness to stand trial. Usually the defendant will be either fit or unfit for both, but there may be cases in which there is a valid distinction to be drawn. Moreover, the issue may arise at different times: a defendant who seems fit to plead at the PCMH may have suffered a severe deterioration in his/her mental state by the time of his/her trial. Subject to retaining that distinction, I agree that disaggregation is undesirable.

Further Question 9: Do consultees consider that making the test one of capacity for effective participation “in determination of the allegation(s) faced” would introduce a desirable element of context into the assessment?

RESPONSE:

Expert witnesses do not assess fitness to plead/stand trial in a vacuum, and the court does not determine fitness in a vacuum: the context is obviously important (and is implicit in my own formulation, in my Response to Qs 1 & 2 above).

Further Question 10: Do consultees agree that the United Kingdom’s obligations under the UNCRPD and the ECHR can properly be accommodated in the manner outlined in paragraphs 2.80 to 2.82?

RESPONSE:

Yes.

Further Question 11: Do consultees agree that the difficulties surrounding unrepresented defendants cannot be addressed by amendment to the legal test itself?

RESPONSE:

Yes.

PART 3: SPECIAL MEASURES

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

RESPONSE:

I think this question introduces wide-ranging considerations which go beyond those defendants who are unfit to plead. As to desirability: if the court has concluded that a defendant cannot have a fair trial without the assistance of an intermediary, the question answers itself. As to practicability: there are issues of funding, and training of intermediaries, on which I do not feel able to comment.

PART 4: ASSESSING THE CAPACITY OF THE ACCUSED

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

RESPONSE:

I do not agree. This is an issue relating to a defendant's capability of functioning at quite a basic level, and the consequence is loss of the right to the usual trial procedure. On such important questions, the evidence of a psychiatrist is in my view

necessary, in order to assist the court with the medical explanation of why the defendant is unfit, and why he/she should be deprived of his/her right. It would be wrong in principle to dilute the strict requirement of at least one psychiatrist.

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

RESPONSE:

See above. In my view, there should be two expert witnesses, at least one of whom is approved under s12.

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

RESPONSE:

I cannot identify an alternative.

PART 5: PROCEDURE FOR THE UNFIT ACCUSED

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

RESPONSE:

No. I see no need for such a power, and no advantage in it. If there is a realistic prospect that a defendant who has been found unfit will recover his/her fitness to plead/stand trial within a short period of time, then no special power is needed to enable the court to adjourn proceedings in the interests of justice, taking into account

all the relevant circumstances including the impact on a victim. If however there is no basis for predicting a recovery within a short period, then it is undesirable to adjourn the proceedings on a more or less speculative basis. A defendant who later recovers his/her fitness can be remitted for trial.

Further Question 17: Do consultees consider that it would be appropriate to extend the maximum period of a section 36 MHA 1983 remand to hospital for treatment to 24 weeks in these circumstances?

RESPONSE:

If, contrary to the view I have expressed in my preceding Response, there is to be a power to adjourn for up to 6 months, then it would seem logical to extend the maximum period of remand under s36 to cover the same period. However such adjournment often runs contrary to the overall justice of the case, including the interests of any victims.

Further Question 18: Do consultees consider that the determination of facts procedure for the accused who lacks capacity should be made discretionary following the finding of unfitness, to allow for discontinuance of the proceedings, and diversion out of the criminal justice system into health or related services in appropriate cases?

RESPONSE:

No. The court does not have a general discretion to prevent a prosecution from proceeding, and I would oppose the introduction of such a discretion into this limited class of case. No doubt the court can make its views known, and no doubt the prosecutor will have regard to those views; but if the prosecution have good reason to wish to pursue the s4A procedure, in circumstances which do not amount to an abuse of the process of the court, then they are entitled to do so.

Further Question 19: Do consultees consider that public protection concerns arising in relation to an acquitted, but dangerous, unfit defendant could be adequately met by the use of civil powers under section 3 or 7 MHA 1983?

RESPONSE:

No. Reliance on the use of civil powers has the disadvantages summarised in para 5.40. Moreover, I think para 5.41 may be over-optimistic.

Further Question 20: Do consultees consider that on a determination of the facts, any defence should be left to the jury, after discussion with the advocates, where there is evidence on which a jury properly directed might reasonably find the defence made out or the essential element of the offence unproven?

RESPONSE:

Yes. There will rarely if ever be evidence from the defendant, but the prosecution bears the burden of proof and the jury should consider all reasonable possibilities.

Further Question 21: Do consultees consider that the special verdict should be made available to the jury on their initial consideration of the facts?

RESPONSE:

Yes.

Further Question 22: Do consultees agree that it is not necessary for the judge to retain the discretion, in cases of exceptional prejudice, to order a second stage process for the consideration of the special verdict, in the manner envisaged in Provisional Proposal 9?

RESPONSE:

Yes.

Further Question 23: Do consultees consider that the determination of facts in relation to a defendant found to lack capacity could be dealt with by a judge sitting without a jury?

RESPONSE:

It could be, but it should not be: to do so would be an unjustifiable discrimination against a defendant who has been found unfit. The fact that many finding of fact procedures are not contested is not a reason for removing the jury from the procedure.

Further Question 24: Do consultees agree that a representative, appointed by the court to put the case for the defence, should be entitled to act contrary to the defendant's identified will and preferences, where the representative considers that to do so is necessary in the defendant's best interests?

RESPONSE:

Yes. This is a necessary part of a procedure in which the prosecution bears a burden of proof and the defendant is unfit to stand trial.

PART 6: DISPOSALS

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

RESPONSE:

No. In principle, the court should not require a supervising officer to supervise a person whom – for good reason - he/she is not willing to supervise. In practice, if the supervising officer does have good reason for his/her reluctance, the court is likely to find that supervision is not appropriate.

Further Question 26: Do consultees consider that it would be appropriate and effective to expand the power of supervision orders under section 5 of the CP(I)A to include recall of a supervised person to hospital, as available under section 17E-F of the MHA 1983?

RESPONSE:

Yes.

Further Question 27: Do consultees consider that there are any other enhancements of the powers available under supervision orders which would be beneficial?

RESPONSE:

I do not feel able to answer this question.

PART 7: REMISSION AND APPEALS

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

RESPONSE:

Yes, for the reasons given in paras 7.28, 7.29.

Further Question 29: Do consultees consider that the power to remit an accused for trial should only be exercisable by the Crown where the judge has ruled, following the section 4A hearing, that it is in the public interest for remission to be available should the defendant regain capacity?

RESPONSE:

No, because this would require the judge to make a ruling, binding for the future, in ignorance of what may happen in the future. As noted in para 7.30, the circumstances of the earlier act may become relevant because of some later, unforeseen, act. If the medical evidence shows that in reality the defendant will never be fit to be tried, then in practice there is no need for the suggested restriction.

Further Question 30: Do consultees agree that the Crown's power to remit defendants for trial upon their recovery should not be limited in time?

RESPONSE:

Yes. Any time limit would be likely to produce artificial and arbitrary results if relevant events occur just before, or just after, the time limit expires.

Further Question 31: Do consultees agree that where there has been a finding that a defendant had "done the act or made the omission," he or she should be entitled to request remission for trial on regaining capacity, where recovery is confirmed by the opinions of two experts competent to address the defendant's particular condition?

RESPONSE:

This proposal raises significant practical problems. The position of victims and witnesses must be considered: the grant to a defendant of an unqualified right to remission ignores their interests. Any right to obtain remission might cause injustice and be open to abuse. It would be preferable if the court, on application by the defendant, had an overall discretion in the interests of justice. Victims and witnesses would face the prospect that for an indefinite period of time they might again be called upon to give evidence against a defendant who had been found by a jury to have done the act or made the omission. It would be necessary to restrict the circumstances in which any such entitlement arose, not only by requiring medical evidence, but also by requiring the defendant to act promptly and with all due diligence to commence and pursue his/her request for remission within a short time of his/her having grounds to believe he/she is fit to plead/stand trial. It would also be necessary to ensure that in any s4A procedure, the recording of the evidence was

preserved, to guard against the possibility that the defendant might recover his/her fitness years later, at a time when witnesses had died or become untraceable.

Further Question 32: Do consultees consider that the rights of appeal vested in the unfit defendant should be exercisable by his or her legal representatives?

RESPONSE:

Yes. Given that the legal representatives would have been appointed by the court to act in the best interests of the unfit defendant, there should be no difficulty about their pursuing any right of appeal which the defendant is in principle entitled to pursue. As to para 7.47, the fact that the defendant could not be made subject to a loss of time order is not a reason for denying him/her a right of appeal. Many appellants come before the CACD who cannot in practice be made subject of such an order. Legal representatives will in any event be under a professional duty not to take frivolous or groundless points.

PART 8: UNFITNESS TO PLEAD IN THE MAGISTRATES' AND YOUTH COURTS

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

RESPONSE:

I agree that it is not strictly necessary, but in my view it is highly desirable for such hearings to be dealt with by DJ(MC)s. In addition to their legal qualifications, they are more likely to be able to maintain continuity and expedition in proceedings which may vary significantly in length according to the finding as to fitness. Lay justices could no doubt resolve any problems in this regard by adjourning, but it is undesirable to build in a likelihood of delay when it can be avoided.

Further Question 34: Do consultees consider that, where the defendant's capacity is in doubt, it would be preferable for his or her capacity to be determined in the

magistrates' court, and, if the defendant is found to lack capacity, that all further proceedings against him or her should remain in that court?

Further Question 35 (in the alternative): Do consultees alternatively consider that such a case should be sent to the Crown Court for determination of capacity and, if the defendant is found to lack capacity, that all further proceedings against him or her should remain in that court?

RESPONSE:

Both procedures have advantages and disadvantages. On balance, I favour the procedure summarised in Q35.

Further Question 36: Do consultees agree that capacity procedures in the summary courts should be applicable for all criminal offences?

RESPONSE:

Yes.

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

RESPONSE:

Yes.

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

RESPONSE:

Please see my response to FQ9 above.

Further Question 39: Do consultees consider that there are any adjustments to the test, or the procedure, for defendants lacking capacity that would materially improve the prospects of the court identifying those adults with capacity issues?

RESPONSE:

I do not have sufficient experience of daily practice in the Magistrates' Courts to be able to answer this question.

Further Question 40: Do consultees agree that it is appropriate to have the same evidential requirement in the summary courts as in the Crown Court?

RESPONSE:

In principle, yes; but there are obvious resource implications.

Further Question 41: Regardless of the position in the Crown Court, do consultees agree that, in the summary courts, the tribunal should have a discretion whether to proceed to the determination of facts hearing following a finding that the defendant lacks capacity?

RESPONSE:

No. Please see my response to FQ 18 above. It is, with respect, difficult to see that any prosecutor would wish to pursue a case such as is mentioned in the last sentence of para 99; but if there was good reason to do so, which could be explained to the court, then in principle it is not for the court to prevent the case from proceeding.

Further Question 42: Do consultees agree that in reaching its determination on the facts, the tribunal in the summary courts should be able to reach a special

determination of acquittal because of mental disorder existing at the time of the offence?

RESPONSE:

Yes, because there is no reason in principle to distinguish between defendants in the Crown Court and those in the Magistrates' or Youth Courts.

Further Question 43: Do consultees agree that there should be mandatory specialist training on issues relevant to trying youths, for all legal practitioners and members of the judiciary engaged in cases involving young defendants?

RESPONSE:

Training is obviously desirable, but I would not support a mandatory requirement. This is a wide-ranging issue, with substantial resource implications. So far as legal representatives are concerned, there is a problem of an interference with freedom of choice. So far as the judiciary are concerned (particularly in the Crown Court), in the absence of funding for wholesale training of everyone, there is a problem that cases may be seriously delayed by the need to list them before one of a small group of "ticketed" judges. As para 8.113 indicates, the issue is the subject of consideration elsewhere, and I do not wish to comment further.

Further Question 44: Do consultees consider it appropriate for there to be initial screening for mental health issues for all defendants under 14 years of age, to be conducted by mental health professionals?

RESPONSE:

No. This is not simply a resource issue, though that is an important part of it. With respect, the arguments advanced in this paper do not, in my view, justify such a mandatory requirement, which runs counter to the general approach of a presumption of fitness and an emphasis on ensuring that the normal trial process is adopted in all cases other than the small minority in which a defendant is unfit. Nor

do they justify a mandatory requirement for some but not all of a group aged 13 and 14 who jointly commit a crime. Moreover, there would be a substantial difficulty if (as the paper seems to envisage) the critical age is that at the time of trial, as opposed to age at the time of the alleged offence: arbitrary distinctions would be drawn according to whether a 13 year old is to be tried before or after his/her 14th birthday, or according to whether the scheduled pre-birthday trial date has to be adjourned.

Further Question 45: Do consultees agree that the provisional reformed test proposed for the Crown Court at paragraph 2.34 above is suitable for application to young defendants without adjustment?

RESPONSE:

In principle, the same test should be applicable to all.

Further Question 46: Do consultees agree that the summary courts should have the power to commit a defendant to the Crown Court for the imposition of a restriction order, but should not have the power to impose one themselves?

RESPONSE:

Yes.

Further Question 47: Do consultees agree that the following disposals should be available to the magistrates' court on a finding that the defendant has "done the act or made the omission," or where a special determination has been arrived at:

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

RESPONSE:

Yes.

Further Question 48: Do consultees consider that the non-penal requirements of a youth rehabilitation order should be available as part of a youth supervision order, following a finding that a young person has “done the act or made the omission,” or where a special determination has been arrived at?

RESPONSE:

Yes.

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

RESPONSE:

In principle, yes, though subject to the points made in my response to FQ 31 above.

Further Question 50: Do consultees agree that a new right of appeal should be created from any determination or disposal imposed under a reformed capacity procedure, which would mirror the right to appeal against conviction or sentence under section 108 Magistrates’ Courts Act 1980?

RESPONSE:

Yes: this follows logically.

The Hon. Mr Justice Holroyde
25th August, 2014



LORD CHIEF JUSTICE
OF ENGLAND AND WALES

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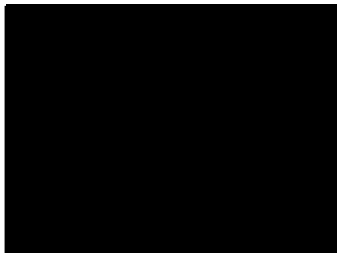
4 September 2014

Dear David

Unfitness to Plead: Response to the Issues Paper

I enclose a response to the Law Commission's issues paper on unfitness to plead. This was written by Mr Justice Holroyde, Presiding Judge on the Northern Circuit, on behalf of the senior judiciary. It has not been possible to obtain the views of other members of the senior judiciary over the summer vacation, so it is a personal response, but one which I endorse in its entirety.

However, I must underline my concern that although the interests of victims and witnesses are acknowledged throughout the paper, I do not think that the balance between their interests and those of the defendant is right, in particular in Parts 5 and 7. In particular, there should be no right of remission other than a right to make an application to the court, which will make the decision in the interests of justice. I would be very happy to discuss this issue further, bearing in mind the considerable public importance.



Unfitness to Plead Consultation Response

Helen Howard, Senior Lecturer in Law, Teesside University

Following on from the Symposium which took place on 11th June 2014 at Leeds University, I would like to make additional comments with particular focus on the proposals for a new test.

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

Although I can see how foundational competence, discussed in para. 2.23 of the Issues Paper, as well as the additional element of decision-making capacity would make for a more explicit test, it seems likely that an individual lacking in the ability, for example, to understand the charges against him, would be 'unable to use or weigh information as a consequence'. For this reason, and with the aim of achieving consistency with the Mental Capacity Act 2005, I still prefer the original proposed test based on decision-making capacity, although I accept that the amended *John M* criteria are likely to remain.

I think effective participation is implicit within the test. If it is thought necessary, I do not think it would be a problem to incorporate 'effective participation' along the lines of the Scottish test (D must be incapable 'of participating effectively in a trial') or *O'Driscoll* (D must lack the capacity 'to participate effectively in the proceedings').

For example, an adapted test based on *M (John)* [2003] EWCA Crim 3452 could incorporate effective participation as follows:

The jury may find unfitness to plead if the defence could establish on a balance of probabilities that D is *unable to participate effectively in a trial due to a lack of capacity in any one of following...*

Further Question 2: Do consultees consider that an effective participation test, framed around the John M criteria with an additional decision-making capacity limb, represents the most appropriate formulation for such a combined legal test?

This seems to reflect to some extent the test which is set out in *O'Driscoll*.

The advantage of the *John M* criteria above that of *O'Driscoll* is that they make reference to the specific requirement to understand the charges (as opposed to the *proceedings*). The advantage of the *John M* criteria above the Scottish test appears to be inclusion of the capacity to give evidence in his own defence.

The most significant omission in the *John M* criteria in comparison with the other tests is clearly the lack of reference to decision-making capacity. An addition of this criterion does seem to represent the most appropriate formulation for a combined legal test.

Substitution of one criterion (exercising the right to challenge jurors) for one of decision-making capacity along the lines of *O'Driscoll* seems appropriate. Thus, I would be prepared to support the introduction of a test along the following lines:

The jury may find unfitness to plead if the defence could establish on a balance of probabilities that D is unable to participate effectively in a trial due to a lack of capacity in any one of following:

- (1) understanding the charges;
- (2) deciding whether to plead guilty or not;
- (3) instructing solicitors and counsel;
- (4) following the course of the proceedings;
- (5) giving evidence in his own defence.
- (6) *making rational decisions in relation to his participation in the proceedings which reflect true and informed choices on his part.*

Further to the Symposium held at Leeds University, I would not be in favour of a much broader and more flexible test, which could create uncertainty and a lack of predictability in relation to when legal representatives should advise their clients on the use of the legal test.

The test need not be determinative. Thus, permitting the court to *have regard to* any of the criteria, along the lines of the Scottish test, allows for an acceptable level of discretion. However, the threshold may be set too low in the Scottish test by allowing the court to take into account *any other factor* which the court considers relevant

Further Question 4: Do consultees consider that a reformed test should explicitly refer to a 'satisfactory' or 'sufficient' level of capacity for effective participation?

Yes. It seems logical to recognise that some individuals will be fit but not fit enough. This also allows for the context to be taken into account, referred to in Further Question 9 as a 'sufficient' level of capacity will vary according to the complexity of the proceedings. While 'satisfactory' could imply an objective level of capacity based on reasonableness, I would prefer the term 'sufficient' which implies an appropriate level of capacity.

Further Question 5: Do consultees agree that a diagnostic threshold would be unlikely to assist in maintaining the threshold of unfitness at a suitable level?

No, although I understand the need to keep the test as broad as possible. The Scottish and *O'Driscoll* tests require a link to a medical condition (mental or physical condition/unsoundness of mind or inability to communicate respectively). What is notable with the new proposals is the omission of any need for a link to a recognised medical condition.

This is required for the diminished responsibility defence and is set out in proposals for a new insanity defence of not criminally responsible by reason of recognised medical condition (para 1.93, *Criminal Liability: Insanity and Automatism – A Discussion Paper* (Law Commission, July 2013)). Furthermore, s2(1) Mental Capacity Act 2005 requires a link to impairment of, or a disturbance in the functioning of, the mind or brain.

If a recognised medical condition is required for the Mental Capacity Act and the mental condition defences, then we need compelling reasons as to why we should not require it for unfitness. Conversely, if a link to a recognised medical condition is not needed for unfitness, then do we need to consider why *is* it required for insanity and diminished responsibility?

Given that DSM 5 and ICD 10 are very broad, all of the examples provided in the Consultation Paper appear to fall within a recognised medical condition as follows:

- Example 3A (para. 3.15) (F70 Mild mental retardation (*International Statistical Classification of Diseases and Related Health Problems 10th Revision (ICD-10) Version for 2010*))
- Example 3B (para. 3.16) (F32 Major depressive disorder, single episode)
- Example 3C (para. 3.17) (F90 Attention-deficit hyperactivity disorder)
- Example 3D (para. 3.18) (F20.0 Paranoid schizophrenia)
- Example 3E (para. 3.19) (F42 Obsessive-compulsive disorder)
- Example 3F (para. 3.20) (F84.0 Autistic disorder)
- Example 3G (para. 3.43) (F70 Mild mental retardation)

At the forefront of our concerns should be that a trial needs to represent a two-way moral conversation between the defendant and the court. This cannot occur where the defendant is found unfit to plead and so, ideally, as many defendants as possible should be afforded this right.

If a trial represents a moral conversation between the court and the defendant, then D must be a moral agent in order to have this conversation. D might not be a moral agent due to a lack of capacity or fair opportunity (according to the capacity version of choice theory; see A.18 *Criminal Liability: Insanity and Automatism – A Discussion Paper* (Law Commission, July 2013)). In my view, a lack of capacity should be linked to a recognised medical condition, since failure to do so could set the threshold too

low. Depriving D of moral agency is not a decision to be taken too lightly. If we are going to deprive someone of moral agency, then we should be sure of our reasons for doing so. Use of a recognised medical condition would strengthen and support our reasons in this respect, and would provide for consistency and predictability across the mental condition defences.

The main issue I can see with my suggestion is that developmental immaturity is not a recognised medical condition. Developmental immaturity in children does not appear to feature on its own under DSM 5 or ICD 10. As such, unless the immaturity can be linked to conditions on the autism spectrum or due to mild mental retardation, then the developmentally immature 10 year old, who may be unable to effectively participate in a trial, could fail to satisfy the test.

The ideal solution to this issue would be reform of *doli incapax* for such children. If, and until, such reform is forthcoming it may be worth adding developmental immaturity to any new legislation as a separate condition to be taken into account when applying the test in the Youth Courts.

Thus, I would recommend incorporating into the test a diagnostic threshold as follows:

The jury may find unfitness to plead if the defence could establish on a balance of probabilities that D, *by reason of a recognised medical condition*, is unable to participate effectively in a trial due to a lack of capacity in any one of following:

- (1) understanding the charges;
- (2) deciding whether to plead guilty or not;
- (3) instructing solicitors and counsel;
- (4) following the course of the proceedings;
- (5) giving evidence in his own defence.
- (6) making rational decisions in relation to his participation in the proceedings which reflect true and informed choices on his part.

Further Question 9: Do consultees consider that making the test one of capacity for effective participation “in determination of the allegation(s) faced” would introduce a desirable element of context into the assessment?

Yes. This would allow for the appropriate context to be taken into account.

Further Question 20: Do consultees consider that on a determination of the facts, any defence should be left to the jury, after discussion with the advocates, where there is evidence on which a jury properly directed might reasonably find the defence made out or the essential element of the offence unproven?

Continuing with the current s4A hearing risks uncertainty within the law and that the unfit accused could be treated less fairly than his fit counterpart. Consideration of all, or even most elements of the offence, i.e. the *actus reus* and the absence of any valid defence, would mean the hearing takes on the appearance of a trial, in which issues of culpability and moral judgments may arise. The danger here is that an inadequate distinction would be made between protection of the vulnerable accused and the criminal responsibility of the individual on trial. A compromise must always be made in balancing the rights of the unfit, and potentially dangerous defendant, and the protection of the public. Given that the risk is most often borne by society – an individual is innocent, for example, until proven guilty beyond reasonable doubt – and that civil measures are available for the protection of the individual and the public, then it is submitted here that the risk in respect of the unfit accused should be similarly borne.

Helen Howard 14/7/14



WADHAM COLLEGE
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From:

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Barrister & Solicitor (Alberta, retired)

2 September 2014

Professor David Ormerod QC
Law Commission of England & Wales

Dear David,

Response to consultation: Unfitness to Plead an Issues Paper

Thank you and your team for the extension on the deadline to provide for the responses to your issues paper on unfitness to plead (or, as I prefer to call it, fitness to stand trial). I respond to the questions *seriatim*. I do not provide reasons for some responses because I hope that I made them sufficiently clear during my presentation and the subsequent discussions at the symposium. My overarching concern is that the issues paper, in contrast to the consultation paper, seems to be inordinately concerned about setting the standard for unfitness to stand trial *too low* so that more defendants could avail themselves of it. To my mind the current test is too high. I respectfully suggest that you should not be concerned about the numbers affected by changing the legal test; instead the issue for law reform is the appropriate benchmark to enable a defendant to make effective decisions and to participate effectively in his trial, to ensure he can have a fair trial under ECHR Article 6. This is not the case at present under the *Pritchard* test, even as updated by *John M*.

Q1. YES. An explicit reference to decision-making capacity is necessary. However, I am concerned that setting them out as separate limbs draws an artificial line between decision-making and effective participation, as they are inextricable in reality. For example, *how* the defendant participates in the trial is a matter for decision. His/her capacity to follow the evidence and identify inconsistencies or untruths for counsel involves both decision and participation. Moreover, it is vital that the test explicitly apply to pre-trial decision-making as well, including the necessary decisions at police interview.

Q2, Q3 NO As noted in my flow diagram, the exhaustive list of decisions for which the defendant requires capacity which you have drafted in paragraph 2.36 (and as listed in *John M*) is much too brief in time span and in content. I think it is important that there be sufficient decision-making capacity to engage in the more complex decisions required in a criminal trial, if it is something on which counsel will require instructions (for example in joint enterprise cases which are extremely complex). In contrast, a decision whether to adduce bad character evidence under the CJA 2003 would not normally require instructions. As I mentioned in my presentation, I am inclined to support Professor Grubin in his suggestion (as I understand it) that the test simply be that the court must be satisfied that the defendant has capacity to make the decisions required to defend himself or herself and to participate effectively in the trial. This gives counsel and the court some latitude to examine the demands on the defendant in the particular proceedings and whether he or she is capable of meeting the statutory standard.

Q4 NO. This would be redundant.



INVESTOR IN PEOPLE



Q5 YES.

Q6 NO. My concern would be that this fundamental question should not be aligned with the test of competence of a witness under YJCEA 1999. It ultimately is for the court to be satisfied that the defendant is fit to stand trial under ECHR Article 6. In this regard I would refer you to the *voir dire* ruling in *R v Davison & Hopkinson* of Andrew Smith J pointing out the difficulties in the allocation of the burden of proof. I agree with Sir Andrew that where a defendant's representative (or indeed anyone with some standing in the proceedings, including an expert witness) properly draws to the court's attention concerns as to the defendant's fitness to stand trial, there should not be a burden on either of the defence or prosecution. That would be likely to follow if there was to be a statutory presumption, as then one party would have to rebut it. Its absence would not mean that fitness to plead would be an issue in every case, as someone would have to raise it and give an air of reality to the question.

Q7 YES. With reference to the three issues listed in paragraph 2.50, I do not agree with the third one, that expert should be required to agree on at least one stated capacity to found the finding of incapacity. On no other issue in a trial are experts required to agree before the trial judge can accept expert opinion. Otherwise the ultimate decision would be delegated to the experts, one of whom could block consensus. This should be an issue for the trial judge who understands the trial process, under ECHR Article 6.

Q8 YES. Not only would it be undesirable, but it would likely would breach ECHR Article 6, as well as the UNCRPD Article 13, as it is difficult to see how someone could be competent to plead guilty but not to stand trial, and still be considered to have had effective access to justice.

Q9 NO. I think it would be an unnecessary complication, especially in a multi-handed trial.

Q10 I find it impossible to answer this question because I do not fully concur with your proposals (and it is not easy to discern their shape given the number of open questions you have put to consultees).

Q11 YES. If only for this reason, there should be no presumption of fitness; if the court is concerned about the defendant's capacity, then it should take measures to ensure that he or she has access to legal advice, as you suggest in paragraph 2.87. No statutory test can fix the current problems with legal aid.

Q12 YES – but for the reasons I stated in my presentation, a statutory entitlement to a registered intermediary has the potential to redress only communicative deficits, not anterior cognitive deficits. Moreover, it is important that any statutory entitlement provide that it applies to pre-trial proceedings, including the police interview, wherever the police have reason to believe that the defendant has communication difficulties.

Q13, Q14 I have no particular view as I do not have direct practical experience of such hearings.

Q15-Q23 I would reiterate what I said in my presentation, that I think it paradoxical that the court could find that a defendant could not effectively participate in his trial such that it would constitute a breach of Article 6 to require him to stand trial, but then subject him to a hearing adjudicating whether he committed the actus reus — *ex hypothesi* without the defendant's effective participation— without that also being a breach of Article 6. I do not see how the procedures proposed remediate this problem. Certainly it would be impossible for a court (jury or judge alone) to adjudicate properly the issue whether there are “no grounds for acquittal” under paragraph 5.52.





Q28-Q31 I find it difficult to form an opinion on these questions given my concerns about the fairness of the procedure from which the appeal or requested remission would lie.

Part 8 In response to the whole of this section, I strongly endorse the concerns expressed by Dr Eileen Vizard in her presentation. I am very sceptical that the more informal arrangements in the youth courts are successful in redressing the developmental immaturity and the cognitive deficits very frequently exhibited by child defendants, and would refer you to Lord Carlile's extensive report on the youth courts which should displace any complacency about children's ability to defend themselves in the youth courts (including that entertained by some of the magistrates and district judges present at the symposium). As I said in my presentation, there is an imperative need for a structured assessment of the cognitive and communicative capacities of (a) every suspect under 18 (not 14 as you proposed, as this is not a logical stopping point), and (b) every adult defendant who seems to have a relevant impairment. The current tests (ASSET and ASSETPLUS) are clearly inadequate. As Dr Vizard indicated, we are part of an interdisciplinary team working on developing an assessment protocol which would detect where there were significant problems which required further examination and assessment in relation to that defendant's fitness to stand trial, as well as eligibility for special measures. I would also record my disappointment that once again the Law Commission has declined to take on the issue of the age of criminal responsibility. One only has to look at the flow diagram I produced to appreciate that a 10-year-old of normal developmental (im)maturity is not capable of making these decisions, much less the troubled youngsters who appear in the criminal courts every day.

Q33 NO. Determination of the fitness to plead of a child is far too complex an evidentiary issue for lay magistrates without any legal qualifications. The issue must be reserved for at least a district judge who is trained to evaluate (potentially conflicting) expert evidence and understands from having practised law the complexities of taking instructions from such defendants.

Q34 I am ambivalent about this proposal, because I am firmly of the view that all cases involving child defendants should be tried in the youth courts, i.e. a child defendant should never be sent to the Crown Court for trial of any issue or case. This is consistent with the jurisprudence from the ECtHR. So far as adult defendants in the magistrates courts are concerned, I am inclined to think that the district judge could make a ruling but I am very much opposed to having this issue left to lay magistrates as they are unqualified to adjudicate on it.

Q35 NO. If a defendant is fit to stand trial and the appropriate place to be tried is magistrates court, then that is where the trial on the merits should be held.

Q36 YES.

Q37 YES.

Q38 NO. Please see my answers to questions 2 and 3.

Q39 YES. Please see my response to Part 8 and the inadequacies of current screening tests (including the one about to be introduced, ACCESSPLUS).

Q40 YES.

Q41 NO. For the reasons stated earlier, it is impossible for this fact-finding determination to be conducted fairly if the defendant lacks the necessary capacity to participate effectively in it. There should be methods of nonpunitive diversion, such as the children's panel system in Scotland, which would enable concerns about





behaviour to be dealt with in a holistic way without an adjudication which necessarily implies some attenuated guilt, conducted in a way which breaches Article 6.

Q43 YES. Definitely. I have made some proposals in the article I submitted to you in another capacity as to how this might be handled for defence advocates. With reference to your fn 80, I have recently conducted research on 'ticketing' of counsel, and have discovered that it is a myth (which I had heard independently of your report) that there is a ticketing requirement for counsel appearing in the Family Courts. [REDACTED]

[REDACTED] Moreover, ticketing is on the agenda of the committee set up by Sir James Munby P to review the handling of vulnerable witnesses in the family courts (Interim Report of the Children and Vulnerable Witnesses Working Group: http://www.familylaw.co.uk/news_and_comment/interim-report-of-the-children-and-vulnerable-witnesses-working-group-31-july-2014#.U-5oistATEA) Some family barristers are alarmed at this prospect.

Q44 As stated earlier, the screening should be not just for mental health issues but also to assess levels of developmental maturity, and general competence to defend themselves.

Q45 No, because I regard the proposal in paragraph 2.34 to be inadequate.

Q46 This also should be reserved to a district judge.

Q47, Q48, Q49 I have already expressed concerns about the fairness of the procedure. Under no circumstances should such adjudication be made by lay magistrates.

Q50. YES.

I suspect that these responses were not worth the wait.

Best wishes

[REDACTED]

Laura Hoyano



Response of David Hughes, Member of the Public

PART 5: PROCEDURE FOR THE UNFIT ACCUSED

Further Question 21 Do consultees consider that the special verdict should be made available to the jury on their initial consideration of the facts? (5.54)

YES: NO: OTHER:

I want to preface my answer to this question with two observations. First, at para. 6.132 in the CP, the Commission states that a special verdict is "a qualified acquittal on the grounds of mental disorder at the time of the offence". I am not clear as to what is meant by "mental disorder". It is not defined in the CP or the Issues Paper. Clearly, a person can suffer from a mental disorder without being legally insane. That would suggest that the special verdict is not confined to cases where the acquittal is founded on legal insanity. On the other hand, the reasoning in para. 6.136 in the CP implies, in my view, that the Commission is deploying the term "mental disorder" as a synonym for legal insanity. In answering this question, in the light of para 6.136, I am assuming that "mental disorder" is a synonym for legal insanity.

Second, when I read the CP, I found Provisional Proposals 9 and 11 contradictory. The former states that the special verdict should be determined by a jury. The latter states that it would be for "a judge to hold a further hearing". The word "hold" is ambiguous. In my view, the natural interpretation is that it would be the judge who would determine the special verdict. I note that this is how two respondents - HHJ Wendy Joseph QC and the South Eastern Circuit - interpreted it. There is a difference between "holding" a further hearing and "ordering" or "directing" a further hearing. If the Commission's proposal is that it should be for a jury to determine the special verdict, it should have avoided the word "hold".

Turning directly to the question, I start by saying that I found the Commission's proposal for the special verdict to be considered at a subsequent hearing - whether by a jury or by a judge - unattractive. In part, this was based on the cost implications together with the additional stress and uncertainty to the accused by virtue of the prospect of a further hearing.

However, in addition, I was puzzled as to how this would work in practice. At this stage, I refer to para. 6.148 in the CP. As part of its argument for a two stage process, the Commission asserted that it would be problematic for the jury to consider all the issues at the same time. Rather, the accused "ought (if his or her counsel thinks it is in the accused's best interests) to have the opportunity of achieving an outright acquittal after which it is not thought appropriate to go to a special verdict hearing."

Now take the following example. Suppose that D is charged as a secondary party with an offence under section 18 Offences Against the Person Act 1861. D's legal representative is of the view there are two possible avenues for securing an acquittal. These are: (1) D did not do any act which amounted to an act of assistance or encouragement and (2) even if he did, D did not have the requisite mens rea to be convicted as a secondary party. The evidence in support of (2) is medical evidence to the effect that when the alleged offence was committed D was mentally "ill".

As I understand the Commission's argument in para 6.148 for a two stage process, D ought to be able to seek to secure an outright acquittal on the basis of (1). So, evidence as to whether D did an act of assistance or encouragement is adduced. No medical evidence going to mens rea is adduced. The judge rejects a submission of no case to answer. The jury go on to find that D performed an act of assistance with the requisite mens rea. Unless I have misunderstood the Commission's proposals, there can be no question of there being any subsequent hearing to consider a special verdict based on the medical evidence for the simple reason that D has not been acquitted. So the medical evidence going to mens rea will never be considered.

Suppose, however, that instead D's representative decides to argue both (1) and (2) at the initial hearing. In relation to both (1) and (2), the burden of proof will be on the prosecution. In considering (2), unless I have misunderstood the proposals, the jury will not have to consider whether D was legally insane. The jury simply has to decide whether D, whether or not legally insane, had the requisite mens rea.

The jury acquit D. The judge will not know the basis of the acquittal. Accordingly, I find it hard to see how the judge can order a further hearing to determine whether the acquittal was because of a mental disorder in the narrow sense of D being legally insane. If the decision of the jury to acquit D was because the prosecution had failed to prove that D had done an act amounting to assistance or encouragement, it would be wrong if the judge could order a further hearing. At the same time, if the jury, despite finding that D did an act of assistance or encouragement, acquit D because he lacked mens rea, then the case for the judge ordering a further hearing to determine whether the lack of mens rea was because D was legally insane is much stronger. The point, however, is that the judge will not know the basis of the jury's decision.

So far, to me this suggests that the Commission's proposal for a subsequent hearing to determine the special verdict is problematic, certainly in cases where D is arguing both lack of actus reus and lack of mens rea. I acknowledge, however, that my concerns can in part be met by the suggestion made in the response of the Council of Circuit judges, namely that it should be possible for a jury to return a verdict that "there are no grounds for an acquittal which are not connected with his mental disorder or learning disability". (Incidentally, the reference to "learning disability" suggests that the Council does not interpret "mental disorder" as a synonym for legal insanity). However, I am not sure how this assists in a case where the the jury is split. So, in our example, half the jury are satisfied that D perpetrated an act of assistance or encouragement but are not satisfied as to mens rea while half the jury are satisfied as to mens rea but not that D perpetrated an act of assistance or encouragement.

All of this leads me to believe that a two stage process is unsatisfactory. Would it be better if the jury could deliver a special verdict on their initial consideration of the facts?

Consider again the example above of D charged with being a secondary party to a section 18 offence. There is contradictory expert medical evidence. The minority is of the view that D was mentally "ill" at the time of the alleged offence. The majority view points the other way. The minority view, if accepted, is CAPABLE of supporting a finding of legal insanity.

D's case is that he did not perpetrate an act of assistance or encouragement and he lacked the requisite mens rea as a result of being mentally "ill". The prosecution's case is that D did perpetrate an act of assistance or encouragement and had the requisite mens rea.

How will the judge direct the jury? Something along the following lines.

(1) the prosecution must prove beyond reasonable doubt that D perpetrated an act of assistance or encouragement and did so intending or believing that D1 (the principal offender) would or might assault V intending to cause V serious harm.

(2) If you are not sure that D assisted or encouraged D1, you must acquit D.

(3) If you are sure that D assisted or encouraged D1, go on to consider whether D did so intending or believing that D1 would or might assault V intending to cause V serious harm.

(4) If you are sure that D intended or believed that D1 would or might assault V intending to cause V serious harm, you must return a verdict that D assisted or encouraged D1 and that there are no grounds for acquitting D.

(5) If you are not sure that D intended or believed that D1 would or might assault V intending to cause V serious harm, you must go on to consider whether D's lack of intent or belief was as a result of D being insane. (Judge then explains what amounts to legal insanity)

(6) It is for the prosecution to prove beyond reasonable doubt that D was legally insane. In this case, the prosecution has never sought to argue that D was legally insane.

And that to me is the nub of the problem - it was never the prosecution's case that D should be acquitted by reason of "mental disorder". The result is that D should secure an outright acquittal despite evidence supporting the view that he could be a danger to the public.

Arguably, the problem could be overcome if the two stage process was adopted. In the example above, with one qualification, it seems to me that it would be open to the judge to order a further hearing. The judge will be aware that the jury, in acquitting the defendant, may have entertained doubts as to whether the defendant, because of his mental "illness", had the requisite mens rea. Accordingly, he could direct a further hearing to determine whether that mental illness constituted "mental disorder".

At the further and distinct hearing, it would then be open to the prosecution, in the light of, and respecting the the jury's decision at the original hearing, to change tack and seek to prove that D should be acquitted by reason of "mental disorder".

The qualification refers to something that I mentioned earlier when discussing the merits of the two stage procedure, namely that the judge will not know the basis on which the jury acquitted D. However, the verdict suggested by the Council of Circuit Judges, referred to above, would assist, at least in cases where the jury is not split.

However, if it would be open to the judge to direct a further hearing, a very odd consequence would ensue. At the further hearing directed by the judge, it would be in D's interest that his lack of mens rea was not found to be the result of "mental disorder".

He would secure an outright acquittal. Accordingly, D would seek to rely on the medical evidence adduced by the prosecution at the original hearing. By contrast, the prosecution in seeking to prove that the lack of mens rea was by reason of "mental disorder", would be relying on the evidence adduced by D at the original hearing.

My final observation. Whatever else, based in part by my experience as serving on a jury, I am fairly sure that, with proper instructions, juries will not be prejudiced by hearing medical evidence relevant to the special verdict on their initial consideration of the facts. Nevertheless, because of the issues I have referred to, I am not sure that the special verdict should be made available to the jury on their initial consideration of the facts.

Further Question 23 Do consultees consider that the determination of facts in relation to a defendant found to lack capacity could be dealt with by a judge sitting without a jury? (5.60)

YES: NO: OTHER:

I believe that on cost grounds any Government would welcome a recommendation that the determination of facts should be determined by a judge sitting without a jury.

As a matter of principle, I am not so sure. I will comment briefly on some, but not all, of the arguments set out in paras. 5.57 - 5.58 of the Issues Paper.

5.57 (1) I agree.

5.57 (2) I disagree. Juries are quite capable of evaluating expert evidence. Further, the logic would be to remove juries in other contexts where conflicting expert evidence is before the court. I should add that I have undertaken jury service. The charge was murder.

5.57 (3) I find this a more persuasive argument, particularly if one or more of the (fit to plead) co-defendants was seeking a verdict of not guilty by reason of insanity.

5.57 (4) This is irrelevant. The issue is what should happen when the section 4A hearing IS contested. Of course, when there is no contest, the judge alone should be able to determine the issue.

5.58 (1) One needs to focus on the substance, namely that a hospital order is a deprivation of liberty. I am sympathetic to the view of Professor Poole who, in his response to the CP, stated "the distinction between a conviction and a finding that the accused 'did the act or made the omission and there are no grounds for an acquittal' may not be very meaningful".

5.58 (4) I am not persuaded by the argument that there are already instances where a judge alone makes determinations that can impact on liberty. The issue is whether there is a compelling case for there being an addition to the existing instances. There are obvious practical reasons why a judge alone should determine Newton hearings (where, of course, because D has pleaded guilty there will have been no jury involvement) and bail hearings. It would be madness for a jury to have to be empanelled to determine every bail application in the Crown Court.

5.58 (5) In magistrates' courts, magistrates are the jury. I accept that District Judges sitting alone have the power to make decisions which impact on liberty. However, it is important to acknowledge that that includes the determining of guilt or innocence of defendants who are fit to plead. Should the fact that District Judges have the power to determine guilt or innocence in such cases lead to the conclusion that trials in the Crown Court - irrespective of whether the accused is fit to plead - should be determined by a judge without a jury? I suggest not.

I would just like to elaborate slightly on my response to question 23. I am conscious that my comment on para 5.57(4) of the Issues Paper may be construed as abrupt. My position is that I am not persuaded that, where there is a contest between prosecution and defence, a judge sitting alone should determine the issue. However, I do strongly support the proposition that in uncontested cases a judge sitting alone should be able to determine the issue.

The criminal justice system is under strain financially. So, anything that can reduce costs without jeopardising important safeguards should be welcomed. In addition, as a matter of public policy, I do not think it is right to empanel juries to determine issues where there is no disagreement between prosecution and defence. If I was empanelled to sit on a jury where there was no contest, I would have serious questions to ask of the authorities.

Just for Kids Law: Response to the Law Commission Unfitness to plead Issues Paper

Drafted By

Kate Aubrey-Johnson

1. Just for Kids Law is a charity (1121368) that provides specialist representation, support, advice to young people in difficulty with 3 offices across London. We work in conjunction with the Youth Departments of legal aid firms 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 original 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. We also intervened in the recent case of ***OP v Secretary of State for Justice*** [2014] EWHC 1944 (Admin) (registered intermediaries for defendants).
2. 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.

OUTLINE SUBMISSIONS

New legal test for fitness to plead / effective participation [Qs 1 – 5, 7]

3. Just for Kids Law believe that there should be a new legal test that incorporates decision-making capacity and may properly be described as an ‘effective participation test’. We 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’. The term ‘capacity’ also has a legal meaning in civil proceedings so this may lead to confusion.

4. We think it is important that all defendants, and in particular children, can meaningfully participate in criminal proceedings (also see para 20 below). We note that 'criminal proceedings' includes police station interviews and procedures, pre-trial issues such as giving instructions, sentencing or other hearings that run adjunct to trials, such as ASBO hearings.
5. 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). We therefore think the *John M* criteria are too narrow.
6. We would propose a test that reflects 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
7. We would also endorse the criteria for effective participation identified in *SC v UK* (2005) 40 EHRR 10 (at para 29), where 'effective participation' presupposes that:
 - The accused has a broad understanding of the nature of the trial process and of what is at stake, including the significance of any penalty which may be imposed; if necessary with the assistance of, for example, an interpreter, lawyer, social worker or friend,
 - The accused 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, to point out any statements with which he disagrees and make them aware of any facts which should be put forward in his defence.
8. The new Fitness to Plead / Effective Participation framework should encompass situations where a person's ability to effectively participate in criminal proceedings will remain unchanged or may change over time (see paragraphs 31-32 below). We agree that a finding that a person cannot effectively participate in criminal proceedings should remain valid until the contrary is established.

Statutory presumption & inherent jurisdiction of court [Q 6, 11, 15]

9. We think that it is important to enshrine within criminal proceedings the requirement that all defendants, and in particular children, can meaningfully participate in criminal proceedings. We think the correct approach should be that there is a continuing duty placed on the court, the defence and prosecution to ensure that the defendant can effectively participate in criminal proceedings. This would also reflect the duty of the court to have regard to the welfare of the child.¹
10. 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. It is not uncommon for a defendant whose ability to effectively participate is in doubt to refuse expert assessment. The Court, however, is independent and could order the investigation even if the defendant did not wish that avenue to be pursued (or was unrepresented). Should a defendant be found not to have the capacity to effectively participate 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.

Disaggregated test [Qs 8, 9]

11. We are troubled by the proposal that there could be a distinction between a defendant's capacity to plead and their capacity to participate in a trial. Or, that their capacity to plead should be determined in relation to the specific allegation faced, suggesting a defendant could be fit to plead to one offence, but not another. Firstly, criminal proceedings are far broader than simply entering a plea and having a trial (see para 4 above). Secondly, it is an over-simplistic distinction and hard to envisage a defendant unable to effectively participate in a trial who would be able to effectively participate in the process of entering a plea. In our experience, 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.
12. A decision about whether to plead guilty or not guilty, particularly for children, is never as simple as asking if the accused 'did the act' (even in relation to an apparently straight-forward or minor offence). A defendant would still need to be able to effectively give instructions, comprehend the consequences of pleading guilty and understand

¹ s 44 Children and Young Persons Act 1933

potentially complex legal concepts. Low level offences may still involve legal concepts such as joint enterprise, intention/recklessness, legal privilege/confidentiality and other complex issues that would not necessarily be apparent on reading the case papers. Entering a plea requires the accused to:

- Have the capacity to make decisions for him or herself
- Understand the charges
- Have a broad understanding of the nature of the trial process and understand the potential consequences / what is at stake, including the significance of any penalty which may be imposed
- Have the capacity to participate with his or her legal team in a defence: To explain to his own lawyers his version of events, to point out any statements with which he disagrees and make them aware of any facts which should be put forward in his defence
- Have the ability for participation during court hearings

13. We make the observation that children are predisposed to impulsive decision-making and find it difficult to foresee the consequences of their decisions (see paras 20-22 below). Therefore it is essential that their legal team are satisfied they have the ability to effectively participate in criminal proceedings. Children are also heavily-incentivised to admit guilt / plead guilty in the criminal justice system and yet a decision to plead guilty or be cautioned (even to a relatively minor offence) can have long term consequences, for example, a criminal record can impact opportunities to participate in education, attend college or university, get insurance, bank loans, mortgages or rental agreements and may preclude entering certain professions.

Convention Obligations [Q 10]

14. We feel that defendants rights protected under the UNCRPD and the ECHR might properly be protected by reforming the 'fact finding' limb of the Fitness to Plead/Effective Participation test. Their rights would be protected by replacing the present section 4A hearing 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.

15. We believe the argument of loss of freedom / restriction of liberty (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 i.e. self-defence, duress and others that are currently not available to an unfit defendant. Article 6 protection would also give the defendant the same protection as 'fit' defendants with regards with regards to admission of hearsay and other available protections.

Special Measures [Q 12]

16. We strongly agree that it is highly desirable for defendants to have a statutory entitlement to the support of a registered intermediary, for as much of the proceedings, including pre and post trial, as is required, where the court is of the view that such assistance is necessary to ensure that the defendant receives a fair trial. This is essential to ensure equality of arms and the defendant's rights protected by Article 6(3)(d) of the ECHR.

17. In the recent case of ***OP v Secretary of State for Justice***, in which Just for Kids Law were Interveners, the High Court considered the exclusion of defendants from the Witness Intermediary Scheme (WIS) that provides Registered Intermediaries for Vulnerable Defence and Prosecution Witnesses. The High Court made the following determination:

*i. 'We are not reassured that an arguable inequality of arms has not been revealed by a review of the legal framework and supporting information in this case. In any event there is either a risk of unfairness or at its lowest a perceived risk of unfairness.'*²

18. We reiterate a number of observations made in our consultation response:

- The statutory provision that provides for defendant intermediaries (s 104 *Coroners and Justice Act 2009*) is not yet in force. This needs to be implemented, with the additional safeguards that defendants are entitled to registered intermediaries throughout criminal proceedings.
- 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).
- Where children and young people are deemed to be able to effectively participate with the assistance of enhanced features to the existing special measures framework, we propose that a Guardian/Litigation friend option is available to them, this would provide parity with the civil system (Gillick competency).³
- In cases where the defendant's ability to effectively participate relies upon special measures and/or reasonable adjustments during the criminal proceedings, the following safeguards are necessary:

² *OP v Secretary of State for Justice* [2014] EWHC 1944 (Admin), at para 46

³ 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.

- i. There should be a regular review of the defendant's participation; and,
 - ii. A statutory procedure for halting the criminal proceedings and shifting into a section 4A hearing if necessary.
- We also 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.

Assessing Effective Participation [Qs 13, 14]

19. We propose a single assessment of the ability of a defendant to effectively participate in criminal proceedings (and disagree that the test should have regard to 'the determination of the allegations faced'). We agree that it is unnecessary to retain a requirement for two registered medical practitioners, one duly approved under section 12 (see case study 1 below). We propose the following minimum requirements:

- Evidence from two 'responsible clinicians' (terminology mirroring that used in the Mental Health Act 2007).
- A defined clinical assessment tool for effective participation that could be used as a standard (but not exhaustive) test. We think the *Grisso* criteria could form the basis of a standardised test but an exhaustive list would quickly become outdated.
- 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.
- A code of practice (similar to that which is used in the civil capacity test) should be introduced to guide clinicians in the assessment of effective participation.

Case Study 1

█ is a █ defendant on the Autistic spectrum, █
 █ is 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 █ 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.

20. Effective participation should be assessed with regard to the assistance of special measures or any other reasonable adjustments (see paras 16-18 above). Any expert report regarding the use of special measures or reasonable adjustments should clearly set out the measures / adjustments required to allow the defendant to effectively participate. This expert opinion can only ever be theoretical and the reality of proceedings may prove otherwise. We would suggest the safeguards (as set out a para 18 (i) & (ii) above) are built into the legal framework.

Developmental Immaturity

21. It is now understood that children, particularly adolescents, are going through a period of marked neurodevelopmental immaturity.⁴ We think that an additional 'Development Immaturity Test' should be available for defendants aged under 18 years old. We are aware that the Law Commission has a separate project on the defence of insanity / automatism that raises these issues. Neuro-developmental disorders include: learning disabilities (eg low IQ, significant difficulties with everyday tasks), specific learning difficulties (eg dyslexia, dyspraxia, dyscalculia), communication disorders, ADHD (Attention Deficit Hyperactivity Disorder), ASD (Autism Spectrum Disorder) and TBI (Traumatic Brain Injury).

22. Developmental Immaturity is relevant to this Issues Paper because of the concern about setting a threshold in relation to Fitness to Plead/Effective Participation. We raise the issue, in particular, due to the age-related element to developmental maturity and the high

⁴ Centre for Social Justice, Rules of Engagement: Changing the Heart of Youth Justice (Jan 2012) p 201. "Scanning adolescent brains has (perhaps unsurprisingly) shown them to be under-developed when contrasted with adults": C Walsh, "Youth Justice and Neuroscience: a Dual-use Dilemma" (2011) 51(1) British Journal of Criminology 21, 22. ; 'Brain Waves Module 4: Neuroscience and the Law', The Royal Society, Dec 2011.

prevalence of neuro-developmental disorders amongst young defendants. Figures suggest:⁵

- 23-32% of young people in custody have a generalised learning disability, compared to 2-4% of the general population.
- 43-57% of young people who offend have specific learning difficulties, compared to around 10% of the general population.
- 60-90% of young offenders have a communication disability, compared with approximately 1 – 7% of the general population.
- 65-76% of children in custody have a Traumatic Brain Injury compared with rates of between 5 – 24% of the general population.

23. We propose a Developmental Immaturity Test that could be analogous to the 'special verdict of acquittal'. We feel that children who are developmentally immature should not be held criminally responsible.

Procedure for the unfit accused [Qs 16, 18, 20 – 24]

24. We would make the observation that any postponement/deferral should take into consideration the fact that delays during criminal proceedings disproportionately impact children and young people (both witnesses and defendants) who may have more difficulty recalling past events. Where there has been delay this may have the consequence of reducing children's ability to effectively participate in criminal proceedings.

25. Where defendants are found unfit / unable to effectively participate, the Effective Participation framework should not only allow for, but should actively encourage, discontinuance of proceedings and diversion into health or related service without proceeding to a determination of facts hearing.

26. In relation to the second limb of an Effective Participation test (determination of the facts), we agree that any defence should be left to the jury, after discussion with the advocates, where there is evidence on which a jury properly directed might reasonably find the defence made out or the essential element of the offence unproven (see also our comments at para 15 above). We consider a special verdict of an acquittal by reason of a mental disorder or developmental immaturity (a 'special verdict') should be available to the jury.

⁵ Sources: Office of the Children's Commissioner, October 2012, 'Nobody made the connection: The prevalence of neurodisability in young people who offend', p. 9-10; 'Independent Parliamentarians' Inquiry into the Operation and Effectiveness of the Youth Court' (June 2014), chaired by Lord Carlile, p. 15.

27. We agree that it is not necessary for the judge to retain the discretion, in cases of exceptional prejudice, to order a second stage process for the consideration of the special verdict, in the manner envisaged in Provisional Proposal 9 (see our reasons set out on p. 7 of our consultation response).

28. We feel it is important that the fact finding limb of an Effective Participation hearing should be heard by a jury (please see paras 14 & 15). We agree that a representative, appointed by the court to put the case for the defence, should be entitled to act contrary to the defendant's instructions, where the representative considers that to do so is necessary in the defendant's best interests (in circumstances as set out in para 10 above).

Disposals [Qs 25, 27]

29. We agree that there are difficulties with the current system of hospital orders and supervision orders, with the possibility of no entity taking responsibility for supervision of an unfit defendant (see case study 2 below). We have already raised concerns that potential difficulties could arise where a local justice board, or social services authority, declines to accept responsibility for supervision of an unfit defendant. In the current climate of cuts to funding we anticipate that this might become a more frequent problem. We therefore recommend amending s.5 and Schedule 1A CP(l)A to give the court greater powers to require local services to accept supervision of an unfit person.

Case Study 2

■ is a ■ youth who was charged with ■. 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) ■ was given an absolute discharge as the Court felt it had no other options available.

30. We feel that supervision orders could be enhanced by a requirement of the supervising officer providing the court with regular reports on the defendant's progress and for the court to have a supervisory function

enabling the defendant to attend court to tell the judge about the progress of the supervision order, and providing the court with the power to amend the order, where necessary.

Remission and Appeals [Qs 28-32]

31. We agree that if a defendant who was unable to effectively participate, gains the capacity to participate effectively in criminal proceedings, there should be a mechanism to request remission for trial. This entitlement should be exercisable by the prosecution or the defendant. For example, a defendant may feel 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.
32. The prosecution should only be able to trigger remission for trial against a defendant who has/may have regained the ability to participate effectively in criminal proceedings with the leave of the court and if it is in the public interest / interests of justice (delay of time could therefore be a factor taken into consideration by the court). The prosecution should be required provide the court with the opinions of two 'responsible clinicians', competent to address the defendant's particular condition.

Unfitness to Plead in the magistrates' court and youth courts [Qs 33-38, 40-45, 48-50]

33. There is no rational basis for distinguishing between the Crown Court and summary courts and, in our view, the procedure in the magistrates' court and youth court should mirror that in the Crown Court and apply to all offences. We feel Effective Participation determinations can properly be conducted in the summary courts and would be best conducted by district judges.
34. Where defendants are found unfit / unable to effectively participate, the Effective Participation framework should actively encourage discontinuance of proceedings and diversion into health or related service without proceeding to a determination of facts hearing and allow for a special verdict of acquittal. The disposals available must be proportionate to the act(s) done, therefore non-imprisonable offences should have lesser disposals available.
35. We agree that the Effective Participation test should take into consideration the more accessible surroundings and procedures in the youth court (although it follows that there should be mandatory, specialist training – see para 36 below). We do not feel a legal test which has regard to 'the determination of the allegation(s) faced' is of assistance (see para 11-13 & 19 above).

36. We strongly support mandatory specialist training on issues relevant to trying youths, for all legal practitioners and members of the judiciary engaged in cases involving young defendants. This is a key recommendation of Lord Carlile's recent Inquiry into the Operation and Effectiveness of the Youth Court.⁶
37. We would propose initial screening of *all under 18 year olds* for mental health issues (by mental health professionals) and capacity issues (by a responsible clinician). We agree that the reformed test for Effective Participation (set out at para 19 above) would be suitable for application to young defendants. We also propose an additional Developmental Immaturity test for children aged under 18 (see paras 21 - 23 above).
38. Where possible, children involved in criminal proceedings should appear in the youth court. We would therefore encourage the youth court to have a number of disposals available in order to reflect the wide ranging offences dealt with in the youth court. We agree there need to be specialist disposals for youths but we are concerned about the blurring of the boundaries between sanctions for criminal behaviour, namely a youth rehabilitation order, and disposals where a defendant has been found unable to effectively participate.
39. We would propose a youth supervision order that could have a variety of requirements in order that it represents a robust disposal. We would endorse an approach where the supervisory function could be overseen by a responsible clinician. We would encourage supervision outside the criminal justice system, where possible (i.e. not overseen by Youth Offending teams) and we would endorse the court exercising a supervisory function over the order (see para 30 above).
40. We agree that if a defendant who was unable to effectively participate, gains the capacity to participate effectively in criminal proceedings, there should be a mechanism to request remission for trial (see paras 31-32 above).
41. We agree that a new right of appeal should be created from any determination or disposal imposed under a reformed Effective Participation procedure, which would mirror the right to appeal against conviction or sentence under section 108 *Magistrates Court Act 1980*.

⁶ 'Independent Parliamentarians' Inquiry into the Operation and Effectiveness of the Youth Court' (June 2014), chaired by Lord Carlile, p. 37

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.

Response of Justices' Clerks Society

PART 2: THE LEGAL TEST

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

YES: NO: OTHER:
Consistent with our previous response.

Further Question 2 Do consultees consider that an effective participation test, framed around the *John M* criteria (set out at paragraph 2.3 above), with an additional decision-making capacity limb, represents the most appropriate formulation for such a combined legal test? Or do consultees favour another of the formulations set out at paragraph 2.28 above and, if so, why? (2.34)

YES: NO: OTHER:
We are attracted to the elegant formulation of such a test as articulated by Professor Ronnie Mackay.

Further Question 3 Do consultees consider that incorporating an exhaustive list of decisions for which the defendant requires capacity into a reformed legal test for unfitness to plead would assist in maintaining the threshold for unfitness at a suitable level? (2.42)

AGREE: DISAGREE: OTHER:
Whilst it would provide a practical benefit in that such a list would facilitate assessment of capacity to engage, it would carry risks in that such a list would potentially engage defendants in the test who would be fit to stand trial (with or without assistance).

Further Question 4 Do consultees consider that a reformed test should explicitly refer to a "satisfactory" or "sufficient" level of capacity for effective participation? (2.43)

YES: NO: OTHER:
A "broad understanding" of the nature of the charge, the requirement to plead, the issues relevant to the offence and the examination and cross examination process is what is required to show ability effectively to engage in the trial process.

Further Question 5 Do consultees agree that a diagnostic threshold would be unlikely to assist in maintaining the threshold of unfitness at a suitable level? (2.44)

YES: NO: OTHER:

Further Question 6 Do consultees think that it would be helpful to have a statutory presumption that all defendants are fit to be tried until the contrary is proved? (2.46)

YES: NO: OTHER:

Further Question 7 Do consultees agree that a finding that a person lacks capacity shall remain valid unless and until the contrary is established on the basis of the evidence of two suitably qualified experts? (2.48)

YES: NO: OTHER:

We would suggest that the procedure is becoming quite convoluted. If this process were to be adopted along with the other recommendations in the report, the Criminal process would start with a presumption of fitness to plead. This presumption could be displaced if it was proved that the defendant was unfit. Once it was proved he was unfit it would then need a further consideration of evidence from two suitably qualified experts to agree that the defendant was now fit. Is this too complicated a process? Notwithstanding our concerns, on balance we think that these are appropriate safeguards for those who may lack the capacity to participate effectively and that the opinion of two qualified experts to reverse that finding is appropriate.

Further Question 8 Do consultees agree that disaggregation of capacity to plead and capacity for trial is undesirable? (2.59)

YES: NO: OTHER:

Further Question 9 Do consultees consider that making the test one of capacity for effective participation "in determination of the allegation(s) faced" would introduce a desirable element of context into the assessment? (2.68)

YES: NO: OTHER:

We recognise that the ability to participate effectively in the trial will vary according to the complexity of the issues to be addressed. However we favour a test which addresses the capacity of the accused to have a broad understanding of the issues of trial. We fear that procedural difficulties would arise and confusion would be created for those assessing capacity if the test of capacity were to vary according to the context in which was undertaken.

Further Question 10 Do consultees agree that the United Kingdom's obligations under the UNCRPD and the ECHR can properly be accommodated in the manner outlined in paragraphs 2.80 to 2.82? (2.83)

YES: NO: OTHER:

Further Question 11 Do consultees agree that the difficulties surrounding unrepresented defendants cannot be addressed by amendment to the legal test itself? (2.88)

YES: NO: OTHER:

If there exist genuine concerns over the accessibility of legal representation for the defendants who may lack capacity, this should be addressed by adjustments of the gateways to publicly funded legal advice and representations. It should not have a bearing on the legal test of fitness to plead.

PART 3: SPECIAL MEASURES

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

AGREE: DISAGREE: OTHER:

We give qualified agreement to this proposal. We would emphasise the point that the provisions of 33BA of the Youth Justice and Criminal Evidence Act 1999 which are yet to be brought into force are of narrower effect than provisions which would facilitate effective participation and in all aspects of the trial process by a defendant for example with severe learning difficulties. Courts are left to rely on their inherent powers under authorities such as R(C) v Sevenoaks Youth Court to ensure that intermediaries are engaged to assist such defendants pre-trial, at trial and post trial, even though the authority primarily relates to assistance in the giving of evidence in court. As the consultation paper acknowledges special measures have developed outside the concept of fitness to plead and a number of practical difficulties arise in making special measures available for defendants. Not least of these is the rising cost to the Ministry of Justice in the increasing use of intermediaries to enhance the fairness of the trial process. The proposal appears to suggest that the approach to the question of unfitness to plead needs to be addressed having regard to how the involvement of an intermediary might overcome the "limitations" affecting the defendant's ability effectively to participate in the trial. This carries risks for defendants for whom a broad understanding of the issue of the trial and effective participation are beyond their capability. We note the comments of Lord Justice Thomas regarding the need for close scrutiny of evidence of psychiatrists. We do not disagree but would say that this must be the case either because it is not adequate to show unfitness or because it is clear that the defendants limitations cannot be overcome through the availability of special measures such as an intermediary.

PART 4: ASSESSING THE CAPACITY OF THE ACCUSED

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

AGREE: DISAGREE: OTHER:

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

AGREE: DISAGREE: OTHER:

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

AGREE: DISAGREE: OTHER:

PART 5: PROCEDURE FOR THE UNFIT ACCUSED

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

YES: NO: OTHER:

We believe the negative consequences of such a proposal far outweigh the advantages and would not serve the public interest in reducing delay in bringing criminal proceedings to a speedy conclusion.

Further Question 17 Do consultees consider that it would be appropriate to extend the maximum period of a section 36 MHA 1983 remand to hospital for treatment to 24 weeks in these circumstances? (5.25)

YES: NO: OTHER:

See our comments in relation to question 16 above.

Further Question 18 Do consultees consider that the determination of facts procedure for the accused who lacks capacity should be made discretionary following the finding of unfit, to allow for discontinuance of the proceedings, and diversion out of the criminal justice system into health or related services in appropriate cases? (5.33)

YES: NO: OTHER:

Further Question 19 Do consultees consider that public protection concerns arising in relation to an acquitted, but dangerous, unfit defendant could be adequately met by the use of civil powers under section 3 or 7 MHA 1983? (5.44)

YES: NO: OTHER:

Whilst the proposal set out in paragraph 5.4.2 is outwardly attractive we envisage difficulties arising due to the shortage of available psychiatrists to do this work. We remain supportive of the special verdict proposals as a safer method of providing for public protection for dangerous individuals.

Further Question 20 Do consultees consider that on a determination of the facts, any defence should be left to the jury, after discussion with the advocates, where there is evidence on which a jury properly directed might reasonably find the defence made out or the essential element of the offence unproven? (5.50)

YES: NO: OTHER:

Further Question 21 Do consultees consider that the special verdict should be made available to the jury on their initial consideration of the facts? (5.54)

YES: NO: OTHER:

This would appear to be an attractive idea but we note the introduction of another complex issue into jury trial. This is an area where the knowledge and experience of circuit judges as to the competence of a jury to deal with such issues would be more valuable to the Commissioners than our own views.

Further Question 22 Do consultees agree that it is not necessary for the judge to retain the discretion, in cases of exceptional prejudice, to order a second stage process for the consideration of the special verdict, in the manner envisaged in Provisional Proposal 9? (5.56)

YES: NO: OTHER:

Further Question 23 Do consultees consider that the determination of facts in relation to a defendant found to lack capacity could be dealt with by a judge sitting without a jury? (5.60)

YES: NO: OTHER:

Further Question 24 Do consultees agree that a representative, appointed by the court to put the case for the defence, should be entitled to act contrary to the defendant's identified will and preferences, where the representative considers that to do so is necessary in the defendant's best interests? (5.64)

YES: NO: OTHER:

PART 6: DISPOSALS

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

YES: NO: OTHER:

Further Question 26 Do consultees consider that it would be appropriate and effective to expand the power of supervision orders under section 5 of the CP(I)A to include recall of a supervised person to hospital, as available under section 17E-F of the MHA 1983? (6.21)

YES: NO: OTHER:

Further Question 27 Do consultees consider that there are any other enhancements of the powers available under supervision orders which would be beneficial? (6.22)

YES: NO: OTHER:

We have no suggestions to make in this regard.

PART 7: REMISSION AND APPEALS

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

YES: NO: OTHER:

Further Question 29 Do consultees consider that the power to remit an accused for trial should only be exercisable by the Crown where the judge has ruled, following the section 4A hearing, that it is in the public interest for remission to be available should the defendant regain capacity? (7.35)

YES: NO: OTHER:

Further Question 30 Do consultees agree that the Crown's power to remit defendants for trial upon their recovery should not be limited in time? (7.38)

YES: NO: OTHER:

Although we support this proposition we would anticipate challenges to the fairness of subsequent trials due to lapse of time in cases where there is a significant delay.

Further Question 31 Do consultees agree that where there has been a finding that a defendant had "done the act or made the omission," he or she should be entitled to request remission for trial on regaining capacity, where recovery is confirmed by the opinions of two experts competent to address the defendant's particular condition? (7.43)

YES: NO: OTHER:

Further Question 32 Do consultees consider that the rights of appeal vested in the unfit defendant should be exercisable by his or her legal representatives? (7.48)

YES: NO: OTHER:

We are not convinced by the arguments either way. We have reservations about the position that such an issue might have for the professional standing of the lawyer in the case.

PART 8: UNFITNESS TO PLEAD IN THE MAGISTRATES' AND YOUTH COURTS

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

YES: NO: OTHER:

There are many occasions when magistrates are required to address issues of similar complexity and, with advice from a well trained legal advisers, they invariably show that they are entirely competent to deal with such issues. We are concerned about the growing tendency for cases to be reserved to professional judges, a product of which is procedural complexity and delay in listing. We are generally opposed to the creation of a two tier summary justice system.

Further Question 34 Do consultees consider that, where the defendant's capacity is in doubt, it would be preferable for his or her capacity to be determined in the magistrates' court, and, if the defendant is found to lack capacity, that all further proceedings against him or her should remain in that court? (8.76)

YES: NO: OTHER:

The procedure in magistrates' courts is suitable for this process. This is evidently the fairest and most efficient way of dealing with such cases.

Further Question 35 (in the alternative) Do consultees alternatively consider that such a case should be sent to the Crown Court for determination of capacity and, if the defendant is found to lack capacity, that all further proceedings against him or her should remain in that court? (8.77)

YES: NO: OTHER:

It should not be an expectation in the conduct of criminal proceedings that a case would be sent to the Crown Court because the defendant appears unable to make the decision for himself as to venue for trial of the issue. If there are no reservations as to the competence of the magistrates' court to deal with the issue, there can be no justification for directing that there be a slower, more costly and more intimidating form of trial hearing conducted in the Crown Court.

Further Question 36 Do consultees agree that capacity procedures in the summary courts should be applicable for all criminal offences? (8.83)

AGREE: DISAGREE: OTHER:

We share the view of the Commissioners that the inclusion of all criminal offences is unlikely to lead to a significant increase in capacity finding hearings in the magistrates' court.

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

AGREE: DISAGREE: OTHER:

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

YES: NO: OTHER:

Further Question 39 Do consultees consider that there are any adjustments to the test, or the procedure, for defendants lacking capacity that would materially improve the prospects of the court identifying those adults with capacity issues? (8.92)

AGREE: DISAGREE: OTHER:

Not all magistrates' courts or youth courts benefit from a Mental Health Diversion Scheme. Those that do would certainly be capable of managing a diversion process for the benefit of the defendants and public at large. Such schemes, if they were of universal application, would significantly improve the prospects of these issues being identified through early screening. Once the issue is identified the test and procedure would be capable to straightforward application in both the magistrates' court and in the youth court.

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

YES: NO: OTHER:

We understand reservations as to the impact on the timely conclusion of the case but consider that it could be contrary to the interests of justice for a lesser requirement to apply in the magistrates' court or youth court.

Further Question 41 Regardless of the position in the Crown Court, do consultees agree that, in the summary courts, the tribunal should have a discretion whether to proceed to the determination of facts hearing following a finding that the defendant lacks capacity? (8.102)

AGREE: DISAGREE: OTHER:

We believe that case for diversions away from the criminal justice system is stronger in the lower courts due to the lower levels of seriousness of offences dealt with at this tier.

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

YES: NO: OTHER:

Further Question 43 Do consultees agree that there should be mandatory specialist training on issues relevant to trying youths, for all legal practitioners and members of the judiciary engaged in cases involving young defendants? (8.114)

YES: NO: OTHER:

This must be correct. We would point out that the Youth Offending Team workers, who provide court support, play an important role in the early identification of physical and mental health issues. Such specialist training should therefore be extended to YOT's.

Further Question 44 Do consultees consider it appropriate for there to be initial screening for mental health issues for all defendants under 14 years of age, to be conducted by mental health professionals?. (8.119)

YES: NO: OTHER:

There is clearly a significant resource issue connected to the delivery of such a regime.

Further Question 45 Do consultees agree that the provisional reformed test proposed for the Crown Court at paragraph 2.34 above is suitable for application to young defendants without adjustment? (8.126)

YES: NO: OTHER:

Further Question 46 Do consultees agree that the summary courts should have the power to commit a defendant to the Crown Court for the imposition of a restriction order, but should not have the power to impose one themselves? (8.130)

YES: NO: OTHER:

It is important to note the distinction between the magistrates' court dealing with adult offenders and the youth court where procedures are adapted to promote greater engagement of young defendants in the process. We do not disagree that the power to impose a restriction order should be reserved to the Crown Court for adult offenders. However the Youth Court has power to impose more lengthy custodial terms. Coupled with the desirability of avoiding sending vulnerable young persons to the Crown Court for trial or sentence we would invite consideration of whether such a power ought to be available in the youth court.

Further Question 47 Do consultees agree that the following disposals should be available to the magistrates' court on a finding that the defendant has "done the act or made the omission," or where a special determination has been arrived at:
 (a) a hospital order (without restriction);
 (b) a supervision order;
 (c) an absolute discharge? (8.135)

YES: NO: OTHER:

Further Question 48 Do consultees consider that the non-penal requirements of a youth rehabilitation order should be available as part of a youth supervision order, following a finding that a young person has "done the act or made the omission," or where a special determination has been arrived at? (8.138)

AGREE: DISAGREE: OTHER:

We are not convinced that the option to include non-penal requirements would add to the effectiveness of the range of disposals available in the youth court. We would envisage that the officer responsible for oversight of the supervision order would wish not to be constrained in what is required of the young person in order to achieve a satisfactory outcome at the end of the order. Whilst we do not doubt the effectiveness of such requirements we think that there is a risk that the addition by order of the court of such a requirement to a supervision order in such circumstances might give the false appearance that a sentence of the court had been imposed.

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

YES: NO: OTHER:

Further Question 50 Do consultees agree that a new right of appeal should be created from any determination or disposal imposed under a reformed capacity procedure, which would mirror the right to appeal against conviction or sentence under section 108 Magistrates' Courts Act 1980? (8.143)

AGREE: DISAGREE: OTHER:

OTHER COMMENTS

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

Justices' Clerks Society is grateful for the the opportunity to respond to this consultation paper.

Response of Dr Michael Kavuma, Health Professional (Consultant Forensic Psychiatrist)

PART 2: THE LEGAL TEST

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

YES: NO: OTHER:

Further Question 2 Do consultees consider that an effective participation test, framed around the *John M* criteria (set out at paragraph 2.3 above), with an additional decision-making capacity limb, represents the most appropriate formulation for such a combined legal test? Or do consultees favour another of the formulations set out at paragraph 2.28 above and, if so, why? (2.34)

YES: NO: OTHER:

Further Question 3 Do consultees consider that incorporating an exhaustive list of decisions for which the defendant requires capacity into a reformed legal test for unfitness to plead would assist in maintaining the threshold for unfitness at a suitable level? (2.42)

AGREE: DISAGREE: OTHER:

It would be impossible to produce an exhaustive list and it would not necessarily maintain the threshold.

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

YES: NO: OTHER:

Further Question 5 Do consultees agree that a diagnostic threshold would be unlikely to assist in maintaining the threshold of unfitness at a suitable level? (2.44)

YES: NO: OTHER:

Further Question 6 Do consultees think that it would be helpful to have a statutory presumption that all defendants are fit to be tried until the contrary is proved? (2.46)

YES: NO: OTHER:

Further Question 7 Do consultees agree that a finding that a person lacks capacity shall remain valid unless and until the contrary is established on the basis of the evidence of two suitably qualified experts? (2.48)

YES: NO: OTHER:

Further Question 8 Do consultees agree that disaggregation of capacity to plead and capacity for trial is undesirable? (2.59)

YES: NO: OTHER:

Further Question 9 Do consultees consider that making the test one of capacity for effective participation “in determination of the allegation(s) faced” would introduce a desirable element of context into the assessment? (2.68)

YES: NO: OTHER:

Further Question 10 Do consultees agree that the United Kingdom’s obligations under the UNCRPD and the ECHR can properly be accommodated in the manner outlined in paragraphs 2.80 to 2.82? (2.83)

YES: NO: OTHER:

Further Question 11 Do consultees agree that the difficulties surrounding unrepresented defendants cannot be addressed by amendment to the legal test itself? (2.88)

YES: NO: OTHER:

PART 3: SPECIAL MEASURES

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

AGREE: DISAGREE: OTHER:

PART 4: ASSESSING THE CAPACITY OF THE ACCUSED

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

AGREE: DISAGREE: OTHER:

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

AGREE: DISAGREE: OTHER:

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

AGREE: DISAGREE: OTHER:

PART 5: PROCEDURE FOR THE UNFIT ACCUSED

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

YES: NO: OTHER:

Further Question 17 Do consultees consider that it would be appropriate to extend the maximum period of a section 36 MHA 1983 remand to hospital for treatment to 24 weeks in these circumstances? (5.25)

YES: NO: OTHER:

Further Question 18 Do consultees consider that the determination of facts procedure for the accused who lacks capacity should be made discretionary following the finding of unfitness, to allow for discontinuance of the proceedings, and diversion out of the criminal justice system into health or related services in appropriate cases? (5.33)

YES: NO: OTHER:

Further Question 19 Do consultees consider that public protection concerns arising in relation to an acquitted, but dangerous, unfit defendant could be adequately met by the use of civil powers under section 3 or 7 MHA 1983? (5.44)

YES: NO: OTHER:

The use of civil powers to deal with such a defendant would not necessarily address risk as the defendant could be discharged at any time by the Tribunal or Responsible Clinician so long as the clinical criteria for detention are not met. Furthermore the court would cease to have any powers over the defendant for purposes of public protection. Therefore the issue of dangerousness loses significance/relevance in civil section of the MHA. The use of the MHA essentially for public protection would contravene the UNCRPD

Further Question 20 Do consultees consider that on a determination of the facts, any defence should be left to the jury, after discussion with the advocates, where there is evidence on which a jury properly directed might reasonably find the defence made out or the essential element of the offence unproven? (5.50)

YES: NO: OTHER:

Further Question 21 Do consultees consider that the special verdict should be made available to the jury on their initial consideration of the facts? (5.54)

YES: NO: OTHER:

Further Question 22 Do consultees agree that it is not necessary for the judge to retain the discretion, in cases of exceptional prejudice, to order a second stage process for the consideration of the special verdict, in the manner envisaged in Provisional Proposal 9? (5.56)

YES: NO: OTHER:

Further Question 23 Do consultees consider that the determination of facts in relation to a defendant found to lack capacity could be dealt with by a judge sitting without a jury? (5.60)

YES: NO: OTHER:

This would contravene both the ECHR with regard to effective participation and the UNCRPD in terms of fair access to legal process.

Further Question 24 Do consultees agree that a representative, appointed by the court to put the case for the defence, should be entitled to act contrary to the defendant's identified will and preferences, where the representative considers that to do so is necessary in the defendant's best interests? (5.64)

YES: NO: OTHER:

PART 6: DISPOSALS

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

YES: NO: OTHER:

Just as the unfit accused has to be willing to comply with the terms of the supervision order and there can be no sanction on breach of the same, so the supervising officer should be able to decline if they feel the supervision order is inappropriate for any reason.

Further Question 26 Do consultees consider that it would be appropriate and effective to expand the power of supervision orders under section 5 of the CP(I)A to include recall of a supervised person to hospital, as available under section 17E-F of the MHA 1983? (6.21)

YES: NO: OTHER:

Recall can only take place if the the accused meets the criteria for detention under the mental health act. the person has to be detained under the MHA for the CTO to be implemented and they have to be willing to comply. Supervision orders containing liability for recall would be inappropriate under the MHA as the accused would not necessarily meet the criteria for detention. Furthermore the CTOs have not been found to be effective in reducing readmission.

Further Question 27 Do consultees consider that there are any other enhancements of the powers available under supervision orders which would be beneficial? (6.22)

YES: NO: OTHER:

PART 7: REMISSION AND APPEALS

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

YES: NO: OTHER:

Further Question 29 Do consultees consider that the power to remit an accused for trial should only be exercisable by the Crown where the judge has ruled, following the section 4A hearing, that it is in the public interest for remission to be available should the defendant regain capacity? (7.35)

YES: NO: OTHER:

Further Question 30 Do consultees agree that the Crown's power to remit defendants for trial upon their recovery should not be limited in time? (7.38)

YES: NO: OTHER:

Further Question 31 Do consultees agree that where there has been a finding that a defendant had "done the act or made the omission," he or she should be entitled to request remission for trial on regaining capacity, where recovery is confirmed by the opinions of two experts competent to address the defendant's particular condition? (7.43)

YES: NO: OTHER:

Further Question 32 Do consultees consider that the rights of appeal vested in the unfit defendant should be exercisable by his or her legal representatives? (7.48)

YES: NO: OTHER:

PART 8: UNFITNESS TO PLEAD IN THE MAGISTRATES' AND YOUTH COURTS

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

YES: NO: OTHER:

Further Question 34 Do consultees consider that, where the defendant's capacity is in doubt, it would be preferable for his or her capacity to be determined in the magistrates' court, and, if the defendant is found to lack capacity, that all further proceedings against him or her should remain in that court? (8.76)

YES: NO: OTHER:

Further Question 35 (in the alternative) Do consultees alternatively consider that such a case should be sent to the Crown Court for determination of capacity and, if the defendant is found to lack capacity, that all further proceedings against him or her should remain in that court? (8.77)

YES: NO: OTHER:

Further Question 36 Do consultees agree that capacity procedures in the summary courts should be applicable for all criminal offences? (8.83)

AGREE: DISAGREE: OTHER:

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

AGREE: DISAGREE: OTHER:

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

YES: NO: OTHER:

Further Question 39 Do consultees consider that there are any adjustments to the test, or the procedure, for defendants lacking capacity that would materially improve the prospects of the court identifying those adults with capacity issues? (8.92)

AGREE: DISAGREE: OTHER:

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

YES: NO: OTHER:

Further Question 41 Regardless of the position in the Crown Court, do consultees agree that, in the summary courts, the tribunal should have a discretion whether to proceed to the determination of facts hearing following a finding that the defendant lacks capacity? (8.102)

AGREE: DISAGREE: OTHER:

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

YES: NO: OTHER:

Further Question 43 Do consultees agree that there should be mandatory specialist training on issues relevant to trying youths, for all legal practitioners and members of the judiciary engaged in cases involving young defendants? (8.114)

YES: NO: OTHER:

Further Question 44 Do consultees consider it appropriate for there to be initial screening for mental health issues for all defendants under 14 years of age, to be conducted by mental health professionals?. (8.119)

YES: NO: OTHER:

Further Question 45 Do consultees agree that the provisional reformed test proposed for the Crown Court at paragraph 2.34 above is suitable for application to young defendants without adjustment? (8.126)

YES: NO: OTHER:

Further Question 46 Do consultees agree that the summary courts should have the power to commit a defendant to the Crown Court for the imposition of a restriction order, but should not have the power to impose one themselves? (8.130)

YES: NO: OTHER:

Further Question 47 Do consultees agree that the following disposals should be available to the magistrates' court on a finding that the defendant has "done the act or made the omission," or where a special determination has been arrived at:
 (a) a hospital order (without restriction);
 (b) a supervision order;
 (c) an absolute discharge? (8.135)

YES: NO: OTHER:

Further Question 48 Do consultees consider that the non-penal requirements of a youth rehabilitation order should be available as part of a youth supervision order, following a finding that a young person has "done the act or made the omission," or where a special determination has been arrived at? (8.138)

AGREE: DISAGREE: OTHER:

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

YES: NO: OTHER:

Further Question 50 Do consultees agree that a new right of appeal should be created from any determination or disposal imposed under a reformed capacity procedure, which would mirror the right to appeal against conviction or sentence under section 108 Magistrates' Courts Act 1980? (8.143)

AGREE: DISAGREE: OTHER:

OTHER COMMENTS

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

Reform is necessary but it will require significant increase in resources in both the health service and CJS to cope with the potential increase in proceedings or outcomes under Unfitness to Plead

RESPONSE OF HHJ LAMB QC TO THE UNFITNESS ISSUES PAPER

DATED 02.05.14

| Para | Question | Response |
|------|----------|--|
| | | |
| 2.33 | 1 | I agree |
| | | |
| 2.34 | 2 | I agree |
| | | |
| 2.42 | 3 | No |
| | | |
| 2.43 | 4 | Sufficient. Sitting in the Mental Health Review Tribunal I have observed many patients who were able to participate to some extent in proceedings which had a profound effect on their liberty and their lives. |
| | | |
| 2.44 | 5 | I agree |
| | | |
| 2.46 | 6 | No more than a presumption. What about the Defendant who has remained silent from the moment of his arrest? If medical records exist which show a history of mental illness, surely the Court should consider the records? |
| | | |
| 2.48 | 7 | No. Evidence of capacity might come from lay witnesses. Suppose the Defendant successfully faked incapacity and was later seen by non medics to undertake some complex activity? |
| | | |
| 2.59 | 8 | I agree |
| | | |
| 2.68 | 9 | Formulating a defence strategy can embrace more than just the "allegations faced" – e.g whether to adopt a cut throat defence, actively attacking a co-defendant. |
| | | |
| 2.83 | 10 | <p>Pass. I would want to consider how other ratifying countries have dealt with the same obligations.</p> <p>I am particularly troubled about the existing and proposed difference in treatment of the disabled in our Civil and Criminal justice systems.</p> |

| | | |
|------|----|---|
| | | <p>Suppose that :</p> <p>(1) An obstetrician, in private practice, drops a baby which he has delivered. The baby is paralysed. The child grows up and gains its majority. The child, now an adult, sues the doctor for negligence. The Doctor retired 10 years later having developed Huntington's Chorea. The Doctor has no idea what is going on and he can remember nothing about the incident. The Court of Protection appoints a Litigation Friend to act in his best interests in the civil proceedings. During his career the Doctor had managed to buy a house and save £2.5m which would have been sufficient to fund his care and to support his dependent wife until they died. The Claimant wins the action. The Doctor's insurers have long since avoided liability on the grounds of non-disclosure. Having been in private practice, no-one is vicariously liable for the Doctor's negligence. The Claimant enforces an award for £3.5m inclusive of costs. The Doctor and his wife are out on the street.</p> <p>(2) As he left the delivery room, having dropped the baby, the Doctor brushed his hand against the breast of the midwife. Traumatized she kept silent about her ordeal until she read of the above civil action in the newspapers. Then the midwife goes forward to the police. The CPS decide to charge the Doctor with sexual/indecent assault. Because of his Chorea the Doctor is found unfit to plead. He suffers no criminal penalty and continues to live with his wife in their £1m home. He retains his pension pot.</p> <p>(1) could have been negligence or an early symptom of chorea, about which the Defendant has no recollection and can give no instructions</p> <p>(2) could have been lust or another involuntary movement.</p> <p>It may be that Arts 12 and 13 of UNCRPD will be interpreted as requiring more consistency.</p> |
| 2.88 | 11 | I agree |
| 3.22 | 12 | Yes. Suppose that a Defendant doesn't speak English and therefore cannot follow the proceedings. I wouldn't dream of conducting the trial without an interpreter. In general terms the functions of an interpreter and an intermediary are the same. |

| | | |
|--------------|----------|---|
| | | The Government may have a different view on “practicability”. |
| | | |
| 4.22 4.23 | 13 14 | <p>In personal injury litigation it was not uncommon to find medical “experts” who were hacks, selling their opinions unscrupulously.</p> <p>It is not difficult to imagine that certain psychiatrists / psychologists / other responsible clinicians might see it as an attractive way to work out their careers giving favourable ftp opinions to Defendants.</p> <p>Of course the opinions of such hacks could be challenged in Court but that is costly of time and resources. It is surely much more efficient to make the hack persuade a professional colleague out of Court of his or her opinion.</p> <p>On balance I would keep the requirement for 2 experts.</p> <p>Only one need attend the hearing.</p> |
| | | |
| 4.27 | 15 | You have already addressed the possibility of a presumption in question 6. |
| | | |
| 5.24 | 16 | I agree |
| | | |
| 5.25 | 17 | I agree |
| | | |
| 5.33 | 18 | If discretionary, there would be no consistency of approach. |
| | | |
| 5.44 | 19 | Even if inadequate those powers would be the only protection for the public. |
| 5.50 | 20 | Yes |
| | | |
| 5.54 | 21 | No |
| | | |
| 5.56 | 22 | I agree |
| | | |

| | | |
|------|----|---|
| 5.60 | 23 | I think it should be an option available to the accused. He may feel that his case would be given more dispassionate consideration |
| | | |
| 5.64 | 24 | Yes |
| | | |
| 6.14 | 25 | Pass |
| | | |
| 6.21 | 26 | In my experience of dealing with patients on CPO's in the MHRT, some of them very much resent the power of recall. The constant threat of recall may not be conducive to their regaining "normalcy" |
| | | |
| 6.22 | 27 | No. Patients have a right to be ill if they so wish; and in my experience some of them do – the occasional self-harmer for example. |
| | | |
| 7.34 | 28 | Yes |
| | | |
| 7.35 | 29 | No |
| | | |
| 7.38 | 30 | Yes |
| | | |
| 7.43 | 31 | Yes |
| | | |
| 7.48 | 32 | No. Solicitors sometimes fight over publicly funded clients. I have seen firms scrapping in the MHRT over the same patient. It is not difficult to imagine Representative 2 seeking to persuade an unfit Defendant that his case was incompetently dealt with by Representative 1. Should Representative 2 be given the right effectively to instruct himself ? |

UNFITNESS TO PLEAD: AN ISSUES PAPER

RESPONSE TO FURTHER QUESTIONS

YOUR DETAILS

Name of Respondent: The Law Society of England and Wales

Type: Legal Practitioners

This is the response of the Law Society of England and Wales, the representative body for over 166,000 solicitors in England and Wales. It negotiates on behalf of the profession, and lobbies regulators, government and others. This response has been prepared on behalf of the Law Society by members of its specialist Criminal Law, and Mental Health and Disability, Committees.

Postal address: 113 Chancery Lane, London WC2A 1PL

[REDACTED]

[REDACTED]

Confidentiality: We do not ask that this response be treated as confidential.

PART 2: THE LEGAL TEST

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

Yes.

The current test is inadequate, and the addition of a decisional capacity limb is essential.

Further Question 2: Do consultees consider that an effective participation test, framed around the John M criteria (set out at paragraph 2.3 above), with an additional decision-making capacity limb, represents the most appropriate formulation for such a combined legal test? Or do consultees favour another of the formulations set out at paragraph 2.28 above and, if so, why? (2.34)

Yes.

We would favour a test framed around the *John M* criteria. Defence solicitors have been instructing psychiatrists and other experts using that test in addition to the Prichard test, and find that it is very clear and sets out the individual steps that should be considered.

Further Question 3: Do consultees consider that incorporating an exhaustive list of decisions for which the defendant requires capacity into a reformed legal test for unfitness to plead would assist in maintaining the threshold for unfitness at a suitable level? (2.42)

Other.

While we agree that the reformed legal test should be formulated to ensure that the threshold for unfitness does not fall too low, the Prichard/John M test already sets out the list of decisions for which the defendant requires capacity to be fit to participate in the criminal proceedings. It is essential that the test is flexible enough to enable an individual decision to be made as to fitness in relation to the particular defendant in the context of the case alleged against them.

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

No.

We do not consider that an explicit reference to a level of capacity for effective participation of 'satisfactory' or 'sufficient' is likely to assist, as they are rather ill-defined concepts and are liable to be applied in an arbitrary fashion, and will vary according to the nature of the defendant's illness or disability, and the nature of the case.

Further Question 5: Do consultees agree that a diagnostic threshold would be unlikely to assist in maintaining the threshold of unfitness at a suitable level? (2.44)

Yes.

We agree that a diagnostic threshold is unlikely to assist the court in maintaining the threshold of unfitness at a suitable level. Simply because a defendant has a mental illness or a disability does not mean that they will necessarily lack capacity to make decisions or be unable to participate. The emphasis should be on determining the level of their abilities in relation to the trial, rather than on the diagnosis.

Further Question 6: Do consultees think that it would be helpful to have a statutory presumption that all defendants are fit to be tried until the contrary is proved? (2.46)

Yes.

Further Question 7: Do consultees agree that a finding that a person lacks capacity shall remain valid unless and until the contrary is established on the basis of the evidence of two suitably qualified experts? (2.48)

Other.

We agree that the court's finding that a person lacks capacity should remain valid until the contrary is established. However, we seriously query whether there is a need for there to be evidence from TWO suitably qualified experts (please see our later comments in this regard).

We agree that there may be cases where a mentally unwell defendant recovers their health, and hence their capacity to stand trial, before the s4A hearing takes place, and that in such cases reverting to the usual criminal process will be appropriate. We agree that this apparent lacuna in the law should be remedied.

Further Question 8: Do consultees agree that disaggregation of capacity to plead and capacity for trial is undesirable? (2.59)

Yes.

We agree that disaggregation presents problems, particularly those identified in paragraph 2.57(1) and (2) in relation to the lasting ramifications of any plea entered by a person otherwise lacking capacity for trial, and dealing with complications that may arise around the sentencing process.

Further Question 9: Do consultees consider that making the test one of capacity for effective participation “in determination of the allegation(s) faced” would introduce a desirable element of context into the assessment? (2.68)

Yes.

We agree that the test of capacity for effective participation should be able to take into account the circumstances and complexity of the specific allegation faced by the defendant. For example, the John M question of whether they are capable of giving evidence in their own defence must be considered in the context of the actual allegations faced and their complexity or otherwise, the participation of co-defendants etc.

While there is some risk this could potentially overcomplicate cases where solicitors are representing a defendant on more than one charge and in separate proceedings (e.g. where they might just about be able to participate in a trial of a shoplifting allegation watching CCTV, but may not be able to participate in a trial with multiple witnesses). Clearly it would depend on the particular difficulties of the defendant. But if the test in John M is adopted we are confident that they are sufficiently thorough to cover all aspects of a criminal trial which could be faced by any defendant.

Additionally, in this context, we would raise the issue of the timing of the determination of the issue of fitness, and whether in some cases it may be appropriate in the defendant's best interests to defer consideration of capacity until the strength of an apparently weak allegation can be tested. Where a defendant whose capacity may be in issue is facing a case in which the prosecution allegations are particularly weak, it may be appropriate for the issue of capacity to be postponed until the end of the prosecution case, where there is a reasonable chance that the prosecution evidence will be successfully challenged. Only when a case to answer is established in such circumstances should the issue of a defendant's capacity need to be raised, before the defence case is opened. The cases of *R v Norman*, The Times August 21, 2008, CA, *R v Webb* [1969] 2 QB 278, 53 Cr.App.R and *R v Burles* [1970] 2 QB 191, 54 Cr.App.R 196, referred to at paragraph 4 - 234 of Archbold 2014 endorse this approach.

Further Question 10: Do consultees agree that the United Kingdom's obligations under the UNCRPD and the ECHR can properly be accommodated in the manner outlined in paragraphs 2.80 to 2.82? (2.83)

Other.

We do not claim any expertise in either set of obligations and therefore will not express a view.

Further Question 11: Do consultees agree that the difficulties surrounding unrepresented defendants cannot be addressed by amendment to the legal test itself? (2.88)

Yes.

The difficulties faced by and surrounding unrepresented defendants cannot be addressed by amendment of the legal test itself.

We fully endorse the suggestion in paragraph 2.87 of the issues paper that where concerns around legal capacity have been identified the court should ensure that a defendant has sufficient opportunity to consider the benefits of legal representation. We would suggest that in such cases if an issue of unfitness to plead arises at that stage the court should have the power to appoint a legal representative, similar to the power of Crown Courts under s.4A(2)(b) Criminal Procedure (Insanity) Act 1964. We note that at paragraph 8.49, the National Bench Chairmen's forum felt there should be consideration of the appointment of a legal representative to protect the interest of the defendant, in the Magistrates' courts context.

PART 3: SPECIAL MEASURES

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

Agree.

We note the recent case of *OP, R (On the Application Of) v Secretary of State for Justice* [2014] EWHC 1944 (Admin), 13 June 2014, in this context, but agree with the view that a defendant's entitlement to a registered intermediary should extend pre-, and post-trial, and should not be limited to the giving of evidence only. However, we believe that caution is still required as special measures cannot compensate for cognitive deficits. Defendants have to be able to participate fully and effectively in their trial, as required by article 6 of the ECHR. This means that special measures can only assist a defendant who has the inherent cognitive capacity to participate fully in the trial, but whose communication skills could hinder exercise of that capacity. We agree with the views of Laura Hoyano at the Leeds University Symposium, that the statutory eligibility criteria are discriminatory, compared to those applicable to prosecution and ordinary defence witnesses. At present the only special measures available to defendants are the live video-link and an intermediary who is appointed by the court on an ad hoc basis, and who must not be acting in the statutory capacity of registered intermediary.

PART 4: ASSESSING THE CAPACITY OF THE ACCUSED

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

Agree.

We do not think that under any reformed unfitness test that it will be necessary for the requirement of two registered medical practitioners approved under section 12 to do the assessment. We believe that an assessment could be made by one expert, initially instructed by the defence, with the option for the CPS to seek an alternative assessment.

The requirement should not be limited to registered medical practitioners, but rather it should be open for the instruction of an expert who is competent to address the particular defendant's condition. For example, in relation to an autistic client who has Autistic Spectrum Disorder, this is not a mental illness, but rather a developmental problem (although this may result in a learning disability). In such a case a clinical psychologist, qualified in that particular field, would be more appropriate to do the initial assessment on fitness to plead. Autistic clients are representative of a group of people whose capacity is very unlikely to change over time.

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

Disagree.

We do not agree that it is necessary, at the unfitness to plead hearing itself, for the defence to have to obtain two expert opinions. The prosecution may of course instruct and call their own expert to rebut the defence expert/s, meaning there are sometimes three experts' opinions in total.

We would propose that the defence would obtain the first expert opinion, and whether that be from a psychiatrist, or a fully qualified psychologist, would depend on the nature of the defendant's disability. As we set out above it is not always necessary that the expert is s.12 MHA approved, as long as they have the appropriate expertise for the case. The prosecution then have the choice as to whether or not they wish to obtain their own expert, presumably on the basis that they do not accept the first opinion. If the prosecution decide not to contest the unfitness hearing we see no reason why one expert's/doctor's evidence cannot be sufficient. If the final disposal is to be by way of a hospital order, then a second opinion can be obtained at that point. We believe this would save a considerable amount of public funds and delay in the trial proceeding. In the usual experience of defence solicitors, it takes at least three months to get a first expert's report and then usually another two to three months to get the second expert, as inevitably one is instructing an expert who is in practice and has to fit such work into a busy schedule. That, together with the delays of the prosecution obtaining their own expert, can mean it is between six and nine months before an unfitness to plead hearing can be listed.

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

Other.

Unfortunately we are unaware of any alternative mechanisms to address the difficulty of a defendant whose capacity is in doubt, but who refuses an expert assessment, and we agree that they do present an intractable problem for the courts, as well as posing dilemmas for their legal representatives. Hopefully the ready presence of the Liaison and Diversion Services will ameliorate this problem to some extent, given that even where an assessment is refused they and the police may be able to give the court information as to the defendant's demeanour and behaviour that could enable the court to reach a conclusion as to their

decision-making and participation. The scope for diversion out of the criminal justice process will increase as a result of the presence of Liaison and Diversion Services.

PART 5: PROCEDURE FOR THE UNFIT ACCUSED

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

Other.

While we agree that it may be appropriate for the court to have the power to delay the determination of the facts hearing to allow the accused to regain capacity and be tried in the usual way, we do have concerns about the proposal.

What is often not understood is the incredible pressure upon an unfit defendant waiting for their unfitness hearing to proceed. By their nature, they will involve a defendant who has a disability of some sort. That disability will often make the person more anxious, and delay, as well as the court process itself, often exacerbates the person's disability and distress. To factor in yet another six month delay could be most unfair to the defendant.

If such a power were to be introduced it should only be exercised very sparingly and only where there is sufficient evidence that the accused is likely to recover their capacity and, arguably, only with the consent of the defendant. Only where a condition is amenable to treatment could use of the power be contemplated. Certainly the defendant's views should be taken into account in reaching a decision to adjourn. And if the proposed power of remission is introduced the need for a power to adjourn the s4A hearing would diminish.

Further Question 17: Do consultees consider that it would be appropriate to extend the maximum period of a section 36 MHA 1983 remand to hospital for treatment to 24 weeks in these circumstances? (5.25)

Yes, in the event of an adjournment being judged appropriate then it would be appropriate to extend the maximum period of s 36 remand to hospital to 24 weeks.

Further Question 18: Do consultees consider that the determination of facts procedure for the accused who lacks capacity should be made discretionary following the finding of unfitness, to allow for discontinuance of the proceedings, and diversion out of the criminal justice system into health or related services in appropriate cases? (5.33)

Yes. We fully support this proposal. The determination of facts procedure should be discretionary in both the Magistrates' and Crown Court, and at all stages the CPS should be reminded of their duty to review their decision to prosecute the case, and to consider diversion out of the criminal justice system.

Further Question 19: Do consultees consider that public protection concerns arising in relation to an acquitted, but dangerous, unfit defendant could be adequately met by the use of civil powers under section 3 or 7 MHA 1983? (5.44)

Yes.

In representations to the CPS on behalf of defendants who could be placed under s 3 of the MHA defence solicitors will frequently point out to the CPS that detention under s 3 is exactly the same as detention under s 37, save that under s 37 the defendant does not have a right of appeal to a Mental Health Tribunal in the first six months of detention, whereas they do under s 3.

Thus, if it is not the case that a defendant is likely to receive a s 41 disposal and the defendant is in hospital under s 3, or could be admitted under s 3, this will be an eminently sensible representation to make. The protection of the public is the same under a civil section, or under a hospital order, as the statutory criteria for detention are the same.

Further Question 20: Do consultees consider that on a determination of the facts, any defence should be left to the jury, after discussion with the advocates, where there is evidence on which a jury properly directed might reasonably find the defence made out or the essential element of the offence unproven? (5.50)

Yes.

Further Question 21: Do consultees consider that the special verdict should be made available to the jury on their initial consideration of the facts? (5.54)

Yes.

Further Question 22: Do consultees agree that it is not necessary for the judge to retain the discretion, in cases of exceptional prejudice, to order a second stage process for the consideration of the special verdict, in the manner envisaged in Provisional Proposal 9? (5.56)

Yes.

We agree it is not necessary.

Further Question 23: Do consultees consider that the determination of facts in relation to a defendant found to lack capacity could be dealt with by a judge sitting without a jury? (5.60)

No. As a matter of principle the Law Society is firmly of the view that the role of the jury, as the determiner of facts in non-summary criminal cases, is a vital component in the criminal justice system in England and Wales. We are not persuaded that it would be appropriate to create an exception in relation to determining the facts where a defendant lacks capacity.

Further Question 24: Do consultees agree that a representative, appointed by the court to put the case for the defence, should be entitled to act contrary to the defendant's identified will and preferences, where the representative considers that to do so is necessary in the defendant's best interests? (5.64)

Yes.

Where a defendant lacks capacity a court appointed legal representatives should be entitled to act contrary to the defendant's identified will and preferences where it is in the defendant's best legal interests to do so.

If a person lacks capacity then there is a duty on a solicitor to act in the client's best legal interests, which might be a contradiction to the client's best medical interests. This is raised in the Practice Note of the Law Society to solicitors representing patients who lack capacity at Mental Health Tribunals. It is a difficult area and the threshold for lack of capacity in a Mental Health Tribunal is quite low; it is probably higher in a criminal case because it is extremely important that a defendant is able to communicate his or her instructions to their representative. The court should have a power to appoint a representative to act in the best interests of the defendant where that person lacks capacity.

In the civil context, rule 11(7) of the First Tier Tribunal Rules 2008 gives the First Tier Tribunal (Mental Health) the power to appoint a representative for a patient with capacity who does not want to represent themselves and who wants a representative, or a patient without capacity where the Tribunal believes it is in the patients 'best interests' to be represented. Rule 11 does not, however, deal with the situation where a patient resolutely refuses to be represented, save to permit the First Tier Tribunal to appoint a representative in the patient's best interests if the patient lacks capacity to do so himself. The emphasis is on having representation.

When representing an incapacitated patient before the Tribunal it is for the solicitor, first, to form a view on the extent to which the patient's wishes form the basis of a properly arguable submission and this is on the same basis upon which a competent patient's case must be put (*Buxton v. Mills/Owen* [2010] EWCA Civ 122). A solicitor must not advance an argument that is not properly arguable in any case. Thus, in a Tribunal situation if the solicitor decides that the patient's wishes cannot form a properly arguable submission, then the solicitor must consider whether there is any properly arguable point capable of being advanced on behalf of the patient. This judgment must be based on the patient's legal best interests. The patient's wishes must still be placed before the Tribunal even where it is the solicitor's judgment that their wishes do not reflect their best interests and the solicitor proposes also to advance an alternative argument based on the patient's legal best interests.

PART 6: DISPOSALS

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

Other.

We have no view and suggest this is a question for those tasked with supervision.

Further Question 26: Do consultees consider that it would be appropriate and effective to expand the power of supervision orders under section 5 of the CP(I)A to include recall of a supervised person to hospital, as available under section 17E-F of the MHA 1983? (6.21)

No.

We believe it would be problematic include recall of a supervised person to hospital. A person can only be placed under a Community Treatment Order under s 17a MHA if they have been in hospital on either s 3 or s 37 of the MHA. In contrast, someone who is placed under a supervision order under s 5 of the CP(I)A might never have been in hospital. It

would be inappropriate therefore to be able to shortcut an admission to hospital by using what is, effectively, breach proceedings.

In order to be put on s 3 or s 37 there is a requirement of two medical opinions together with an Approved Mental Health Practitioner. In order to be recalled under s.17E-F of the MHA that recall has to be by the person's community responsible clinician, usually in consultation with their care coordinator. The recall sometimes is only for 72 hours if the person can be, for example, given medication by way of a depot injection and then re-released. We consider that incorporating this into the supervision order would be too complicated, and there would be insufficient safeguards for the defendant.

Further Question 27: Do consultees consider that there are any other enhancements of the powers available under supervision orders which would be beneficial? (6.22)

Other.

Again we have no view and suggest this is a question for those tasked with supervision.

PART 7: REMISSION AND APPEALS

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

Other.

As in our answer to question 16, it must be remembered that one is dealing with a defendant who has disability. Therefore for such a defendant to know that, having been through an unfitness trial and all that that entails, together with a fact finding hearing and possibly a hospital admission, only to be told that that will happen all over again but as a 'ordinary' defendant would be very damaging for the defendant's mental health and would, in effect, be like being on trial twice. We are therefore very uneasy about the proposal to extend the power for the Crown to remit a defendant for trial to all defendants, i.e. those who have not received a hospital order with restriction.

However, if the power to remit is to be extended, in our view it should be for the judge, at the time of the unfitness and determination hearings (where it was established that the act/ omission was done/not done), to determine whether the case is a suitable one for remission, taking into account both the interests of the defendant and the public interest (including those of victims and witnesses) in reopening the case in due course, informed by both the submissions of the CPS and the defence. It may be that the defendant him/herself would wish to keep open the option of remission.

Further Question 29: Do consultees consider that the power to remit an accused for trial should only be exercisable by the Crown where the judge has ruled, following the section 4A hearing, that it is in the public interest for remission to be available should the defendant regain capacity? (7.35)

Yes.

See above.

Further Question 30: Do consultees agree that the Crown's power to remit defendants for trial upon their recovery should not be limited in time? (7.38)

Yes.

However, this is subject to our comments above, about the judge being the more appropriate person to make this decision.

Further Question 31: Do consultees agree that where there has been a finding that a defendant had "done the act or made the omission," he or she should be entitled to request remission for trial on regaining capacity, where recovery is confirmed by the opinions of two experts competent to address the defendant's particular condition? (7.43)

Yes.

Although we query the need for there to have been confirmation by two competent experts (see our comments in relation to question 14 above).

Further Question 32: Do consultees consider that the rights of appeal vested in the unfit defendant should be exercisable by his or her legal representatives? (7.48)

Yes.

We agree that this power should be able to be exercisable by legal representatives, particularly if there has been an error of law which would not be understandable to an incapacitated defendant.

PART 8: UNFITNESS TO PLEAD IN THE MAGISTRATES' AND YOUTH COURTS

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

Yes.

We see no reason why lay benches, with an appropriate level of training, could not hear such cases.

It is currently being proposed that legal advisors are dispensed with in courts where a District Judge is sitting. It would be necessary to ensure that a legal advisor is available in cases where lay justices are sitting.

Further Question 34: Do consultees consider that, where the defendant's capacity is in doubt, it would be preferable for his or her capacity to be determined in the magistrates' court, and, if the defendant is found to lack capacity, that all further proceedings against him or her should remain in that court? (8.76)

Yes.

We agree with the Commission's provisional view that if the magistrates retain jurisdiction in an ether-way case and the defendant is found to lack capacity, that the determination of the facts hearing take place in that court, notwithstanding the fact that they would not have their case determination heard by a jury.

It is our experience that many defendants (both with or without disabilities) have a fear of the Crown Court. We do not believe that where a defendant's capacity is in doubt the case should automatically be sent to the Crown Court, and we very much welcome the proposal to reform the law to allow this issue to be dealt with in the summary courts. Where a defendant is found to lack capacity we believe it is important that one court should hear the case, as often the change of court and change of structure of the proceedings can be extremely intimidating for an unwell defendant.

The practical problem with the Commission's provisional view that magistrates should adjourn the defendant's consideration of whether to elect Crown Court trial or not for the determination of the defendant's capacity to be conducted (paragraph 8.71) is that this will require some time, which is contrary to the current trend to deal with cases quickly, and to progress the case at every hearing. From our experience as defence solicitors, it will take a minimum of 8 to 12 weeks for a report to be obtained from an appropriate psychiatrist. This is because any psychiatrist worth their salt will want to see a defendant's previous medical records, which will need to be obtained often from several sources e.g. their GP, hospitals etc. Once those have been obtained prior authority from the Legal Aid Agency has to be sought, with a quotation from the expert. Once prior authority is granted the expert is then instructed but can sometimes be unavailable for a number of weeks. Once the expert has seen the defendant they usually require between 2 to 3 weeks to provide their report.

We have no objection to assessment of capacity procedure taking place in the Magistrates Court, but it is very important that where issues of capacity are raised that they are taken out of the 'Stop Delaying Justice' regime of case management. Magistrates must allow time for the issue of capacity to be considered. Defence solicitors should not be forced into a situation of completing case management forms when they do not know whether or not the defendant has capacity to give instructions regarding his defence.

Having said that, it may well be helpful for this procedure to take place initially in the Magistrates' Court, allowing an adjournment for a realistic period of up to three months for the initial report, because it will mean that solicitors are better placed at an earlier stage to make representations to the Crown Prosecution Service for discontinuance or a diversion out of the criminal justice system.

While we very much welcome the NHS England Liaison and Diversion Service, which will hopefully be able to identify defendants who might lack capacity, we are worried about a defendant being charged and turning up in court with a report from a doctor or a psychiatric nurse who has attended the police station and given an opinion that the defendant is fit to plead, without having had the opportunity to consider the defendant's full medical history, or having spent a considerable amount of time examining those records and interviewing the patient, nor being aware of the charge, the *mens rea* required for that charge, the facts of the case and the likely procedure and number of witnesses etc to be called at the trial, all of which will all affect whether or not the defendant is in fact likely to be capacious.

Further Question 35: (in the alternative) Do consultees alternatively consider that such a case should be sent to the Crown Court for determination of capacity and, if the defendant is found to lack capacity, that all further proceedings against him or her should remain in that court? (8.77)

Further Question 36: Do consultees agree that capacity procedures in the summary courts should be applicable for all criminal offences? (8.83)

Yes.

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

Yes.

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

Yes.

Further Question 39: Do consultees consider that there are any adjustments to the test, or the procedure, for defendants lacking capacity that would materially improve the prospects of the court identifying those adults with capacity issues? (8.92)

No.

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

Yes.

We agree it is appropriate to have the same evidential requirement in the summary courts as in the Crown Court, but would reiterate our query as to the need, at the unfitness to plead preliminary hearing, for there to be two experts for the defence.

Further Question 41: Regardless of the position in the Crown Court, do consultees agree that, in the summary courts, the tribunal should have a discretion whether to proceed to the determination of facts hearing following a finding that the defendant lacks capacity? (8.102)

Yes.

We are of the view that both the Crown Court and the Magistrates' Court should have a discretion as to whether to proceed to the determination of facts hearing, following a finding that the defendant lacks capacity. If there is a possibility to divert the defendant in any way then it might be done at that stage.

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

Yes.

We are very much in agreement with this. Often, but for a person's mental disorder they, would not have committed the crime alleged and therefore a right to reach a special determination of acquittal because of mental disorder existing at the time of the offence in the summary jurisdiction is a fair and just adjustment to be made to the law.

Further Question 43: Do consultees agree that there should be mandatory specialist training on issues relevant to trying youths, for all legal practitioners and members of the judiciary engaged in cases involving young defendants? (8.114)

Yes.

Further Question 44: Do consultees consider it appropriate for there to be initial screening for mental health issues for all defendants under 14 years of age, to be conducted by mental health professionals?. (8.119)

No.

While initial screening for *some* defendants under the age of 14 years will certainly be appropriate and should be available, we are not convinced of the need to screen for mental health issues for *all* under 14 year olds. It should not be mandatory, in other words. Some issues affecting under 14 year olds are social in nature, rather than medical, and there would be potentially significant resource implications.

Further Question 45: Do consultees agree that the provisional reformed test proposed for the Crown Court at paragraph 2.34 above is suitable for application to young defendants without adjustment? (8.126)

Yes.

Further Question 46: Do consultees agree that the summary courts should have the power to commit a defendant to the Crown Court for the imposition of a restriction order, but should not have the power to impose one themselves? (8.130)

Yes.

A restriction order is a very serious disposal and should therefore be confined to the Crown Court.

Further Question 47: Do consultees agree that the following disposals should be available to the magistrates' court on a finding that the defendant has "done the act or made the omission," or where a special determination has been arrived at (8.135):

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

Yes.

Further Question 48: Do consultees consider that the non-penal requirements of a youth rehabilitation order should be available as part of a youth supervision order, following a finding that a young person has "done the act or made the omission," or where a special determination has been arrived at? (8.138)

Yes.

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

Yes, although again we do not see the need for two expert opinions if one will suffice.

Further Question 50: Do consultees agree that a new right of appeal should be created from any determination or disposal imposed under a reformed capacity procedure, which would mirror the right to appeal against conviction or sentence under section 108 Magistrates' Courts Act 1980? (8.143)

Yes.

**Response from Anna Lawson and Rebecca Parry,
School of Law and Centre for Disability Studies, University of Leeds
to**

Further Question 10: Do consultees agree that the United Kingdom's obligations under the UNCRPD and the ECHR can properly be accommodated in the manner outlined in paragraphs 2.80 to 2.82?

We would like to thank the Law Commission for the opportunity to comment on this point. Whilst we congratulate the Law Commission for its careful analysis, and its engagement with the CRPD, we have some concerns about the suggested 'accommodation' of the CRPD and the ECHR in paras 2.80-2.82.

The CRPD (Article 12 in particular) poses many important and difficult questions for law-makers. The UN Committee on the Rights of Persons with Disabilities has provided more guidance on some of these questions than on others. Unfortunately, the Committee has not yet provided any specific guidance on the particular questions lying at the heart of this consultation. There would, however, be an opportunity for the government to seek such guidance during the Committee's constructive dialogue with the UK due to take place in 2015. At present, however, there is no definitive guidance on the implications of the CRPD for laws on fitness to plead and take part in criminal trials. What follows is therefore an attempt to reflect on this issue in light of first principles and the more generic guidance that is currently available.

At the outset, we would like to stress that other Articles of the CRPD have relevance to the issue of 'fitness to plead' besides Article 12 and that it is important to consider the CRPD as a whole. Article 13, as mentioned in the issues paper, has obvious significance and this will be discussed below. In addition, however, other Articles are important.

Articles 5 and 9, on non-discrimination and accessibility respectively, have cross-cutting relevance throughout the Convention. They thus apply in the context of access to justice (Art 13) and require measures to be taken to make the physical environment, information and communications accessible to disabled people; and individual adjustments (including the provision of support) to be made which will enable a particular disabled person to participate in the legal process on an equal basis with others. Unreasonable failure to provide a disabled person with such adjustments (including support) at any point of the legal process thus amounts to discrimination contrary to Art 5 of the CRPD (and indeed the Equality Act 2010 at domestic level). We therefore strongly support the Law Commission's proposal that 'fitness to plead' assessments should not take place in the absence of any required adjustments and supports for the disabled individual in question.

In order to ascertain what supports and adjustments are needed by a particular individual, a detailed assessment (in which the person concerned actively participates) will be required. This assessment obviously must be context specific as it is assessing the adjustments and supports required to enable equal participation in a particular activity (here, a criminal trial). This type of assessment addresses many of the same issues as a fitness to plead assessment. However, it is oriented to assessing the adjustments and supports which can be provided to an individual rather than to assessing the functional capacity of that individual. Individuals who cannot adequately be supported to participate on an equal basis in a criminal trial would thus not be judged 'unfit' at the end of the process. Nor, we suggest, would their legal capacity necessarily have been curtailed. Instead, limitations of the justice system would have been encountered and exposed. If these limitations were unreasonable, people thereby denied the opportunity to

have a criminal trial might be able to bring actions for disability discrimination based on failure to provide reasonable adjustments (or reasonable accommodation in the language of the CRPD). Such an approach, we suggest, need not be viewed as running contrary to Article 12 – provided that it operated effectively, consensually and with the full involvement of the person concerned.

Various Articles of the CRPD require services and support to be provided to disabled people in order to enable them to live within the community on an equal basis with everybody else. These include Article 19 (independent living), Article 26 (habilitation and rehabilitation) and Article 28 (standard of living, social protection, housing etc). In addition, Article 24 concerns education and refers specifically (in Art 24(1)(c)) to the fact that it should be directed to “enabling persons with disabilities to participate effectively in a free society”. All these provisions may be cited in support of the need for programmes and support designed to give disabled people access to information and guidance, on an equal basis with others, as to what is socially acceptable conduct and what is unacceptable and criminal in nature. There are concerns that people with learning difficulties in particular may not always be given appropriate, accessible and understandable guidance on such matters. As a result they are liable to step over the line and engage in socially unacceptable behaviour which brings them within the domain of the criminal justice system. In such cases, particularly where the offences are minor, it would be contrary to the public interest to prosecute. Instead, diversion mechanisms should be made available which ensure that the person concerned has access to the support and services they need and want.

Article 14 of the CRPD is a somewhat ambiguous provision which (like Article 12) has attracted considerable debate. It requires that a person should not be deprived of their liberty on the basis only of disability. Whatever its precise meaning and implications, it represents a clear warning against systems which divert people from the criminal justice system only to imprison them in healthcare institutions.

Article 12, in our view, does not have to bear the harsh interpretation put on it in the issues paper. It does not, in other words, need to be interpreted in such a way as to require all people to stand trial even if supports and adjustments cannot be provided that would allow them to participate meaningfully in the process – whether because of a long-term condition or because of a temporary illness or crisis (such as a bereavement). Above, we suggested a means by which such people could be spared the ordeal of a trial in which they were unable to participate that could be consistent with Article 12. This would be based on assessments of the fitness of the criminal trial process to accommodate the person (through adjustments and supports) rather than assessments of the functional capacity of the individual.

Our suggested approach to Article 12 would resolve the tensions, identified in the issues paper, between Article 12 of the CRPD and the Article 6 ECHR right to a fair trial. This tension would not simply have been one between Article 12 and the ECHR. It would also have brought Article 12 into conflict with Article 13 of the CRPD.

Article 13 concerns the right to access justice. The CRPD did not aim to create new rights and Article 13 is thus a disability-specific articulation of pre-existing rights in international human rights law – rights such as the fair trial rights contained in Article 14(1) of the International Covenant on Civil and Political Rights, which reads as follows:

“14(1): ‘In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.’”

A conflict of the type envisaged in the issues paper between Article 12 and fair trial rights (recognised in Art 6 ECHR and Art 13 CRPD) is avoidable if an approach such as the one suggested above is adopted. Such a conflict cannot have been intended by the drafters of the CRPD given the close connection between the right to equal recognition before the law (as recognised in Article 12) and the right to access justice (as recognised in Article 13). We therefore urge the Law Commission:

- to interpret Article 12 in a way that does not bring it into conflict with rights to a fair trial if at all possible (and we suggest that it is);
- to find solutions (such as the one suggested above) that aim to be consistent with Article 12 as well as with rights to a fair trial; and
- to resist endorsing and utilising the maverick suggestion made by Baroness Hale, in an otherwise excellent judgement, that the rights of disabled people may on occasion be properly 'restricted or limited'. This is a potentially dangerous line of reasoning which could do great damage to disabled people in the UK.

Professor Anna Lawson, in addition to original submission:

My feeling is that, if it can be shown that (even with adjustments and support) a person is not able to meaningfully engage with legal advice (something which requires great caution as it's all too easy to conclude that somebody is not able to engage with it if the decisions they make are not ones we would make), the trial itself might need to take a significantly different form (perhaps along the fact finding lines you mention). It might even be possible to view this as a form of reasonable adjustment to the criminal process - but only if it would enable these people to be tried on an equal basis with others (the aim of reasonable adjustments) - and there is a danger of creating a separate segregated system in that it creates division and potential disadvantage to those assigned to it.

Response of the Legal Committee of HM District Judges (Magistrates' Court)

PART 2: THE LEGAL TEST

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

YES: NO: OTHER:

Further Question 2 Do consultees consider that an effective participation test, framed around the *John M* criteria (set out at paragraph 2.3 above), with an additional decision-making capacity limb, represents the most appropriate formulation for such a combined legal test? Or do consultees favour another of the formulations set out at paragraph 2.28 above and, if so, why? (2.34)

YES: NO: OTHER:

It is essential that a combined test is developed.

The most appropriate proposal appears to be that set out in paragraph 2.29 (2)

Further Question 3 Do consultees consider that incorporating an exhaustive list of decisions for which the defendant requires capacity into a reformed legal test for unfitness to plead would assist in maintaining the threshold for unfitness at a suitable level? (2.42)

AGREE: DISAGREE: OTHER:

A non exhaustive list would appear preferable as to allow flexibility in appropriate cases where a defendant might be objectively (and actually) unfit and yet not "fail" the test posed by an exhaustive list. However a minimum ability to understand/engage with a list of those decisions proposed in paragraph 2.36 would be attractive and necessary.

Further Question 4 Do consultees consider that a reformed test should explicitly refer to a "satisfactory" or "sufficient" level of capacity for effective participation? (2.43)

YES: NO: OTHER:

The narrative contained in paragraph 2.37 covers the point.

A "good enough" level of capacity combined with special measures (where available) and trial management geared to any identified difficulties that a defendant has will secure a fair trial. However if a defendant is truly unfit then special measures cannot ensure a fair trial.

Further Question 5 Do consultees agree that a diagnostic threshold would be unlikely to assist in maintaining the threshold of unfitness at a suitable level? (2.44)

YES: NO: OTHER:

Further Question 6 Do consultees think that it would be helpful to have a statutory presumption that all defendants are fit to be tried until the contrary is proved? (2.46)

YES: NO: OTHER:

Yes as applied to adult defendants. However there is much attraction in a proposition that the assumption might be reversed for particularly young defendants.

Further Question 7 Do consultees agree that a finding that a person lacks capacity shall remain valid unless and until the contrary is established on the basis of the evidence of two suitably qualified experts? (2.48)

YES: NO: OTHER:

Once unfitness is established it would be necessary to set a high threshold in relation to a reversal of that finding.

Further Question 8 Do consultees agree that disaggregation of capacity to plead and capacity for trial is undesirable? (2.59)

YES: NO: OTHER:

For all the reasons set out in the consultation paper. In addition the question of basis of plea cases with potential Newton hearings would cause frequent difficulties and potential injustice to both defendants and victims.

Further Question 9 Do consultees consider that making the test one of capacity for effective participation "in determination of the allegation(s) faced" would introduce a desirable element of context into the assessment? (2.68)

YES: NO: OTHER:

Although there would be concern if any presumption were to exist that matters within the summary jurisdiction were automatically less complex. This will particularly apply in the youth court which routinely deals with serious criminal offences often involving very complex issues.

Further Question 10 Do consultees agree that the United Kingdom's obligations under the UNCRC and the ECHR can properly be accommodated in the manner outlined in paragraphs 2.80 to 2.82? (2.83)

YES: NO: OTHER:

Further Question 11 Do consultees agree that the difficulties surrounding unrepresented defendants cannot be addressed by amendment to the legal test itself? (2.88)

YES: NO: OTHER:

PART 3: SPECIAL MEASURES

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

AGREE: DISAGREE: OTHER:

The fact that this issue has remained unresolved for such a length of time has been a grave cause of concern. The proposal contained within paragraph 3.20 would ensure that defendants are able to enjoy a fair trial.

PART 4: ASSESSING THE CAPACITY OF THE ACCUSED

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

AGREE: DISAGREE: OTHER:

Yes as it is essential that the expertise of other disciplines is engaged in appropriate cases.

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

AGREE: DISAGREE: OTHER:

In most cases, however there may be many cases where agreement may be reached between all parties and court after the opinion of a single expert. If both prosecution, defence and court are able to accept such an opinion without the requirement to obtain a second opinion then in such cases resources will be saved.

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

AGREE: DISAGREE: OTHER:

Other than a defendant already detained under MHA there seems little prospect of formulating any appropriate approach that could include any element of "forced" assessment.

PART 5: PROCEDURE FOR THE UNFIT ACCUSED

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

YES: NO: OTHER:

Such a power should potentially not apply in summary only cases where emphasis remains on achieving swift summary justice.

Further Question 17 Do consultees consider that it would be appropriate to extend the maximum period of a section 36 MHA 1983 remand to hospital for treatment to 24 weeks in these circumstances? (5.25)

YES: NO: OTHER:

Further Question 18 Do consultees consider that the determination of facts procedure for the accused who lacks capacity should be made discretionary following the finding of unfitness, to allow for discontinuance of the proceedings, and diversion out of the criminal justice system into health or related services in appropriate cases? (5.33)

YES: NO: OTHER:

Such a system would give judicial discretion. Subject to a requirement to allow all parties to make representations and a requirement to give reasons when making such a decision.

Further Question 19 Do consultees consider that public protection concerns arising in relation to an acquitted, but dangerous, unfit defendant could be adequately met by the use of civil powers under section 3 or 7 MHA 1983? (5.44)

YES: NO: OTHER:

Further Question 20 Do consultees consider that on a determination of the facts, any defence should be left to the jury, after discussion with the advocates, where there is evidence on which a jury properly directed might reasonably find the defence made out or the essential element of the offence unproven? (5.50)

YES: NO: OTHER:

Any other outcome would place the already vulnerable defendant at further disadvantage.

Further Question 21 Do consultees consider that the special verdict should be made available to the jury on their initial consideration of the facts? (5.54)

YES: NO: OTHER:

As per the Council of HM Circuit Judges

Further Question 22 Do consultees agree that it is not necessary for the judge to retain the discretion, in cases of exceptional prejudice, to order a second stage process for the consideration of the special verdict, in the manner envisaged in Provisional Proposal 9? (5.56)

YES: NO: OTHER:

As per the discussion on this point it is difficult to foresee such a need arising although a level of judicial discretion would prevent injustice in a handful of exceptional cases.

Further Question 23 Do consultees consider that the determination of facts in relation to a defendant found to lack capacity could be dealt with by a judge sitting without a jury? (5.60)

YES: NO: OTHER:

Such a situation has considerable attractions.

Further Question 24 Do consultees agree that a representative, appointed by the court to put the case for the defence, should be entitled to act contrary to the defendant's identified will and preferences, where the representative considers that to do so is necessary in the defendant's best interests? (5.64)

YES: NO: OTHER:

As per the consultation paper at paragraph 5.62 this approach safeguards the defendant.

PART 6: DISPOSALS

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

YES: NO: OTHER:

It is unfortunate but entirely possible that resource constraints will become a factor in determining the level of supervision. An amendment would allow for a defined minimum level of supervision.

Further Question 26 Do consultees consider that it would be appropriate and effective to expand the power of supervision orders under section 5 of the CP(I)A to include recall of a supervised person to hospital, as available under section 17E-F of the MHA 1983? (6.21)

YES: NO: OTHER:

The lack of effective "sanction" for breach is a cause for concern. However it is possible to foresee difficult situations arising where the supervisor and court may desire such a recall and the MHA services disagree.

Further Question 27 Do consultees consider that there are any other enhancements of the powers available under supervision orders which would be beneficial? (6.22)

YES: NO: OTHER:

As above, with defendants suffering from a mental illness and unfit as a result the courts must trust the MHA services to make the correct decisions, however a positive duty might be imposed on any supervisor to report concerns.

PART 7: REMISSION AND APPEALS

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

YES: NO: OTHER:

The proposals contained within paragraph 7.31 and 7.32 contain the most satisfactory way forward in relation to this issue

Further Question 29 Do consultees consider that the power to remit an accused for trial should only be exercisable by the Crown where the judge has ruled, following the section 4A hearing, that it is in the public interest for remission to be available should the defendant regain capacity? (7.35)

YES: NO: OTHER:

See above, although such a power might be limited to the crown court given the volume of work dealt with in courts of summary jurisdiction.

Further Question 30 Do consultees agree that the Crown's power to remit defendants for trial upon their recovery should not be limited in time? (7.38)

YES: NO: OTHER:

But limited to indictable matters only for the reasons above.

Further Question 31 Do consultees agree that where there has been a finding that a defendant had "done the act or made the omission," he or she should be entitled to request remission for trial on regaining capacity, where recovery is confirmed by the opinions of two experts competent to address the defendant's particular condition? (7.43)

YES: NO: OTHER:

However as identified in the consultation paper such cases are likely to be very rare

Further Question 32 Do consultees consider that the rights of appeal vested in the unfit defendant should be exercisable by his or her legal representatives? (7.48)

YES: NO: OTHER:

PART 8: UNFITNESS TO PLEAD IN THE MAGISTRATES' AND YOUTH COURTS

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

YES: NO: OTHER:

As per the consultation paper there are many attractions to this approach. Whilst such a restriction and exclusion of lay justices from dealing with these cases may appear divisive a precedent already exists whereby only district judge with a "serious sex ticket" may deal with such cases in the youth court.

It is recognised that many courts still do not have the benefit of district judge attendance however where such courts have youth serious sex cases an appropriately ticketed district judge will be assigned. In addition there is a pool of deputy district judges who could be assigned to deal with these cases when they arise at courts that do not have resident district judges.

Whilst it is recognised that there are likely to be far more cases of unfit defendants at summary level (which deals with 95% of criminal cases) resource issues should not arise

If such jurisdiction is not restricted to district judges then it will be appropriate to ensure specialist training for any lay justice dealing with these issues.

Further Question 34 Do consultees consider that, where the defendant's capacity is in doubt, it would be preferable for his or her capacity to be determined in the magistrates' court, and, if the defendant is found to lack capacity, that all further proceedings against him or her should remain in that court? (8.76)

YES: NO: OTHER:

Any alternative proposal could see a huge volume of work sent unnecessarily to the crown court for consideration resulting in enormous cost and resource issues

Further Question 35 (in the alternative) Do consultees alternatively consider that such a case should be sent to the Crown Court for determination of capacity and, if the defendant is found to lack capacity, that all further proceedings against him or her should remain in that court? (8.77)

YES: NO: OTHER:

This would see the work load of crown court increase to potentially unmanageable levels. It would routinely be sent either way offences that would otherwise remain at summary level.

Further Question 36 Do consultees agree that capacity procedures in the summary courts should be applicable for all criminal offences? (8.83)

AGREE: DISAGREE: OTHER:
This is essential

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

AGREE: DISAGREE: OTHER:
Although as per additional question 26 if sanctions were to be applied then the unfit defendant would be placed in a position of disadvantage as compared to the fit defendant who could only receive a discharge or fine for the same offence.

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

YES: NO: OTHER:
There seems little or no reason to distinguish the legal test between the level of court.
to make any assumption that in some way cases dealt with at summary level are less complex than at crown court is potentially misleading. Applying the same test across all jurisdictions is the optimum way of ensuring that unfit defendants are adequately protected.

Further Question 39 Do consultees consider that there are any adjustments to the test, or the procedure, for defendants lacking capacity that would materially improve the prospects of the court identifying those adults with capacity issues? (8.92)

AGREE: DISAGREE: OTHER:
Unfortunately until and unless a robust liaison and diversion scheme receives national roll out there will be many unfit defendants who are simply not appropriately identified.
restrictions on legal aid and the duty solicitor scheme mean for example that defendants charged with non-imprisonable offences are unlikely to ever have the services of a solicitor, given the volume of work it is likely that unfit defendants will simply pass through the system unnoticed
The diversion and liaison scheme is essential to properly identify such vulnerable defendants so that the court is then able to ensure that they are thereafter fairly dealt with.

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

YES: NO: OTHER:

It is again essential that the same test, safeguards and procedure applies across all jurisdictions.

Further Question 41 Regardless of the position in the Crown Court, do consultees agree that, in the summary courts, the tribunal should have a discretion whether to proceed to the determination of facts hearing following a finding that the defendant lacks capacity? (8.102)

AGREE: DISAGREE: OTHER:

Given the volume of relatively low level crime that an unfit defendant may commit it is essential that such discretion is given to the judiciary within the summary jurisdiction.

Subject to the need to take representations from the parties and give reasons for such a decision.

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

YES: NO: OTHER:

Again there should be no difference between jurisdictions, this is particularly the case as it applies to the youth court routinely dealing with very serious allegations.

Further Question 43 Do consultees agree that there should be mandatory specialist training on issues relevant to trying youths, for all legal practitioners and members of the judiciary engaged in cases involving young defendants? (8.114)

YES: NO: OTHER:

Currently all district judges receive substantial training in this complex jurisdiction before they are able to commence youth court work (deputy district judges are not able to do this work), in addition there is ongoing annual continuation training in this field.

All levels of the judiciary dealing with youths must undertake exhaustive specialist training in order to properly understand it's complexity.

Further Question 44 Do consultees consider it appropriate for there to be initial screening for mental health issues for all defendants under 14 years of age, to be conducted by mental health professionals?. (8.119)

YES: NO: OTHER:

Some form of screening is most desirable when dealing with particularly young defendants. Care should be exercised in relation to any particular age cut off point and phraseology in this regard may be of the utmost importance. To suggest to a youth defendant and his parents that he/she must undergo some form of "mental health" assessment is to invite a hostile reaction!

Further Question 45 Do consultees agree that the provisional reformed test proposed for the Crown Court at paragraph 2.34 above is suitable for application to young defendants without adjustment? (8.126)

YES: NO: OTHER:

Again there should be no distinction between the jurisdictions

Further Question 46 Do consultees agree that the summary courts should have the power to commit a defendant to the Crown Court for the imposition of a restriction order, but should not have the power to impose one themselves? (8.130)

YES: NO: OTHER:

Further Question 47 Do consultees agree that the following disposals should be available to the magistrates' court on a finding that the defendant has "done the act or made the omission," or where a special determination has been arrived at:
 (a) a hospital order (without restriction);
 (b) a supervision order;
 (c) an absolute discharge? (8.135)

YES: NO: OTHER:

Further Question 48 Do consultees consider that the non-penal requirements of a youth rehabilitation order should be available as part of a youth supervision order, following a finding that a young person has "done the act or made the omission," or where a special determination has been arrived at? (8.138)

AGREE: DISAGREE: OTHER:

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

YES: NO: OTHER:

Further Question 50 Do consultees agree that a new right of appeal should be created from any determination or disposal imposed under a reformed capacity procedure, which would mirror the right to appeal against conviction or sentence under section 108 Magistrates' Courts Act 1980? (8.143)

AGREE: DISAGREE: OTHER:

Response of Professor Ronnie Mackay, Academic (Professor of Criminal Policy and Mental Health, De Montfort University, Leicester)

PART 2: THE LEGAL TEST

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

Paragraph 2.33

Yes, I think this is the best way forward. See my article on the CP at [2011] Crim LR 433, 445

9.2 Further Question 2: Do consultees consider that an effective participation test, framed around the *John M* criteria (set out at paragraph 2.3 above), with an additional decision-making capacity limb, represents the most appropriate formulation for such a combined legal test? Or do consultees favour another of the formulations set out at paragraph 2.8 above and, if so, why?

Paragraph 2.34

Yes, I think this is an appropriate reform vehicle as I argued in my [2011] Crim LR article. It seems to me that the best approach is to update the *Pritchard* criteria and to add a decision-making capacity limb. See again at Question 3 below. Here is what I said at the Symposium (my slides are attached separately)

Thank you, to the Commission for inviting me. We need a legal test appropriate for the 21st century. And that is absolutely essential.

So, basically, *Pritchard* test, as updated to some extent in *M(John)*, gives us the criteria which in my view represent those who are foundationally unfit. Those who are foundationally unfit, I think, clearly fall within the *Pritchard* criteria. And I do not think that anyone has really suggested otherwise.

So if you look at unfitness to plead findings (indicates slide 3) you will see that over the years we have reached a threshold in a five year period of about 500 cases. Each year we have got now about approximately 100 cases of those who our foundationally unfit.

So these are defendants who are found unfit to plead and satisfy the *Pritchard/John* criteria.

You have got there (indicates slide 3) Lord Justice Thomas referring to the fact that it is an area of considerable difficulty and one which, I think, legitimately needs to be reformed.

The problem with the *Pritchard* test is that it is too narrow. And I have long argued that the addition of a decisional capacity limb is essential, I think, to take account of the full account of the effective participation requirement.

This is what the Law Commission, I think, are moving towards in the issues paper. And I think that is rightly so.

We do have this in the Jersey test, for unfitness to plead. In 2003 in the *Attorney General and O'Driscoll* you have got the Bailiff, who is the senior judge in Jersey, refusing to apply the *Pritchard* test per se, and instead preferring this test here (indicates slide 5). You will notice that what he does is he emphasises effective participation, and in doing so he talks about the abilities required of the defendant and (a) (b) and (c) are effectively the *Pritchard* criteria.

But what he has done is specifically to introduce a decisional capacity limb which he does in (d) ‘...to make rational decisions in relation to his participation in the proceedings...which reflect true and informed choices on his or her part’.

And he did this because he felt that this much more truly reflected effective participation.

And in the single case regarding Jersey where this has been looked at judicially, the Court was able to apply the decision-making capacity limb. And it did so in the case of *Harding* (puts up slide 6) in relation to a female defendant who suffered from borderline personality disorder and her condition was one where she had changes in her emotional state which would impact on thought processes and her ability to make rational decisions.

I will close by saying that when the jurats, that is the special procedure in Jersey - they don't have a jury but they have special people selected for this role- found the accused unfit to plead, I think, it is more than likely that she would have been found fit to plead under the *Pritchard* test. So this, in my view, is a perfect example of a case where the decisional capacity limb is protecting her from a full trial so her effective participation here is what it is all about. And this limb is in my view, the sort of limb that the Law Commission needs to look at in terms of the new test.

By all means update the *Pritchard* test criteria but introduce a decisional capacity limb, thank you.

9.3 Further Question 3: Do consultees consider that incorporating an exhaustive list of decisions for which the defendant requires capacity into a reformed legal test for unfitness to plead would assist in maintaining the threshold for unfitness at a suitable level?

Paragraph 2.42

Updating the *Pritchard* criteria would lay out the relevant decisions. In my view this is sufficient as to be overly prescriptive would be counterproductive.

9.4 Further Question 4: Do consultees consider that a reformed test should explicitly refer to a “satisfactory” or “sufficient” level of capacity for effective participation?

Paragraph 2.43

Is this not implicit in the current law in terms of allocation of the burden of proof for unfitness to plead? I'm not yet convinced of the need for this. Might it not lead to more litigation surrounding the issue of whether this level of capacity has been reached?

9.5 Further Question 5: Do consultees agree that a diagnostic threshold would be unlikely to assist in maintaining the threshold of unfitness at a suitable level?

Paragraph 2.44

Agreed, I don't think this would help. Indeed, it might exclude some who are temporarily unfit and who don't fit neatly into any diagnostic category.

9.6 Further Question 6: Do consultees think that it would be helpful to have a statutory presumption that all defendants are fit to be tried until the contrary is proved?

Paragraph 2.46

This might help to clarify the position but again in seems implicit now in the light of *Ghulam*.

9.7 Further Question 7: Do consultees agree that a finding that a person lacks

capacity shall remain valid unless and until the contrary is established on the basis of the evidence of two suitably qualified experts?

Paragraph 2.48

Agreed, there needs to be some mechanism which enables the judge to set aside the initial unfitness finding if he is satisfied that D is now fit to plead. Accordingly, what is suggested might be an appropriate way of dealing with the “lacuna” exposed in Omara.

9.8 Further Question 8: Do consultees agree that disaggregation of capacity to plead and capacity for trial is undesirable?

Paragraph 2.59

While I agree this may be somewhat problematical I do think it is worth further investigation. In this connection it is interesting to look at the position in New Zealand where in the case of *R v Komene* [2013] NZHC 1347 the court made a distinction between fitness to plead and fitness to stand trial on the basis that the “level of cognitive understanding may not involve the same demands as conducting a defence” see para.19. In reading psychiatric reports in cases of unfitness to plead I have noted that some experts do make this distinction. So it might be worth investigating this further. In addition, to permit a lower threshold for guilty pleas might be cost effective as it would mean that a full unfitness hearing would not be required. While I take on board the concerns expressed in the Issues Paper at para. 2.57, I think this is an important issue which merits further discussion.

9.9 Further Question 9: Do consultees consider that making the test one of capacity for effective participation “in determination of the allegation(s) faced” would introduce a desirable element of context into the assessment?

Paragraph 2.67

There is no doubt that a complex fraud trial is more demanding than one of, say, shoplifting. But I am not aware of any research which supports the fact that experts take complexity into account. But you may want to look at this further. However, inclusion of the suggested phrase might indeed introduce a degree of context into the assessment. But in doing so might this not also permit “determination” of a plea of guilty where the accused might otherwise be unfit to proceed to a full trial of the issue(s)?

9.10 Further Question 10: Do consultees agree that the United Kingdom’s obligations under the UNCRPD and the ECHR can properly be accommodated in the manner outlined in paragraphs 2.80 to 2.82?

Paragraph 2.83

Agreed

9.11 Further Question 11: Do consultees agree that the difficulties surrounding unrepresented defendants cannot be addressed by amendment to the legal test itself?

Paragraph 2.88

Agree and there is every possibility that with a new unfitness to plead test available in the Magistrates’ Court the number of unrepresented defendants will increase.

PART 3: SPECIAL MEASURES

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

Paragraph 3.22

Agreed, and in doing so it is vital that the securing of special measures be made the responsibility of the court.

PART 4: ASSESSING THE CAPACITY OF THE ACCUSED

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

Paragraph 4.22

Agreed, see my comments at [2010] Crim LR at 439.

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

Paragraph 4.24

Agreed.

9.15 Further Question 15: Do Consultees consider that there is any alternative appropriate mechanism to address the difficulty presented by a defendant whose capacity is in doubt, but who refuses expert assessment?

Paragraph 4.27

No alternative comes to mind.

PART 5: PROCEDURE FOR THE UNFIT ACCUSED

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

Paragraph 5.24

This of course will deny the unfit D a right to the determination of facts procedure and the chance of an acquittal and will leave it up in the air for a further maximum of six months. However, in view of the fact that this power will only be available where the unfit D is hospitalised under s 36 MHA 1983 on balance it seems appropriate.

9.17 Further Question 17: Do consultees consider that it would be appropriate to extend the maximum period of a section 36 MHA 1983 remand to hospital for treatment to 24 weeks in these circumstances?

Paragraph 5.25

Agreed.

9.18 Further Question 18: Do consultees consider that the determination of facts procedure for the accused who lacks capacity should be made discretionary following the finding of unfitness, to allow for discontinuance of the proceedings, and diversion out of the criminal justice system into health or related services in appropriate cases?

Paragraph 5.33

Agreed in the light of para. 5.31.

9.19 Further Question 19: Do consultees consider that public protection concerns arising in relation to an acquitted, but dangerous, unfit defendant could be adequately met by the use of civil powers under section 3 or 7 MHA 1983?

Paragraph 5.44

I am not convinced about this. In this connection I do think that the whole matter of the hearing to determine the special verdict needs to be further considered. The CP refers to this as an acquittal on the grounds of “mental disorder”. I had taken this to mean on the grounds of “insanity” (see [2011] Crim LR at 440-441) but the CP does not make this clear and neither does the Issues Paper at para. 6.142.

In addition, if the unfit D is entitled to a civil guardianship order then if this is thought to be an appropriate form of disposal why not reintroduce it for all findings of unfitness to plead?

9.20 Further Question 20: Do consultees consider that on a determination of the facts, any defence should be left to the jury, after discussion with the advocates, where there is evidence on which a jury properly directed might reasonably find the defence made out or the essential element of the offence unproven?

Paragraph 5.50

Agreed.

9.21 Further Question 21: Do consultees consider that the special verdict should be made available to the jury on their initial consideration of the facts?

Paragraph 5.54

Again I have to ask whether this is a new form of special verdict or it is a not guilty by reason of insanity verdict, see para. 5.52? I assume it is the latter, in which case why not make this clear? I remain unclear as to how this would work in practice and consider this proposal needs further elaboration and discussion.

9.22 Further Question 22: Do consultees agree that it is not necessary for the judge to retain the discretion, in cases of exceptional prejudice, to order a second stage process for the consideration of the special verdict, in the manner envisaged in Provisional Proposal 9?

Paragraph 5.56

Agreed.

9.23 Further Question 23: Do consultees consider that the determination of facts in relation to a defendant found to lack capacity could be dealt with by a judge sitting without a jury?

Paragraph 5.60

I raised this question in my comments on the draft Issues Paper. I note with interest that it was supported by Judge Ashurst at the Symposium. It is also worth noting that in Scotland the examination of facts procedure does not involve the jury. Both the determination of unfitness for trial and the examination of facts are done by the judge alone.

On balance I am in favour but I have the following reservation. If the determination of the facts procedure is reformed in the manner suggested it will become more like a full criminal trial in which case it might be argued that the role of the jury will become less formalistic and more deliberative, at least in contested cases. I think this is an issue which ought to be given some consideration. Contested cases pose something of a problem as to remove the jury in cases of this nature might be regarded as going too far. It is likely that the majority of such determination of facts cases will continue to be uncontested in which case, as I see it, there is no need for jury involvement.

9.24 Further Question 24: Do consultees agree that a representative, appointed by the court to put the case for the defence, should be entitled to act contrary to the defendant's identified will and preferences, where the representative considers that to do so is necessary in the defendant's best interests?

Paragraph 5.64

Agreed.

PART 6: DISPOSALS

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

Paragraph 6.14

I know of no empirical evidence to support this. However, if the reformed law of unfitness to plead led to many more such cases then this would necessarily increase the number of supervision orders in which case it is possible that more such problems would arise. The obvious solution would be to amend the CP(I)A in the manner suggested in para. 6.11. Why not require local services to accept such supervision?

9.26 Further Question 26: Do consultees consider that it would be appropriate and effective to expand the power of supervision orders under section 5 of the CP(I)A to include recall of a supervised person to hospital, as available under section 17E-F of the MHA 1983?

Paragraph 6.21

I remain to be convinced that this is so as there is no empirical evidence to support the need for such coercive power.

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9.27 Further Question 27: Do consultees consider that there are any other enhancements of the powers available under supervision orders which would be beneficial?

Paragraph 6.22

No.

PART 7: REMISSION AND APPEALS

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

Paragraph 7.34

Yes, in principle as it does not make sense to restrict it as at present. The problem is that at present restriction order cases are closely monitored by the MOJ's Mental Health Casework Section so that in appropriate cases they can easily be identified and remitted. But this is not the case for other disposals. So in respect of other disposals if remission is extended the mechanism for remission needs to be clear.

9.29 Further Question 29: Do consultees consider that the power to remit an accused for trial should only be exercisable by the Crown where the judge has ruled, following the section 4A hearing, that it is in the public interest for remission to be available should the defendant regain capacity?

Paragraph 7.35

Yes this would help to ensure that only certain cases might be remitted. However, it does not deal with the point I make above. My concern is that once the judge so rules how are such cases which do not result in hospitalisation to be monitored with a view to remission? It seems likely that the reason why remission is currently limited to restriction order disposals is one of practicality. It might be useful to enquire of the CPS how many, if any, non-restriction order unfitness cases they have prosecuted.

9.30 Further Question 30: Do consultees agree that the Crown's power to remit defendants for trial upon their recovery should not be limited in time?

Paragraph 7.38

Agreed.

9.31 Further Question 31: Do consultees agree that where there has been a finding that a defendant had "done the act or made the omission," he or she should be entitled to request remission for trial on regaining capacity, where recovery is confirmed by the opinions of two experts competent to address the defendant's particular condition?

Paragraph 7.43

In principle this seems right. However, on recovering fitness will there be a legal obligation on the two experts or someone else to inform the now fit defendant that he has a right to request remission?

9.32 Further Question 32: Do consultees consider that the rights of appeal vested in the unfit defendant should be exercisable by his or her legal representatives?

Paragraph 7.48

10 4

Yes.

PART 8: UNFITNESS TO PLEAD IN THE MAGISTRATES' AND YOUTH COURTS

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

Paragraph 8.68

Agreed.

9.34 Further Question 34: Do consultees consider that, where the defendant's capacity is in doubt, it would be preferable for his or her capacity to be determined in the magistrates' court, and, if the defendant is found to lack capacity, that all further proceedings against him or her should remain in that court?

Paragraph 8.76

On balance I think this is the preferable option for the reasons give. Also if the determination of facts becomes one for the judge alone then this would help in supporting this approach.

9.35 Further Question 35 (in the alternative): Do consultees alternatively consider that such a case should be sent to the Crown Court for determination of capacity and, if the defendant is found to lack capacity, that all further proceedings against him or her should remain in that court?

Paragraph 8.77

No, see above.

9.36 Further Question 36: Do consultees agree that capacity procedures in the summary courts should be applicable for all criminal offences?

Paragraph 8.83

Agreed.

9.37 Further Question 37: For non-imprisonable offences, do consultees agree that

the available disposals should be limited to a supervision order and an absolute discharge?

Paragraph 8.84

Agreed but I think this also adds to the argument against tightening the requirements for supervision orders as they are non-punitive and non-coercive, see questions 25-27 above.

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

Paragraph 8.87

Agreed.

9.39 Further Question 39: Do consultees consider that there are any adjustments to the test, or the procedure, for defendants lacking capacity that would materially improve the prospects of the court identifying those adults with capacity issues?

Paragraph 8.92

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I think the points made in para. 8.90 would help in this matter.

9.40 Further Question 40: Do consultees agree that it is appropriate to have the same evidential requirement in the summary courts as in the Crown Court?

Paragraph 8.96

Agreed.

9.41 Further Question 41: Regardless of the position in the Crown Court, do consultees agree that, in the summary courts, the tribunal should have a discretion whether to proceed to the determination of facts hearing following a finding that the defendant lacks capacity?

Paragraph 8.102

Agreed. This seems eminently sensible and achieves the correct balance.

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

Paragraph 8.110

I remain to be convinced that instead of the special “verdict” there should be something different. As mentioned above in question 19 I do think the terminology surrounding “mental disorder” needs clarification and that the whole mechanism as to how this would operate needs further consideration.

9.43 Further Question 43: Do consultees agree that there should be mandatory specialist training on issues relevant to trying youths, for all legal practitioners and members of the judiciary engaged in cases involving young defendants?

Paragraph 8.114

Agreed.

9.44 Further Question 44: Do consultees consider it appropriate for there to be initial screening for mental health issues for all defendants under 14 years of age, to be conducted by mental health professionals?

Paragraph 8.119

Agreed.

9.45 Further Question 45: Do consultees agree that the provisional reformed test proposed for the Crown Court at paragraph 2.34 above is suitable for application to young defendants without adjustment?

Paragraph 8.126

Agreed.

9.46 Further Question 46: Do consultees agree that the summary courts should have the power to commit a defendant to the Crown Court for the imposition of a restriction order, but should not have the power to impose one themselves?

Paragraph 8.130

10 6

Agreed.

9.47 Further Question 47: Do consultees agree that the following disposals should be available to the magistrates' court on a finding that the defendant has "done the act or made the omission," or where a special determination has been arrived at:

(a) a hospital order (without restriction);

(b) a supervision order;

(c) an absolute discharge?

Paragraph 8.135

Agreed.

9.48 Further Question 48: Do consultees consider that the non-penal requirements of a youth rehabilitation order should be available as part of a youth supervision order, following a finding that a young person has "done the act or made the omission," or where a special determination has been arrived at?

Paragraph 8.138

Agreed.

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

Paragraph 8.140

Agreed.

9.50 Further Question 50: Do consultees agree that a new right of appeal should be created from any determination or disposal imposed under a reformed capacity procedure, which would mirror the right to appeal against conviction or sentence under section 108 Magistrates' Courts Act 1980?

Paragraph 8.143

Agreed.

Response of the Magistrates' Association

PART 8: UNFITNESS TO PLEAD IN THE MAGISTRATES' AND YOUTH COURTS

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

YES: NO: OTHER:

The MA agrees that further proceedings should remain in the magistrates' court if the defendant is found to lack capacity. This would ensure continuity, so the case is dealt with by those who already have an understanding of the relevant issues, and effective case management, so that justice is not delayed.

If further proceedings remain in the magistrates' court, magistrates would need to have suitable disposals available to them.

Further Question 34 Do consultees consider that, where the defendant's capacity is in doubt, it would be preferable for his or her capacity to be determined in the magistrates' court, and, if the defendant is found to lack capacity, that all further proceedings against him or her should remain in that court? (8.76)

YES: NO: OTHER:

The MA agrees that further proceedings should remain in the magistrates' court if the defendant is found to lack capacity. This would ensure continuity, so the case is dealt with by those who already have an understanding of the relevant issues, and effective case management, so that justice is not delayed.

If further proceedings remain in the magistrates' court, magistrates would need to have suitable disposals available to them.

Further Question 35 (in the alternative) Do consultees alternatively consider that such a case should be sent to the Crown Court for determination of capacity and, if the defendant is found to lack capacity, that all further proceedings against him or her should remain in that court? (8.77)

YES: NO: OTHER:

Further Question 36 Do consultees agree that capacity procedures in the summary courts should be applicable for all criminal offences? (8.83)

AGREE: DISAGREE: OTHER:

Yes: the MA's general principle is that capacity procedures in the summary courts should be comparable to those in the Crown Court.

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

AGREE: DISAGREE: OTHER:

Yes: the MA supports greater discretion for magistrates' courts as a general rule, and it is important that magistrates have the appropriate disposals available in cases where defendants lack capacity.

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

YES: NO: OTHER:

Yes: the MA's general principle is that capacity procedures in the summary courts should be comparable to those in the Crown Court. 'Having regard to the determination of the allegations faced' already allows the court to take the fact that summary proceedings are more straightforward into account.

Further Question 39 Do consultees consider that there are any adjustments to the test, or the procedure, for defendants lacking capacity that would materially improve the prospects of the court identifying those adults with capacity issues? (8.92)

AGREE: DISAGREE: OTHER:

The MA would also add 'capability to understand the implications of pleading/being found guilty and the likely consequences', as it would for young defendants.

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

YES: NO: OTHER:

Further Question 41 Regardless of the position in the Crown Court, do consultees agree that, in the summary courts, the tribunal should have a discretion whether to proceed to the determination of facts hearing following a finding that the defendant lacks capacity? (8.102)

AGREE: DISAGREE: OTHER:

Yes: the MA supports greater discretion for magistrates' courts as a general rule. In this case, our general principle is that capacity procedures in the summary courts should be comparable to those in the Crown Court.

Both the adult and the youth court should be able to have the discretion whether to proceed to the determination of facts hearing based on the apparent capacity of the defendant.

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

YES: NO: OTHER:

The MA supports greater discretion for magistrates' courts as a point of general principle, and sees no reason why, if a special verdict is to be available for the Crown Court, an equivalent should not be available to the summary courts. As with Further Question 34, this position depends on magistrates' courts having suitable disposals available.

Further Question 43 Do consultees agree that there should be mandatory specialist training on issues relevant to trying youths, for all legal practitioners and members of the judiciary engaged in cases involving young defendants? (8.114)

YES: NO: OTHER:

The MA agrees that there should be mandatory specialist training for all participants in youth courts, including magistrates, DJ(MC)s, legal advisers, CPS and defence advocates. Of course, magistrates already have to be ticketed to sit in the Youth Court, and the MA supports the Carlile Report's recommendation that all those involved in the youth justice system should be similarly trained.

The training should be interactive and should cover interacting with young people as a key part of the programme. Training for magistrates should be focussed on the key issues to be considered in order to decide the relevant issues, based on the arguments of those who have received more intensive specialist training.

Further Question 44 Do consultees consider it appropriate for there to be initial screening for mental health issues for all defendants under 14 years of age, to be conducted by mental health professionals?. (8.119)

YES: NO: OTHER:

The MA agrees that magistrates should not make any decision unless there has been an initial screening. Mandatory screening would need to be managed appropriately so that there are no undue delays to justice.

Further Question 45 Do consultees agree that the provisional reformed test proposed for the Crown Court at paragraph 2.34 above is suitable for application to young defendants without adjustment? (8.126)

YES: NO: OTHER:

The right to challenge jurors is irrelevant when a case is retained in the youth court, and the MA would like to see as many cases as possible dealt with there rather than the Crown Court. With this caveat, the provisional reformed test is suitable.

Looking at the test referred to in paragraph 8.126, the MA would also add 'capability to understand the implications of pleading/being found guilty and likely consequence'.

Further Question 46 Do consultees agree that the summary courts should have the power to commit a defendant to the Crown Court for the imposition of a restriction order, but should not have the power to impose one themselves? (8.130)

YES: NO: OTHER:

The MA believes that as many cases as possible should be dealt with in the youth court rather than the Crown Court. The youth court already has the power to impose a detention and training order for up to two years. In view of this, the MA feels that magistrates in the youth court or a judge sitting in the youth court should have the power to impose a restriction order.

Further Question 47 Do consultees agree that the following disposals should be available to the magistrates' court on a finding that the defendant has "done the act or made the omission," or where a special determination has been arrived at:
 (a) a hospital order (without restriction);
 (b) a supervision order;
 (c) an absolute discharge? (8.135)

YES: NO: OTHER:

Yes: magistrates should be able to make such disposals.

The youth court should also have the power to impose a hospital order with restriction.

Further Question 48 Do consultees consider that the non-penal requirements of a youth rehabilitation order should be available as part of a youth supervision order, following a finding that a young person has “done the act or made the omission,” or where a special determination has been arrived at? (8.138)

AGREE: DISAGREE: OTHER:

Yes: youth courts already consider the young offender's welfare in any sentence, so this would be no different.

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

YES: NO: OTHER:

In such circumstances, the MA agrees that a defendant should be able to request remission for trial.

Further Question 50 Do consultees agree that a new right of appeal should be created from any determination or disposal imposed under a reformed capacity procedure, which would mirror the right to appeal against conviction or sentence under section 108 Magistrates' Courts Act 1980? (8.143)

AGREE: DISAGREE: OTHER:

The MA supports a right to appeal as a matter of general principle, but makes no comment on the precise mechanism.

OTHER COMMENTS

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

The MA has restricted its comments to section 8, as this relates specifically to magistrates' and youth courts.



Law Commission: Unfitness to Plead- Further Questions

Response from Mind

About Mind

Mind is the leading mental health charity in England and Wales. We provide advice and support to empower anyone experiencing a mental health problem. We campaign to improve services, raise awareness and promote understanding.

We work in partnership with over 150 independent local Minds to provide a range of services tailored to the needs of their local community. Services on offer include supported housing, crisis help lines, drop-in centres, counselling, befriending, advocacy, and employment and training schemes. Last year our network provided direct support to over 285,000 people.

Mind wants to ensure that people with mental health problems have their voices heard, and are treated fairly, positively and with respect.

Mind's Legal Unit prepares legal information on key areas of law, including mental capacity and mental health law, community care, human rights and disability discrimination law. Mind runs a Legal Advice Service via telephone and email for people based in England and Wales, which processes around 5,000 legal enquiries. Mind's Legal Team undertakes casework on behalf of Mind in cases which have a wider public interest for people with mental health problems.

Introduction

Mind welcomes the opportunity to respond to this consultation. Access to justice and particularly access to the courts is very important for people with experience of mental health problems, who are one of the most disadvantaged groups in society. However, we are not criminal practitioners and we do not advise about criminal law. As such we were unable to answer some of the questions.

THE LEGAL TEST

In Mind's view, the starting point should be that all defendants have capacity to participate in proceedings and this presumption of capacity should be enshrined in legislation to ensure alignment with civil law. It is also Mind's view that all appropriate measures should be taken to support defendants to enable effective participation in their trial in accordance with Article 6 of the European Convention on Human Rights and Article 12 UNCRPD.

Mind agrees that the test to decide whether an accused is unfit to plead should not be based on a status or outcome approach. We would reiterate from our first response that making an unwise decision should not be taken as an indication of a lack of capacity. Such an approach would create an anomaly as it would be at odds with the approach taken in the Mental Capacity Act 2005. A functional test is a preferable approach to the alternatives. This assessment of decision-making capacity should include whether a person can effectively participate in the proceedings.

It would be important for all aspects of the trial to be considered when deciding on whether a defendant is unfit to plead. A unitary test would look at numerous factors and would be able to apply the test to the individual circumstances of the case. This contextualised approach would be further strengthened by the narrowing of the test to effective participation "in determination of the allegation(s) faced".

An exhaustive list of decisions for which the defendant requires capacity would be useful not only to maintain the threshold for unfitness but also to assist in ensuring that the test is applied consistently. It is important that the list is wide enough to cover all aspects of the proceedings to ensure that the defendant is sufficiently protected. The test would also need to be flexible enough to allow for testing capacity on an ongoing basis so that if, for example, a particularly complex cross-examination were to take place, an assessment could take place to ensure that the defendant is able to understand and participate fully in that particular aspect of the process.

However, a functional test which is solely applied to people with mental health problems would be incompatible with the UNCRPD. The General Comment on Article 12 states "*perceived or actual deficits in mental capacity must not be used as justification for denying legal capacity.*"¹ A functional test should be such that it can encompass all defendants rather than just those that have mental health problems. This would separate the test from a diagnosis of disability or cognitive impairment so that it is neutrally defined and would therefore apply to all defendants on equal basis.

Concerns that this would lower the threshold would be unjustified provided the framework was properly structured to focus on supported decision-making. This would include providing support by way of special measures.

¹ Para 13 <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G14/031/20/PDF/G1403120.pdf?OpenElement>

As highlighted in our previous response there are many defendants who have mental health diagnoses but would be fit to plead. Example 3E from the previous consultation is evidence that the defendant suffering from obsessive compulsive disorder might be helped by special measures to answer a question asked of him by Counsel.

Whilst we recognise that many defendants may not understand the minutiae of the proceedings, our concern is that use of "satisfactory" and "sufficient" definitions are subjective and are based on a third party's interpretation. The test should focus on the defendant's understanding as opposed to the assessor's perception which would inevitably lead to variations in application.

Capacity is not a term to be used in the abstract and therefore the assessment should be decision specific. As a consequence, the assessment process should be completed every time a new decision is to be made.

Mind believes that there should be a very clear framework to ensure that a defendant who has been deemed unfit to plead is assessed regularly to see whether they have regained capacity and can participate in the proceedings so that they are not detained arbitrarily for any longer than is necessary.

We agree that the threshold should be on the balance of probabilities as opposed to beyond reasonable doubt. This lower burden of proof will ensure that the focus is on engagement and active participation of the defendant and ensure alignment with civil law.

A defendant who is afforded offers of support and assistance but chooses not to use them, should not be presumed to be unfit to plead. As reflected in the Mental Capacity Act 2005, an unwise decision is not an indication of a lack of capacity. Should a defendant decide that he does not require representation or assistance his right to autonomy should be respected.

SPECIAL MEASURES

Mind strongly believes that a statutory entitlement to the support of a registered intermediary would assist defendants and therefore the court process.

As set out in our previous response, patients detained under the Mental Health Act have a statutory entitlement to advocates. Their remit is set out in legislation and empower and support patients to help obtain and understand information and to exercise those rights.

An online survey showed that advocacy is under pressure with an average reduction in spending of 36%, alongside a 40% increase in demand, over the last 12 months. 68% of advocacy organisations say they are expecting further cuts to their budgets

over the next year.² Since the survey, there have been further reductions in funding as well as cuts to legal aid which will increase pressure on advocacy services.

A statutory provision would ensure consistency across all regions. Furthermore, we would recommend that the legislation be explicit as to which body or agency has a statutory duty to provide such services. This would go some way in preventing the difficulties as seen in the Appropriate Adult Scheme in police custody which does not have a body with statutory responsibility which has led to "patchy and ad-hoc" responses to requests.³

ASSESSING THE CAPACITY OF THE ACCUSED

Mind considers that two medical practitioners are required before making a finding of unfitness to plead in order to ensure the necessary protection for the defendant.

We acknowledge that there will be circumstances where a psychiatrist will not be the most appropriate expert in making the assessment. It is therefore important that there is sufficient flexibility for the relevant expert to be instructed in the individual case.

PROCEDURE FOR THE UNFIT ACCUSED

It is undeniable that the current procedure is in need of reform. However, we are concerned about the effect of a finding of unfitness to plead on a defendant.

The General Comment for Article 12 CRPD states that "*the denial of the legal capacity of persons with disabilities and their detention in institutions against their will, either without their consent or with the consent of a substitute decision-maker, is an ongoing problem. This practice constitutes arbitrary deprivation of liberty and violates articles 12 and 14 of the Convention.*"⁴

The section 4A hearing is effectively a quasi-criminal trial which does not allow the defendant to participate which undermines the very nature of special measures and supported decision-making. This type of hearing should only be utilised as a last resort when all other efforts have failed.

Mind would advocate reconsideration of current proposals to focus on the treatment of the defendant to enable him to take part in the proceedings and to make a disposal at the earliest possible time.

² Action for Advocacy, *Advocacy in a cold climate* (2011)

³ http://www.centreformentalhealth.org.uk/pdfs/Bradley_report_five_years_on.pdf

⁴ Para 40 <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G14/031/20/PDF/G1403120.pdf?OpenElement>

It is on that basis that we would highlight the recommendations in the Bradley Report and, in particular, the development of the liaison and diversion services which will enable early intervention and reduce delays in treatment.

There is a strong argument that the extension of adjournment powers would increase the opportunity for defendants' recovery. This in turn would enable them to participate in proceedings and avoid excessive arbitrary detention.

It would be far more acceptable to use civil powers for example section 3 MHA and / or civil restraining orders. Public protection concerns could be addressed by way of a risk assessment based on the defendant's current circumstances notwithstanding the allegations.

Mind is concerned that there is a reliance on representatives that have been imposed on defendants to make decisions on their behalf. The focus would be in their "best interests" rather than interpreting the defendant's rights, will and preference. This system would be similar to the role of the Official Solicitor under the MCA. A system which provides for decisions to be made based on best interests is a substituted decision-making framework which is incompatible with Article 12 UNCRPD.

Mind Legal Unit

July 2014

Response of Dr Linda Monaci, Health Professional (Consultant Clinical Neuropsychologist)

PART 2: THE LEGAL TEST

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

YES: NO: OTHER:

In my view it would be useful to carry out separate assessments for the two components, as perhaps different remedies could be had for these two separate parts (or different structure - like a decision tree or support from the Court/process).

We may then have an individual who is deemed able to participate but not to take decisions, the Judge would then consider how it may be possible to involve the individual but also ensure he/she has a fair trial (or this could follow a decision tree flow chart like).

I think, however, that it would be helpful if clear examples could be given for both (e.g. John M. criteria), so to help clinicians with their assessments/ reports for the Court (perhaps in new Fitness to Plea Guidelines?).

Further Question 2 Do consultees consider that an effective participation test, framed around the *John M* criteria (set out at paragraph 2.3 above), with an additional decision-making capacity limb, represents the most appropriate formulation for such a combined legal test? Or do consultees favour another of the formulations set out at paragraph 2.28 above and, if so, why? (2.34)

YES: NO: OTHER:

After reading all comments and some consideration, I agree that the Fitness to Plea assessment should ideally include: 1. effective participation and 2. decision-making ability.

The first could be assessed by given criteria (those in John M seem helpful as tangible enough for clinicians although it would be great if case law could be from time to time reported in special documents that could help clinicians understanding legal matters and outcomes. The second could be assessed using the same (or similar) 2-stage functional test used by the MCA (2005).

Probably the complication would be that there are some areas of overlap between the two, but if clinicians gave particular examples (knowing what is relented from a legal point of view), the Judge may still be able to make the best decision.

Further Question 3 Do consultees consider that incorporating an exhaustive list of decisions for which the defendant requires capacity into a reformed legal test for unfitness to plead would assist in maintaining the threshold for unfitness at a suitable level? (2.42)

AGREE: DISAGREE: OTHER:

Assessors need to establish whether an individual is aware of those decisions as well as considering whether they are able to make them. It would seem therefore very helpful to have such a list as not all clinicians are necessarily familiar with all the part of the legal process, which in my view does not necessarily make them unable to provide such opinions.

I wonder whether it is possible to adapt an an approach similar to that of the MCA (2005) in the sense that people are not considered to lack capacity unless all reasonable steps to support them have been taken. I am not clear what support individuals are given if not from their Solicitor, who is unlikely to be an expert in mental health and/or cognitive issues.

What about supporting individuals who appear they may struggle with fitness to plea? For instance in neurorehabilitation I spent several sessions trying to support individuals with acquired brain injury to be capable to make a decision on their discharge destination. Another consideration is how many lay individuals are aware of all the decisions that need to be taken in a legal case; although it would seem normally the case that a Solicitor supports their clients, this may be more difficult in case individuals have significant mental health and/or cognitive problems.

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

YES: NO: OTHER:

I think it would help to have examples, clinicians could then ask questions as part of their assessment and report the responses to enable the Judge (for instance) to review the content of the clinic interview and understand how the clinician formed their opinion.

Further Question 5 Do consultees agree that a diagnostic threshold would be unlikely to assist in maintaining the threshold of unfitness at a suitable level? (2.44)

YES: NO: OTHER:

Probably this does not help simplify things but I think it would help when the diagnosis is a clear category. Unfortunately diagnoses in mental health are not very reliable so different Psychiatrists may give the same person (and symptoms) a different diagnosis. In this case clearly a diagnosis is not helpful to establish functioning.

On the other hand, more clearly medical diagnosis, such as dementia, stroke, acquired brain injury are more reliable and at the severe end of the spectrum are likely to be an useful threshold. The complication is that at times (although not at all common) that are people who appear to have a rather normal functioning following a massive stroke or brain injury and viceversa. Severe dementia instead by definition means the individual would be highly likely to struggle with a trial.

Further Question 6 Do consultees think that it would be helpful to have a statutory presumption that all defendants are fit to be tried until the contrary is proved? (2.46)

YES: NO: OTHER:

Yes and this would be more in line with the MCA (2005) principle that everyone should be considered to have the mental capacity to make a decision unless there is reason to believe otherwise.

Hopefully this is not going to mean that financial savings are tried to be made by avoiding funding fitness to plea assessments as probably if necessary steps were not taken delays would cost more than the savings (as well as unfair trials).

Further Question 7 Do consultees agree that a finding that a person lacks capacity shall remain valid unless and until the contrary is established on the basis of the evidence of two suitably qualified experts? (2.48)

YES: NO: OTHER:

I am not sure two are needed, but I suppose one may be required to establish lack of capacity and two required to establish capacity? I may remember correctly that this is the model followed for compulsory treatment under the Mental Health Act, but if one followed more the MCA (2005) approach, then I think one may be needed and deemed sufficient.

Further Question 8 Do consultees agree that disaggregation of capacity to plead and capacity for trial is undesirable? (2.59)

YES: NO: OTHER:

"A number of clinicians felt that capacity to plead, capacity to stand trial and even capacity to give evidence could usefully be distinguished (eg Charles de Lacy)"

After reading this I agree that this seems reasonable and useful, provided an individual may then be deemed capable on some of these but not all (e.g. fit to plead but not capable of giving evidence).

If the test was unitary the person may be found to be unable to do all three, but actually making those components different (on some sort of difficulty scale) appear likely to mean that an individual may do more simple things, such as say whether they are guilty or not but struggle with interview and cross examination.

Further Question 9 Do consultees consider that making the test one of capacity for effective participation "in determination of the allegation(s) faced" would introduce a desirable element of context into the assessment? (2.68)

YES: NO: OTHER:

And this would be consistent with the MCA (2005) principle that when assessing someone's ability to manage finances, the kind of assesses impacts on decision (e.g. someone may be able to manage a small amount of money such as benefits but unable to manage a large settlement). Perhaps a comparison may be that someone is able to stand trial for the theft of a mobile phone but would struggle with a more serious crime, such as robbery or rape.

However I understand from paragraph 2.54 that this approach may cause other complications.

Further Question 10 Do consultees agree that the United Kingdom's obligations under the UNCPRD and the ECHR can properly be accommodated in the manner outlined in paragraphs 2.80 to 2.82? (2.83)

YES: NO: OTHER:

As I reported in my answer to question 3. (What about supporting individuals who appear they may struggle with fitness to plea? For instance in neurorehabilitation I spent several sessions trying to support individuals with acquired brain injury to be capable to make a decision on their discharge destination. Another consideration is how many lay individuals are aware of all the decisions that need to be taken in a legal case; although it would seem normally the case that a Solicitor supports their clients, this may be more difficult in case individuals have significant mental health and/or cognitive problems), I think there could be some kind of specialist support to try enable individual to regain competency for the trial (or some of the competencies), which is not something the Intermediaries are trained for (I hope for skills not to be dumbed down to save costs!!).

Further Question 11 Do consultees agree that the difficulties surrounding unrepresented defendants cannot be addressed by amendment to the legal test itself? (2.88)

YES: NO: OTHER:

I think this may partly be addressed by an expert assessment considering whether the person is able to make that decision (or whether perhaps they are temporarily affected by a severe mental health problem or whether their judgment is so impaired due to a brain injury to be unable to make that decision. In this case the principle of the MCA (2005) involving considering the person's beliefs and wishes may help establish whether that's a change of character or whether this is a choice consistent with the person's beliefs.

PART 3: SPECIAL MEASURES

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

AGREE: DISAGREE: OTHER:

I am not sure that Intermediaries are necessarily always that helpful. I am under the impression that these are mostly speech and language therapists and I am not sure they would have enough their clinical experiences of all the conditions affecting people that needs support.

PART 4: ASSESSING THE CAPACITY OF THE ACCUSED

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

AGREE: DISAGREE: OTHER:

I agree as I think Psychiatrists often just rely on self-reports but Clinical Psychologists (and in particularly Neuropsychologists) have access to a variety of psychometrically sound clinical measures that include symptom validity.

In my view Clinical Psychologists (and in particularly Neuropsychologists) are more likely to assess complaints and symptoms in a more critical manner and should certainly be included in the professions that can make such judgments (similarly to the MCA, 2005).

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

AGREE: DISAGREE: OTHER:

I am not sure why one is not enough given that presumably the Prosecution would also instruct their own expert in case of disagreement.

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

AGREE: DISAGREE: OTHER:

Possibly review history and GP other medical records - but could this be done without the individual's consent? Would it be OK if ordered by a Judge?

PART 5: PROCEDURE FOR THE UNFIT ACCUSED

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

YES: NO: OTHER:

Further Question 17 Do consultees consider that it would be appropriate to extend the maximum period of a section 36 MHA 1983 remand to hospital for treatment to 24 weeks in these circumstances? (5.25)

YES: NO: OTHER:

Further Question 18 Do consultees consider that the determination of facts procedure for the accused who lacks capacity should be made discretionary following the finding of unfitness, to allow for discontinuance of the proceedings, and diversion out of the criminal justice system into health or related services in appropriate cases? (5.33)

YES: NO: OTHER:

Further Question 19 Do consultees consider that public protection concerns arising in relation to an acquitted, but dangerous, unfit defendant could be adequately met by the use of civil powers under section 3 or 7 MHA 1983? (5.44)

YES: NO: OTHER:

Not sure

Further Question 20 Do consultees consider that on a determination of the facts, any defence should be left to the jury, after discussion with the advocates, where there is evidence on which a jury properly directed might reasonably find the defence made out or the essential element of the offence unproven? (5.50)

YES: NO: OTHER:
Not sure

Further Question 21 Do consultees consider that the special verdict should be made available to the jury on their initial consideration of the facts? (5.54)

YES: NO: OTHER:
Not sure

Further Question 22 Do consultees agree that it is not necessary for the judge to retain the discretion, in cases of exceptional prejudice, to order a second stage process for the consideration of the special verdict, in the manner envisaged in Provisional Proposal 9? (5.56)

YES: NO: OTHER:
Not sure

Further Question 23 Do consultees consider that the determination of facts in relation to a defendant found to lack capacity could be dealt with by a judge sitting without a jury? (5.60)

YES: NO: OTHER:

Further Question 24 Do consultees agree that a representative, appointed by the court to put the case for the defence, should be entitled to act contrary to the defendant's identified will and preferences, where the representative considers that to do so is necessary in the defendant's best interests? (5.64)

YES: NO: OTHER:
Not sure

PART 8: UNFITNESS TO PLEAD IN THE MAGISTRATES' AND YOUTH COURTS

Further Question 36 Do consultees agree that capacity procedures in the summary courts should be applicable for all criminal offences? (8.83)

AGREE: DISAGREE: OTHER:
I would seem a good standard

Further Question 43 Do consultees agree that there should be mandatory specialist training on issues relevant to trying youths, for all legal practitioners and members of the judiciary engaged in cases involving young defendants? (8.114)

YES: NO: OTHER:

Further Question 44 Do consultees consider it appropriate for there to be initial screening for mental health issues for all defendants under 14 years of age, to be conducted by mental health professionals?. (8.119)

YES: NO: OTHER:

Response of National and Specialist CAMHS Forensic Psychology Service

PART 2: THE LEGAL TEST

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

YES: NO: OTHER:

Further Question 2 Do consultees consider that an effective participation test, framed around the *John M* criteria (set out at paragraph 2.3 above), with an additional decision-making capacity limb, represents the most appropriate formulation for such a combined legal test? Or do consultees favour another of the formulations set out at paragraph 2.28 above and, if so, why? (2.34)

YES: NO: OTHER:

We believe the additional decision-making capacity limb should involve psychological assessment rather than be a matter of professional opinion alone.

Further Question 3 Do consultees consider that incorporating an exhaustive list of decisions for which the defendant requires capacity into a reformed legal test for unfitness to plead would assist in maintaining the threshold for unfitness at a suitable level? (2.42)

AGREE: DISAGREE: OTHER:

We think this would be impractical, and may draw attention away from the particularities of a case.

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

YES: NO: OTHER:

Further Question 5 Do consultees agree that a diagnostic threshold would be unlikely to assist in maintaining the threshold of unfitness at a suitable level? (2.44)

YES: NO: OTHER:

This could set a dangerous precedent and overlooks the importance of context when considering fitness.

Further Question 6 Do consultees think that it would be helpful to have a statutory presumption that all defendants are fit to be tried until the contrary is proved? (2.46)

YES: NO: OTHER:

* Particularly in the case of 10-14 year olds

* For all cases: not until we are reassured by uniform access to assessment / screening (e.g. in Diversion and Liaison Service)

Further Question 7 Do consultees agree that a finding that a person lacks capacity shall remain valid unless and until the contrary is established on the basis of the evidence of two suitably qualified experts? (2.48)

YES: NO: OTHER:

Within the context of a single case, rather than across cases

Further Question 8 Do consultees agree that disaggregation of capacity to plead and capacity for trial is undesirable? (2.59)

YES: NO: OTHER:

Further Question 9 Do consultees consider that making the test one of capacity for effective participation "in determination of the allegation(s) faced" would introduce a desirable element of context into the assessment? (2.68)

YES: NO: OTHER:

Although at the point of assessment the assessor may not know what the individual is facing - e.g. are they pleading guilty to allegation(s), which court will they be in etc (a solicitor may be waiting until after the effective participation assessment to take instruction, as is common). This may make evaluating their ability to effectively participate in a specific situation difficult.

Further Question 10 Do consultees agree that the United Kingdom's obligations under the UNCRPD and the ECHR can properly be accommodated in the manner outlined in paragraphs 2.80 to 2.82? (2.83)

YES: NO: OTHER:

Further Question 11 Do consultees agree that the difficulties surrounding unrepresented defendants cannot be addressed by amendment to the legal test itself? (2.88)

YES: NO: OTHER:

PART 3: SPECIAL MEASURES

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

AGREE: DISAGREE: OTHER:

Giving defendants access to *registered* intermediaries, as vulnerable witnesses have currently, is important in ensuring intermediaries have access to training and support, and are of a consistent quality.

We believe intermediaries would also be of assistance to defendants with mental health and behavioural problems (such as anxiety or ADHD impeding their ability to effectively participate), as well as linguistic ones, given appropriate training.

PART 4: ASSESSING THE CAPACITY OF THE ACCUSED

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

AGREE: DISAGREE: OTHER:

As the Issues Paper suggests, psychologists routinely carry out standardised tests (including fitness assessments in the US); we believe psychologists are as able as psychiatrists to act as expert witnesses in these cases.

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

AGREE: DISAGREE: OTHER:

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

AGREE: DISAGREE: OTHER:

We wonder if there could be a meeting between the defendant's lawyer and an expert, to try to ascertain the reason for the refusal. This could then be fed back to court, and would highlight any significant and relevant issues such as paranoia / suspected learning disability.

PART 5: PROCEDURE FOR THE UNFIT ACCUSED

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

YES: NO: OTHER:

Further Question 17 Do consultees consider that it would be appropriate to extend the maximum period of a section 36 MHA 1983 remand to hospital for treatment to 24 weeks in these circumstances? (5.25)

YES: NO: OTHER:

Further Question 18 Do consultees consider that the determination of facts procedure for the accused who lacks capacity should be made discretionary following the finding of unfitness, to allow for discontinuance of the proceedings, and diversion out of the criminal justice system into health or related services in appropriate cases? (5.33)

YES: NO: OTHER:

PART 8: UNFITNESS TO PLEAD IN THE MAGISTRATES' AND YOUTH COURTS

Further Question 36 Do consultees agree that capacity procedures in the summary courts should be applicable for all criminal offences? (8.83)

AGREE: DISAGREE: OTHER:

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

YES: NO: OTHER:

Given the differing demands of the courtroom in Crown and Magistrates' courts, a separate test may be more appropriate. See answer to further question 45.

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

YES: NO: OTHER:

We agree that there is no logical basis for distinction

Further Question 41 Regardless of the position in the Crown Court, do consultees agree that, in the summary courts, the tribunal should have a discretion whether to proceed to the determination of facts hearing following a finding that the defendant lacks capacity? (8.102)

AGREE: DISAGREE: OTHER:

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

YES: NO: OTHER:

Further Question 43 Do consultees agree that there should be mandatory specialist training on issues relevant to trying youths, for all legal practitioners and members of the judiciary engaged in cases involving young defendants? (8.114)

YES: NO: OTHER:

This would help legal practitioners to direct defendants to assessment. It would also help communication between professionals and make assessment report findings clearer (e.g. clearing up the misconception that having a diagnosis of autism makes a person a 'savant').

Further Question 44 Do consultees consider it appropriate for there to be initial screening for mental health issues for all defendants under 14 years of age, to be conducted by mental health professionals?. (8.119)

YES: NO: OTHER:

Important both for ascertaining young defendants' capacity and for research purposes, given the controversy surrounding the current age of criminal responsibility.

Further Question 45 Do consultees agree that the provisional reformed test proposed for the Crown Court at paragraph 2.34 above is suitable for application to young defendants without adjustment? (8.126)

YES: NO: OTHER:

There are two issues here: firstly, the linguistic and cognitive demands of the Crown Court test may not be developmentally appropriate; secondly, the particular structure and character of the Youth Court means that issues of effective participation are different here. It would seem more appropriate to develop a version of the test for young people, as with other standardised tests.

Further Question 48 Do consultees consider that the non-penal requirements of a youth rehabilitation order should be available as part of a youth supervision order, following a finding that a young person has "done the act or made the omission," or where a special determination has been arrived at? (8.138)

AGREE: DISAGREE: OTHER:

This would be helpful for getting access to needed services, and could be one of few opportunities to help these young people and prevent future offending.

OTHER COMMENTS

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

Our service frequently assesses the ability of young people (11-17) to effectively participate in their court trial. Due to the absence of a standardised assessment measure, and the cognitive, linguistic and mental health challenges some of the young people face, we are currently developing a novel, computerised, interactive assessment tool. This project is supported by the Maudsley Charity (#798), and we are working closely with solicitors and Just For Kids Law.

Our assessment is loosely based around the Grisso framework mentioned in the Issues Paper. We are planning to pilot it with ten year olds and fourteen year olds in local schools, and are also interested in doing so within YOS / a diversion and liaison service. We would be happy to provide more details - please contact us at the email addresses at the start of the form.

Dr Troy Tranah
Consultant Clinical Psychologist

Dr Kate Johnston
Clinical Psychologist

Dr Kate Prentice
Assistant Psychologist

Response of the National Bench Chairmen's Forum

PART 8: UNFITNESS TO PLEAD IN THE MAGISTRATES' AND YOUTH COURTS

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

YES: NO: OTHER:

All of these hearings are able to be carried out by Magistrates. The determination other than the legal test are based on medical reasoning (capacity) with the findings of "fact". Magistrates have experience of dealing with such complex issues with advice from legal advisers in a number of wide-ranging cases. Further, if cases of these kind were to only be reserved to District Judges, there would be problems with listing and availability which in turn would cause delays in proceedings, some of which may involve vulnerable persons. There should be no differentiation between lay benches who sit with qualified lawyers and District Judge benches in dealing with these determinations.

Further Question 34 Do consultees consider that, where the defendant's capacity is in doubt, it would be preferable for his or her capacity to be determined in the magistrates' court, and, if the defendant is found to lack capacity, that all further proceedings against him or her should remain in that court? (8.76)

YES: NO: OTHER:

It seems sensible to the NBCF that when Capacity is in doubt the case should remain in the Magistrates Court. However, a caveat should be in place so that Magistrates can send these to the Crown Court should further circumstances and/or evidence come to light.

Further Question 35 (in the alternative) Do consultees alternatively consider that such a case should be sent to the Crown Court for determination of capacity and, if the defendant is found to lack capacity, that all further proceedings against him or her should remain in that court? (8.77)

YES: NO: OTHER:

Please see above reply to question 34

Further Question 36 Do consultees agree that capacity procedures in the summary courts should be applicable for all criminal offences? (8.83)

AGREE: DISAGREE: OTHER:

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

AGREE: DISAGREE: OTHER:

In addition, in the Youth Court, referral orders could be the correct sentence as they are flexible and adapted to the individual so they should be included. However, if the aim is to be able to include a "punitive" element where appropriate, these options do not make that possible and a wider range of sentencing options must be made available in the adult Court.

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

YES: NO: OTHER:

Further Question 39 Do consultees consider that there are any adjustments to the test, or the procedure, for defendants lacking capacity that would materially improve the prospects of the court identifying those adults with capacity issues? (8.92)

AGREE: DISAGREE: OTHER:

This needs to be clarified as to what is necessary and/or appropriate under Section 4A - does a fact finding hearing take place, whether a hospital order could be made or simply go straight to trial in the case of an adult. The legal test and Capacity test as outlined in Paragraphs 2.49 - 3.13 and 3.26 along with "moral" one presented to the Judiciary and/or Jury need to be reconciled. An early screening test would allow for the appropriate test and procedure to be followed from the onset of cases.

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

YES: NO: OTHER:

Further Question 41 Regardless of the position in the Crown Court, do consultees agree that, in the summary courts, the tribunal should have a discretion whether to proceed to the determination of facts hearing following a finding that the defendant lacks capacity? (8.102)

AGREE: DISAGREE: OTHER:

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

YES: NO: OTHER:

Further Question 43 Do consultees agree that there should be mandatory specialist training on issues relevant to trying youths, for all legal practitioners and members of the judiciary engaged in cases involving young defendants? (8.114)

YES: NO: OTHER:
Most definitely, this is very important.

Further Question 44 Do consultees consider it appropriate for there to be initial screening for mental health issues for all defendants under 14 years of age, to be conducted by mental health professionals?. (8.119)

YES: NO: OTHER:

As the Consultation states it is not yet known what proportion of the population are suffering from such ailments, to screen ALL defendants under 14 years old would be disproportionate, however we would approve of this screening if the Young person was within the Care system. Such a regime will also be a resource issue.

Further Question 45 Do consultees agree that the provisional reformed test proposed for the Crown Court at paragraph 2.34 above is suitable for application to young defendants without adjustment? (8.126)

YES: NO: OTHER:

This would merely delay the course of Justice from a Court to Court. The power should be in Summary Courts to impose a restriction order. The Youth Court can impose custodial sentences for up to two years. It is far more desirable not to send youths and vulnerable persons to the Crown Court. In addition, it would also save the costs of cases being committed to the Crown Court.

Further Question 47 Do consultees agree that the following disposals should be available to the magistrates' court on a finding that the defendant has "done the act or made the omission," or where a special determination has been arrived at:

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

YES: NO: OTHER:

Further Question 48 Do consultees consider that the non-penal requirements of a youth rehabilitation order should be available as part of a youth supervision order, following a finding that a young person has "done the act or made the omission," or where a special determination has been arrived at? (8.138)

AGREE: DISAGREE: OTHER:

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

YES: NO: OTHER:

Further Question 50 Do consultees agree that a new right of appeal should be created from any determination or disposal imposed under a reformed capacity procedure, which would mirror the right to appeal against conviction or sentence under section 108 Magistrates' Courts Act 1980? (8.143)

AGREE: DISAGREE: OTHER:

Dr Brendan O'Mahony
Health Professional

CJS Psychology
PO Box 325
Diss
Norfolk
IP22 1WT

[REDACTED]

[REDACTED]

Part 3: Special Measures. Further Question 12

Whilst I consider that it is desirable I am not convinced that it is practicable. I am a Registered Intermediary and I have also undertaken approximately ten cases with vulnerable defendants. In most of these cases I have been asked by the court to support the communication needs of the defendant throughout the trial. On occasions I have also attended the Probation Service when interviews for a Pre-Sentence Report are conducted. Whilst this gold-star service is desirable, I have reservations about how realistic it will be to find suitably qualified professionals to undertake this function.

The current system for vulnerable witnesses with Ministry of Justice Registered (Witness) Intermediaries is that the intermediaries are either self-employed or employees of large organizations such as the NHS. In my case I am a forensic psychologist in independent practice so I have some flexibility to organise my diary so long as I am given sufficient notice of the trial date. I frequently receive last minute calls to act as an intermediary for a defendant and I have to decline these cases. I am not sure how practical it will be to locate professionals who have the time to act throughout a trial, particularly lengthy trials. I also have reservations as to how many professionals will commit to trials if the hourly fee paid by the LAA and HMCTS is far below what they can earn in their professional capacity elsewhere. This is the current state with witness intermediaries. Currently, I only undertake defendant cases as an intermediary because I can currently negotiate my own fee with the court. If the court was to pay me the standard hourly witness intermediary fee (£36) I would not accept the instruction. I foresee a scenario where inappropriately qualified individuals will be instructed by the courts to take on complex communication cases.

As highlighted in my thesis (see link below), it may be the case that Registered Intermediaries should be reserved for if / when a defendant elects to provide oral testimony which was the intention of s104 of the Coroners and Justice Act 2009. Perhaps the court could then employ less qualified individuals to sit in the dock throughout a trial. This of course adds an additional person to the equation for the vulnerable person to work with. A real concern in this scenario is giving sufficient notice to an intermediary to attend a court on a particular date. It is just not practical to ask a professional to keep several days free in their diary on the off chance that they might be required at court. The court system will have to improve efficiency in time-tabling if this is to happen.

I completed my doctoral thesis on the role of defendant intermediaries and it can be downloaded free of charge here: <http://eprints.port.ac.uk/12434/>

Special Measures - intermediaries
Other comments

1) I act as an expert witness (Forensic Psychologist) and as an intermediary (obviously not both roles in the same case). I have recently completed an expert witness psychology assessment where I assessed the defendant as 'faking' cognitive impairment. I had been asked if an intermediary would be beneficial at court and the psychology assessment enabled me to answer this question. I am not suggesting that many defendants might try and fake impairment in order to gain access to an intermediary but it is something that we need to be aware of. Will expert witness reports always be requested if an intermediary is requested for a defendant who presents as vulnerable?

2) What happens if an expert witness, for example a psychiatrist, states that a defendant is fit to plead / stand trial so long as an intermediary is present, and an intermediary assessment subsequently states that an intermediary cannot assist with facilitating communication at court? The intermediary is not acting as an 'expert witness' in this instance but could be seen to be undermining the expert witness report.

3) Based on one experience of acting as an intermediary at court where a vulnerable defendant had a learning disability and mental health issues, I have concern that the function of the intermediary with defendants can be vague on occasion. For example, I advised the court mid-trial that in my opinion the defendant was so distressed that I felt that a further psychiatric assessment was required. The court engaged a psychiatrist to re-assess the defendant and stated that the defendant could continue 'solely because s/he had a qualified psychologist sat with him/her in the dock'.

4) There is no academic research evidence base to inform us how jurors interpret the role of intermediaries with defendants. Perhaps this research should be funded and disseminated before any scheme is implemented. I address this issue in my doctoral thesis and related academic papers.

Response of Dr Susan O'Rourke, Health Professional (Clinical Psychologist)

PART 2: THE LEGAL TEST

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

Yes: No: Other:

I am a clinical psychologist specialising in the assessment of Deaf people using British Sign Language. A number of defendants I have worked with would have capacity to make certain key decisions but have difficulty with effective participation due to issues of deprivation of information and background information necessary for understanding.

Further Question 3 Do consultees consider that incorporating an exhaustive list of decisions for which the defendant requires capacity into a reformed legal test for unfitness to plead would assist in maintaining the threshold for unfitness at a suitable level? (2.42)

AGREE: DISAGREE: OTHER:

I think it would be difficult to provide an exhaustive list and maintain the test as contextual and specific to the particular case. There are likely to be issues of concern which fall outside the remit of the 'exhaustive list' particularly in complex cases.

Further Question 4 Do consultees consider that a reformed test should explicitly refer to a "satisfactory" or "sufficient" level of capacity for effective participation? (2.43)

YES: NO: OTHER:

In my experience clinicians interpret current criteria very differently so some guidelines in this regard would be helpful.

Further Question 5 Do consultees agree that a diagnostic threshold would be unlikely to assist in maintaining the threshold of unfitness at a suitable level? (2.44)

YES: NO: OTHER:

In considering specific cases and putting these in context of exactly what needs to be understood, a diagnostic threshold would be meaningless and unhelpful.

Further Question 6 Do consultees think that it would be helpful to have a statutory presumption that all defendants are fit to be tried until the contrary is proved? (2.46)

YES: NO: OTHER:

Whilst I would agree in principle, my experience is that in cases involving deaf individuals there may be an erroneous assumption of capacity due to the complexities of the interpretation process which may give the impression that a defendant is more able than is the case. In the recent family case *Re C(A Child)* [2014] EWCA Civ 128 the Court of Appeal issued guidelines for involvement of specialist experts sooner rather than later in cases involving deaf parents. I would argue this should be the case in criminal cases also due to the difficulties that the court has in directly assessing capacity.

Further Question 7 Do consultees agree that a finding that a person lacks capacity shall remain valid unless and until the contrary is established on the basis of the evidence of two suitably qualified experts? (2.48)

YES: NO: OTHER:

I would want to stress 'suitably' qualified, which should encompass, not only the professional qualification, but also the clinical area of expertise. Again in relation to deaf defendants, I have experience of a number of poor and inaccurate assessments by professionals who are not experienced in working with deaf people and have no knowledge of BSL. I am sure this concern applies to other areas.

Further Question 9 Do consultees consider that making the test one of capacity for effective participation "in determination of the allegation(s) faced" would introduce a desirable element of context into the assessment? (2.68)

YES: NO: OTHER:

PART 3: SPECIAL MEASURES

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

AGREE: DISAGREE: OTHER:

I strongly agree with this proposal. In many assessments I conclude that the deaf defendant would be fit to plead and stand trial only if he/she were afforded special measures. These can be effortful and cumbersome and my advice is not always taken but the conclusion of fitness may stand nonetheless. This is of great concern. If this were to be implemented there is a great need for additional intermediaries, particularly Deaf Intermediaries as there are only currently 2- 3 working in the UK.

PART 4: ASSESSING THE CAPACITY OF THE ACCUSED

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

AGREE: DISAGREE: OTHER:

In cases involving a question of cognitive impairment/ Learning Disability, the appropriate professional is a psychologist.

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

AGREE: DISAGREE: OTHER:

PART 5: PROCEDURE FOR THE UNFIT ACCUSED

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

YES: NO: OTHER:

Further Question 17 Do consultees consider that it would be appropriate to extend the maximum period of a section 36 MHA 1983 remand to hospital for treatment to 24 weeks in these circumstances? (5.25)

YES: NO: OTHER:

Further Question 18 Do consultees consider that the determination of facts procedure for the accused who lacks capacity should be made discretionary following the finding of unfitness, to allow for discontinuance of the proceedings, and diversion out of the criminal justice system into health or related services in appropriate cases? (5.33)

YES: NO: OTHER:

Further Question 19 Do consultees consider that public protection concerns arising in relation to an acquitted, but dangerous, unfit defendant could be adequately met by the use of civil powers under section 3 or 7 MHA 1983? (5.44)

YES: NO: OTHER:

Further Question 21 Do consultees consider that the special verdict should be made available to the jury on their initial consideration of the facts? (5.54)

YES: NO: OTHER:

I agree with opinion stated by previous consultees, that to have a second trial would be unhelpful and confusing to a vulnerable defendant.

PART 6: DISPOSALS

Further Question 26 Do consultees consider that it would be appropriate and effective to expand the power of supervision orders under section 5 of the CP(I)A to include recall of a supervised person to hospital, as available under section 17E-F of the MHA 1983? (6.21)

YES: NO: OTHER:

OTHER COMMENTS

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

If the proposals go down the route of the MCA and require a two stage test, the first being 'an impairment of brain or mind,' there will be a number of deaf individuals who would fall outside of this, but who, in my view lack capacity in proceedings.

This is a unique group, who may be of average intellectual ability (potential), but who through lack of access to education and incidental learning have minimal language skills and huge deprivation in knowledge skills and learning to the extent that they are seriously disadvantaged. The use of special measures will assist in many cases and allow such individuals to be deemed 'fit' but in some cases, for example in a complex case, no amount of support will suffice. In such circumstances it would be problematic to be restricted to assessment according to the two stage test under the MCA, as those concerned cannot be said to have an impairment of brain or mind, since the issue is one of deprivation not impairment.

some of these issues are discussed in Toolkit 11 Planning to Question Someone who is Deaf, soon to be published on the Advocates Gateway.

Response of Professor Jill Peay, Academic (Department of Law, LSE)

PART 2: THE LEGAL TEST

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

YES: NO: OTHER:

The original provisional proposal in CP 197 at p.63 spoke of 'decision-making capacity for trial' - contextually interpreted, as I think was originally intended, this would have embraced meaningful participation (see my comments in other section at the very end of this form). But, if that has not been the shared perception of other consultees, then I can see some advantage in breaking the test down (albeit I would not favour it myself for the reasons given in the final box).

Further Question 2 Do consultees consider that an effective participation test, framed around the *John M* criteria (set out at paragraph 2.3 above), with an additional decision-making capacity limb, represents the most appropriate formulation for such a combined legal test? Or do consultees favour another of the formulations set out at paragraph 2.28 above and, if so, why? (2.34)

YES: NO: OTHER:

I would prefer effective participation (with all that that entails about the interaction between the accused and a trial process) to take the lead but can see that could be achieved by extending John (M) to include, critically, understanding the probable likelihood of conviction or acquittal, understanding the significance of the penalty, deleting reference to the jury and including reference to the ability to understand the issues relating to selecting trial in the Crown Court (which necessarily entails the possibility of a more severe penalty). And understanding that pleading guilty at an early stage will produce a significant sentence discount but that this should not be done where the accused does not believe him/herself responsible for the offence (a very tricky issue). Giving evidence in your own defence (and choosing whether to do so) and following the course of proceedings can be seen as short-hand for some of those emotional/control aspects that are required of accused persons to effectively participate in a trial. The issue of foreseeable consequences of decision-making choice of course covers both criminal penalties and therapeutic interventions, but perhaps this does need spelling out.

Further Question 3 Do consultees consider that incorporating an exhaustive list of decisions for which the defendant requires capacity into a reformed legal test for unfitness to plead would assist in maintaining the threshold for unfitness at a suitable level? (2.42)

AGREE: DISAGREE: OTHER:

not exhaustive, but requires something more extensive than John (M).

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

YES: NO: OTHER:

If judges remain the arbiters of unfitness I am happy to trust to their judgment as to what level of capacity is necessary given the broad complexity of the likely issues entailed in the specific case. But, I obviously would like them to have access to the Blackwood et al screening tool results which will give a scaled response and not simply a dyadic sufficient/insufficient measure.

Further Question 5 Do consultees agree that a diagnostic threshold would be unlikely to assist in maintaining the threshold of unfitness at a suitable level? (2.44)

YES: NO: OTHER:

Further Question 6 Do consultees think that it would be helpful to have a statutory presumption that all defendants are fit to be tried until the contrary is proved? (2.46)

YES: NO: OTHER:

Further Question 7 Do consultees agree that a finding that a person lacks capacity shall remain valid unless and until the contrary is established on the basis of the evidence of two suitably qualified experts? (2.48)

YES: NO: OTHER:

Further Question 8 Do consultees agree that disaggregation of capacity to plead and capacity for trial is undesirable? (2.59)

YES: NO: OTHER:

For reasons given in other box at end

Further Question 9 Do consultees consider that making the test one of capacity for effective participation “in determination of the allegation(s) faced” would introduce a desirable element of context into the assessment? (2.68)

YES: NO: OTHER:
but see Q4 above

Further Question 10 Do consultees agree that the United Kingdom’s obligations under the UNCRPD and the ECHR can properly be accommodated in the manner outlined in paragraphs 2.80 to 2.82? (2.83)

YES: NO: OTHER:
I think this would be good start. Properly accommodated is a nuanced phrase. I have commented further in my paper to the Craigie initiative, to which I think you have access. But I do think the provision of special measures facilitators/ registered intermediaries on a statutory basis is critical.

Further Question 11 Do consultees agree that the difficulties surrounding unrepresented defendants cannot be addressed by amendment to the legal test itself? (2.88)

YES: NO: OTHER:
And this problem will be exacerbated with reference to the diminishing legal aid provisions.

PART 3: SPECIAL MEASURES

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

AGREE: DISAGREE: OTHER:
This is critical.

PART 4: ASSESSING THE CAPACITY OF THE ACCUSED

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

AGREE: DISAGREE: OTHER:
This is two questions in one. Two assessments probably yes, approved under s.12, less certain. Depends on the reason for unfitness. Dementia, for example, wouldn't necessarily require a s.12 doctor. Especially if the Blackwood et al screening tool works and is adopted.

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

AGREE: DISAGREE: OTHER:

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

AGREE: DISAGREE: OTHER:

I have no idea how often this arises. But I would have thought a skilled use of negotiation, patience, the threat of unfair criminal proceedings, the use of s.35 MHA assessment should bring results.

PART 5: PROCEDURE FOR THE UNFIT ACCUSED

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

YES: NO: OTHER:

Further Question 17 Do consultees consider that it would be appropriate to extend the maximum period of a section 36 MHA 1983 remand to hospital for treatment to 24 weeks in these circumstances? (5.25)

YES: NO: OTHER:

But s.36 only applies currently in the Crown Court

Further Question 18 Do consultees consider that the determination of facts procedure for the accused who lacks capacity should be made discretionary following the finding of unfitness, to allow for discontinuance of the proceedings, and diversion out of the criminal justice system into health or related services in appropriate cases? (5.33)

YES: NO: OTHER:

This would, I fear, become the default option, denying accused persons the right to finding that they did not do the act or make the omission charged with the requisite mental state.

Further Question 19 Do consultees consider that public protection concerns arising in relation to an acquitted, but dangerous, unfit defendant could be adequately met by the use of civil powers under section 3 or 7 MHA 1983? (5.44)

YES: NO: OTHER:

This may feel potentially uncomfortable but it is the non-discriminatory approach.

Further Question 20 Do consultees consider that on a determination of the facts, any defence should be left to the jury, after discussion with the advocates, where there is evidence on which a jury properly directed might reasonably find the defence made out or the essential element of the offence unproven? (5.50)

YES: NO: OTHER:

Further Question 21 Do consultees consider that the special verdict should be made available to the jury on their initial consideration of the facts? (5.54)

YES: NO: OTHER:

I am somewhat anxious about this becoming a default option in cases of uncertainty - it is a stigmatic finding. I am less anxious about it in front of a jury than I am in front of a bench of lay magistrates, but I remain unenthusiastic. The empirical evidence suggests that it is pretty unusual for mental disorder to lead directly to offending. And if it does then the prosecution should be unlikely to be able to prove any fault based offending. I prefer acquittal, followed by civil commitment if the disorder is of sufficient severity. However, if the Commission recommend a very narrow basis for their 'insanity' defence (as looks likely) then this may be preferable to that!

Further Question 22 Do consultees agree that it is not necessary for the judge to retain the discretion, in cases of exceptional prejudice, to order a second stage process for the consideration of the special verdict, in the manner envisaged in Provisional Proposal 9? (5.56)

YES: NO: OTHER:

Further Question 23 Do consultees consider that the determination of facts in relation to a defendant found to lack capacity could be dealt with by a judge sitting without a jury? (5.60)

YES: NO: OTHER:

It could be, but I am of the old-fashioned view that fact finding is for a lay body.

Further Question 24 Do consultees agree that a representative, appointed by the court to put the case for the defence, should be entitled to act contrary to the defendant's identified will and preferences, where the representative considers that to do so is necessary in the defendant's best interests? (5.64)

YES: NO: OTHER:

The representative should follow, as far as is possible the individuals expressed will and preferences. If the court wishes to act in the individuals best interests so be it, but the representative should not be prejudging the issues.

PART 6: DISPOSALS

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

YES: NO: OTHER:

Further Question 26 Do consultees consider that it would be appropriate and effective to expand the power of supervision orders under section 5 of the CP(I)A to include recall of a supervised person to hospital, as available under section 17E-F of the MHA 1983? (6.21)

YES: NO: OTHER:

If they weren't initially sufficiently disordered to merit hospital admission, I don't see how they can be recalled there subsequently. Whilst I accept that if elements of mens rea get embraced by the expanded test there is greater justification for a more sanctioning approach, it remains the case that these orders follow from non-criminal proceedings. A separation between them and criminal based community orders should be maintained. There is quite enough informal coercion and confusion in this field without giving it further legal authority.

Further Question 27 Do consultees consider that there are any other enhancements of the powers available under supervision orders which would be beneficial? (6.22)

YES: NO: OTHER:

assorted powers to make positive provisions for what people need would be by my approach.

PART 7: REMISSION AND APPEALS

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

YES: NO: OTHER:

Further Question 29 Do consultees consider that the power to remit an accused for trial should only be exercisable by the Crown where the judge has ruled, following the section 4A hearing, that it is in the public interest for remission to be available should the defendant regain capacity? (7.35)

YES: NO: OTHER:

Further Question 30 Do consultees agree that the Crown's power to remit defendants for trial upon their recovery should not be limited in time? (7.38)

YES: NO: OTHER:

Further Question 31 Do consultees agree that where there has been a finding that a defendant had "done the act or made the omission," he or she should be entitled to request remission for trial on regaining capacity, where recovery is confirmed by the opinions of two experts competent to address the defendant's particular condition? (7.43)

YES: NO: OTHER:

Further Question 32 Do consultees consider that the rights of appeal vested in the unfit defendant should be exercisable by his or her legal representatives? (7.48)

YES: NO: OTHER:

PART 8: UNFITNESS TO PLEAD IN THE MAGISTRATES' AND YOUTH COURTS

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

YES: NO: OTHER:

Further Question 34 Do consultees consider that, where the defendant's capacity is in doubt, it would be preferable for his or her capacity to be determined in the magistrates' court, and, if the defendant is found to lack capacity, that all further proceedings against him or her should remain in that court? (8.76)

YES: NO: OTHER:

Since I favour (see end box) the use of delay (given maximum prior non-prosecution) as a method of facilitating the possibility of recovery of capacity for conventional trial, this would logically entail the Magistrates using their s.35 powers to remand for assessment under the MHA and extending s.36 powers to the Magistrates if the criteria are satisfied. Or via the use of s.3 civil provisions if criteria met. But if s.36 isn't extended, then dealing with the matter via the Crown Court would be my preferred route.

Further Question 35 (in the alternative) Do consultees alternatively consider that such a case should be sent to the Crown Court for determination of capacity and, if the defendant is found to lack capacity, that all further proceedings against him or her should remain in that court? (8.77)

YES: NO: OTHER:

see Q 34,

Further Question 36 Do consultees agree that capacity procedures in the summary courts should be applicable for all criminal offences? (8.83)

AGREE: DISAGREE: OTHER:

but only if the supervision order remains non coercive

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

AGREE: DISAGREE: OTHER:

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

YES: NO: OTHER:

I agree with the spirit. The wording is a bit Delphic. why not 'given the prospect of summary proceedings'?

Further Question 39 Do consultees consider that there are any adjustments to the test, or the procedure, for defendants lacking capacity that would materially improve the prospects of the court identifying those adults with capacity issues? (8.92)

AGREE: DISAGREE: OTHER:

Screening with use of Blackwood et al instrument!

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

YES: NO: OTHER:

Further Question 41 Regardless of the position in the Crown Court, do consultees agree that, in the summary courts, the tribunal should have a discretion whether to proceed to the determination of facts hearing following a finding that the defendant lacks capacity? (8.102)

AGREE: DISAGREE: OTHER:

assuming right to put prosecution to proof remains, and that outcome of diversion remains a finding of lack of capacity; and no more - albeit if civil provisions for admission to hospital under s.2/3 are met so be it.

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

YES: NO: OTHER:

Again, whilst this is rarely used now my anxiety is that it could become the default option in cases of uncertainty, especially in the magistrates. It is not clear from the Issues paper what consequences would follow from such a finding.

Further Question 43 Do consultees agree that there should be mandatory specialist training on issues relevant to trying youths, for all legal practitioners and members of the judiciary engaged in cases involving young defendants? (8.114)

YES: NO: OTHER:

Further Question 44 Do consultees consider it appropriate for there to be initial screening for mental health issues for all defendants under 14 years of age, to be conducted by mental health professionals?. (8.119)

YES: NO: OTHER:

Further Question 45 Do consultees agree that the provisional reformed test proposed for the Crown Court at paragraph 2.34 above is suitable for application to young defendants without adjustment? (8.126)

YES: NO: OTHER:

Yes, but see my answer to Q 2 above. Effective participation has to be judged in the light of the person, including their age, who has to participate!

Further Question 46 Do consultees agree that the summary courts should have the power to commit a defendant to the Crown Court for the imposition of a restriction order, but should not have the power to impose one themselves? (8.130)

YES: NO: OTHER:

Further Question 47 Do consultees agree that the following disposals should be available to the magistrates' court on a finding that the defendant has "done the act or made the omission," or where a special determination has been arrived at:
 (a) a hospital order (without restriction);
 (b) a supervision order;
 (c) an absolute discharge? (8.135)

YES: NO: OTHER:

Assuming this still remains a finding of non-responsibility/culpability, then I would prefer the s.3 wording to the s.37 wording. S37 talks of most suitable option (which may come about because there are no others). S.3 requires satisfaction of a standard of necessity.

Further Question 48 Do consultees consider that the non-penal requirements of a youth rehabilitation order should be available as part of a youth supervision order, following a finding that a young person has “done the act or made the omission,” or where a special determination has been arrived at? (8.138)

AGREE: DISAGREE: OTHER:

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

YES: NO: OTHER:

Further Question 50 Do consultees agree that a new right of appeal should be created from any determination or disposal imposed under a reformed capacity procedure, which would mirror the right to appeal against conviction or sentence under section 108 Magistrates’ Courts Act 1980? (8.143)

AGREE: DISAGREE: OTHER:

OTHER COMMENTS

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

Trying to get the balance right between a principled approach and practical advice about what will work strikes me as extraordinarily difficult. I agree wholeheartedly with your principled approach set out in paras 1.6 - 1.11 but as someone not practising in court I am less equipped to comment on the practicalities. However, years of empirical research have taught me that short, comprehensible and memorable tests are much more likely to be adopted and applied consistently. It is hard to get working practitioners in diverse settings to be compliant with law that is not used on a routine basis.

Thus, I would not favour an approach which splits a test into foundational and decision-making capacity. Indeed, I'm not certain I can clarify in my own mind the working difference between them since they overlap in large part and both contribute to the concept of effective participation/meaningful engagement.

The principle of a right to a fair trial puts an emphasis on fairness (which requires effective participation) and an emphasis on trial, implying that trial is preferable to diversion where it can be fairly managed.

But a system which emphasizes pre-charge diversion or non-prosecution for those alleged to have committed minor crimes in the context of a problematic mental state, which delays a determination of mental state through an early and appropriate use of the Mental Health Act provisions, which provides full statutorily based support for those for whom trial would not otherwise be fair, and which delays or can delay the determination of unfitness until the prosecution have established a prima facie case, would seem to me the fairest approach. Together with a determination of the facts process which includes a 'mens rea' element.



**Response to the Law Commission's
Unfitness to Plead: An Issues Paper
from
the 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 Issues Paper on Unfitness to Plead, which builds on their Consultation Paper 197 (2011), which the Prison Reform Trust also responded to. The Further Questions posed in the Issues Paper are important and, where we are able, we are pleased to respond. Our response has been informed by Alison Giraud-Saunders, independent consultant. For a small number of questions we have drawn on responses made by Just For Kids Law and the Law Society, and we have highlighted where this is the case.

Further Questions (FQ)

PART 2: THE LEGAL TEST

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

The Prison Reform Trust (PRT) agrees with FQ1.

Our response to Provisional Proposal 1 (PP1) of Consultation Paper 197 (2011) is unchanged, 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.'

FQ 2 (2.34): *Do consultees consider that an effective participation test, framed around the John M criteria (set out at paragraph 2.3 above), with an additional decision-making capacity limb, represents the most appropriate formulation for such a combined legal test? Or do consultees favour another of the formulations set out at paragraph 2.28 above and, if so, why?*

While PRT favours an effective participation test, with an additional decision-making capacity limb, we are concerned that the John M criteria alone might be too narrow. In considering 'effective participation' we endorse the criteria identified in *SC v UK* (2005) 40 EHRR 10, where effective participation

"...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 witness and, if represented, to explain to his own lawyers his version of events, point out any statement with which he disagrees and make them aware of any facts which should be put forward in his defence" (*S v UK*, 2004).

We add the following points:

- The 'test' should be uniformly applied by competent (sufficiently skilled and knowledgeable) person(s)
- There should be an entitlement in law for the accused to receive the necessary support, from competent person(s), when undertaking the 'test' and, if deemed fit, throughout subsequent proceedings; including preparation to participate in court proceedings, throughout court proceedings and immediately following court proceedings. See also our response to FQ 12.

FQ3 (2.42): *Do consultees consider that incorporating an exhaustive list of decisions for which the defendant requires capacity into a reformed legal test for unfitness to plead would assist in maintaining the threshold for unfitness at a suitable level?*

An exhaustive list of decisions, as described at 2.36, could provide useful guidance to assist in maintaining uniformity in the application of the test and in maintaining the threshold for unfitness at a suitable level. Practical examples and case studies should also be given.

Assessment of decision-making capacity should be in accordance with the Mental Capacity Act 2005 (MCA 2005), s3; namely, that a person should be able to:

- Understand the information relevant to the decision
- Retain that information
- Use or weigh that information as part of the process of making the decision
- Communicate their decision (whether by talking, using sign language or any other means).

Further, in considering the above, it is important to note that the second principle of the MCA is to take all practical steps to support a person to make a decision themselves. In particular:

"(2) A person is not to be regarded as unable to understand the information relevant to a decision if he is able to understand an explanation of it given to him in a way that is appropriate to his circumstances (using simple language, visual aids, or any other means).

(3) The fact that a person is able to retain the information relevant to a decision for a short period only does not prevent him from being regarded as able to make the decision.

(4) The information relevant to a decision includes information about the reasonably foreseeable consequences of

(a) deciding one way or another, or

(b) failing to make the decision.” (MCA 2005, s3).

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

Whether an accused is unfit to plead should be determined by a defined ‘test’ and clinical interview by competent person(s). It shouldn’t be necessary to add the words, ‘satisfactory’ or sufficient’.

FQ 5 (2.44): *Do consultees agree that a diagnostic threshold would be unlikely to assist in maintaining the threshold of unfitness at a suitable level?*

Yes; the MCA states clearly that assumptions about capacity should not be made on diagnosis. While the emphasis should be on determining the ability of the accused to participate effectively in court proceedings and their decision-making capacity, and necessary support, a diagnosis can help to determine the most appropriate support, and way of providing that support. For example, a diagnosis of learning disability could allow the skills of those assessing capacity and those supporting decision-making to be matched to the needs of the accused.

FQ 6 (2.46): *Do consultees think that it would be helpful to have a statutory presumption that all defendants are fit to be tried until the contrary is proved?*

Yes; the assumption of capacity should match the MCA assumption of capacity unless proven otherwise. Unfitness to plead is a finding that should be avoided if at all possible – in the interests of the accused and society at large.

Findings of unfitness to plead should be reviewed and reported upon annually. An independent body, such as the Equality and Human Rights Commission, should be involved in the review, which would help ensure that decisions that declare an individual unfit are appropriate.

FQ 7 (2.48): *Do consultees agree that a finding that a person lacks capacity shall remain valid unless and until the contrary is established on the basis of the evidence of two suitably qualified experts?*

Capacity can fluctuate. Assessment of capacity is time and decision-specific. The capacity of an individual found unfit to plead should be kept under review, much as the capacity of an individual found fit to plead should be kept under review during court proceedings.

On balance, we agree.

FQ 8 (2.59): *Do consultees agree that disaggregation of capacity to plead and capacity for trial is undesirable?*

Yes, we agree.

FQ 9 (2.68): *Do consultees consider that making the test one of capacity for effective participation “in determination of the allegation(s) faced” would introduce a desirable element of context into the assessment?*

Notwithstanding the difficulties highlighted in paragraph 2.60, context is relevant. Introducing context supports a case by case, person centred approach to assessment, which, in turn, should determine necessary support that can be tailored to meet individual need. This

approach may well have the advantage of fewer defendants being found unfit to plead.

FQ 10 (2.83): *Do consultees agree that the United Kingdom's obligations under the UNCRPD and the ECHR can properly be accommodated in the manner outlined in paragraphs 2.80 to 2.82?*

NIL RESPONSE

FQ11 (2.88): *Do consultees agree that the difficulties surrounding unrepresented defendants cannot be addressed by amendment to the legal test itself?*

Yes. Any indication that an individual may lack capacity (paragraph 2.84) should trigger proactive assistance, from a specified postholder and in a manner that is understood by the accused (see FQ3), to secure representation. This would reflect the 'appropriate measures' required by article 12(3) UNCRPD (paragraph 2.85) without compromising the 'rights, will and preferences' of the accused, should he or she refuse such assistance.

PART 3: SPECIAL MEASURES

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

Yes; this is long overdue and the current position is discriminatory (see, for example, *Fair Access to Justice?* Talbot, 2012).

The anomaly of registered intermediaries for victims and witnesses and non-registered intermediaries for the accused should be addressed (see, for example, *Fair Access to Justice?* Talbot, 2012; *OP, R (on the application of) v Secretary of State for Justice* [2014] EWHC 1944 (Admin), June 2014).

Where a finding against unfitness to plead is made on the basis of necessary support being made available (or, that an accused is fit to plead with the necessary support), that support should be an entitlement in law, provided and paid for by the court. The same should apply for all support identified as necessary, not only that afforded by a registered intermediary.

Detailed guidance exists on the need to support vulnerable defendants, and how this might be achieved, for example, the *Equal Treatment Bench Book*, summarised in *Fairness in courts and tribunals* and *Criminal Practice Directions*. Case law exists where support has been put in place, for example, *C v Sevenoaks Youth Court* (2009) and *R v Great Yarmouth Youth Court* (2011); there are a small number of 'special measures' that relate to vulnerable defendants; the Equality Act requires that 'reasonable adjustments' are made that anticipate and prevent discrimination against people with disabilities; and members of the judiciary have an inherent discretion within their court, which they can use to ensure the necessary support is put in place.

Yet, despite these measures, evidence suggests that the support needs of vulnerable defendants are frequently neither recognised nor met (Talbot, 2008; 2012). In 2008 the UK Joint Committee on Human Rights said:

We are concerned that the problems highlighted by this evidence could have

potentially very serious implications for the rights of people with learning disabilities to a fair hearing, as protected by the common law and by Article 6 ECHR. Some of this evidence also suggests that there are serious failings in the criminal justice system, which gives rise to the discriminatory treatment of people with learning disabilities (A Life Like Any Other? Human Rights of Adults with Learning Disabilities; 212:2008).

More recently, the Criminal Justice Joint Inspection (CJJI) thematic on the treatment of offenders with learning disabilities within the Criminal Justice System found that:

For someone with a learning disability, the court environment and process is confusing and possibly frightening. The court environment could very easily, and with little extra cost, be made less intimidating... We found, however, that little attention had been paid to the needs of those with learning disabilities, for example through the availability of 'easy read' posters and leaflets to explain the court process (CJJI, 2014).

There are, perhaps, two main factors behind these findings, in brief: the courts not recognising that an individual accused has support needs; and/or not knowing how to address support needs should they come to light. To assist with the former (not recognising support needs), it is expected that NHS England Liaison and Diversion services will increasingly assist in identifying individuals with support needs as they enter the criminal justice system, including those who may lack capacity, and these services are welcomed. However, it is important to note that:

- The government commitment for such services applies only in England
- Full roll out, by 2017, rests on the acceptance of a business case in 2015 and subsequent ministerial approval.

Further, in relying on Liaison and Diversion services to provide information that will assist the courts in addressing possible unfitness to plead cases, information sharing protocols will be necessary and common screening and assessment procedures helpful.

There is an identified need for mental health and learning disability awareness training for professionals and practitioners across the criminal justice system, including court staff and members of the judiciary (Bradley Report, 2009). Arguably, there is also the need for information and awareness raising on when and how general support for vulnerable defendants should be provided, and when specialist support, such as that offered by a registered intermediary, might be needed.

Finally, it is important to note that necessary support to ensure effective participation and decision-making capacity should be put in place for all court proceedings, not just for cases that go to trial, in accordance with the MCA second principle (to take all practical steps to support a person to make a decision themselves).

PART 4: ASSESSING THE CAPACITY OF THE ACCUSED

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

We agree, and support the statement contained at 4.21, that 'the important issue is that the training and experience of the individual expert makes them competent for the task.'

FQ 14 (4.24): *Do consultees agree that the evidence of two expert witnesses,*

competent to address the defendant's particular condition, should be the minimum requirement for a finding of lack of capacity?

We agree. This is a grave decision and the implications for the accused, in particular, justifies the involvement of two expert witnesses competent to address the defendant's particular condition or conditions.

It is important to note that the prevalence of co-morbidity, where people experience more than one condition, is high. For example, an individual may have a learning disability, be on the autistic spectrum and have mental health problems. It is important that those involved in assessments are competent to address a range of conditions and the interplay between complex needs.

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

Members of the judiciary have an inherent discretion within their court, which they can use to ensure the necessary support is put in place.

PART 5: PROCEDURE FOR THE UNFIT ACCUSED

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

Yes; in particular, we agree with paragraph 5.23 that 'this power should only be exercised where both experts agree that capacity may be recoverable within that period.'

While capacity can fluctuate in people with, for example, mental ill-health, for people with conditions such as learning disability and autistic spectrum disorder, there is likely to be little change in capacity over time. Delays, and consequent incarceration, for individuals unlikely to regain capacity would be an inappropriate use of this power.

FQ 17 (5.25): Do consultees consider that it would be appropriate to extend the maximum period of a section 36 MHA 1983 remand to hospital for treatment to 24 weeks in these circumstances?

Other: any decision to increase the time that an individual is held against his or her will should be taken very seriously. We do not feel competent to pass further comment.

FQ 18 (5.33): Do consultees consider that the determination of facts procedure for the accused who lacks capacity should be made discretionary following the finding of unfitness, to allow for discontinuance of the proceedings, and diversion out of the criminal justice system into health or related services in appropriate cases?

Yes; on the basis that 'the accused, or the defence representative, should be entitled to put the Crown to proof of the allegation if they wish... where the allegation itself is likely to be reputationally damaging (for instance an alleged sexual offence)' (paragraph 5.31).

FQ 19 (5.44): Do consultees consider that public protection concerns arising in relation to an acquitted, but dangerous, unfit defendant could be adequately met by

the use of civil powers under section 3 or 7 MHA 1983?

NIL RESPONSE

FQ 20 (5.50): *Do consultees consider that on a determination of the facts, any defence should be left to the jury, after discussion with the advocates, where there is evidence on which a jury properly directed might reasonably find the defence made out or the essential element of the offence unproven?*

NIL RESPONSE

FQ 21 (5.54): *Do consultees consider that the special verdict should be made available to the jury on their initial consideration of the facts?*

NIL RESPONSE

FQ 22 (5.56): *Do consultees agree that it is not necessary for the judge to retain the discretion, in cases of exceptional prejudice, to order a second stage process for the consideration of the special verdict, in the manner envisaged in Provisional Proposal 9?*

NIL RESPONSE

FQ 23 (5.60): *Do consultees consider that the determination of facts in relation to a defendant found to lack capacity could be dealt with by a judge sitting without a jury?*

No. We endorse the response made by the Law Society to this question, which is:

'As a matter of principle the Law Society is firmly of the view that the role of the jury, as the determiner of facts in non-summary criminal cases, is a vital component in the criminal justice system in England and Wales. We are not persuaded that it would be appropriate to create an exception in relation to determining the facts where a defendant lacks capacity.'

FQ 24 (5.64): *Do consultees agree that a representative, appointed by the court to put the case for the defence, should be entitled to act contrary to the defendant's identified will and preferences, where the representative considers that to do so is necessary in the defendant's best interests?*

Such a decision (to act contrary to the defendant's will and preferences) only becomes relevant if the person is assessed not to have capacity to make that decision. If they do have capacity, they are entitled to make an 'unwise' decision.

If the person is assessed as having capacity but the judge remains concerned that their decision is so unwise that it could result in a miscarriage of justice, the first consideration should be to review, and to ensure that the necessary decision-making support is both available and adequate.

If, after such a review, it is thought necessary to act contrary to the defendant's identified will and preferences, then a decision can be made under the MCA in their 'best interests'. In such a case the guidance in the MCA Code of Practice should be followed, including listening to the defendant themselves and others who know and care about them. The role of IMCAs, as currently defined, does not include supporting a defendant, and this should be

explored as an integral part of this consultation.

We further suggest that such decisions – acting contrary to the defendant’s identified will and preferences, where the court appointed representative considers that to do so is necessary in the defendant’s best interests – be reviewed annually by an independent body, such as the Equality and Human Rights Commission, to help ensure that the best interests of the accused have been served and to learn from decisions taken.

PART 6: DISPOSALS

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

Yes; we agree with the response made by Just For Kids Law (paragraph 29), illuminated by their Case Study 2 on page 9 of their submission.

FQ 26 (6.21): *Do consultees consider that it would be appropriate and effective to expand the power of supervision orders under section 5 of the CP(I)A to include recall of a supervised person to hospital, as available under section 17E-F of the MHA 1983?*

NIL RESPONSE

FQ 27 (6.22): *Do consultees consider that there are any other enhancements of the powers available under supervision orders which would be beneficial?*

Yes; we agree with the response made by Just For Kids Law that

‘supervision orders could be enhanced by a requirement of the supervising officer providing the court with regular reports on the defendant’s progress and for the court to have a supervisory function enabling the defendant to attend court to tell the judge about the progress of the supervision order, and providing the court with the power to amend the order, where necessary’ (paragraph 30, page 9).

PART 7: REMISSION AND APPEALS (FQs 28-32)

NIL RESPONSE

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

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

We agree. It would, however, be necessary to ensure that training is undertaken by lay benches in advance of such a move and that a legal advisor is routinely available.

FQ 34 (8.76): *Do consultees consider that, where the defendant’s capacity is in doubt, it would be preferable for his or her capacity to be determined in the magistrates’ court, and, if the defendant is found to lack capacity, that all further proceedings against him or her should remain in that court?*

Yes; we consider that it would be preferable.

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|---|
| FQ 35: (in the alternative to FQ 34) |
| <p>FQ 36 (8.83): <i>Do consultees agree that capacity procedures in the summary courts should be applicable for all criminal offences?</i></p> <p>Yes.</p> |
| <p>FQ 37 (8.84): <i>For non-imprisonable offences, do consultees agree that the available disposals should be limited to a supervision order and an absolute discharge?</i></p> <p>Yes.</p> |
| <p>FQ 38 (8.87): <i>Do consultees agree that a legal test which has regard to “the determination of the allegation(s) faced” would allow sufficient effect to be given to the accessible and more straightforward nature of summary proceedings?</i></p> <p>Yes.</p> |
| <p>FQ 39 (8.92): <i>Do consultees consider that there are any adjustments to the test, or the procedure, for defendants lacking capacity that would materially improve the prospects of the court identifying those adults with capacity issues?</i></p> <p>No, the same test should be applied. But see our answer to FQ12.</p> |
| <p>FQ 40 (8.96): <i>Do consultees agree that it is appropriate to have the same evidential requirement in the summary courts as in the Crown Court?</i></p> <p>Yes.</p> |
| <p>FQ 41 (8.102): <i>Regardless of the position in the Crown Court, do consultees agree that, in the summary courts, the tribunal should have discretion whether to proceed to the determination of facts hearing following a finding that the defendant lacks capacity?</i></p> <p>Yes.</p> |
| <p>FQ 42 (8.110): <i>Do consultees agree that in reaching its determination on the facts, the tribunal in the summary courts should be able to reach a special determination of acquittal because of mental disorder existing at the time of the offence?</i></p> <p>NIL RESPONSE</p> |
| <p>FQ 43 (8.114): <i>Do consultees agree that there should be mandatory specialist training on issues relevant to trying youths, for all legal practitioners and members of the judiciary engaged in cases involving young defendants?</i></p> <p>Yes.</p> <p>Further, there should be mandatory disability awareness training, and mental health and learning disability awareness training, in particular, and specific training on effective communication for all legal practitioners and members of the judiciary engaged in cases involving child and adult defendants.</p> <p>Courts are verbally mediated environments and the ability to communicate effectively, especially as high numbers of child and adult defendants experience communication</p> |

difficulties, is essential.

FQ 44 (8.119): *Do consultees consider it appropriate for there to be initial screening for mental health issues for all defendants under 14 years of age, to be conducted by mental health professionals?*

Yes, but this should be for all defendants under 18 years of age and not just for mental health issues.

It has long been acknowledged that children who come into contact with criminal justice services are disadvantaged socially, educationally and also because they experience a range of impairments and emotional difficulties (*Punishing Disadvantage: a profile of children in Custody*, Jacobson et al, 2010; *Seen and Heard: supporting vulnerable children in the youth justice system*, Talbot, 2010).

Initial screening and, where necessary, assessment should include mental health issues, low IQ/learning disability, and communication difficulties. NHS England Liaison and Diversion services should increasingly undertake such screening and assessment (see FQ 12).

FQ 45 (8.126): *Do consultees agree that the provisional reformed test proposed for the Crown Court at paragraph 2.34 above is suitable for application to young defendants without adjustment?*

NIL RESPONSE

FQ 46 (8.130): *Do consultees agree that the summary courts should have the power to commit a defendant to the Crown Court for the imposition of a restriction order, but should not have the power to impose one themselves?*

Yes. The consequences of a restriction order are very serious and should therefore be confined to the Crown Court.

FQ 47 (8.135): *Do consultees agree that the following disposals should be available to the magistrates' court on a finding that the defendant has "done the act or made the omission," or where a special determination has been arrived at:*

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

Yes.

FQ 48 (8.138): *Do consultees consider that the non-penal requirements of a youth rehabilitation order should be available as part of a youth supervision order, following a finding that a young person has "done the act or made the omission," or where a special determination has been arrived at?*

Yes.

We agree with the submission made by Just For Kids Law, which 'would encourage supervision outside the criminal justice system'... '(i.e. not overseen by Youth offending Teams) and we would endorse the court exercising a supervisory function over the order.'

Just For Kids Law goes on to say:

'We feel that supervision orders could be enhanced by a requirement of the supervising officer providing the court with regular reports on the defendant's progress and for the court to have a supervisory function enabling the defendant to attend court to tell the judge about the progress of the supervision order, and providing the court with the power to amend the order, where necessary' (paragraph 30, page 10).

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

Yes.

FQ 50 (8.143): *Do consultees agree that a new right of appeal should be created from any determination or disposal imposed under a reformed capacity procedure, which would mirror the right to appeal against conviction or sentence under section 108 Magistrates' Courts Act 1980?*


Yes.

Additional points for consideration

In addition to our responses to Further Questions, we would like to make the following points.

1. Finding a person unfit to plead is a grave and complex decision. Any 'test' should have at its heart a set of principles that help to ensure access to justice for the individual concerned and to safeguard his or her best interests. For example, FQ 5, 'the presumption that all defendants are fit to be tried until the contrary is proven' would be one such principle and the right to appeal, (FQ 50), another. Others, for example, might include:
 - a. That the process and outcome for defendants found to be unfit to plead should not be more punitive than for defendants charged with a similar offence where no such finding is made
 - b. That necessary support for effective participation and decision making is determined on a case by case basis, is person centred and tailor-made to suit the particular needs of the individual concerned
 - c. That necessary support, whatever that might look like, should be an entitlement in law, paid for by the court; and that necessary support might change during court proceedings and should be kept under review.
2. 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

3. Pre-sentence: should it be deemed necessary for a vulnerable defendant to be remanded at any stage of his or her trial, including for a report on his or her mental capacity or while awaiting trial or awaiting sentence, the accused should not be remanded to prison. It is generally acknowledged that prisons are unsuitable environments for vulnerable people, and such incarceration is likely to result in a further deterioration of their mental health.

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Consultation closing date 25 July 2014; submitted, with agreement, 8 August 2014.

Response of the Royal College of Psychiatrists

PART 2: THE LEGAL TEST

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

YES: NO: OTHER:

In other jurisdictions in the world, the test is often framed around the person's ability to take part in a trial process to the requisite extent.

Further Question 2 Do consultees consider that an effective participation test, framed around the *John M* criteria (set out at paragraph 2.3 above), with an additional decision-making capacity limb, represents the most appropriate formulation for such a combined legal test? Or do consultees favour another of the formulations set out at paragraph 2.28 above and, if so, why? (2.34)

YES: NO: OTHER:

Further Question 3 Do consultees consider that incorporating an exhaustive list of decisions for which the defendant requires capacity into a reformed legal test for unfitness to plead would assist in maintaining the threshold for unfitness at a suitable level? (2.42)

AGREE: DISAGREE: OTHER:

It would be impossible to come up with a complete list of such decisions.

Further Question 4 Do consultees consider that a reformed test should explicitly refer to a "satisfactory" or "sufficient" level of capacity for effective participation? (2.43)

YES: NO: OTHER:

To refer to a "sufficient" level of capacity would be better.

There should also be a requirement, as in the Mental Capacity Act (MCA), that all supportive steps have been taken to allow a person to have capacity.

Further Question 5 Do consultees agree that a diagnostic threshold would be unlikely to assist in maintaining the threshold of unfitness at a suitable level? (2.44)

YES: NO: OTHER:

The RCPsych view is that while some professional groups may not be comfortable with using a diagnostic threshold, it is very difficult to justify the subsequent detention of an individual found unfit to plead under the Mental Health Act, if they do not have a diagnosed mental disorder that can be treated.

That said, the RCPsych Adolescent Forensic Psychiatry Special Interest Group also notes that in terms of children and young people diagnosis is only one part of the assessment and in fact in the case of developmental immaturity may be moot.

Further Question 6 Do consultees think that it would be helpful to have a statutory presumption that all defendants are fit to be tried until the contrary is proved? (2.46)

YES: NO: OTHER:

This fits with the presumption that an individual has capacity, unless proved otherwise, and is compatible with the MCA principles

Further Question 7 Do consultees agree that a finding that a person lacks capacity shall remain valid unless and until the contrary is established on the basis of the evidence of two suitably qualified experts? (2.48)

YES: NO: OTHER:

Further Question 8 Do consultees agree that disaggregation of capacity to plead and capacity for trial is undesirable? (2.59)

YES: NO: OTHER:

These are two distinct things and need to be treated as such.

Consultant forensic psychiatrists who are usually asked to assess individuals where there is an issue of fitness to plead, are often confused by instructions from solicitors that refer to "fitness to plead" and "fitness to stand trial". The only additional issue which arises in the latter instruction is where physical health problems may prevent them attending the trial.

Further Question 9 Do consultees consider that making the test one of capacity for effective participation “in determination of the allegation(s) faced” would introduce a desirable element of context into the assessment? (2.68)

YES: NO: OTHER:

In any test of capacity, the issue is does the individual have capacity to make a specific decision. It is impossible to say that somebody lacks all capacity. Therefore it would be better to focus the capacity assessment on the issue of the allegations faced. Again this is more in line with the MCA.

Further Question 10 Do consultees agree that the United Kingdom’s obligations under the UNCRPD and the ECHR can properly be accommodated in the manner outlined in paragraphs 2.80 to 2.82? (2.83)

YES: NO: OTHER:

Not qualified to answer.

Further Question 11 Do consultees agree that the difficulties surrounding unrepresented defendants cannot be addressed by amendment to the legal test itself? (2.88)

YES: NO: OTHER:

Consultant forensic psychiatrist's have had many experiences of defendants where they are unrepresented, often because of severe mental illness, yet they will not raise the issue of being fit to plead.

PART 3: SPECIAL MEASURES

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

AGREE: DISAGREE: OTHER:

This is extremely important

PART 4: ASSESSING THE CAPACITY OF THE ACCUSED

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

AGREE: DISAGREE: OTHER:

There is still the unanswered question, which experts have the necessary experience and expertise to undertake these assessments, which should include the diagnosis of any mental disorder?

The second could be another suitably qualified professional such as a psychologist with the necessary expertise.

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

AGREE: DISAGREE: OTHER:

The issue is, as above, ensuring that the two expert witnesses are competent to undertake the assessment and have the right experience to do so.

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

AGREE: DISAGREE: OTHER:

The possibility of remand to hospital for assessment could be considered in this situation.

The RCPsych Adolescent Forensic Psychiatry Special Interest Group also notes that [remand to hospital in the case of a resolvable mental disorder where unfitness to plead was found would be reasonable \(though this is less common in adolescents since the formal resolvable mental disorders more frequently have onset in adulthood and what we're left with is ID, ASD and emerging PD\)](#). In the case of adolescents the assessment is likely to be complex and will encapsulate developmental immaturity as well as the presence and impact of any mental disorder - this assessment requires a level of expertise and other avenues of assessment are not appropriate in order to arrive at a valid opinion of the young person. [Developmental immaturity is not a mental disorder within the meaning in the MHA so a hospital order would not be available.](#)

PART 5: PROCEDURE FOR THE UNFIT ACCUSED

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

YES: NO: OTHER:

A time limit would not be helpful. It is impossible to give a period of time by which all defendants will have regained their capacity. It cannot be determined for an individual how long it will take to recover, even if the potential is there.

The RCPsych Adolescent Forensic Psychiatry Special Interest Group also notes that although this may be appropriate in the case of mental disorder, developmental immaturity may take longer to resolve - this fact should be highlighted, although it is acknowledged that a prolonged delay of proceedings can also be disadvantageous. Setting a specific time limit on the process does present some challenges.

Further Question 17 Do consultees consider that it would be appropriate to extend the maximum period of a section 36 MHA 1983 remand to hospital for treatment to 24 weeks in these circumstances? (5.25)

YES: NO: OTHER:

This could be useful in complex cases and could be needed to help in the situation referred to in answer to Question 15

Further Question 18 Do consultees consider that the determination of facts procedure for the accused who lacks capacity should be made discretionary following the finding of unfitness, to allow for discontinuance of the proceedings, and diversion out of the criminal justice system into health or related services in appropriate cases? (5.33)

YES: NO: OTHER:

This would be unfair. If no determination took place it would be possible to detain a person on the grounds of abnormally aggressive behaviour or seriously irresponsible conduct when in fact they did not do the act.

Further Question 19 Do consultees consider that public protection concerns arising in relation to an acquitted, but dangerous, unfit defendant could be adequately met by the use of civil powers under section 3 or 7 MHA 1983? (5.44)

YES: NO: OTHER:

Unfortunately, in practice, the arranging of a Mental Health Act Assessment is often cumbersome and cannot be relied on to take place in sufficient time to ensure the defendant does not leave the court. This would, therefore be too hard to work in practice.

Further Question 20 Do consultees consider that on a determination of the facts, any defence should be left to the jury, after discussion with the advocates, where there is evidence on which a jury properly directed might reasonably find the defence made out or the essential element of the offence unproven? (5.50)

YES: NO: OTHER:

Not qualified to comment.

Further Question 21 Do consultees consider that the special verdict should be made available to the jury on their initial consideration of the facts? (5.54)

YES: NO: OTHER:

We agree with this, if there is sufficient evidence that this is appropriate

Further Question 22 Do consultees agree that it is not necessary for the judge to retain the discretion, in cases of exceptional prejudice, to order a second stage process for the consideration of the special verdict, in the manner envisaged in Provisional Proposal 9? (5.56)

YES: NO: OTHER:

Not qualified to comment.

Further Question 23 Do consultees consider that the determination of facts in relation to a defendant found to lack capacity could be dealt with by a judge sitting without a jury? (5.60)

YES: NO: OTHER:

Not qualified to comment.

Further Question 24 Do consultees agree that a representative, appointed by the court to put the case for the defence, should be entitled to act contrary to the defendant's identified will and preferences, where the representative considers that to do so is necessary in the defendant's best interests? (5.64)

YES: NO: OTHER:

This should only be the case, as stated in the consultation document when a person lacks capacity.

PART 6: DISPOSALS

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

YES: NO: OTHER:

Not qualified to comment.

Further Question 26 Do consultees consider that it would be appropriate and effective to expand the power of supervision orders under section 5 of the CP(I)A to include recall of a supervised person to hospital, as available under section 17E-F of the MHA 1983? (6.21)

YES: NO: OTHER:

Not qualified to comment.

Further Question 27 Do consultees consider that there are any other enhancements of the powers available under supervision orders which would be beneficial? (6.22)

YES: NO: OTHER:

PART 7: REMISSION AND APPEALS

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

YES: NO: OTHER:

Further Question 29 Do consultees consider that the power to remit an accused for trial should only be exercisable by the Crown where the judge has ruled, following the section 4A hearing, that it is in the public interest for remission to be available should the defendant regain capacity? (7.35)

YES: NO: OTHER:

Further Question 30 Do consultees agree that the Crown's power to remit defendants for trial upon their recovery should not be limited in time? (7.38)

YES: NO: OTHER:

As stated already, a time limit cannot be put on an individual's recovery of capacity.

The RCPsych Adolescent Forensic Psychiatry Special Interest Group also notes that developmental immaturity is something that resolves rather than requires an element of recovery from.

Further Question 31 Do consultees agree that where there has been a finding that a defendant had "done the act or made the omission," he or she should be entitled to request remission for trial on regaining capacity, where recovery is confirmed by the opinions of two experts competent to address the defendant's particular condition? (7.43)

YES: NO: OTHER:

Further Question 32 Do consultees consider that the rights of appeal vested in the unfit defendant should be exercisable by his or her legal representatives? (7.48)

YES: NO: OTHER:

PART 8: UNFITNESS TO PLEAD IN THE MAGISTRATES' AND YOUTH COURTS

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

YES: NO: OTHER:

The RCPsych does not have a view on this point, although the RCPsych Adolescent Forensic Psychiatry Special Interest Group does agree.

Further Question 34 Do consultees consider that, where the defendant's capacity is in doubt, it would be preferable for his or her capacity to be determined in the magistrates' court, and, if the defendant is found to lack capacity, that all further proceedings against him or her should remain in that court? (8.76)

YES: NO: OTHER:
Not qualified to comment.

Further Question 35 (in the alternative) Do consultees alternatively consider that such a case should be sent to the Crown Court for determination of capacity and, if the defendant is found to lack capacity, that all further proceedings against him or her should remain in that court? (8.77)

YES: NO: OTHER:

Further Question 36 Do consultees agree that capacity procedures in the summary courts should be applicable for all criminal offences? (8.83)

AGREE: DISAGREE: OTHER:

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

AGREE: DISAGREE: OTHER:

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

YES: NO: OTHER:
The RCPsych does not have a view on this point, although the RCPsych Adolescent Forensic Psychiatry Special Interest Group does agree.

Further Question 39 Do consultees consider that there are any adjustments to the test, or the procedure, for defendants lacking capacity that would materially improve the prospects of the court identifying those adults with capacity issues? (8.92)

AGREE: DISAGREE: OTHER:

The RCPsych Adolescent Forensic Psychiatry Special Interest Group felt that the procedure would need to be sufficiently flexible to deal with a number of scenarios but that this would need to be assessed in the case of adolescents by a suitably qualified expert with the means at his/her disposal to properly answer the question.

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

YES: NO: OTHER:

Further Question 41 Regardless of the position in the Crown Court, do consultees agree that, in the summary courts, the tribunal should have a discretion whether to proceed to the determination of facts hearing following a finding that the defendant lacks capacity? (8.102)

AGREE: DISAGREE: OTHER:

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

YES: NO: OTHER:

Further Question 43 Do consultees agree that there should be mandatory specialist training on issues relevant to trying youths, for all legal practitioners and members of the judiciary engaged in cases involving young defendants? (8.114)

YES: NO: OTHER:

The RCPsych Adolescent Forensic Psychiatry Special Interest Group wish to highlight the need for appropriate training to be available for those dealing with young people in a legal context, and this needs to be ubiquitous across the country. This training should cover not only mental disorders common in childhood but also developmental level as it impacts upon an individual's ability to effectively participate in court proceedings.

Further Question 44 Do consultees consider it appropriate for there to be initial screening for mental health issues for all defendants under 14 years of age, to be conducted by mental health professionals? (8.119)

YES: NO: OTHER:

The RCPsych Adolescent Forensic Psychiatry Special Interest Group recommends that the term 'screening' is used, as this is more appropriate for assessment of Fitness to Plead in adolescents, comprising as it does only screening for mental disorder but also for developmental immaturity. It is crucial in any event that an appropriately qualified professional undertakes this screening, namely a consultant child psychiatrist or psychologist.

With regard to the question of age, we wish to make the following points. Age cut-offs, whilst perhaps helpful from an administrative viewpoint, are arbitrary in terms of what is known about the heterogeneity of brain development. A blanket rule of "all those aged 14 or under" could unfairly impinge upon 15-year-olds who are developmentally immature, whilst needlessly subjecting many high-functioning 14-year-olds to an assessment which they may not need. Our view is that there is a need to consider both mental disorder and developmental immaturity in all those under the age of 18, as there is no material reason why those under the age of 14 should have a mental health screen and those aged 15-18 automatically should not. We recognise that the process by which this reaches a formal assessment by a consultant will probably have to remain as it is currently until the minimum age of criminal responsibility changes, but it would be helpful for there to be sufficient flexibility in the system to acknowledge this developmental variation and complexity.

Further Question 45 Do consultees agree that the provisional reformed test proposed for the Crown Court at paragraph 2.34 above is suitable for application to young defendants without adjustment? (8.126)

YES: NO: OTHER:

The RCPsych does not have a view on this point, although the RCPsych Adolescent Forensic Psychiatry Special Interest Group does agree.

Further Question 46 Do consultees agree that the summary courts should have the power to commit a defendant to the Crown Court for the imposition of a restriction order, but should not have the power to impose one themselves? (8.130)

YES: NO: OTHER:

Further Question 47 Do consultees agree that the following disposals should be available to the magistrates' court on a finding that the defendant has "done the act or made the omission," or where a special determination has been arrived at:

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

YES: NO: OTHER:

Further Question 48 Do consultees consider that the non-penal requirements of a youth rehabilitation order should be available as part of a youth supervision order, following a finding that a young person has "done the act or made the omission," or where a special determination has been arrived at? (8.138)

AGREE: DISAGREE: OTHER:

The RCPsych does not have a view on this point, although the RCPsych Adolescent Forensic Psychiatry Special Interest Group does agree.

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

YES: NO: OTHER:

Not qualified to comment.

Further Question 50 Do consultees agree that a new right of appeal should be created from any determination or disposal imposed under a reformed capacity procedure, which would mirror the right to appeal against conviction or sentence under section 108 Magistrates' Courts Act 1980? (8.143)

AGREE: DISAGREE: OTHER:

OTHER COMMENTS

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

The RCPsych would like to reiterate the following points from its submission to the 2011 Law Commission Consultation Paper on this topic:

[2011 CP] 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.

The RCPsych Adolescent Forensic Psychiatry Special Interest Group has made the following further comments about certain paragraphs within the Issues Paper:

8.40 In light of the limited published material raising the need for a test for determining unfitness to plead (or decision-making capacity) in the summary jurisdiction, we did not make firm proposals for reform of the summary unfitness procedures in the CP. Rather the following questions were formulated:

Magistrates' 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?

Yes, to confirm whether the issues should be dealt with in a criminal justice setting.

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 - the AFPSIG wanted to highlight the need for other disposal options in the case of a finding of unfitness to plead, which may include local authority care - there is currently no effective mechanism for moving young people from a criminal court to a civil setting in which safeguarding and local authority care can be considered, and we feel this needs to be remedied.

Youth court

We did, however, pose a question aimed at identifying the extent to which the low age of criminal responsibility affects decision-making capacity in youth trials:

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

The AFPSIG is of the opinion that the current minimum age of criminal responsibility is disadvantageous since many ten year olds may be considered to be developmentally immature and therefore not fit to plead with the result that they may be criminalised following a "trial of the facts" with no due process to appeal against the finding.

The abolition of doli incapax, itself a dissatisfactory remedy, placed young people in an even more invidious position and some consideration must be given, in light of the current scientific understanding of the brain, to a mechanism to effectively deal with individuals who are too developmentally immature to form mens rea and may additionally be too developmentally immature to be able to effectively participate in the court process.

Question 9: A mandatory fact-finding procedure in the magistrates' court?
8.46 This question invited respondents to consider whether the determination of the facts under section 4A CP(I)A, which the Crown Court is required to undertake after finding a defendant unfit, would be necessary in every case in the lower courts.

The AFPSIG were of the view that diversionary strategies are often sought prior to court, and are of the view that if the case must proceed to a "trial of the facts", this should be done by a district judge to reflect the gravity of the potential outcome for the young person. Whilst diversion strategies are important for many young people, this process should not be to the detriment of the young person understanding that there are consequences to antisocial behaviour.

General observations

8.49 The National Bench Chairmen's Forum felt that there should be consideration of the appointment of a legal representative to protect the interests of the defendant. This, it was felt, would advance the overall objective to deal with cases justly and achieve greater consistency.

The AFPSIG were in support of this, which would be analogous to the role of Guardians in care proceedings.

8.50 The Legal Committee of the Council of District Judges suggested reserving cases raising issues of unfitness to district judges.

The AFPSIG strongly supported this position.

8.53 The Council of HM Circuit Judges thought consideration should be given to cases where unfitness to plead is in issue being committed to the Crown Court to be dealt with, on the basis that a hospital order represents a serious deprivation of liberty.

The AFPSIG strongly supported this position.

Question 12: Taking account of age and developmental immaturity. 8.56 There was a broad acknowledgement that the developmental immaturity of very young defendants will be a very significant factor in assessing their decision-making capacity and arguably their capacity for effective participation

The AFPSIG agreed with this and had specific comments to make in terms of those assessing fitness to plead in young people - it is our opinion that these assessments should only be performed by an appropriately-qualified clinician, and that this is likely to be a consultant psychiatrist or psychologist who has specific training in the assessment of young people.

The reasons for this relate not just to mental disorders particularly affecting children but also the assessment of developmental immaturity as an impact factor, and knowledge of the resources available to help young people in court settings.

Should cases where fitness to plead issues arise be reserved to district judges?

8.62 There is capacity in any court for a certain case, or even a certain class of case, to be heard before a specially trained tribunal.⁵⁷ It would be possible to restrict the determination of capacity issues, and any section 4A hearing for determination of the facts, to be heard only by legally trained district judges rather than by lay magistrates.

The Legal Committee for the Council of District Judges raised the question of whether this might be a suitable restriction and we consider that the option is worth exploring.

8.63 The advantage of reserving such hearings to district judges is that a legally trained tribunal might be better able to deal with the complexities of applying the legal test for unfitness, and considering complex expert evidence. It could be argued that greater consistency of approach might be achieved as a result.

Indeed it is noteworthy that in the Crown Court, applying the test for unfitness is now the task of the judge and not the jury.

It was our view that District Judges should deal with this issue.

8.70 A more difficult situation arises where, in a case which can be tried in either court, the magistrates conclude that they will retain jurisdiction. In that situation it is the defendant's choice as to where the trial should take place.⁶³ As discussed at paragraph 8.12 above, the decision whether to elect Crown Court trial is significant, and can only be exercised by the defendant. It is clear to us that it would be highly undesirable if a defendant whose capacity for effective participation were in doubt were required to make that decision before a determination as to his capacity had been arrived at, or for defence representatives to make that decision where they are unable to take reliable instructions.

The AFPSIG agreed with this position.

8.80 We also note that there is some evidence that the lack of any provision for mentally disordered defendants facing non-imprisonable charges currently causes difficulties with case management (as discussed at paragraph 8.20 above). Therefore, there may be practical advantages in having a procedure in place for dealing with capacity issues arising in all cases.

The AFPSIG agreed with this position.

8.81 Available disposals would have to be limited in the case of non-imprisonable offences. It seems to us that it would obviously be inappropriate for a hospital order to be available in relation to a non-imprisonable offence.

However if, as discussed below, a supervision order were to be an available disposal in the magistrates' court for a defendant lacking capacity, we provisionally consider that it may be appropriate for that disposal to remain available to the court in relation to non-imprisonable matters (in addition to the absolute discharge). We appreciate that a community order would not otherwise be available on conviction for such an offence, but we also bear in mind the non-punitive nature of supervision orders following a finding of lack of capacity.

The AFPSIG questioned why detention under the Mental Health Act would not be feasible for non-imprisonable offences. This would be dealt with under Part II of the Mental Health Act. If a young person requires detention the fact that he/she is in a criminal court is moot and the court would be obliged to facilitate an assessment under Part II of the Mental Health Act which deals with civil detention rather than criminal detention (which is covered by Part III of the same Act).

8.124 We agree with those consultees who made reference to the significance of developmental age, or developmental immaturity in assessing capacity. This will be plain from our observations at paragraphs 8.24 to 8.39 above.

The AFPSIG agreed that having a prescribed test for developmental immaturity was not appropriate and that this judgement needed to be made by an appropriately-qualified professional who can base their decision on myriad factors which may vary from case to case, though they will of course need to account for their decision-making process.

8.125 We also consider whether the specialised nature of the youth court is adequately reflected in the proposed reformed test.

The AFPSIG wanted to reflect that Youth Courts, despite their specialism, may not be adequately sensitive to mood dysregulation and developmental immaturity in young people.

Restriction orders

8.129 We would propose to include hospital orders amongst the available disposals, but raise the question of whether there should be a power in the magistrates' court to impose a restriction order, or to commit to the Crown Court for that purpose.

It was our view that Restriction Orders should continue to be referred to Crown Courts in line with the powers under Section 43 of the Mental Health Act.

8.132 We take the provisional view that the power to make a guardianship order where a defendant is found to lack capacity would not represent a suitable community disposal option. We therefore consider that such orders should no longer be available under the capacity reforms proposed in this paper. We suggest that it would be preferable for magistrates' courts to have the power to impose a supervision order, with or without a treatment requirement, as is available in the Crown Court. This would introduce equality of provision between the Crown Court and magistrates' court, and would provide a community order which is genuinely applicable in all cases.

The AFPSIG strongly supported this position.

Unfitness to Plead – response to consultation

Dr Hetal Mehta, Dr Paula Murphy, Dr Andrew Iles - St Andrew's, Northampton

The focus on capability or functioning rather than impairment or illness, and presumption of capacity for effective participation, is unsatisfactory. The issue of capacity is decision and time specific and dynamic, and maintenance of such a capacity or regaining such a capacity cannot be tested by a unitary test, at one point, in the process of trial. Also, assessing the capacity based on the Mental Capacity Act 2005 for fitness may set the threshold for unfitness too low.

The capacity for decision making may be relevant during the process of entering a plea, whether to give evidence and choosing a jury trial, where it appears to be implicit within the '*Pritchard test*', but other factors may be more relevant during the trial process itself, like the capabilities discussed within the *Pritchard* and *John M* criteria. A partial dis aggregation may be possible by assessing an individual's capacity to enter a plea, and including the potential outcomes including sentencing, risks or benefits and consequences similar to a capacity to have a medical or surgical procedure carried out.

The '*Pritchard test*' as reformulated by 'the case of *John M*', needs to be further refined as the right to challenge a juror without cause is abolished by the Criminal Justice Act 1988, but a certain ability to exercise such a right where such a need arises, needs to be assessed for a fair trial.

Although there appears to be too much emphasis on intellectual ability, within the '*Pritchard test*', rather than wider mental capabilities, such mental faculties must, however, include 'sufficient intellect', to comprehend the trial process and 'details of evidence' for effective participation and forming a defence by instructing the counsel. For the defendant to follow what is discussed in evidence by the prosecution witnesses and point out disagreements within such evidence, it requires a sufficient degree of mental, cognitive and on occasions physical abilities to maintain a reasonable level of active participation. The issue of proportionality may be relevant as the assessment of capacity should be based on an individual's capabilities and the complexity of the case. This consideration must be left with the Judge, who after considering all relevant facts, may apply an objective test of 'reasonable competence', on balance of probabilities, to find whether a defendant has a degree or level of capacity required for the trial in that case. This may introduce uncertainty, but will ensure consideration for the issue of proportionality. There is inherent proportionality element within the consideration of 'enhancing' effective participation in pleading or undergoing trial by special measures and reasonable adjustments. Statutory provision of intermediaries will act as 'compensatory aids' for individuals who otherwise would not be able to participate effectively in the process and would be a welcome consideration.

The issue of rational engagement with the proceedings may be misleading as irrational decisions do not necessarily mean a lack of capacity for that decision. Thus, the Jersey case of *O'Driscoll*, ignores the mere fact that irrational decisions can be arrived at by individuals with a capacity to make such decisions.

A qualifying diagnosis does not inform an individual's ability to effectively participate within a trial process due to their nature and degree, which can fluctuate, is misleading and unlikely to maintain a suitable threshold for unfitness.

A statutory presumption of fitness like one of capacity within the Mental Capacity Act 2005 may not be appropriate as such fitness is multifactorial and the process is dynamic and on most occasions prolonged. A presumption of unfitness may be more appropriate as it provides a safeguard for a further assessment on a balance of probabilities. Two suitably qualified experts approved under section 12 of the Mental Health Act 1983 (as amended, 2007) may be required to provide the evidence on an individual's fitness in an adversarial system. Dilution of such a requirement may introduce expert evidence which is not standardised and introduce inconsistency.

Unrepresented defendants lacking capacity must be treated in the same way as patients who lack capacity, in their 'best interest', and supported accordingly. Unrepresented defendants with capacity, their 'rights, will and preference', must be respected.

As such, an effective participation test, framed around the *Pritchard* and *John M* criteria with an additional explicit decision making capacity limb, as a combined legal test is more appropriate.

An amended section 4A procedure may need to be looked at from an alternative and radical perspective. The finding of unfitness is usually due to a medical or psychological reason. At the first instance, a medical disposal must be considered, which may also mean a disposal option under section 36 of the Mental Health Act 1983 (as amended, 2007) which will ascertain whether a defendant needs a further hospital disposal by reason of a 'special verdict'. This will also help in providing treatment to recover fitness and developing of evidence based on the findings during such an admission. All elements of the offence charged must be proved to alleviate the obvious disadvantage to an unfit defendant within the current provisions. An extension for up to 24 weeks for treatment in such circumstances may not be sufficient as some disorders may take longer to recover and hence a period of a year may be more appropriate, which may also be a sufficient period of time for repeat neuropsychological testing, which may be required in some cases, to objectively show any improvement in functioning. The determination of the facts procedure can then be optionally considered at the discretion of the Judge and allow for further non-criminal justice disposals for example a community treatment order under the Mental Health Act 1983 (as amended, 2007).

Using civil powers of detention under part 2 of the Mental Health Act 1983 (as amended, 2007) for an acquitted, but dangerous, unfit defendant may not be adequate, because not all such individuals will be 'detainable' under such provisions if they do not suffer from a recognisable mental disorder, especially if the unfitness is due to a neurological cause rather than a mental health one.

In an adversarial judicial system, the determination of all the facts, including medical evidence and *mens rea* must be considered by a Jury especially if discrimination from those defendants who are fit to stand trial must be avoided disadvantaging the unfit defendant further. We are not in favour of a two-stage trial, and the outcome in the form of disposal, for individuals receiving a hospital order is likely not to be different.

Whilst we are of the opinion that capacity determinations and fact-finding hearings need not be reserved to district Judges, we would advocate that they are reserved to legally qualified persons. With regards to the Magistrates' and Youth Courts, we are of the opinion that there is a need to ensure the assessor of unfitness to plead is a suitably qualified person, i.e. for adolescents this should be a child psychiatrist, who has some experience

of courts, in line with Adolescent Forensic Psychiatry Special Interest Group recommendations, or a forensic psychiatrist with experience in child psychiatry.

CAROLYN TAYLOR'S RESPONSE TO LAW COMMISSION ISSUES PAPER: FURTHER QUESTIONS

Question 1

Answer: Yes. The current test is inadequate. The addition of a decisional capacity limb is essential. At the Law Commission's symposium on Unfitness to Plead it was mooted that no criteria are needed and that the Judge could decide if a defendant's mental state would affect a fair trial on a case by case basis. One speaker put forward the possibility of adopting the unfitness test in Jersey mentioning the case of *Attorney General v. O'Driscoll [2003] JRC 117 para 29* which held as follows: 'an accused person is so insane as to be unfit to plead to the accusation or unable to stand the nature of the trial if, as a result of unsoundness of mind, or inability to communicate, s/he lacks the capacity to participate effectively in the proceedings'.

In determining this issue the court shall have regard to the ability of the accused:

- a. To understand the nature of the proceedings so as to instruct his lawyer and make a proper defence.
- b. To understand the substance of the evidence.
- c. To give evidence on his own behalf.
- 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.**

A further case in Jersey of *Attorney General v. Gemma Harding [2009] JRC 198* raised the issue that the case showed 'it is clear that the main impact of the disorder is on the sufferer's mood and **volition**'.

Another speaker raised the Scottish procedure under s.53F Criminal Procedure (Scotland) Act 1995 which states as follows:

1. 'A person is unfit for trial if it is established on the balance of probabilities that the person is incapable, by reason of 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.

It is clear that there are therefore other jurisdictions which allow for a legal test for fitness to incorporate a decision making capacity and I would favour that.

Question 2

Answer: I would favour a test framed around the *John M* criteria. As a defence solicitor I have been instructing psychiatrists using that test in addition to the Prichard test as it is very clear and sets out the individual steps that should be considered.

Questions 3-5

Answer: I don't feel experienced enough to comment on this as it is more a matter for psychiatrists.

Question 6

Answer: Possibly no firm view.

Question 7

Answer Yes.

Question8

Answer I agree it presents problems in particular as raised at para 2.57(1) of the issues paper. My view is that there should not be disaggregation.

Question 9

Answer I think this could potentially overcomplicate cases where solicitors are representing a defendant on more than one charge and in separate proceedings where they might just about be able to participate in a trial of shoplifting watching CCTV but may not be able to participate in a trial with multiple witnesses. Clearly it would depend on the particular difficulties of the defendant but if one is to use the test in *John M* then they are sufficiently thorough to cover all aspects of a criminal trial which are faced by any defendant.

Question 10

Answer No particular comment.

Question 11

Answer I do not think any amendment to the legal test can provide a solution to the problem of an unrepresented defendant. In my view if there is an issue of unfitness to plead then the court should have the power to appoint a legal representative, similar to the power under s.4A(2)(b) CP(i)(a) 1964. Note that at para 8.49 of the issues paper, the National Bench Chairmen's forum felt there should be consideration of the appointment of a legal representative to protect the interest of the defendant.

Question 12

Answer In theory I agree with this. See the recent case of *OP, R (On the Application Of) v Secretary of State for Justice* [2014] EWHC 1944 (Admin) (13 June 2014)

which is helpful on the court's view of the current problem. However, I believe that caution is still required as special measures cannot compensate for cognitive deficits. Defendants have to be able to participate fully and effectively in their trial as required by article 6 ECHR. This means that special measures can only assist a defendant who has the inherent cognitive capacity to participate fully in the trial but whose communication skills could hinder exercise of that capacity. I agree with the view of Laura Hoyano at the Symposium who expressed the view that at present the only special measures available to defendants are the live video link and an intermediary who is appointed by the court on an ad hoc basis and who must not be acting in the statutory capacity of registered intermediary. The statutory eligibility criteria are discriminatory compared to those of a prosecution and ordinary defence witnesses. She is of the view that what is needed is a structured assessment of the cognitive and communication capacities of every suspect under 18 and every adult suspect who appears to have a relevant impairment.

Questions 13-15 – assessing the capacity of the accused

Answer I question whether or not it is necessary at the unfitness to plead hearing itself for the defence to have to obtain two experts as it allows of course for the prosecution to call their own expert to rebut the defence experts meaning there are sometimes three experts in total. I would propose that the defence obtain the first expert – whether that be a psychiatrist or a fully qualified psychologist would depend on the nature of the defendant's disability and so I think the fact the person is not s.12 authorised is not always necessary as long as they have the appropriate expertise for the case - then the prosecution have the choice as to whether or not they wish to obtain their own expert. If the prosecution decide not to contest the unfitness hearing then I see no reason why one doctor's evidence cannot be sufficient (in civil trials there is usually one expert for each party). If the disposal is then to be by of a hospital order then a second opinion can be obtained at that point. In my view this would save considerable amount of public funds and delay in the trial proceeding as from my experience as a defence solicitor it takes at least three months to get a first expert's report and then usually another two to three months to get the second expert as inevitably one is instructing an expert who is in practice and has to fit such work into a busy schedule. That together with the delays of the

prosecution obtaining their own expert can mean it is between 6 and 9 months before an unfitness to plead hearing can be listed.

Questions 16-24 – procedure for the unfit accused

Question 16

Answer I do not agree that there should be a further delay of a maximum of 6 months to allow the accused to regain capacity. What is often not understood is the incredible pressure upon a defendant waiting for unfitness trial to proceed. By their nature they are for a defendant who has a disability. That disability often makes the person more anxious and delay as well as the court process itself often exacerbates the persons disability. To factor in yet another 6 month delay would in my view be most unfair to the defendant.

Questions 41 and 42 raise the issue as to whether or not the Magistrates' Court should have a discretion whether to proceed to the determination of facts hearing following a finding that the defendant lacks capacity or whether they ought to be able to reach a special determination of acquittal because of mental disorder existing at the time of the offence. I see no reason at all why the Crown Court should not be able to have that same power at that stage of the proceedings. If the Law Commission is trying to harmonise procedures in the Magistrates' Court and Crown Court then I think they should be made as similar as possible. A person should not be prejudiced by having gone to the Crown Court for his/her trial.

Question 18

Answer I agree with. I think the determination of facts procedure should be discretionary in both the Magistrates' and Crown Court and that at all stages the CPS should be reminded of their duty to review a case and consider diversion out of the criminal justice system.

Question 19

Answer In my representations to the Crown Prosecution Service on behalf of defendants who could be placed under s.3 Mental Health Act I frequently point out to the CPS that detention under s.3 is exactly the same as detention under s.37 save that under s.37 the defendant does not have a right of appeal to a Mental Health

Tribunal in the first 6 months of detention whereas they do under s.3. Thus, if it is not the case that a defendant is likely to receive a s.41 disposal and the defendant is in hospital under s.3 or could be admitted under s.3 that is a representation that I make as the protection of the public is the same under a civil section or under a hospital order as the statutory criteria for detention are the same. It is slightly different for a guardianship s.7 as the person is not in hospital.

Question 24

Answer If a person lacks capacity then there is a duty on the solicitor to act in the client's best legal interests which might be a contradiction to the client's best medical interests (this is raised in the Practice Note of the Law Society to solicitors representing patients who lack capacity at Mental Health Tribunals). It is a difficult area and the threshold for lack of capacity in a Mental Health Tribunal is quite low but I think it is probably higher in a criminal case because it is extremely important that a defendant is able to communicate his/her instructions to their representative. I am of the view that the court should have a power to appoint a representative to act in the best interests of the defendant where that person lacks capacity. The commission should be aware of rule 11(7) of the First Tier Tribunal rules 2008 which give the First Tier Tribunal (Mental Health) the power to appoint a representative for a patient with capacity who does not want to represent themselves and wants a representative or a patient without capacity where the Tribunal believes it is in the patients 'best interests' to be represented. Rule 11 does not however deal with the situation where a patient resolutely refuses to be represented save to permit the first tier Tribunal to appoint a representative in the patient's best interests if the patient lacks capacity to do so himself. The emphasis is on having representation.

When representing an incapacitated patient before the Tribunal it is for the solicitor first to form a view on the extent to which the patient's wishes form the basis of a properly arguable submission and this is on the same basis upon which a competent patient's case must be put (*Buxton v. Mills/Owen* [2010] EWCA CIV 122). A solicitor must not advance an argument that is not properly arguable in any case. Thus in a Tribunal situation if the solicitor decides that the patient's wishes cannot form a properly arguable submission then the solicitor must consider whether there is any properly arguable point capable of being advanced on behalf of the patient. This

Judgment must be based on the patient's legal best interests. The patient's wishes must still be placed before the Tribunal even where it is the solicitor's judgment that their wishes do not reflect their best interests and the solicitor proposes also to advance an alternative argument based on the patients legal best interests.

Questions 25-27 – Disposals

Question 26

Answer I think there is a problem with adding a power of recall to include to hospital. You can only be placed under a Community Treatment Order under s.17a Mental Health Act 1983 if you have been in hospital on either s.3 or s.37 of the Mental Health Act. Someone who is placed under a supervision order under s.5 of the CP(I)A might never have been in hospital. It would be inappropriate therefore in my view to be able to shortcut an admission to hospital by using what is effectively breach proceedings. In order to be put on s.3 or s.37 there is a requirement of two medical opinions together with an AMHP. In order to be recalled under s.17 – E – F of the Mental Health Act that recall has to be by the person's community responsible clinician usually in consultation with their care coordinator. The recall sometimes is only for 72 hours if the person can be for example given medication by way of a depot injection and then re-released. I think that incorporating this into the supervision order is too complicated and there would be insufficient safeguards for the defendant.

Questions 28-32 – Remission and appeals

Question 28

Answer Similar to my answer to question 16 above, one has to remember that one is dealing with a defendant who has disability. Therefore for that defendant to know that having been through an unfitness trial and all that that entails together with a fact finding hearing and possibly a hospital admission only to be told that that will happen all over again but as a 'ordinary' trial I think would be very damaging for the defendants mental health and would in effect be like being on trial twice. I do not therefore agree it should be statutorily extended.

Question 29

Answer I make the same comments as I do for question 28 but I am of the view that the Crown Court Judge is best placed to consider it might be in the public interest for remission to be available should the defendant regain capacity. In general I am unhappy about this provision.

Question 31

Answer I do agree that the fact that recovered defendants cannot request remission for trial so they can 'clear their name' does arguably cause them significant injustice. I would consider it fair that they should be entitled to request remission for trial on regaining capacity in those circumstances.

Question 32

Answer I agree that this power should be able to be exercisable by legal representatives particularly if there has been an error of law which would not be understandable to an incapacitated defendant. It goes back to my argument above about the representative acting in the defendant's legal best interests.

Questions 33-50 – unfitness to plead in the Magistrates' and Youth Court**Question 33**

Answer I see no reason why lay benches who are appropriately trained could not hear such cases. At the moment it is proposed that legal advisors are dispensed with in court where a District Judge is sitting so I would want to ensure that they are not dispensed of in cases where lay justices are sitting if that becomes a proposal in the future.

(copied from above) Questions 41 and 42 raise the issue as to whether or not the Magistrates' Court should have a discretion whether to proceed to the determination of facts hearing following a finding that the defendant lacks capacity or whether they ought to be able to reach a special determination of acquittal because of mental disorder existing at the time of the offence. I see no reason at all why the Crown Court should not be able to have that same power at that stage of the proceedings. If the Law Commission is trying to harmonise procedures in the Magistrates' Court

and Crown Court then I think they should be made as similar as possible. A person should not be prejudiced by having gone to the Crown Court for his/her trial.

Question 44

Answer In general I would agree with this proposal because many defendants (with or without disabilities) have a fear of the Crown Court. I do not therefore agree that a case where a defendant's capacity is in doubt should automatically be sent to the Crown Court. However, if the defendant is found to lack capacity I am of the view that one court or the other should hear the case as often the change of court, change of structure of the proceedings etc can be extremely intimidating to an unwell defendant. I note the Commission's provisional view is that Magistrates should adjourn the defendant's consideration of whether to elect Crown Court trial or not for the determination of the defendant's capacity to be conducted (8.71). The problem with this is that from my experience as a defence solicitor it takes a minimum of 8-12 weeks for a report to be obtained from an appropriate psychiatrist. The reason it takes so long is any psychiatrist worth their salt will want to see a defendant's previous medical records therefore those need to be obtained often from several sources e.g. GP, hospitals etc. Once those have been obtained prior authority from the Legal Aid Agency has to be applied for on a quotation from the expert; once that is granted the expert is then instructed and the expert can sometimes be unavailable for a number of weeks. Once the expert has seen the defendant they usually require between 2-3 weeks to provide a report. I would have no objection to this procedure taking place if cases were then taken out of the 'stop delaying justice' regime currently in the Magistrates' Court so that defence solicitors are not forced into a situation of completing a case management form when they do not know whether or not the defendant has capacity to give instructions regarding his defence. It might be helpful for this procedure to take place initially in the Magistrates' Court allowing for as I say up to three months for the initial report because it might mean that solicitors are in a better position at an earlier stage to make representations to the Crown Prosecution Service for discontinuance or diversion out of the Criminal Justice System. Being aware of the NHS England diversion and liaison scheme which is going to be in place over the next few years at police stations to try and identify defendants who might lack capacity, I am slightly worried about a defendant still

being charged and turning up in court with a report, from a doctor (or possibly a psychiatric nurse) who has attended the police station, giving an opinion that the defendant is fit to plead without having the full history of the defendant's medical notes or having spent a considerable amount of time examining those and interviewing the patient and being aware of the charge, the mens rea required for that charge, the facts of the case and the likely procedure and number of witnesses etc to be called at the trial which will all affect whether or not the defendant is likely to be capacious.

Question 36

Answer Yes.

Question 37

Answer Yes. I also raise the possibility of a conditional discharge and I raise that generally in respect of disposals under the CP(I)A. I say this because sometimes when a defendant does not merit a hospital order and is already well supported in the community e.g. on a Community Treatment Order or is fully compliant with treatment from the local Community Mental Health Team and so a supervision order would add nothing to prevention of crime in the future, judges are reluctant to pass an absolute discharge which they see as a completely 'soft' option. I appreciate that a conditional discharge is a punishment which can be breached which the other three disposals cannot, so maybe some form of additional sentence like a conditional discharge which the defendant would to a certain extent have hanging over him could be formulated.

Question 38

Answer Yes as long as it incorporates the rest of the test.

Question 40

Answer I agree it is appropriate to have the same evidential requirement in the summary courts as in the Crown Court but would reiterate my questioning of the need at the unfitness to plead preliminary hearing for 2 experts for the defence.

Question 41

Answer I am of the view that both the Crown Court and the Magistrates' Court should have a discretion whether to proceed to the determination of facts hearing following a finding that the defendant lacks capacity. I am of the view that if there is a possibility to divert the defendant in any way then it might be at that stage.

Question 42

Answer I absolutely agree with this. Often I find that in my cases but for a person's mental disorder they would not have committed the crime alleged and therefore a right to reach a special determination of acquittal because of mental disorder existing at the time of the offence is a fair adjustment to be made to the law.

Question 46

Answer At present summary courts have a power to commit a defendant to the Crown Court for imposition of a restriction order obviously in imprisonable offences only. I do not think this should be amended to include non-imprisonable offences.

Question 47

See comments to question 37 above regarding the addition of a form of conditional discharge.

14.7.14



Law Commission: Unfit to Plead

Victim Support is the independent charity for victims and witnesses of crime in England and Wales. Last year we offered support to more than 1 million victims of crime and helped more than 198,000 people as they gave evidence at criminal trials through our Witness Service. Victim Support run more than 100 local projects which tackle domestic violence, antisocial behaviour and hate crime. We also help children and young people, deliver restorative justice and provide the Homicide Service, who support supporting people bereaved through murder and manslaughter. The charity has 1,400 staff and 4,300 volunteers and is celebrating its 40th anniversary during 2014.

Introduction

As our position providing services to victims and witnesses predominantly, we are not in a position to provide feedback on every question within the consultation and issues paper, as we are not legal practitioners or health service providers. Therefore, we will provide information that on issues that need to be considered when making any changes to the legal guidance on a defendant's unfitness to plead.

We believe taking account of victims' and witnesses needs is vital to any meaningful reform of the criminal law. Without the contribution made to the justice process by victims and witnesses, from reporting crime to giving evidence, it could not function and victims' experiences can influence wider public confidence in the system. We hope the information we provide is useful to you. We appreciate the importance 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.

There are unfortunate consequences for victims when an offender is found unfit to plead, the most obvious is that the defendant cannot be tried and held to account for a crime that has been committed, but also delays and uncertainty.

Issues for victims and witnesses

1. Waiting times

Witnesses and victims have to endure long waiting times during court until they are called to give their evidence. While the Witness Charter and Victims' Code advises this should be no longer than two hours, a report into London Crown Courts found witnesses often waited over four hours before they were called to give their evidence. Furthermore, our research *Out of the Shadows* found witnesses were called into court to wait all day to be sent home again. Some trials were adjourned many times which increases anxiety, reduces confidence and results in a witness being less likely to engage. Cracked trials cost a vast amount of money, approximately £37m in CPS cost alone¹, and approximately 14% of these are due to a lack of evidence at the trial². It is therefore vital to ensure any change to the legal guidance aims to reduce the

¹ http://www.cps.gov.uk/news/articles/challenge_and_opportunity/

² https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/207804/court-stats-q1-2013.pdf

length of time witnesses are required to wait in court, especially to then be told a defendant is unfit to stand trial. This should not be left until day of the trial, and victims kept informed as much as possible to reduce wasted time and uphold confidence in the system.

This anguish is further described by our volunteers based in the court, from a case only five months ago where the case was adjourned because the defendant was in custody and deemed to be unfit to attend court.

The Witness Service volunteer told me:

“The witness was furious when she arrived at Court because she and her husband (the victim) received summons to appear at 7.30pm the previous night. She had missed a day's work and her husband had not been able to make arrangements with his work. She told me that neither she nor her husband would ever want to get involved or give statements again, she made it clear that they were not willing to return to Court.”³

2. Information

Victims remain to be left in the dark on key progresses of a criminal case, both leading up to the trial and after sentencing. Our research *Left in the Dark*, found only half of victims were kept informed to a satisfactory level, which presented a widespread failure for agencies to meet their duties under the Victims' Code. This is very concerning as for incidents in which victims felt they were not well informed, satisfaction with police handling of the case overall is low; where victims felt they were kept well informed, it is far higher – in fact up to 96% in incidents where the victim was kept very well informed, compared to only 21% satisfaction amongst victims who were not kept at all well informed. Low satisfaction results in victims being unlikely to report a crime in future or support a prosecution⁴. This has the potential to result in injustice as crimes are not reported, crimes not recorded or detected, and offenders not brought to justice. It is therefore imperative any final guidance includes duties upon the agencies outlined in the Victims' Code; to provide a timely explanation to victims should a case be adjourned or closed due to the defendant being unfit to stand trial or plea.

3. Delays

The delay from the police charging a defendant, to reaching a trial for serious offences is of great concern to us. Our research *Out of the Shadows* found victims felt their lives were placed on hold during this period, and they could not move on from the crime until after sentencing. It is therefore vital that any final guidance seeks to keep delays to a minimum and victims are given some certainty where possible. The delays should be acknowledged in a sensitive manner and victims treated with respect and dignity whatever the outcome.

4. Safeguarding of witnesses

We have specific concerns about the way that victims are treated in court, especially children. We wholly support a defendant's right to use a Registered Intermediary if this enables them to understand the processes of the court and to be able to weigh up the consequences to any decision to they make. With that we also believe that vulnerable victims should have more access to Registered Intermediaries, and we support the NSPCC Order in Court campaign which recommends the right to access an intermediary for all children 11 years old and under. We find that victims and witnesses are expected to proceed in giving their evidence, despite their health deteriorating. Victims with mental health issues fear their mental health issue being used to question the credibility of their evidence them in court, and this can result in victims becoming very distressed and requiring safeguarding.

A particular case from 2012 stands out for this:

³ Policy Evidence Tool case number 1550

⁴ <https://www.victimsupport.org.uk/sites/default/files/Left%20in%20the%20dark.pdf>

Eileen Vizard's response to the questions posed in:

The Law Commission's Unfitness to Plead: An Issues Paper

29th June 2014

**PART 2
THE LEGAL TEST**

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

Answer 1: Yes

2.33 Further Question 2: Do consultees consider that an effective participation test, framed around the John M criteria (set out at paragraph 2.3 above), with an additional decision-making capacity limb, represents the most appropriate formulation for such a combined legal test?

Answer 2: Yes

2.41 Further Question 3: Do consultees consider that incorporating an exhaustive list of decisions for which the defendant requires capacity into a reformed legal test for unfitness to plead would assist in maintaining the threshold for unfitness at a suitable level?

Answer 3: No

2.42 Further Question 4: Do consultees consider that a reformed test should explicitly refer to a "satisfactory" or "sufficient" level of capacity for effective participation?

Answer 4: Yes. 'Satisfactory' might be better for young defendants since it could incorporate a 'satisfactory' assessment of developmental immaturity by a mental health professional.

2.43 Further Question 5: Do consultees agree that a diagnostic threshold would be unlikely to assist in maintaining the threshold of unfitness at a suitable level?

Answer 5: Yes

2.45 Further Question 6: Do consultees think that it would be helpful to have a statutory presumption that all defendants are fit to be tried until the contrary is proved?

Answer 6: No. Particularly unsuitable for developmentally immature children and young people.

2.47 Further Question 7: Do consultees agree that a finding that a person lacks capacity shall remain valid unless and until the contrary is established on the basis of the evidence of two suitably qualified experts?

Answer 7: Yes

2.58 Further Question 8: Do consultees consider that disaggregation of capacity to plead and capacity for trial is undesirable?

Answer 8: Yes

2.67 Further Question 9: Do consultees consider that making the test one of capacity for effective participation “in determination of the allegation(s) faced” would introduce a desirable element of context into the assessment?

Answer 9: Yes

2.72 Further Question 10: Do consultees agree that the difficulties surrounding unrepresented defendants cannot be addressed by amendment to the legal test itself?

Answer 10: Yes

3.21 Further Question 11: Do consultees consider that vulnerable defendants should have the same access to special measures as vulnerable witnesses?

Answer 11: Yes

3.24 Further Question 12: Do consultees consider that it would be desirable and practicable for the funding and securing of special measures to be made the responsibility of the court?

Answer 12: Yes

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

Answer 13: No. It is very likely that vulnerable individuals who are being assessed for FTP will be ‘co-morbid’ for other psychiatric, developmental and behavioural disorders which require a full mental health assessment by an approved psychiatrist. These diagnoses are usually complex/controversial and, if unfitness to plead is found as a result of the psychiatric co-morbidity, this could lead to a loss of liberty in the sense of the unfit defendant being detained until he becomes fit to plead. So a second psychiatric opinion on the mental health issues which led to the not fit to plead finding, seems to be an essential safeguard to avoid unfairness.

However, given the (often hitherto undiagnosed) high prevalence of learning disability it is, in my view, also essential for a psychologist to assess the defendant’s cognitive capacities.

Rather than replace one of the psychiatrists with a psychologist, the ideal, in my opinion, would be for 2MHA ‘83 approved psychiatrists and one experienced clinical psychologist to assess the defendant for FTP giving a full picture of the defendant’s ability to participate effectively in the trial to the court. However, since, it seems that this proposal is at least partly resource/cost driven (a less expensive psychologist to replace a more expensive psychiatrist), the least detrimental alternative would be for 1 approved psychiatrist and 1 experienced clinical psychologist to undertake very clearly delineated assessments of the defendant’s mental state and cognitive functioning respectively.

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

Answer 14: Yes, a minimum of two experts are needed. However, see my answer to Q. 13 above re the disciplines required.

5.24 Further Question 15: Do consultees consider that, following a finding that the defendant lacks capacity, there should be a power to delay the determination of facts procedure for a maximum 6 month period, on the agreement of two competent experts, to allow the accused to regain capacity and be tried in the usual way?

Answer 15: Yes.

5.25 Further Question 16: Do consultees consider that it would be appropriate to extend the maximum period of a section 36 MHA 1983 remand for hospital for treatment to 24 weeks in these circumstances?

Answer 16: Yes.

5.33 Further Question 17: Do consultees consider that the determination of facts procedure for the accused who lacks capacity should be made discretionary following the finding of unfitness, to allow for discontinuance of the proceedings, and diversion out of the criminal justice system into health or related services in appropriate cases?

Answer 17: Yes.

5.44 Further Question 18: do consultees consider that public protection concerns arising in relation to an acquitted, but dangerous, unfit defendant could be adequately met by the use of civil powers under section 3 or 7 of the Mental Health Act 1983?

Answer 18: Yes.

5.50 Further Question 19: Do consultees consider that on a determination of the facts, any defence should be left to the jury, after discussion with the advocates, where there is evidence on which a jury properly directed might reasonably find the defence made out or the essential element of the offence unproven?

Answer 19: Yes.

5.54 Further Question 20: Do consultees consider that the special verdict should be made available to the jury on their initial consideration of the facts?

Answer 20: Yes.

5.56 Further Question 21: Do consultees agree that it is not necessary for the judge to retain the discretion, in cases of exceptional prejudice, to order a second stage process for the consideration of the special verdict, in the manner envisaged in Provisional Proposal 9?

Answer 21: Yes.

5.60 Further Question 22: Do consultees consider that the determination of facts in relation to a defendant found to lack capacity could be dealt with by a judge sitting without a jury?

Answer 22: Yes.

6.14 Further Question 23: do consultees consider that the requirement for the supervising officer to be willing to undertake supervision of an unfit accused, poses such problems in practice that it needs to be amended?

Answer 23: Yes.

6.21 Further Question 24: Do consultees consider that it would be appropriate and effective to expand the power of supervision orders under section 5 of the 1964 Act to include recall of a supervised person to hospital, as available under Section 17E-F of the Mental Health Act 1983?

Answer 24: Yes.

6.22 Further Question 25: Do consultees consider that there are any other enhancements of the powers available under supervision orders which would be beneficial?

Answer 25: Not sure.

7.34 Further Question 26: Do consultees agree that the power of the prosecution to remit a recovered defendant for trial should be statutorily extended to cover all defendants found to have done the act or made the omission?

Answer 26: Yes.

7.35 Further Question 27: Do consultees consider that the power to remit an accused for trial should only be exercisable by the prosecution where the judge has ruled, following the section 4A hearing, that it is in the public interest for remission to be available should the defendant regain capacity.

Answer 27: Yes.

7.38 Further Question 28: Do consultees agree that the Crown's power to remit defendants for trial upon their recovery should not be limited in time?

Answer 28: Yes.

7.43 Further Question 29: Do consultees agree that a defendant, in respect of whom there has been a finding that he or she had "done the act or made the omission," should be entitled to request remission for trial on regaining capacity, where their recovery is confirmed by the opinions of two experts competent to address their particular condition?

Answer 29: Yes.

7.45 Further Question 30: do consultees consider that the rights of appeal vested in the unfit defendant should be exercisable by his or her legal representatives?

Answer 30: Yes.

8.69 Further Question 31: Do consultees agree that it would not be necessary for capacity determinations and fact-finding hearings to be reserved to District Judges? If not, why not?

Answer 31: No. In my opinion, capacity determinations/fitness to plead assessments require a high level of legal plus mental health understanding, sufficient to know when and why an initial assessment of FTP is needed. Particularly in the case of juveniles, it is not possible, from external inspection of the child who may be talkative and apparently competent, to tell whether or not the he is actually fit to plead. Hence, only trained and experienced individuals who can assess the need for such an assessment from the court and other files plus interviews with the child or young person. The skills set needed to do this is not, in my view present in the magistracy or their legal advisors but is more likely to be present in trained, specialist District Judges.

8.77 Further Question 32: Do consultees consider that where the defendant's capacity is in doubt, it would be preferable for his or her capacity to be determined in the magistrates' court, and if found to lack capacity, for all further proceedings against him or her to remain in that court?

Answer 32: No. Magistrates court not appropriate for capacity determinations.

8.78 Further Question 33 (in the alternative): Do consultees alternatively consider that such a case should be sent to the Crown Court for determination of capacity and, if the defendant is found to lack capacity, all further proceedings against him or her should remain in that court?

Answer 33: Yes. Crown court more appropriate for capacity determinations

8.84 Further Question 34: Do consultees agree that capacity procedures in the summary courts should be applicable for all criminal offences?

Answer 34: Yes.

8.85 Further Question 35: For non-imprisonable offences, do consultees agree that the available disposals should be limited to a supervision order and an absolute discharge?

Answer 35: Yes.

8.88 Further Question 36: do consultees agree that a legal test which has regard to “the determination of the allegation(s) faced” would allow sufficient effect to be given to the accessible and more straightforward nature of summary proceedings?

Answer 36: Yes.

8.93 Further Question 37: Do consultees consider that there are any adjustments to the test, or the procedure, for defendants lacking capacity that would materially improve the prospects of the court identifying those adults with capacity issues?

Answer 37: Yes. For adults likely to have capacity issues, the availability of an agreed, evidence based assessment framework for determining capacity could be used by legal practitioners to identify those individuals likely to need a subsequent expert mental health assessment of capacity. In the case of juveniles, a developmentally appropriate framework for the assessment of capacity in children and young people could also allow identification of those children likely to need subsequent assessment by a child and adolescent mental health expert. However, in my opinion, it will also be necessary for all court staff, including advocates, judiciary and relevant others to have sufficient basic training in the identification of adults and children likely to need assessment so that cases are not missed but are referred, via the defense or CPS solicitors for such assessments.

8.97 Further Question 38: Do consultees agree that it is appropriate to have the same evidential requirement in the summary courts as in the Crown Court?

Answer 38: Yes.

8.103 Further Question 39: Regardless of the position in the Crown Court, do consultees agree that in the summary courts proceeding to the determination of facts hearing following a finding that the defendant lacks capacity should be at the tribunal’s discretion?

Answer 39: Yes.

8.111 Further Question 40: Do consultees agree that in reaching its determination on the facts, the tribunal in the summary courts should be able to reach a special determination of acquittal because of mental disorder existing at the time of the offence?

Answer 40: Yes.

8.115 Further Question 41: Do consultees agree that there should be mandatory specialist training on issues relevant to trying youths, for all legal practitioners and members of the judiciary engaged in cases involving young defendants?

Answer 41: Yes. In 2006, the Royal College of Psychiatrists produced a review entitled 'Child Defendants' in which the need for specific training within a multi-disciplinary context and accreditation ('ticketing') of lawyers including the judiciary, for work with child defendants was recommended. The report stated:

'Active steps should be taken to ensure a process of accreditation of suitably trained legal and other professionals involved with child defendants in the court system. Such training and accreditation would be comparable to that currently in force in relation to specialist joint police and social work training for interviewing child witnesses for criminal proceedings (Home Office & Department of Health, 1992; Home Office et al, 2002). Training in work with child defendants would, therefore, build on the existing knowledge base about children's needs and would take on board recent research (Grisso, 2000b) in relation to the cognitive capacities of child defendants. In future, it should never be possible for an untrained defence solicitor, barrister, judge or police officer to undertake direct work with child defendants in the criminal justice system without being able to demonstrate relevant, accredited training experience. Such training in relation to child defendants should be within a fully multidisciplinary context to include psychologists, psychiatrists, social workers, probation officers and all others usually involved in work with children and young people in the criminal justice system. In this way an exchange of information and perspectives about work with children who are defendants can be ensured' (RCPsych, 2006, page 73).

At that time (2006), little consistent training for lawyers working with children in criminal proceedings, in contrast to lawyers working within family proceedings, was available. The situation seems to be unchanged at the present time although awareness of the need for training in these matters has been raised by the Criminal Bar Association, the Advocates Training Council and others. In my view, serious ethical and professional issues are raised when lawyers, untrained in relation to child defendants are permitted to work directly with children without accreditation or ticketing (see bold text above and also slide 142 in the Law Commission's slide presentations from the recent seminar on Unfitness to Plead, 11.6.14).

8.120 Further Question 42: do consultees consider it appropriate for there to be initial screening for mental health issues for all defendants under 14 years of age, to be conducted by mental health professionals?

Answer 42: Yes. I have responded previously to the Law Commission's CP on this issue. I have also raised the need for a multi-disciplinary assessment to occur in relation to child defendants, i.e. a psychological and a child psychiatric assessment which takes into account the child's developmental status and any co-morbidity for psychiatric or mental health disorders. There is a need for an agreed, evidence based assessment framework for juveniles in the UK, which is something I am currently working on with Laura Hoyano and Emaon McCrory (see slide 136 in the Law Commission's slide presentations from the recent seminar on Unfitness to Plead, 11.6.14).

8.127 In light of the above, we therefore ask the following further question: Further Question 43: Do consultees agree that the provisional reformed test proposed for the Crown Court at paragraph 2.33 above is suitable for application to young defendants without adjustment?

Answer 43: No, not as it stands. I appreciate that the possibility of including reference to assessment of developmental status and any relevance to the reformed test was discussed and dismissed.

However, I believe that this is unfortunate since, even if the reformed test is left to stand, any assessment of a juvenile's capacity and fitness to plead will, of necessity need to take on board the child's developmental status since this is always relevant in assessing children, whether the assessment is by a psychologist using psychometric measures or by a psychiatrist using evidence based clinical guidance, e.g. ICD 10 or DSM-5. All psychometric instruments used with children and young people are normed (tested for reliability) on cohorts of children or young people within the same age group, e.g. IQ testing for 3-7 year olds uses the WPPSI-III; IQ testing for 6-16 year olds uses the WISC-IV; IQ testing for 16 years upwards uses the WAIS-IV.

Since the child's developmental status is an essential part of any mental health assessment, if there is to be no mention of this in the reformed test, surely it will need to be alluded to within any associated guidance on how to proceed with the mental health assessment of children as opposed to adults? A mention of the need to use an agreed (yet to be written) assessment framework to address all the relevant developmental, mental health and welfare needs of the child defendant will, in my view, be an essential safeguard to ensure that developmentally immature (not grown up) children

and young people are protected from inappropriate and misleading assessments designed for adults and delivered by adult mental health professionals.

I was surprised to read that ‘ *We consider that there is nothing in either the Gillick or Grisso formulations, save perhaps **the capacity to control one’s own behavior and manage the stress of the trial** (the final points in the Grisso Framework) which is not addressed in the proposed reformed test. The excluded aspects do not appear to us to be so intrinsic to effective participation as to justify an amended test in the youth court.*’ (8.124, page 89).

The point I have highlighted in bold within this quote does show, in my view, a worrying lack of familiarity with the behavior of ordinary/less disturbed children aged, say 10-14 years old, most of whom would simply ‘drift off’ into their own thoughts during an incomprehensible (to them) trial of abstruse legal issues. However, children who offend usually have a different psychological profile and are much less able to ‘control their behaviour’ and sit quietly, listening attentively. The reason Grisso has included those points in his framework is precisely because of the difficulties young defendants have in controlling their behavior and dealing with stress. These are developmental and psychological issues which need specific attention when the capacities of children are assessed.

I am concerned that, if the reformed test is rolled out as it stands, there will be no further progress made in the identification of vulnerable child defendants, who will simply be assessed on reformed adult criteria for effective participation by individuals who are not necessarily trained in work with children.

8.131 Further Question 44: Do consultees agree that the summary courts should have the power to commit a defendant to the Crown Court for the imposition of a restriction order, but should not have the power to impose one itself?

Answer 44: Yes.

8.136 Further Question 45: Do consultees agree that the following disposals should be available to the magistrates’ court on a finding that the defendant has “done the act or made the omission,” or where a special determination has been arrived at:

- (a) A hospital order (without restriction);
- (b) A supervision order;
- (c) An absolute discharge?

Answer 45: Yes to a,b & c.

8.138 We therefore ask the following further question: Further Question 46: Do consultees consider that the non-penal requirements of a youth rehabilitation order should be available as part of a youth supervision order, following a finding that a young person has “done the act or made the omission,” or where a special determination has been arrived at?

Answer 46: Yes.

8.140 Further Question 47: Do consultees agree that a defendant against whom there has been a finding in the magistrates’ or youth court that he or she had “done the act or made the omission,” should be entitled to request remission for trial upon regaining capacity, where that recovery is confirmed by the opinion of two experts competent to address the defendant’s particular condition?

Answer 47: Yes.

8.143 Further Question 48: Do consultees agree that a new right of appeal should be created from any determination or disposal imposed under a reformed capacity procedure, which would mirror the right to appeal against conviction or sentence under section 108 Magistrates’ Courts Act 1980?

Answer 48: Yes.

Response from DAVID WURTZEL, The City Law School, to the Consultation on Fitness to Plead

In respect of 9.12 Further Question 12: Do consultees consider it desirable and practicable for defendants to have a statutory entitlement to the support of a registered intermediary, for as much of the proceedings, including pre and post trial, as if required, where the court is of the view that such assistance is necessary to ensure that the defendant receives a fair trial?

BACKGROUND

MYSELF

I have been a consultant in the Continuing Professional Development department at The City Law School since January 2003. My arrival coincided with our winning the tender from the Home Office to provide legal training for the first cohort of registered intermediaries and which we delivered in the autumn of 2003. Since then my colleague Professor Penny Cooper and I have delivered all of the legal training to all of the subsequent cohorts. We have co-authored the current edition of the Procedural Guidance Manual. We keep in close contact with registered intermediaries through the Registered Intermediaries Online (RIO) site, offering advice and help in response to their queries. I attend the annual special measures conference and also the RI CPD day, both of which are held at Ryton. In addition, I have devised and delivered what I think are the only participative training courses for barristers on how to cross-examine a vulnerable witness with an intermediary.

INTERMEDIARIES FOR DEFENDANTS

I think I was there 'at the beginning'. After I gave a presentation to the Midland Circuit, someone approached me and asked about his vulnerable lay client who was appealing a conviction in the magistrates' court. That became the first usage of intermediaries for defendants. I later publicised intermediaries for defendants in THE CIRCUITEER (the magazine of the South Eastern Circuit) in 2008, and there have been articles in COUNSEL, the magazine of the Bar of which I am consultant editor.

In the early years, the Home Office, later the Ministry of Justice, allowed defence solicitors to use the register to find an appropriate RI for a defendant and indeed paid for it while they were still paying centrally for all RI services. Once the payment scheme was devolved locally, problems arose about those assisting defendants. There was no protocol from the Legal Services Commission and even when the judge agreed that an intermediary was necessary, securing funding could be problematic. I believe this has now more or less resolved (assisted by the guidance from the Recorder of Leeds in 2012) but I wonder whether it is something of an uneasy compromise, with the courts paying on the basis that intermediaries are analogous to interpreters.

I welcomed the Coroners and Justice Bill in 2009 as it seemed to endorse the success of intermediaries in their role of assisting vulnerable witnesses. In retrospect I see it

as an unsatisfactory compromise. In any event it is not in effect. It is in effect in Northern Ireland at the insistence of their judiciary.

I know that in 2011 the Ministry of Justice withdrew access to the register for defence solicitors. They were concerned that the Ministry's function is to oversee the running of a scheme which originated in an Act of Parliament which expressly excluded defendants. On a more practical level, resources for the Registered Intermediary Scheme are stretched. In January 2014, there were 72 'active' RI's and 21 non-actives. In January 2014 there were 236 requests received by the Matching Service (now outsourced to the National Crime Agency), 211 of whom were matched. This presents a very great burden on existing RI's. It is crucial that the cohort of RI's includes people of varying ages, experience, specialisms and clinical practices. Too many referrals for too few RI's can lead to a further drop-out rate for those who want to maintain their National Health practices. A further 27 RI's should have entered the register since January as a result of the 2014 training.

In practical terms, an RI who helps a prosecution witness may be required in court a matter of days, although it is worth recalling that cases involve many further days of rapport building, report-writing and the court familiarisation process. An RI who helps a defendant throughout their trial may be required in court for weeks. In a recent case at the Old Bailey, the defendant was assisted by two intermediaries who 'swapped over' from time to time. His trial lasted 9 weeks. There was a hung jury. The second trial lasted some days before it had to be aborted. The third trial again lasted about 9 weeks. This was a huge time in which a particularly experienced intermediary could not do other cases.

CURRENT SITUATION

The Law Commission will already know that from 2011 (if not before), private firms began to supply intermediaries for defendants. I know of Communicourt and of Triangle since they are run by RI's. They have carried out their own training for staff, based on the experiences of registered intermediaries. They are free to charge what fees the court feels able to pay—RI's are paid according to the M of J scale. I am in no position to comment on how well these arrangements have worked. I cite them largely to note the obvious demand for this service. Lawyers for defendants are clearly more and more conscious of the needs of their lay clients and anxious to take steps to ensure that they have a fair trial. The appeal of *Jordan Dixon* was an example of how the lawyers more or less ignored the input of the intermediary who assisted the defendant throughout the trial and of the less than ideal attitude of the trial judge.

SHOULD THERE BE A STATUTORY ENTITLEMENT AS SET OUT IN FURTHER QUESTION 12?

FIRST, IS IT DESIRABLE?

Yes.

First, there is a question of need. Whether a defendant needs an intermediary throughout the trial (as the overwhelmingly majority have) or only during the giving of evidence is defendant-specific. There is no obvious justification for having a statutory entitlement for one without the other.

Second, the problems/disabilities suffered by a defendant are likely to impact on him throughout the trial, e. g., understanding of words and concepts, length of time he can concentrate, use of devices to assist understanding, etc. The person best qualified to help the defendant here is the person with an appropriate professional background, who has assessed his communication needs, and who has established rapport with him

Third, as others have pointed out, the giving of evidence is not a discrete process. It comes at towards the end of the trial, but also in the context of what has preceded it. An intermediary who only deals with evidence-giving has missed out on a wealth of detail, e. g., how well the defendant has coped with the trial process and what concepts the defendant has been able to understand as the trial has gone on. However well the intermediary has done her job of assessment and report-writing, some witnesses will in the event prove to be more 'able' or 'less able' than predicted. One of the unknown factors is how skilful the cross-examining advocate proves to be. It would be hugely helpful to the intermediary to be there during the trial itself. One can imagine a situation where the intermediary thinks that the defendant could deal with a certain line of questioning because of her assessment even though that conclusion may well have had to be modified had she seen the defendant's behaviour during the trial—and of course it could work the other way. This is not a science.

Fourth, I disagree with respect with the conclusion of the Divisional Court in the recent Cheltenham Magistrates' Court case that any suitable person could assist the defendant during the trial but that the giving of evidence was something special enough to warrant the assistance of an intermediary. I was present during the argument and understand how the court reached this conclusion but I would say that the distinction is not such a real one.

There are practical difficulties. Say that the defendant has been assessed by an intermediary who duly writes her report; the judge is aware that an intermediary will assist in due course and is broadly sympathetic to this happening; the defence are informed by the report about the defendant's difficulties but they do not want to disclose the report itself at this stage not least because they do not want to 'bind' themselves to a decision whether or not to call the defendant; they cannot use the intermediary as an expert witness when asking the court to adapt the trial process in order to maximise the defendant's participation; the intermediary remains in waiting; the trial reaches the stage where it is time for the defendant to decide whether or not to give evidence. The application is then made; the details of the report take the prosecution 'by surprise' who may want time to consider how to adapt their cross-examination; there could be diary difficulties with the intermediary because the trial lasted a different length of time than initially predicted. And so it goes on.

Fifth, the fuller use of intermediaries would open the way to the use of intermediaries in police stations to assist defendants during interviews under caution. This is potentially a huge area with many practical issues: who recognises the vulnerability of the defendant (police, FME, solicitor who attends), how quickly an intermediary can be sourced, how quickly the intermediary can get to the police station, assess the defendant (NOT with a police officer as the responsible third party) and advise the interviewing officer, having regard to the custody time limits, etc.

SECOND, IS IT PRACTICAL?

Not as things stand now.

As set out above, there are scarcely enough registered intermediaries to deal with the referral level for prosecution witnesses and a number of registered intermediaries also do defendant work which further diminishes the number available. A great deal more training would be required

With respect to the number of people who act as non-registered intermediaries for defendants, public confidence in the scheme would be enhanced if they all underwent the same training and were all subject to the various professional safeguards imposed by the Ministry of Justice, e. g., CPD requirements, complaints procedure and quality assurance. They could then all be available to both defendants and to prosecution and defence witnesses and it would be a matter of choice for the intermediary as to which referrals she wishes to accept—some, for example, may simply not be able to take on whole trials having regard to their other professional or personal commitments.

It is quite possible to train a cohort to do both prosecution and defence work; Professor Cooper and I have done just that in Northern Ireland

Obviously it would require a substantial recruitment exercise by the Ministry of Justice, and the allocation of further resources. I believe those resources would be entirely justified in order to ensure a fair trial for every defendant. In practice it would probably be a chicken-and-egg: the resources would not become available unless there was a statutory duty to provide registered intermediaries for defendants and RI's for defendants will not happen without legislation

There is one further practical aspect, which is whether both defence and prosecution would want to use the identical matching service. I have been told but cannot verify that some defence solicitors may be wary of ringing the National Crime Agency with details of their client's vulnerabilities. As far as I know, both the Ministry of Justice and SOCA were entirely scrupulous here and did not take advantage of this information. However there could be a matter of perceptions. However I do not see the difficulty in having two matching bodies who use the identical pool of registered intermediaries.

I am most of all conscious of the resource implications: who is to pay for all this?

SUMMARY

I hope the Law Commission will feel able to recommend this and will be able to persuade the government to adopt this proposal

Response of Professor Graeme Yorston, Academic (and Health Professional, Consultant Forensic Psychiatrist and Neuropsychiatrist)

PART 2: THE LEGAL TEST

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

YES: NO: OTHER:

There is a problem with this question arising from the subsuming of the separate issues of fitness to plead and fitness to stand trial into the single term fitness to plead. In view the terms should be disaggregated and kept separate and then it would follow logically that capacity to participate in the trial should be assessed as part of the overall picture.

Further Question 2 Do consultees consider that an effective participation test, framed around the *John M* criteria (set out at paragraph 2.3 above), with an additional decision-making capacity limb, represents the most appropriate formulation for such a combined legal test? Or do consultees favour another of the formulations set out at paragraph 2.28 above and, if so, why? (2.34)

YES: NO: OTHER:

The John M criteria appear reasonable, simple and workable in their abbreviated form, but the trial judge's expounding of what each of the criteria means in real terms sets too high a threshold. I have assessed many older adults with mental health problems including dementia for the courts and even those with mild to moderate dementia fall below the threshold. This is particularly problematic for people suffering from neuropsychological conditions of the frontal lobes that affect judgement rather than simply the comprehension of language.

Further Question 3 Do consultees consider that incorporating an exhaustive list of decisions for which the defendant requires capacity into a reformed legal test for unfitness to plead would assist in maintaining the threshold for unfitness at a suitable level? (2.42)

AGREE: DISAGREE: OTHER:

Further Question 4 Do consultees consider that a reformed test should explicitly refer to a "satisfactory" or "sufficient" level of capacity for effective participation? (2.43)

YES: NO: OTHER:

However, this would need to be carefully defined rather than being left to the interpretation of the expert.

Further Question 5 Do consultees agree that a diagnostic threshold would be unlikely to assist in maintaining the threshold of unfitness at a suitable level? (2.44)

YES: NO: OTHER:

Individuals with identical psychiatric diagnoses can vary enormously in their mental capabilities.

Further Question 6 Do consultees think that it would be helpful to have a statutory presumption that all defendants are fit to be tried until the contrary is proved? (2.46)

YES: NO: OTHER:

This would be in line with existing capacity legislation.

Further Question 7 Do consultees agree that a finding that a person lacks capacity shall remain valid unless and until the contrary is established on the basis of the evidence of two suitably qualified experts? (2.48)

YES: NO: OTHER:

Further Question 8 Do consultees agree that disaggregation of capacity to plead and capacity for trial is undesirable? (2.59)

YES: NO: OTHER:

Part of the reason for the current confusion is that the terms have been merged over time.

Further Question 9 Do consultees consider that making the test one of capacity for effective participation “in determination of the allegation(s) faced” would introduce a desirable element of context into the assessment? (2.68)

YES: NO: OTHER:

This would also be in line with existing capacity legislation which is decision specific.

Further Question 10 Do consultees agree that the United Kingdom’s obligations under the UNCRC and the ECHR can properly be accommodated in the manner outlined in paragraphs 2.80 to 2.82? (2.83)

YES: NO: OTHER:

Further Question 11 Do consultees agree that the difficulties surrounding unrepresented defendants cannot be addressed by amendment to the legal test itself? (2.88)

YES: NO: OTHER:

PART 3: SPECIAL MEASURES

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

AGREE: DISAGREE: OTHER:

PART 4: ASSESSING THE CAPACITY OF THE ACCUSED

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

AGREE: DISAGREE: OTHER:

However, it is my view that one of the experts should be a registered medical practitioner with Section 12 approval. The second expert could come from any suitably qualified professional, but there is a real risk that experts could be instructed who are lacking in depth of training to adequately assist the courts on cost saving grounds so there would need to be safeguards put in place to ensure quality is maintained.

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

AGREE: DISAGREE: OTHER:

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

AGREE: DISAGREE: OTHER:

There are already measures within the Mental Health Act that can be used in these circumstances.

PART 5: PROCEDURE FOR THE UNFIT ACCUSED

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

YES: NO: OTHER:

Further Question 17 Do consultees consider that it would be appropriate to extend the maximum period of a section 36 MHA 1983 remand to hospital for treatment to 24 weeks in these circumstances? (5.25)

YES: NO: OTHER:

Further Question 18 Do consultees consider that the determination of facts procedure for the accused who lacks capacity should be made discretionary following the finding of unfitness, to allow for discontinuance of the proceedings, and diversion out of the criminal justice system into health or related services in appropriate cases? (5.33)

YES: NO: OTHER:

Further Question 19 Do consultees consider that public protection concerns arising in relation to an acquitted, but dangerous, unfit defendant could be adequately met by the use of civil powers under section 3 or 7 MHA 1983? (5.44)

YES: NO: OTHER:

Further Question 20 Do consultees consider that on a determination of the facts, any defence should be left to the jury, after discussion with the advocates, where there is evidence on which a jury properly directed might reasonably find the defence made out or the essential element of the offence unproven? (5.50)

YES: NO: OTHER:

Further Question 21 Do consultees consider that the special verdict should be made available to the jury on their initial consideration of the facts? (5.54)

YES: NO: OTHER:

Further Question 22 Do consultees agree that it is not necessary for the judge to retain the discretion, in cases of exceptional prejudice, to order a second stage process for the consideration of the special verdict, in the manner envisaged in Provisional Proposal 9? (5.56)

YES: NO: OTHER:

Further Question 23 Do consultees consider that the determination of facts in relation to a defendant found to lack capacity could be dealt with by a judge sitting without a jury? (5.60)

YES: NO: OTHER:

Further Question 24 Do consultees agree that a representative, appointed by the court to put the case for the defence, should be entitled to act contrary to the defendant's identified will and preferences, where the representative considers that to do so is necessary in the defendant's best interests? (5.64)

YES: NO: OTHER:

PART 6: DISPOSALS

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

YES: NO: OTHER:

Further Question 26 Do consultees consider that it would be appropriate and effective to expand the power of supervision orders under section 5 of the CP(I)A to include recall of a supervised person to hospital, as available under section 17E-F of the MHA 1983? (6.21)

YES: NO: OTHER:

Further Question 27 Do consultees consider that there are any other enhancements of the powers available under supervision orders which would be beneficial? (6.22)

YES: NO: OTHER:

PART 7: REMISSION AND APPEALS

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

YES: NO: OTHER:

Further Question 29 Do consultees consider that the power to remit an accused for trial should only be exercisable by the Crown where the judge has ruled, following the section 4A hearing, that it is in the public interest for remission to be available should the defendant regain capacity? (7.35)

YES: NO: OTHER:

Further Question 30 Do consultees agree that the Crown's power to remit defendants for trial upon their recovery should not be limited in time? (7.38)

YES: NO: OTHER:

Further Question 31 Do consultees agree that where there has been a finding that a defendant had "done the act or made the omission," he or she should be entitled to request remission for trial on regaining capacity, where recovery is confirmed by the opinions of two experts competent to address the defendant's particular condition? (7.43)

YES: NO: OTHER:

Further Question 32 Do consultees consider that the rights of appeal vested in the unfit defendant should be exercisable by his or her legal representatives? (7.48)

YES: NO: OTHER:

PART 8: UNFITNESS TO PLEAD IN THE MAGISTRATES' AND YOUTH COURTS

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

YES: NO: OTHER:

Further Question 34 Do consultees consider that, where the defendant's capacity is in doubt, it would be preferable for his or her capacity to be determined in the magistrates' court, and, if the defendant is found to lack capacity, that all further proceedings against him or her should remain in that court? (8.76)

YES: NO: OTHER:

Further Question 35 (in the alternative) Do consultees alternatively consider that such a case should be sent to the Crown Court for determination of capacity and, if the defendant is found to lack capacity, that all further proceedings against him or her should remain in that court? (8.77)

YES: NO: OTHER:

But only if the offence is one that would have been sent to Crown Court.

Further Question 36 Do consultees agree that capacity procedures in the summary courts should be applicable for all criminal offences? (8.83)

AGREE: DISAGREE: OTHER:

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

AGREE: DISAGREE: OTHER:

A hospital may still be appropriate.

Further Question 39 Do consultees consider that there are any adjustments to the test, or the procedure, for defendants lacking capacity that would materially improve the prospects of the court identifying those adults with capacity issues? (8.92)

AGREE: DISAGREE: OTHER:

The John M criteria could be reformulated with an explicit explanation of each of the criteria setting an appropriate threshold.

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

YES: NO: OTHER:

Further Question 41 Regardless of the position in the Crown Court, do consultees agree that, in the summary courts, the tribunal should have a discretion whether to proceed to the determination of facts hearing following a finding that the defendant lacks capacity? (8.102)

AGREE: DISAGREE: OTHER:

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

YES: NO: OTHER:

Further Question 46 Do consultees agree that the summary courts should have the power to commit a defendant to the Crown Court for the imposition of a restriction order, but should not have the power to impose one themselves? (8.130)

YES: NO: OTHER:

Further Question 47 Do consultees agree that the following disposals should be available to the magistrates' court on a finding that the defendant has "done the act or made the omission," or where a special determination has been arrived at:

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

YES: NO: OTHER:

Further Question 50 Do consultees agree that a new right of appeal should be created from any determination or disposal imposed under a reformed capacity procedure, which would mirror the right to appeal against conviction or sentence under section 108 Magistrates' Courts Act 1980? (8.143)

AGREE: DISAGREE: OTHER:

Response of Youth Justice Board for England and Wales

PART 3: SPECIAL MEASURES

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

AGREE: DISAGREE: OTHER:

All young defendants are vulnerable defendants. As noted in the issues paper at paragraph 8.24 and in our answer to Further Question 43, there is a greater prevalence of effective participation issues among young defendants. Where young defendants need the assistance of an intermediary to ensure effective participation this should be available on a statutory footing for as much of the proceedings as deemed necessary by the court.

The [final report](#) of the Carlile Inquiry into the operation and effectiveness of the youth court also recommends that intermediaries be available on a statutory footing for young defendants for as much of the proceedings as deemed necessary by the court.

The YJB accepts that there are practical difficulties to achieving this aim; particularly funding and the number of trained and registered intermediaries available. The YJB is happy to work with partners in government to find solutions to these difficulties.

PART 8: UNFITNESS TO PLEAD IN THE MAGISTRATES' AND YOUTH COURTS

Further Question 43 Do consultees agree that there should be mandatory specialist training on issues relevant to trying youths, for all legal practitioners and members of the judiciary engaged in cases involving young defendants? (8.114)

YES: NO: OTHER:

As noted in the issues paper at paragraph 8.24, there is a greater prevalence of effective participation issues among young defendants. This is due to natural developmental immaturity and the greater prevalence of learning disabilities or difficulties, speech language and communication needs (SLCN) and mental health difficulties. In young defendants these conditions often emerge in multiple and complex ways that are difficult to define and diagnose; for example through behavioural problems, emotional difficulties, conduct disorders, substance misuse and self-harm (Mental Health Foundation (1999) Bright Futures: Promoting children and young people's mental health; Young Minds (2003) Mental Health Services for Adolescents and Young Adults). The YJB believes that mandatory specialist training would help professionals to identify young defendants with effective participation issues and to ensure that these issues are fully taken into account as part of the court process.

In 2013 the YJB worked with HM Courts and Tribunals Service (HMCTS) and the Communication Trust to facilitate 11 workshops for over 300 court professionals on the speech language and communication needs of children and young people in the youth justice system. The workshops were fully attended and over 80% of attendees who completed an evaluation form rated the events as “good” or “excellent”. The YJB believes that this demonstrates an appetite among court professionals for specialist training on issues relevant to young defendants.

In [written evidence](#) to the Carlile Inquiry into the operation and effectiveness of the youth court the YJB was one of a number of respondents to advocate mandatory specialist training. The Inquiry’s [final report](#) makes a number of recommendations in relation to mandatory specialist training.

The YJB is happy to work with colleagues in government, the legal professions and the judiciary to define and implement mandatory specialist training for legal practitioners and the judiciary.

Further Question 44 Do consultees consider it appropriate for there to be initial screening for mental health issues for all defendants under 14 years of age, to be conducted by mental health professionals?. (8.119)

YES: NO: OTHER:

In principle the YJB supports initial screening for mental health issues, not just of those under 14 years of age, but of all children and young people aged 10 to 17 before they appear at any criminal court. As noted in the issues paper at paragraph 8.25, the natural physical development of the brain continues throughout childhood and adolescence, so there is no basis for limiting screening to those under the age of 14.

The UK Government is currently piloting liaison and diversion services at police stations and magistrates' courts across ten sites in England. These services fund mental health professionals to identify individuals with mental health issues and other vulnerabilities so they can be diverted from the criminal justice system or supported through it. These services will be evaluated and, if successful, extended to the rest of the England in 2017.

The liaison and diversion scheme is a cross-UK Government programme of which the YJB is a partner. Pending successful evaluation the YJB believes that a liaison and diversion scheme would be the most appropriate mechanism to deliver initial screening for all children and young people at the police station and at court.

Further Question 45 Do consultees agree that the provisional reformed test proposed for the Crown Court at paragraph 2.34 above is suitable for application to young defendants without adjustment? (8.126)

YES: NO: OTHER:

The YJB is concerned that, as it stands, the *Pritchard* test as described in paragraph 2.3 may not be applied consistently or appropriately to children and young people in the criminal justice system.

The YJB strongly supports the introduction of an unfitness to plead procedure to the magistrates' and youth court. However, the YJB believes that the provisional reformed test proposed for the Crown Court at paragraph 2.34 should be adjusted when applied to children and young people to take into account natural developmental immaturity.

The youth justice system, including the youth court and the sentences available, is distinct from the adult criminal justice. The YJB believes that the test for fitness to plead should also be distinct if it is to fully take into account the needs of children and young people.

The YJB appreciates the Law Commission's concern that the inclusion of a technical term is undesirable because it could become outdated. The YJB suggests instead that the test as applied to children and young people include a reference to "maturity". This is a word and concept that the judiciary are familiar with because they are required to consider and take into account a child's or young person's maturity when sentencing by the Sentencing Guidelines Council's [Overarching Principles – Sentencing Youths](#).

A reformed test that includes a reference to maturity should be applied to children and young people in the youth court and adult magistrates' court as well as the Crown Court.

Further Question 48 Do consultees consider that the non-penal requirements of a youth rehabilitation order should be available as part of a youth supervision order, following a finding that a young person has “done the act or made the omission,” or where a special determination has been arrived at? (8.138)

AGREE: DISAGREE: OTHER:

The YJB believes that there needs to be an effective and robust way to deal with a child or young person in the community following a finding that they have “done the act or made the omission,” or where a special determination has been arrived at, whether at the youth court, magistrates' court or Crown Court.

However, the YJB does not believe that the proposed youth supervision order should be based on the youth rehabilitation order (YRO) or managed by youth offending teams (YOT). YOTs manage children and young people in the community who have been convicted of and sentenced for a criminal offence. Although YOTs deal with children and young people with complex needs, the YOT would not be the appropriate agency to manage a child or young person who has been found unfit to plead.

Following a finding that a child or young person has “done the act or made the omission,” or where a special determination has been arrived at, the YJB believes that the case should be formally transferred by the criminal court to the family court to set a “youth supervision order” and its conditions under a new family law power. This order should be managed by children's services (social services in Wales), supported by other mainstream and specialist services for children including the local child and adolescent mental health service (CAMHS) and the YOT as appropriate. The family court should be able to review the order to monitor and deal with compliance by the child or young person and the agencies managing the order.

The criminal court should also have a power to make an interim order to manage any risk to the public or to the child or young person before they appear at the family court.

The YJB is happy to work with colleagues in government to explore a solution based in the family court.



SUMMARY OF THE LAW COMMISSION SYMPOSIUM ON UNFITNESS TO PLEAD

11 JUNE 2014 10:30AM-5:20PM

PANEL SESSION 1 – THE LEGAL TEST

Professor Ronnie Mackay, (“RM”) Professor of Criminal Policy and Mental Health, Leicester De Montfort Law School

- 1.1 The *Pritchard* test, as updated in *John (M)*, adequately represents those who are foundationally unfit, but it is too narrow. A decisional capacity limb is essential to take full account of the effective participation requirement. In the “Jersey Test” set out in *Attorney General v O’Driscoll* [2003] JRC 117, the judge applied the *Pritchard* criteria, but introduced a decisional capacity limb involving the requirement “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”. This limb catches those on the margins who would, under the *Pritchard* test, be found fit but who are not able to effectively participate. The subsequent Jersey case of *Attorney General v Gemma Harding* [2009] JRC 198 demonstrates how the decisional capacity limb can operate effectively.
- 1.2 RM endorsed consideration of a new test which added a decision-making capacity limb to the foundational capacity captured by the *Pritchard* test, as updated in *John (M)*.

Rudi Fortson QC (“RF”), Barrister, 25 Bedford Row, Visiting Professor of Law at Queen Mary, University of London

- 1.3 RF made seven central observations:
 - (1) He was in favour of a supported decision making paradigm that respects the rights and autonomy of persons with disabilities, including their right to refuse support, even if a decision is felt to be unwise or high risk.

- (2) It is essential to consider whether a defendant is incapable of participating effectively in trial by reason of a mental or physical condition.
- (3) In determining this, we should look to the criteria in *John (M)*, and s 53F Criminal Procedure (Scotland) Act 1995 especially s 53F(1)(2)(b): “any other factor which the court considers relevant”.
- (4) Decisional capacity should be weighed in the balance but should rarely disable a defendant with regard to his or her decision about how to plead
- (5) Once the threshold of unfitness is determined through the prism of fairness, there is no need to be prescriptive when seeking to describe the level of capacity needed for a defendant to be judged fit to plead or not
- (6) There should be a single unitary test; however the issue of effective participation may require reappraisal during the proceedings.
- (7) A defendant’s fitness to stand trial should be presumed.

In conclusion, RF endorsed a slightly modified version of s 53F Criminal Procedure (Scotland) Act 1995 as providing a workable test for determining unfitness to plead. His modifications were the replacement of the phrase “balance of probabilities” (in s 53F(1)) with “to the court’s satisfaction” and the inclusion of a reference to evidence “for” as well as “against” the defendant in s 53F(2)(a)(iv).

His Honour Judge Robert Atherton, (“RA”), Circuit Judge, Manchester Crown Court, and Member of the Mental Health Review Tribunal (speaking in his personal capacity, but having canvassed views of fellow judges)

- 1.4 Speaking as a judge who frequently deals with cases which involve the issue of the mental state of the defendant, RA considered that unfitness to plead should be regarded as an exceptional course. Often, special arrangements are enough to overcome what at first sight seems to be a case of unfitness.
- 1.5 Amongst the judiciary there is a feeling that unfitness seems to be raised more and more frequently. Where the issue was properly raised, RA felt that consideration should be given by the CPS to the public interest to be served in proceeding with the case.
- 1.6 RA was in favour of a unitary test, but felt that it must be clear and simple to apply. Currently advocates and clinical practitioners do not always consistently apply the test.
- 1.7 There is difficulty in deciding where the threshold should lie. The minimum consideration must be whether the defendant is capable of entering a plea, and whether they are able to give evidence. Not all decisions must be made or effectively understood by the defendant. Tactical decisions in a trial can be made by an advocate without rendering a trial unfair.

Professor Don Grubin, (“DG”) Professor and (Hon) Consultant Forensic Psychiatrist, Newcastle University

- 1.8 The criteria for determining unfitness to plead should be abolished, and decisions should be made by the judge on a case by case basis, with consideration of:
- (1) whether the hearing will be fair
 - (2) whether a conviction would be safe, and
 - (3) whether the defendant’s mental state would prejudice the trial.
- 1.9 It is important to clarify the aims of the procedures. First, the *Pritchard* test was developed to deal with insufficient intellect, not mental or physical disability, and the only question raised was about whether the defendant could construct a defence. Mental illness came later, with the case of *Davies* (1853) Car & Kir 328, in which the question was whether the defendant’s “madness” was genuine and whether he could instruct counsel.
- 1.10 In unfitness determinations DG advocated following the approach taken in applications to exclude evidence, particularly confessions, under s 78 of the Police and Criminal Evidence Act (‘PACE’). He endorsed the observations of Auld J.’ in *Jelen and Katz*, 90 Cr App R. 456 (Slide 24-5) and Hodgson J. in *R v Samuel* 87 Crim App R 232 (Slide 26), arguing that in unfitness determinations account should be taken of the particular circumstances of the case and any “adverse effect on the fairness of the proceedings”. Like s 78 applications, DG suggested that unfitness determinations did not lend themselves to “hard case law” and that judges may well take different views in the proper exercise of their discretion. Given that the circumstances of each case vary infinitely, DG argued that instead of strict criteria for assessing unfitness to plead, the judge should, as in s 78 determinations, make decisions on a case by case basis about whether there can be a fair hearing for a particular defendant, perhaps assisted by the development of general guidelines.

David Hines, (“DH”) Head of Services and Development, National Victims’ Association

- 1.11 DH has been acting as a victims’ advocate for 22 years, having founded the National Victims’ Association following the murder of his daughter Marie. He hoped to provide input from the victim’s perspective. After his daughter was murdered he felt that the criminal justice system had let him down. Since that time, he has worked with many families who feel the same way.
- 1.12 Victims are supposed to be at the heart of the criminal justice system, but he often wonders how or whether they are taken into consideration at all. What victims cannot tolerate is injustice, and the impression that a defendant is ‘getting off’ because they have been found to be unfit. Victims do not want to see offenders avoiding conviction after a finding of unfitness in a system that promotes malingering or creates loop holes that flash lawyers can take advantage of. He would support a unitary test that ensures a fair and quickly executed trial.

QUESTIONS FROM THE FLOOR

A variable standard of proof?

- 1.13 Dr Tracy Elliott raised concerns that RF's proposal to change the standard of proof from "balance of probabilities" to "sufficient to satisfy the court" might result in an infinitely variable standard of proof depending on the court. RF countered that the former standard is too prescriptive and that a sliding standard which allows the judge to reach a decision using his or her experience is a more appropriate way of determining unfitness. DG also felt that the judges could be trusted to use their experience.

Is s 78 a model of flexibility?

- 1.14 Shona Grundy ("SG") queried whether a s 78 model did in fact represent a more flexible approach, given that s 78 applications could be said to involve a high degree of specification since they are frequently underpinned by the highly prescriptive PACE codes of conduct. DG disagreed that the rules are very clear under PACE. In his view the rules refer to procedure, not decision-making.

Clear criteria to guide clinicians, lawyers and the judiciary or greater flexibility?

- 1.15 SG stated that some criminal practitioners, including members of the judiciary, are unaware of the issues involved in unfitness determinations and what should be considered. SG suggested that, in order to ensure that unfitness issues are properly dealt with, and the correct decisions made, it is necessary to have a test to which practitioners and the judiciary can be referred.
- 1.16 In favour of a more flexible test, DG observed that rules which appear prescriptive, such as the Mental Capacity Act criteria for capacity, are in fact applied differently every time, and will always be so. He considered the better approach was to move away from rigidity rather than towards it, and to place the decision in the hands of the judge, rather than a psychiatrist, who can take into account the circumstances of the trial itself.
- 1.17 Dr Tim Rogers ("TR") echoed SG's concerns in relation to clinicians. Research suggests that psychiatrists apply the *Pritchard* test inconsistently and subjectively. He felt this problem would be worsened if there was a move away from a structured test. He asked whether it might rather be possible to find a way to pin psychiatrists down and ensure that they use the test properly and consistently.
- 1.18 Professor Nigel Eastman ("NE") felt that such difficulty arose because psychiatrists tended to answer the legal test directly rather than describing the mental state of abnormality or disability which should then inform the court in applying the legal test. He distinguished between the psychiatrists' role in providing a medical or psychological description of the defendant's condition and legal interpretation of the test. From a judicial perspective, RA concurred that the ideal expert report describes the mental condition of the defendant and identifies the difficulties that might be encountered by a defendant in engaging with the trial process at trial.

“Any other factor”: s 53F(2)(b) as a solution

- 1.19 DJ Graham Wilkinson (“GW”) suggested that perhaps the safety valve of having an “any other factor” provision, such as in the Scottish test at s 53F(2)(b), and in the hearsay provisions, might resolve the tension between those who favour a prescriptive test and those who prefer a more flexible approach. RF agreed that this was a significant advantage of the Scottish test.
- 1.20 Miranda Bevan (“MB”) responded that the Law Commission had considered such a factor, but were concerned that the very breadth of that safety valve might be problematic, in the sense that it might encourage unfitness issues to be raised in a very much greater number of cases.
- 1.21 RM, who had been involved in the Scottish Law Commission’s (“SLC”) work on the test explained that the SLC had decided against a decision-making capacity limb and felt the s 53F(2)(b) catchall would be sufficient to encompass it. RM’s concern was that decision-making capacity was not being considered in Scotland because it was not explicitly contained within the test and that the s 53F(2)(b) safety valve was not being used to address it. In his view if decision-making capacity should be included, include it. Otherwise there is a risk that it will not be dealt with, as in Scotland.

Would the introduction of a decision-making capacity limb unduly raise the number of findings of unfitness?

- 1.22 Dr Penny Brown was concerned that, if a decision-making capacity limb, as in the Jersey Test, was introduced, it might result in thousands of people with borderline personality disorder being found unfit.
- 1.23 RM responded that the defendant in *O’Driscoll* suffered an extreme case of borderline personality disorder, which had a significant effect on the defendant’s decision-making capacity, and that not every individual with a borderline personality disorder would be unfit under the Jersey Test. In his view the *Pritchard* criteria do a good job of identifying foundationally unfit defendants, but there are individuals who would be fit under the *Pritchard* criteria, but whose decision-making capacity is so affected that they should not be found fit. RM did not think that including decision-making capacity would open the floodgates.
- 1.24 NE confirmed that, from his professional knowledge of the case, the defendant in *O’Driscoll* had been extremely disordered. He felt the case was a good example of the importance at looking beyond intellectual ability to consider also the emotional capacity of a defendant. He thought that the inclusion of a statement of the level of capacity required (Further Question (“FQ”) 4) might assist in setting the threshold.
- 1.25 RF suggested that for these reasons decision-making capacity should be a factor, but should not be the decisive criterion. The primary focus should be: can the defendant participate effectively in her or her trial?

The challenge of addressing the breadth of conditions giving rise to participation concerns

- 1.26 Neuropsychologist Ivan Pitman raised the fact that there is a high prevalence of brain injury, autism and Asperger's in the offending population. He felt that we need to have a broader understanding of executive functioning and how brain functioning can impact ability to make decisions, and where errors might arise. RA responded that the courts are very aware of the difficulties which arise from the variety of mental disorders, and the problem of addressing those conditions, such as autism, which are less immediately identifiable.

PANEL SESSION 2: SCREENING AND ASSESSMENT OF THE ACCUSED (INCLUDING SPECIAL MEASURES CONSIDERATIONS)

Glyn Thomas ("GT"), Head of Implementation, Liaison and Diversion Programme, Health and Justice, NHS England

- 2.1 NHS England is currently rolling out a liaison and diversion service, trialled in ten locations so far, with the target of providing services to all police custody suites and all criminal courts by 2017. It is a cross-government programme with Department of Health, Ministry of Justice, Youth Justice Board, Court Services and others. Liaison and diversion is about early identification of those who come into contact with the criminal justice system who have mental health disabilities, learning disabilities, substance misuse issues, or other vulnerabilities. The idea is to identify people and refer them into mainstream health and social care services, and to provide information to key decision makers in the criminal justice system, including the prosecution, defence representatives and the court. With full information about a person's health and social care information, better-informed decisions can be made in terms of prosecuting and sentencing.
- 2.2 From 1 April 2014, liaison and diversion services in two trial areas, Liverpool and Sefton, and West London, have been collecting data to support the Law Commission's project. Practitioners working in custody suites and magistrates' courts are collecting data on potentially unfit individuals and tracing their progress through the criminal justice system. In the first month 33 individuals across the two areas fell into that category, with one case proceeding to a full unfitness enquiry.

Dr Nigel Blackwood (“NB”), Senior Lecturer, Department of Forensic and Neurodevelopmental Sciences, King’s College London

- 2.3 Funded by the Nuffield Trust, NB and his multidisciplinary team, are developing a video-based tool to enable objective assessment of unfitness to plead. The footage puts the viewer in the place of a defendant falsely accused of unlawful wounding and follows the court process. The tool assesses both basic foundational abilities about the individual’s understanding of the court process and the roles of the participants, and probes more detailed understanding as the case proceeds. The test takes about 40 minutes and its factorial structure is similar to the MacArthur tool developed in the USA. Three factors underpin the instrument: reasoning, understanding and appreciation. The tool has been through three rounds of testing over three years with 450 specially selected adults.
- 2.4 The tool has enabled NB and his team to look at the neuropsychological determinants of fitness for the first time. They found that verbal comprehension, working memory, executive function and mentalising ability are all important determinants of performance on this tool. They will be publishing two papers in the next few months and hope to launch the instrument next year.
- 2.5 Dr Penny Brown, funded by the Wellcome Trust, is looking at three additional areas. Firstly, working at Camberwell Green Magistrates’ Court she is assessing the prevalence of unfitness. She is also conducting qualitative work looking at how well the tool marries up with decision making capacity.
- 2.6 Finally, NB’s team will also be conducting focus groups in about 18 months’ time, looking at how the tool addresses particularly difficult cases in comparison with other assessments by psychiatrists, psychologists, judges and others.

Laura Hoyano (“LH”), Associate Professor in Law, Faculty of Law, University of Oxford

- 2.7 Special measures cannot compensate for the cognitive functioning deficit in defendants whose fitness to plead is in issue. The role of special measures, especially an intermediary, is to facilitate the communication of evidence by witnesses whose communication skills are adversely affected by youth, physical disability or mental disorder.
- 2.8 LH detailed the contrasting provision and eligibility criteria for special measures for witnesses and defendants (see slides 40 and 41). The discrepancies are discriminatory, and in breach of Equality Act 2010 duties and article 6 ECHR.
- 2.9 In comparison to witnesses, defendants have to engage in a far more complex intellectual exercise in the trial, and in the pre-trial process, when critical decisions are made at interview. Defendants have to tell not just their own story, but also listen to the words of others, assimilate them, consider their implications for their own situation, and respond appropriately. There are many essential elements of decision-making and effective participation in a case, and they must all be considered regardless of the complexity of the case. LH provided a flow chart tracing what is required of a defendant at each stage of the proceedings (appended at the end of this document).

- 2.10 For this reason, LH agrees with DG that there should not be a single test, as there are too many steps that would have to be accommodated. She thought s 78 PACE might provide an example of how a broader test might be applied. Special measures can only assist the defendant who has the inherent cognitive capacity to participate fully in the trial, but whose communication skills could hinder the exercise of that existing capacity (she suggested that it can only assist with the green coloured boxes on the flow diagram, as intermediaries rarely attend police interviews).
- 2.11 LH endorsed a structured assessment of cognitive and communicative skills and capacities for every suspect under the age of 18, not under 14 as in the IP. She did not think a presumption of fitness would be appropriate. Finally, she suggested that the Law Commission should recommend diversion of unfit defendants to a panel system akin to the Scottish system, in place of the s 4A procedure. She considered the latter paradoxical: if it is unfair to try the defendant because of his/her incapacity to participate effectively, how can it be fair for the s 4A hearing to proceed without the defendant's participation?

Dr Emily Glorney ("EG"), British Psychological Society, Lecturer and MSc Forensic Psychology Course Director, University of Surrey (Presenting the current position of the British Psychological Society).

- 2.12 The question for the court is whether a defendant's decision-making capacity is good enough for the task in hand. Criminal trials vary in their complexity and the evaluator should consider the capacity of the individual and how well that is matched to the demands of the tasks they may be called upon to perform. A case by case approach is required.
- 2.13 In 2006 the BPS published its guidance for psychologists on how to address the *Pritchard* test within a framework of best practice which is evidence-based. The guidance offers a functional approach to the assessment of fitness, which allows the assessor to address the issues without regard for possible diagnosis, and pays attention to the contextual issues that are relevant to the assessment of capacity.
- 2.14 Consideration of special measures as part of the assessment is in line with the focus on functional capacity of the defendant in the context of the particular proceedings.
- 2.15 With regard to the evidential requirement (FQs 13 and 14), it is clear that psychology has become more prominent in the legal process since the introduction of the Criminal Procedure (Insanity) Act 1964 ("the CP(I)A"). Psychologists are increasingly asked to assess people's capacity to make legally significant decisions and are well-placed to do so give their understanding of the cognitive and social processes involved and their training in the application of standardised, as well as non-standardised, assessment measures. Clinical practitioners including both psychiatrists and psychologists can be considered by the court to be adequately qualified by the court and with sufficient experience could provide testimony regarding assessment of fitness to plead.

Ann Creaby-Attwood (“AC-A”), *Practising Solicitor and Senior Lecturer, Northumbria University*

- 2.16 AC-A considered firstly whether evidence is required to establish fitness to plead, as opposed to unfitness. In the case of *Ghulam* [2009] EWCA Crim 2285 it was established that s 4(6) CP(I)A (the evidential requirement) refers only to a determination that a person is unfit. There is no requirement for medical, or other evidence, for a defendant to be considered fit to plead.
- 2.17 Secondly, when evidence is required for a finding of unfitness, AC-A asks whether that could be provided by psychologists, and perhaps nurses in liaison and diversion teams.
- 2.18 AC-A then considered FQ 40 and the question of whether the magistrates’ courts should have unfitness determinations on a less formal basis. She considered, having worked in a diversion team with extremely skilled nurses (band 7 or 8) that they might have the potential to provide evidence for unfitness determinations. Is it necessary for the same requirement in the magistrates’ as in the Crown Court? It would be necessary to consider whether such nurses were becoming expert witnesses, and what that status demands under CPR part 33. It would also be necessary to consider joint instruction. Nonetheless, AC-A considered that there was potential for nurses and clinicians within diversion teams to give evidence on unfitness. Although it may be necessary to consider some sort of specific qualification or certification for nurses, or an approved clinician status.

QUESTIONS FROM THE FLOOR

The effect of resource constraints

- 2.19 Elizabeth Thompson stated that the serious pressures on, and underfunding of, mental health services in her area was resulting in people falling through the cracks. She thought that this might explain the rise in unfitness cases because people are not being diverted properly and at the correct stage. There is a need at all stages of the system for greater understanding about the problems caused by scarcity of resources earlier in the process.
- 2.20 GT accepted that there is currently a very mixed picture in terms of liaison and diversion services across the country. However, subject to satisfying the Treasury that the NHS can deliver the required outcomes, there will be further new funding to enable liaison and diversion schemes to increase to full coverage by 2017.
- 2.21 AC-A explained how liaison and diversion had worked very successfully in the North-East as it was supported by the Recorder of Newcastle. He made a standard direction at Newcastle Crown Court, that information is provided from the police stations as soon as an indictable only offence is charged, so that the initial assessment can then follow the defendant the whole way through the process, if they are not diverted out. In Newcastle, the diversion team is based in the Crown Court, and there is a multidisciplinary team onsite to work with advocates all the time. The result is not only financial saving but also the right outcome for defendants.

Defendant intermediaries: for the full trial or the giving of evidence only?

- 2.22 David Wurtzel (“DW”) spoke from the perspective of having been involved in training and registration of intermediaries since 2003. Intermediaries for defendants can be the difference between being able to have a full and fair trial, or not. The problem lies in the lack of statutory definition as to when a defendant would need an intermediary in the course of the trial. In contrast to intermediaries in their role supporting witnesses, defendant intermediaries are normally required for the duration of the trial for defendants.
- 2.23 LH considers that a defendant who needs an intermediary to communicate his or her evidence, requires one for the entire trial. This is because of all of the cognitive steps that must be taken, in terms of understanding the evidence. An intermediary is important in order to explain to the defendant what is being said in terminology that he or she can understand. However, intermediaries are not a panacea and cannot make a defendant with significant cognitive deficits competent to stand trial.
- 2.24 Paula Backen (“PB”) explained that she has evidence on over 230 cases where Communicourt (the largest intermediary agency) have worked with defendants and less than half of them actually gave evidence. So the role of the intermediary in these cases is not just to facilitate the giving of evidence but rather to ensure that the defendant understands the evidence against them, the progression of the trial and so on.

Intermediary costs issues

- 2.25 PB stated that there is great concern about the cost implications of intermediaries for defendants however her experience is that assisting the defendant from early in proceedings, pre-trial means that the defendant is able to understand the evidence against him or her and as a result sometimes changes their plea to guilty, saving resources.

Over-reliance on /lack of clarity about the role of intermediaries

- 2.26 Naomi Mason explained that the court does not always listen to the intermediary’s recommendations. In cases where the intermediary report has stated that, even with a highly skilled intermediary the person will not be able to follow the proceedings, but the accused has been found to be fit, the court is then appointing an intermediary to ‘fill in the gaps’. This is problematic, where the defendant’s difficulties cannot be properly addressed by the intermediary, and no guidelines have been drawn up for the intermediary’s involvement. The intermediary ends up being expected to act as an expert witness. SG echoed similar concerns, that intermediaries are being used to ‘plug the holes’ in cases where the defendant’s difficulties are too great for the intermediary to be able to assist.
- 2.27 Dr Brendan O’Mahony (intermediary and forensic psychologist) echoed concerns about the lack clarity concerning the role of the intermediary. He had been engaged as an intermediary to facilitate the defendant’s communication, but when the defendant was found not to be coping, the judge said that he was satisfied that trial could proceed because the intermediary was also a qualified psychologist. He was concerned that this was not the capacity in which he was acting at trial, and this changed his role to that of expert witness.

Early assessment of capacity

- 2.28 AC-A argued that unfitness should be assessed at the earliest possible opportunity, even before the police station. Police triage work now involves forensic nurses and CPNs going out with the police doing assessments on the spot to determine if there are mental health problems that need to be addressed. We need teams in each part of the criminal justice system to assess fitness on an ongoing basis. People can become unwell because of the stress of the process or just the nature of their illness. So assessment should be conducted as early as possible and then be ongoing throughout the process.

PANEL SESSION 3: THE PROCEDURE FOR THE UNFIT ACCUSED

His Honour Judge Stephen Ashurst (“SA”), The Honorary Recorder of York

- 3.1 SA is convinced that the question of whether the unfit accused did the act is too simplistic. There are so few criminal offences that can neatly be broken down into bite sized concepts of doing an act plus a mental element, be it dishonesty, intention, knowledge. Therefore, the proposed extension to add a finding of ‘no grounds for acquittal’ is to be welcomed.
- 3.2 Until 2005, jurors were deliberating over unfitness. When this was abolished as a result of professional consensus, there was no outcry, nor have judges been making eccentric judgments since then. It is really an improvement, especially since judges are required to give their reasons for arriving at a decision. There should be serious consideration of whether a judge alone should decide whether the evidence establishes that an unfit defendant did the act or omission and there are no grounds for acquittal. Four factors support this:
- (1) judges’ training and experience would enhance the analysis and lead to a more focused enquiry on critical issues;
 - (2) the provision of the judges’ reasons will provide greater satisfaction for victims and enhance public confidence in the courts;
 - (3) cases would proceed more quickly; and,
 - (4) current experience of juror decisions is inadequate.

Andrew Hadik, Special Casework Lawyer, Crown Prosecution Service

(speaking in his personal capacity)

- 3.3 The CPS position is that the approach taken in the case of *Antoine* [2000] UKHL 20 strikes the appropriate balance between the need to protect the unfit defendant and the need to protect the public.
- 3.4 The jury should not be required to consider mens rea (the mental element of the offence) as its relevance is confined to conviction and passing a sentence that reflects culpability, and these are not the potential outcomes of a s 4A hearing. To require the Crown to prove all elements of the offence beyond reasonable doubt is an almost impossible burden for the Crown to discharge, since unfitness often can and does make mens rea impossible to prove. Where the object is to give the unfit accused as near as we can to the protection of an ordinary trial, how can the prosecution execute its duty? We must bear in mind the duty to balance the rights of the defendant against the need for the Crown to adequately protect its citizens.
- 3.5 AH asked whether a defendant who has received a special verdict should face remission for trial on recovery? He felt that it is important to bear in mind that there have been cases where an accused has suddenly recovered from an allegedly incurable mental disorder at the termination of criminal proceedings.
- 3.6 There needs to be clarity of procedure for all parties. It is very difficult to describe unfitness procedures to victims and their families, who often feel that they have been “had”.
- 3.7 Finally, special verdicts should be made available to the jury on their initial consideration of the facts since we already trust juries to deal with very difficult intellectual concepts. This could also have the effect of reducing the number of hearings required, and delays that are unfair to the defendant and victims alike.
- 3.8 The recommendations should also address how custody time limits should be determined. Legislation is needed to clarify whether the “clock stops” when the judge commences the unfitness hearing, or whether it continues until the defendant is put in a jury’s charge.

Dr Charles O’Mahony (“COM”), Lecturer in Public Law, University of Galway

- 3.9 The UK is a party to the United Nations Convention on the Rights of Persons with disabilities (“the UNCRPD”), which was published in 2006 and ratified in 2007. Article 12 of the UNCRPD establishes that persons with disabilities have equal recognition before the law and have the right to exercise their legal capacity on an equal basis with others. States are specifically required to provide support for persons with disabilities to exercise that legal capacity. Any measures which relate to the exercise of legal capacity must provide for appropriate and effective safeguards which respect the will and preferences of the person.
- 3.10 Importantly, the UK, unlike other jurisdictions, did not put in a reservation or an interpretative declaration in relation to article 12 of the UNCRPD. This has implications for the area of unfitness to plead.

- 3.11 When the Mental Capacity Act 2005 (“the MCA”) was introduced, this was considered to be a powerful piece of human rights legislation. However the MCA is out of sync with the UK’s obligations under the UNCRPD, in particular the requirement for supported decision-making by virtue of the MCA’s adoption of a functional approach which denies legal capacity on the basis of an assessment of mental capacity.
- 3.12 The General Comment of the Committee on the Rights of Persons with Disabilities criticises the functional approach because it is discriminatorily applied to persons with disabilities, and because it presumes to be able to correctly assess the human mind and to deny core human rights on that basis. This approach contravenes the obligations of the UK under the UNCRPD for support to be provided for the exercise of legal capacity. Mental capacity and legal capacity are two distinct concepts. When you assess mental capacity and determine that the person is unfit to stand trial, you are denying them legal capacity, namely the right to have legal rights and to exercise them.
- 3.13 Under the UNCRPD, States are required to act in accordance with the individual’s will and preference. The best interests principle, adopted in unfitness processes, is not an appropriate principle for dealing with people with disabilities.
- 3.14 The implications of article 12 of the UNCRPD are profound. A UNCRPD compliant unfitness procedure will be one which is not limited to persons with disabilities.
- 3.15 Article 14, the right to liberty, challenges the unilateral detention and treatment of persons with disabilities under the Mental Health Act 1983 (“the MHA”). This has implications for unfitness procedures.
- 3.16 Special measures considerations are in effect talking about “reasonable accommodation”. Under article 5 of the UNCRPD, a failure to provide the right to reasonable accommodation amounts to discrimination in and of itself. Putting the right to support in criminal proceedings on a statutory footing is one way to reconcile the laws.
- 3.17 COM called for diversion to be resourced earlier in the process so that reliance on a declaration of incapacity is avoided.

Natalie Wortley (“NW”), Principal Lecturer, Northumbria University

- 3.18 Considering FQ 24 (court appointed representatives acting contrary to the defendant’s will and preferences but in their best interests), in every case where there has been a finding of unfitness to plead, the court has to appoint an advocate for the defence (under s 4(a)(2) of the CP(I)A). This will not necessarily be the instructed advocate who has been representing the defendant up to that point. Rather, it must be someone with the required skills, expertise and experience (*Norman* [2008] EWCA Crim 1810). But it appears that this rarely occurs.

- 3.19 A finding of unfitness can be made at any point up to the opening of the defence case. If it is made at that late stage, it is unclear how the court can appoint a new advocate who has not heard the prosecution evidence and how, given the relative rarity of unfitness cases, such expertise is to be acquired. A change of advocate for a defendant who is unfit would be hard to explain and potentially catastrophic for their wellbeing.
- 3.20 The reason for appointing a separate advocate is said to be because of their specific duties to represent the defendant's best interests, that they need not necessarily follow instructions, and their duty to maintain independence (even though this is already required of advocates under the Bar Code of Conduct). *Swinbourne* [2013] EWCA Crim 2329 demonstrates the difficulty of establishing a 'credible basis' for regarding a defendant's instructions as unreliable. When is it right to override a defendant's personal autonomy?
- 3.21 The duty to appoint an advocate should only exist where the defendant is not represented. To determine an advocate's duty in a case, perhaps we need to consider how close to capacity the defendant is, to decide the extent to which their wishes and autonomy should override the advocate's duty to represent their best interests. Best interests ought perhaps to be thought of as "legal best interests", as under the MCA. Finally, all advocates require further training, not just advocates dealing with defendants that have been found to be unfit.

QUESTIONS FROM THE FLOOR

Disadvantage to the unfit defendant under the current scheme

- 3.22 Carolyn Taylor observed that the unfit defendant is disadvantaged in comparison with the fit defendant, who has greater opportunity to be acquitted. She welcomed the incorporation of a requirement for the Crown to establish mens rea. AH in response described the tension between affording a fair hearing to a defendant and giving the prosecution sufficient scope to properly carry out their duties. How is the Crown to cross-examine an unfit defendant on issues of mens rea? If the Crown can't, has there been a fair trial, fair to citizens and the defendant?

Reasonable adjustment to include accessible materials

- 3.23 Rebecca Parry suggested that what the Law Commission should be looking at is how to make reasonable adjustments in order to assist a defendant who may possibly be unfit to understand what is being said to them. She proposed looking not just at intermediaries, but at having accessible materials in different formats for different disabilities and impairments to assist them to understand what is happening.

A more formalised protocol for the CPS to consider the public interest in unfitness cases?

- 3.24 Paul Humpherson asked if there is scope for the CPS to have a more formalised protocol for considering the public interest in proceeding with prosecution where fitness issues are properly raised. AH responded that the protocol already exists in the Code for Crown Prosecutors. Defence representatives can make representations and the CPS is under a duty to consider them. Representations are not always thorough enough, or supported by a report, to satisfy the codified requirements. This often arises because of limited time and resources.
- 3.25 GW stated that the CPS in certain areas has a protocol of not reviewing cases until the week before trial. Detailed submissions, based on a wealth of material, are sometimes responded to by the CPS quickly, other times not at all. He advocated a dedicated, centralised CPS branch with two or three specialised lawyers to deal with such submissions so that there is a definite answer, within a definite period, which has been reviewed by a senior prosecutor.

Removal of the jury for determinations of fact

- 3.26 A consultant forensic psychiatrist asked whether it is not discriminatory to remove the jury for unfit defendants. SA proposed asking rather whether there is a compelling reason to retain a jury in these cases, where there are particularly difficult and sometimes complex issues of law and evidence which a judge may be best placed to decide.

A different test for the lower courts?

- 3.27 Shauneen Lambe (“SL”) suggested that the Law Commission should consider a different test for the magistrates’ and youth courts in light of the lower level of offending, which may not require a disposal for the unfit defendant.

PANEL SESSION 4: DISPOSALS, REMISSION AND APPEALS

Dr Tim Rogers (“TR”), Consultant Forensic Psychiatrist, North London Forensic Service

- 4.1 If the conditions for detention in hospital under the Mental Health Act are not met, then the court has two options: a supervision order, with or without medical treatment, and an absolute discharge. The supervision order is not meant to be punitive; it is a framework for treatment. A common criticism of the supervision order is that there is no sanction for breaching it – it has no teeth. There is no good middle ground between hospitalisation and absolute discharge, despite there being many situations where one is needed.

- 4.2 The court should have the power to make a community treatment order equivalent to that already available under the civil part of the MHA. There should be a disposal hearing that sets conditions for recall upon breach, and that identifies a responsible clinician who will administer treatment and a hospital to which they can be recalled. This would be appropriate for unfit defendants who have done the act, but are no longer, or never were, detainable in hospital. In these cases, supervision or treatment under compulsion could be protective for both the accused and society.
- 4.3 Supervised community treatments take many different forms, such as a drug rehabilitation requirement for someone who is unfit as a result of a transient period of drug-related mental ill health. In different jurisdictions, the “teeth” associated with such orders vary, from the threat of return to hospital to the withdrawal of supported housing or certain benefits.
- 4.4 The typical person suitable for such a community treatment order might be a poorly functioning man, with limited awareness and understanding of his mental health problems, who has experienced multiple hospitalisations and would benefit from conditions relating to the taking of medication, avoidance of drugs and perhaps supported mental health accommodation. Such orders would allow courts to address problems arising from the fluctuation of fitness.
- 4.5 TR reviewed criticisms of community treatment orders, but considered that such negative research findings were subject to serious limitations and at odds with the popularity of CTOs amongst psychiatrists.

Dr Callum Ross (“CR”), Consultant Forensic Psychiatrist and Acting Clinical Lead, Personality Disorder Directorate, Broadmoor Hospital (unavoidably absent, but his presentation is summarised)

- 4.6 Under s 35 of the MHA the court can remand an accused to hospital for the preparation of a report on the accused’s mental condition. Treatment of the accused is not permitted under s 35 of the MHA, but is often achieved out of necessity by running a civil section (s 2 or 3 of the MHA) alongside the s 35 order. Whilst a s 35, 36 or 38 order does not qualify an accused for a CTO, a civil section under s 3 of the MHA can lead to a CTO.
- 4.7 CR asked whether s 35 powers are underused and could present a useful and more unified option for courts in cases of unfitness to plead. S 35 orders are available in both Crown and magistrates’ courts. S 35 orders can be made on the written or oral evidence of a single registered medical practitioner, where there is reason to suspect that the accused person is suffering from a mental disorder and the court is of the opinion that it would be impracticable for a report on his mental condition to be prepared if the accused were remanded on bail. The existence of a mental disorder (of a nature and/or degree) does not need to be established. A s 35 order must be renewed every twenty-eight days, and cannot be extended beyond twelve weeks in total. The only route to discharge is via the court process, although treatment can continue on the civil section following discharge of a s 35 order.

- 4.8 The use of a s 35 order might be particularly appropriate where the court suspects that the person might have a learning disability or an autistic spectrum disorder where a more prolonged and functional assessment might be helpful.

Master Michael Egan QC, Registrar of Criminal Appeals and of the Court Martial Appeal Court and Master of the Crown Office, Queen's Coroner and Attorney

- 4.9 The Court of Appeal is a creature of statute and it has no powers beyond that given by statute. The lacuna created by s 16(4) of the Criminal Appeal Act 1964, that the Court of Appeal has no power, on quashing a s 4A finding, to remit the case back for rehearing, is unthinkable in a system in 2014 that holds victims' interests to be important.
- 4.10 There should be no need for a second finding on whether a defendant did the act, where remitted but found still to be unfit, as in the case of *Ferris* [2004] EWHC 1221 (Admin).
- 4.11 But how does an unfit accused who by definition lacks decision making capacity, prosecute an appeal in such circumstances? ME suggested that the Court of Appeal should have an explicit power to appoint a representative to conduct such an appeal, as they have in relation to a deceased person's appeal (s 44A Criminal Appeal Act 1968). The costs of an appeal brought by a representative appointed by the court should be paid out of central funds, so that there need be no consideration of the unfit defendant's means.
- 4.12 Since unfitness determinations qualify under s 28 Senior Courts Act 1981 for judicial review, and there is the right of appeal under the Criminal Appeal Act, 1968, some consideration ought perhaps to be given to which is the most appropriate forum for pursuing an appeal.
- 4.13 The Court of Criminal Appeal Office had long been concerned that the current procedures might not be as well understood as might be hoped. He referenced the power to postpone consideration of unfitness until the opening of the defence case, and wondered whether such an approach in certain situations might be advantageous.

QUESTIONS FROM THE FLOOR

A custodial disposal?

- 4.14 Dr Andrew Bickle agreed with concerns that the threshold for unfitness may be too high, in that the test is too narrow and ignores current understanding of mental disorders. However, in consideration of the victim perspective and concerns about unfit defendants walking free from court, he wondered whether some individuals who are unfit to plead might nevertheless be fit for a custodial disposal and whether that should be considered as an alternative disposal.

- 4.15 MB, giving the Law Commission's position, considered that the problem with such an approach is that the s 4A hearing does not result in a finding of culpability, so the punitive aspect of custodial detention is anathema to the fitness process.

Problems arising from limited disposal options

- 4.16 Another delegate sought clarification that some defendants found unfit may not have been under a disability at the time of the offence. MB confirmed that this is the case. The insanity defence (limited as it is) addresses those whose offending was affected by their mental state. Unfitness to plead is distinct from insanity, in that it looks specifically at whether that person can engage with trial and seeks to put in place a process that can protect the public whilst giving the accused an opportunity to be acquitted if that is appropriate. However, the disposal range is necessarily limited because the defendant has not been convicted.
- 4.17 Another forensic psychiatrist raised concerns about the suitability of the disposal range in serious cases. He gave an example of an unfit defendant in a homicide case who was given a supervision order. The lack of options causes clinicians unease when they are considering taking the unfitness route. The inclination is to delay matters in the hope of restoring the client's fitness so that they can be tried. Professor David Ormerod QC ("DO") confirmed that the Law Commission is considering adjournment to regain fitness as well as remission options. The questioner observed that, in his experience, the CPS did not always consider remission for trial for a recovered defendant to be in the public interest, even in a case of attempted murder.

Concerns around giving coercive powers to supervision orders

- 4.18 RM expressed concerns about tightening up supervision orders. Having conducted some research into supervision orders, he was unaware of any research indicating that supervision orders required amendment or were not functioning suitably.
- 4.19 TR responded that there is a certain group of unfit defendants who have a relapsing remitting mental health disorder who do not appear for treatment. For that group, who are relatively easy to identify, the coerciveness of a supervision order with teeth, whatever the teeth may be, is less than further hospitalisation and a potential restriction order for them, which may be the alternative down the line. TR felt that if they were not considered to be ineffective they might be more widely used.

Guardianship orders

- 4.20 RM wondered why guardianship orders had been abolished. MB confirmed that the Law Commission had tried to trace the Parliamentary proceedings to discover the reasons for the removal of guardianship orders. However they were removed by a government amendment which resulted in no argument in Parliament. So the reasoning remains obscure.

Is the Community Treatment Order currently available not sufficient?

- 4.21 A delegate asked whether the CTO powers to recall to hospital under the MHA would be any different from the powers that are being proposed to extend supervision orders. TR explained that if the unfit defendant had never been in hospital then he or she would not be eligible for a CTO powers, hence the need for the proposed extension to supervision orders.
- 4.22 Dr Tracey Elliott suggested that if such an individual were not coping well with a supervision order, and were a risk to the public, then there is the capacity to “section them”. They could then be subject to a CTO on release.

Defendants who refuse assessment

- 4.23 A concern was raised that it is unclear how to proceed if the defence representative thinks that the issue of unfitness should be raised, but the defendant refuses. The Judge can raise the issue but cannot force an assessment. The CPS could be invited to instruct a psychiatrist to assess the defendant, but they might decline to do so, on the basis that they consider the defendant fit. It is unclear how the parties should proceed. MB acknowledged this difficulty which is addressed in the Issues Paper at paragraphs 4.25-4.27. Consultees endorsed respect for the defendant’s autonomy, and this is reinforced by UNCRPD obligations.

Problems with supervision arrangements.

- 4.24 HHJ Peter Collier QC (“PC”) referred to a case where it had been difficult to get the Probation Service to accept the supervision of an unfit defendant, and they swiftly sought revocation of the order.
- 4.25 SL also raised a case where an unfit child defendant with learning disabilities, charged with a very serious case, had received an absolute discharge because nobody was prepared to accept responsibility for his supervision.
- 4.26 In relation to a query about supervising officers, MB explained that the supervising officer for a supervision order will either be a social worker, acting for the defendant’s local social services authority area or a probation officer, acting for the local justice area in which the defendant resides. No order can be made unless the proposed supervising officer is willing to undertake the supervision. Under both structures, a treatment requirement may be imposed, which is overseen by an approved medical practitioner who directs the treatment aspects and can apply for variation or cancellation of that requirement.

PANEL SESSION 5 A AND B: UNFITNESS TO PLEAD IN THE MAGISTRATES' AND YOUTH COURTS

SPEAKERS 5A – MAGISTRATES' COURTS

Professor Rob Poole (“RP”), *Consultant Psychiatrist, Co-Director of the Centre for Mental Health and Society and Professor of Social Psychiatry, Bangor University*

- 5.1 The majority of offenders go through the magistrates' courts, including many of those who will go on to reoffending by committing the most serious offences. Those in the magistrates' courts are often multiply disadvantaged with a range of problems including low educational attainment, mental health problems and substance misuse. Failure to prosecute earlier offences has been identified as a failure in mental health services in this country. Against that background, is it acceptable that issues around unfitness to plead are not addressed in the magistrates' courts?
- 5.2 Summary prosecutions can have a very profound effect on a person's life, especially where an accused is persuaded to plead guilty without fully appreciating the consequences of a plea. Consider for example, the difficulties with securing local authority housing which follow from a conviction for a drugs offence. There are good reasons to take unfitness to plead in the magistrates' court extremely seriously.
- 5.3 Having been involved in setting up two liaison and diversion schemes, RP observed that, while clinicians are very good at identifying people who are known to services, they are very poor at identifying those not yet known to services. This is particularly difficult for people with learning disabilities and autism. Identifying individuals with participation difficulties is a greater challenge than reforming the test for unfitness to plead.
- 5.4 This country has correctly recognised that inpatient admission is not helpful in the long-term. However, mental health services are being taken apart in this country; the number of beds is shrinking. Importantly, those who are diverted must have properly identified services to be diverted into, so that they are not just sent back and forth between agencies.

Carolyn Taylor (“CT”), *Member Partner, Head of Mental Health Department, TV Edwards LLP*

- 5.5 The NHS liaison and diversion project is welcomed as there is currently a piecemeal service with hugely variable standards of assessment for defendants with mental health and learning disabilities in the criminal justice system. CT would endorse the introduction of a standardised examination and screening process conducted by properly qualified mental health professionals.

- 5.6 The manner of dealing with accused persons who may have participation issues in magistrates' court is arbitrary and lacking. There must be a proper unfitness to plead scheme in the magistrates' courts matching that in the Crown Court. At present, because of the lack of such a scheme, CT finds that she has to advise a client to elect trial by jury to engage fitness processes, but this adds at least six months onto the length of the case and places a vulnerable client into the daunting environment of the Crown Court.
- 5.7 CT is currently of the view that the same test should apply in the magistrates' court as in the Crown Court, and that there is no reason why properly trained lay justices should not hear unfitness cases.
- 5.8 If there is an issue of unfitness to plead then the court could alternatively have the power to appoint a legal representative, similar to the power under s 4A(2)(b) CP(i)(a) 1964. Note that at para 8.49 of the Issues Paper, the National Bench Chairmen's forum felt there should be consideration of the appointment of a legal representative to protect the interest of the defendant.
- 5.9 When defendants refuse to sign a legal aid form this can sometimes be overcome, but generally causes huge difficulties. There should be some mechanism for granting legal aid where the defendant is incapable of instructing a solicitor and signing the legal aid form. There should also be some capacity for legal representatives to be appointed for unfit defendants in the magistrates' courts (as under s 36 Youth Justice and Criminal Evidence Act 1999).
- 5.10 Further delays are caused by the number of expert reports required and the difficulties in communicating with the CPS, in particular getting them to consider expert reports and review their position. Consideration should be given to the instruction of joint experts, as in civil cases. Cases involving unfitness issues should be removed from the "Stop delaying Justice" procedures and allowance should be made for the delays in obtaining of reports.
- 5.11 Finally, a conditional discharge should be considered in the magistrates' courts, especially where an individual does not require hospitalisation and is already supported in the community. To be made subject to a further supervision requirement with conditions may increase the burden on the accused who may struggle to adhere to all requirements. This allows a more appropriate response than the currently available absolute discharge, which judges may view as inadequate.

Mignon French ("MF"), *Magistrates' Association Mental Health Group*

- 5.12 It is important that lay magistrates are given the appropriate information and advice when managing vulnerable offenders in court. It is crucial that the new liaison and diversion service provides effective pre-court screening, using a standardised assessment, and provides sentencers with options for more effective sentences.

- 5.13 For imprisonable offences, there are currently three options: making a hospital or guardianship order under s 37(3) MHA, requesting a report to be prepared under s 11 PCC(S)A or staying proceedings (where effective participation is at issue).
- 5.14 The MA agrees that unfitness to plead processes in magistrates' and youth courts should mirror those in the Crown Court and should apply to all criminal offences, not just imprisonable offences. The MA also considers that unfitness issues should not be reserved to district judges: with appropriate guidance and training, three magistrates sitting with a legal adviser would be perfectly capable of deciding fitness to plead. It is clear that guidance and training would be necessary for all members of the judiciary to whom the proposed change would be relevant.
- 5.15 The MA points out that if these proposals were to be implemented, there would need to be a wider range of disposals for unfit defendants in the magistrates' courts, including supervision orders or absolute discharge, and the availability of suitable alternatives for those under 16 years.

Shauneen Lambe ("SL"), Director of Just for Kids Law

- 5.16 In answer to FQ 43 (mandatory training for all practitioners and judiciary on issues relevant to trying youths) lawyers representing young people should have special training. In other areas of law, lawyers for children are specially accredited. This should also be the case in criminal proceedings. There are different legal processes for children, who are a distinct client base. In criminal law, the child is considered to be the client, meaning that they are supposed to be able to understand and instruct counsel in the way that an adult can.
- 5.17 There is a significant difference between the youth and magistrates' courts in that there are much more serious cases tried in youth court. It is widely recognised that the youth court is the most appropriate venue for a child defendant, but the absence of an unfitness process is a significant problem in addressing their vulnerability.
- 5.18 In the Crown Court, the *Pritchard* test is not fit for application to children. This is particularly because the mental health issues experienced by children are frequently learning disabilities and not treatable mental illnesses. The limited disposal range for unfit defendants who do not suffer a treatable mental illness is significantly problematic.
- 5.19 SL rejects the suggestion that there is a 'complete statutory framework' for addressing unfitness issues in the youth court (*R(P) v Barking Youth Court* [2002] EWHC Admin 734). Section 37(3) processes are inadequate because: the offence needs to be imprisonable, the bench have a discretion as to whether to proceed with the fact-finding exercise, guardianship orders are only available to those over 16, and the alternative hospital order requires the defendant to suffer a treatable mental illness, which does not exist for most learning disabled cases.

- 5.20 SL considers effective participation to be more important than fitness to plead, referencing *SC v United Kingdom* App No 60958/00, [29] (where the defendant was fit to plead, but the European Court of Human Rights considered him unable to effectively participate). S 37(3) provides no alternative solution. There is a tension between fitness to plead, as currently conceived, and effective participation which SL hopes the Law Commission will resolve.

SPEAKERS 5B – YOUTH COURT

Dr Eileen Vizard CBE (“EV”), Consultant Child & Adolescent Psychiatrist, Honorary Senior Lecturer at the Behavioural and Brain Sciences Unit, Institute of Child Health, University College London

- 5.21 A small group of individuals is responsible for a large proportion of the offending, and within that group, there is a subgroup of juveniles who started offending at a very young age (under ten years old) who, without effective intervention, are likely to go on offending more prolifically and may become very dangerous. This subgroup of children appearing in criminal courts has major neuro-psychiatric problems including high prevalence of learning disabilities.
- 5.22 There is no agreed and consistent method of assessing these children’s competence, their fitness to plead, and their mental health. Rather, this is done on an ad hoc basis and is dependent on the defence representative having training or experience to be able to recognise the signs and refer them for assessment.
- 5.23 There are different thresholds for child capacity and different approaches to assessing competence across the legal system. A child aged ten is developmentally immature. The *Pritchard* test was drawn up in relation to an adult man and has no reference to developmentally immature children. We urgently need an assessment framework that is relevant for children.
- 5.24 When we consider that they may also have learning disabilities and other neuro-psychiatric difficulties, these accused children are in fact doubly disadvantaged. Training for defence representatives is very important, and EV supports the idea of ticketing for lawyers working with children. One cannot judge a child or young person’s mental capacity by external inspection. What is required is a multidisciplinary assessment framework to properly understand the capacity of the young person in question.

**Naomi Redhouse ("NR"), District Judge, Sheffield Magistrates' Court
(speaking in her personal capacity)**

- 5.25 The Committee of the Council of District Judges is in favour of a single test for unfitness to plead across all the courts, as indicated in their response, in 2011 to the original consultation. Given that we operate the same criminal justice system in the youth court as in the other courts NR queried what justification there could be for a different test.
- 5.26 There are important differences between practice in the youth and adult courts, including the Crown Court. When considering reasonable adjustments for fit defendants, who may still have some difficulty participating in trial, there are lessons to be learnt from the current youth court practice.
- 5.27 'Effective participation' has arisen from youth court jurisprudence, and is more likely to be raised in the youth court. But if a young person is not able to effectively participate in their trial, the proceedings are stayed, leaving the accused without the support that they require, and which would likely have been identified in the proceedings. This is unsatisfactory for the victims and criminal justice system generally.
- 5.28 The youth court is very different to the magistrates' and Crown courts and young defendants have different needs to adults. The fact that very serious matters such as robbery, serious assaults and sexual offences often remain in the youth court rather than being sent to the Crown Court is an illustration of this. The youth court is used to adapting its processes accordingly through measures such as modified language and a different court layout. The youth court does this routinely, as well as further adaptations as necessary. The youth court has two statutory aims: to prevent reoffending and to have regard to the welfare of the young person. There are no equivalent statutory aims in the adult courts.
- 5.29 There is no current test for unfitness to plead and the procedures of the Powers of Criminal Courts Act and the Mental Health Act apply as in the adult magistrates' court. However the youth court has the advantage of its own specialist training for magistrates and district judges. District judges have to undertake a three day residential course and to observe a number of sittings of the youth court before they are 'ticketed' to sit in the youth court. Some district judges have additional specialist training to sit on 'serious sex' cases. In addition, in order to keep their youth court tickets, district judges are required to undergo annual training which may include mental health issues and communication skills. This should be mirrored in the Crown Court with specialist training for judges who sit on cases involving young defendants. In those rare cases where youths are sent to the Crown Court we expect that they be dealt with in a way that understands the law as it relates to young people. In her experience, representatives in the youth courts demonstrated an ability to identify the difficulties faced by young people.
- 5.30 Finally, NR expressed some reservations about the Scottish panel system, and their powers to detain young people in secure accommodation without conviction. She welcomed consideration of additional powers to be attached to supervision orders, but suggested that they should be applicable to adults and children alike.

Deepti Patel (“DP”), *Director of Innovation and Strategy, Kids Company*

- 5.31 In order to put into context points made by earlier speakers, DP outlined early results from a research project conducted by the Anna Freud Centre and Kids Company. In that study one third of the children involved had witnessed someone being shot or stabbed, and one fifth of the cohort had been shot or stabbed themselves. These children demonstrated mental health issues similar to sufferers of post traumatic stress disorder, such as might be prevalent amongst soldiers returning from Afghanistan. These medium to high risk children were separated into groups, one new to Kids Company, and one that had been involved in their intervention programme for a year and a half.
- 5.32 EEG scans were used to measure brain activity, and the children’s emotional responses to a variety of images. The comparison of the scans revealed a significant differentiation between the two cohorts, suggesting that those children who had experienced Kids Company intervention were showing significant signs of recovery from emotional trauma.
- 5.33 Importantly, children do not have the ability to vocalise or at times process the traumas that they have experienced. Therefore, it is crucial to have an innovative system to thoroughly assess capacity and mental health, using cutting-edge research, in order to ensure that those traumatised children are able to access better services that are going to help them so that they do not reoffend. Kids Company’s research suggests that with appropriate and early intervention we can hope to prevent more serious issues arising later on.

QUESTIONS FROM THE FLOOR

A holistic assessment for young defendants?

- 5.34 EV was invited to comment on whether she would support the Law Commission’s position at IP 8.124 that the legal test should not be adjusted to make specific reference to the defendant’s developmental age. EV preferred to focus on the need for a structured assessment which would address issues relevant to the unfitness test, but would comprise a comprehensive mental health assessment and also address other issues in the young person’s life, in particular welfare needs. NR felt that the concept of contextualisation might be useful in addressing the position for young defendants, but felt that the IP perhaps did not go far enough in setting out the factors that could be taken into account.
- 5.35 DCO and MB clarified that what the Law Commission wanted to avoid was introducing into the legal test itself unnecessary complexity and current clinical terminology, such as ‘developmental age’, which might in due course become obsolete. What the proposed reformed test seeks to do is to set out what effective participation requires a defendant to be able to do. It is then for the clinical experts to consider, using expert assessment tailored to their particular client base, whether the particular defendant will be capable of meeting that standard. The judge or magistrate would then, were contextualisation to find favour, be able to take into account the nature of the proceedings, particularly if they are to be conducted in the youth court, in arriving at a judgment about the defendant’s fitness or otherwise.

The availability of child and adolescent forensic psychiatrists

- 5.36 Concerns were raised that adult forensic psychiatrists were often instructed, particularly by the CPS, to assess children, when they are not specially trained in that area. There was some debate as to whether this is a result of low numbers of child and adolescent psychiatrists. NR raised the point that better use should be made of the local youth forensic services, which often have access to a child forensic psychiatrist and should be playing a more important role in the early screening and assessment of child defendants. DP endorsed a multidisciplinary approach that allows a more holistic assessment which is particularly important for children and young people. EV added that real resourcing problems affect the willingness of Child and Adolescent Mental Health Services to be involved and the expertise that they are able to offer.

Screening for young defendants: labelling concerns

- 5.37 GW raised concerns that if the initial screening proposed in FQ 44 was called a “mental health assessment” then there may be resistance from defendants and their families. Dr Emily Glorney agreed that neutral language should be used if such a test were adopted.

Screening for young defendants: no basis for threshold at 14

- 5.38 NR and EV agreed that there is no clinical basis for limiting mandatory screening to young defendants under the age of 14. The general consensus was that such mandatory screening should be applied to all young defendants.

The Scottish panel system

- 5.39 There was further discussion about the nature of the Scottish panel system. LH explained that the advantage of the Scottish panel system is that a trained lay panel are able to summon before them all the individuals involved in the child’s life, including teachers, GP, health visitors, parents, and that the child is legally represented and has a safeguarder as well for the proceedings. The system has been found to be article 5 ECHR compliant. NR clarified that her concern related to the power of the panel to order the detention of a child in secure accommodation without the child being convicted in criminal proceedings.

Training for legal representatives in the youth court

- 5.40 DW observed that, whilst mandatory training for legal representatives on issues related to trying youths should be introduced, he was concerned that the Bar Council was likely to resist it, as there have been previous Advocacy Training Council recommendations on ticketing that have not been implemented by the Bar Council. After the compulsory training programme for barristers under three years call, there is no further compulsory advocacy training. For prosecuting serious sexual offences, the CPS requires advocates to attend a training seminar but there is no linked assessment. The CPS has a panel system which enables them to impose training on any barrister who wants to remain on their panel.

- 5.41 Paul Humpherson observed that a significant factor in the quality of representation in the youth court is the level of fees paid to advocates, routinely £45 for several days' work. As a result barristers instructed at the youth court are often pupils in their first six months of experience. To ensure quality advocacy from barristers that are specially trained, there needs to be a change to the funding of the system; regulation alone will not suffice.
- 5.42 Shona Grundy stated that advocate representation orders can be applied for in the youth court on the basis that a particular case is sufficiently unusual to require the expertise and skill of a recognised advocate. However, these orders are not always easy to obtain. She is herself currently engaged in a judicial review of a decision to refuse such an order for a young defendant with learning disabilities.

No instruction to address men rea

- 5.43 An adolescent forensic psychiatrist observed that, working in an intellectual disability service for young people, they receive a number of requests to assess fitness to plead. However, they are never asked to address whether the individual was capable of forming the mens rea to commit the offence charged. For those individuals that he considered unfit, he invariably took the view that they were also incapable of forming the requisite mens rea so as to be criminally culpable.

CLOSING REMARKS

HHJ Peter Collier QC, Hon Recorder of Leeds (“PC”)

(speaking in his personal capacity)

- 6.1 PC related that on a weekly basis at Leeds Crown Court advocates are raising unfitness to plead as a preliminary issue. He then surveyed, from a judicial perspective, the difficulties posed by the current unfitness arrangements.
- 6.2 PC wondered whether, with appropriate support and help, some defendants who might have been considered unfit under the *Pritchard* criteria might yet be able to participate effectively in a trial, or make a decision to plead guilty. He observed that there have been significant advances in the criminal justice system since Parliament last considered the unfitness to plead provisions, include the giving of evidence for the Crown by children as young as 3 or 4, and the pilot scheme, currently running at Leeds Crown Court, for the pre-trial videoing of cross – examination of child and other vulnerable witnesses.
- 6.3 PC reflected on the difficulties of directing the jury in the s 4A hearing in accordance with *R v Antoine* [2001] 1 AC 340 and *H* [2003] UKHL 1, [2003] 1 WLR 411, especially where issues of specific intent arise, or in sexual offences where questions of belief, understanding or knowledge arise, especially in relation to consent.

- 6.4 In terms of disposals, PC spoke of the difficulty the limited range of disposals presented for unfit defendants who are not suitable for a hospital order. In many cases the option of an absolute discharge is an uncomfortable one, but, as he set out in earlier discussions, there are problems securing the Probation Service's agreement to supervise an individual. The Probation Service state that they are not configured to supervise such individuals, and have clearly defined supervision programmes which do not permit the tailored supervision required for an unfit defendant even where, as in one case PC had dealt with, what was required was simply a monthly home visit to check that the offender was still being looked after by his parents and that his medication was still being taken. He considered that this unwillingness to take on supervision would be likely to continue even under the new probation arrangements.
- 6.5 PC made reference to problems that arise in cases remitted for trial on recovery of the defendant. In particular he described the difficulty he had observed in identifying the appropriate processes to be followed on remission, and the problem for the sentencer in knowing how to take into account in sentencing a period spent in hospital prior to recovery.
- 6.6 In concluding, PC observed that the current system is clearly not fit for purpose, and he made three personal pleas:
- (1) That all present should respond to the issues paper so that the Law Commission can finalise its proposals and produce a draft bill.
 - (2) That the Government support the recommendations and draft bill. (He foresaw that in the forthcoming general election the victim would be placed centre-stage, and referenced the problems which arose in a similar political climate when defendants were explicitly excluded from special measures assistance for witnesses. The result is the current scheme of ad hoc intermediary support for defendants, which lacks a coherent approach and is not administered through a centrally delivered and funded scheme, but through commercially driven providers.)
 - (3) That we have a coherent and sensible system and have it soon.

