Northern Ireland
Law Commission
promoting law reform in Northern Ireland

Consultation Paper Unfitness to Plead

NILC 13 (2012)

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CONSULTATION PAPER

UNFITNESS TO PLEAD

NILC 13 (2012)

Northern Ireland Law Commission

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Belfast BT2 7ES

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NORTHERN IRELAND LAW COMMISSION

BACKGROUND

The Northern Ireland Law Commission ("the Commission") was established in 2007 following the recommendations of the Criminal Justice Review Group (2000). Its purpose is to keep the law of Northern Ireland under review and make recommendations for its systematic development and reform.

The Commission was established under the Justice (Northern Ireland) Act 2002. The Act (as amended by the Northern Ireland Act 1998 (Devolution of Policing and Justice Functions) Order 2010) requires the Commission to consider any proposals for the reform of the law of Northern Ireland that are referred to it. The Commission must also submit to the Department of Justice programmes for the examination of different branches of law with a view to reform. The Department of Justice must consult with the Attorney General for Northern Ireland before approving any programme submitted by the Commission. If the programme includes the examination of any branch of law or the consolidation or repeal of any legislation which relates in whole or in part to a reserved or excepted matter, the Department of Justice must consult the Secretary of State for Northern Ireland before approving the programme.

MEMBERSHIP

The Commission consists of a Chief Executive, a Chairman, (who must hold the office of a judge of the High Court), and four commissioners, one of whom must be a person from outside the legal professions. The Chairman and Commissioners are appointed on a part-time basis.

These positions are currently held by:

Chairman:	The Honourable Mr Justice McCloskey
Commissioners:	Professor Sean Doran (Barrister-at-law) Mr Neil Faris (Solicitor) Mr Robert Hunniford (Lay Commissioner) Dr Venkat Iyer (Law Academic)
Chief Executive:	Ms Judena Goldring MA, BLegSc, Solicitor
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The Commissioner in charge of this project is Dr Venkat Iyer.

The legal team for this project are:

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Legal Researchers:	Sara Duddy LLB, LLM, Solicitor John Clarke LLB

RESPONDING TO THIS CONSULTATION

This consultation seeks views on the proposed reform of the law relating to unfitness to plead in Northern Ireland.

Interested parties are invited to comment on the questions raised in this consultation paper. As well as being available in hard copy, this consultation paper is available on the Commission's website: www.nilawcommission.gov.uk.

This document can be made available in an alternative format or language. Please contact us to discuss how we can best provide a copy of this consultation paper that meets your needs.

The closing date for responses to this consultation paper is 19th October 2012.

Responses should be sent to:

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CONSULTATION PROCESS

1. Consultation criteria

This consultation is being conducted in line with the following seven consultation principles contained in the “Code of Practice on Consultation” which has been adopted across government:

Criterion one: When to consult
Formal consultation should take place at a stage when there is scope to influence the policy outcome.

Criterion two: Duration of consultation exercise
Consultations should normally last for at least twelve weeks with consideration given to longer timescales where feasible and sensible.

Criterion three: Clarity of scope and impact
Consultation documents should be clear about the consultation process, what is being proposed, the scope to influence and the expected costs and benefits of the proposal.

Criterion four: Accessibility of consultation exercises
Consultation documents should be designed to be accessible to, and clearly targeted at, those people the exercise is intended to reach.

Criterion five: The burden of consultation
Keeping the burden of consultation to the minimum is essential if consultations are to be effective and if consultees’ buy-in to the process is to be obtained.

Criterion six: Responsiveness of consultation exercises
Consultation responses should be analysed carefully and clear feedback should be provided to participants following the consultation.

Criterion seven: Capacity to consult
Officials running the consultations should seek guidance in how to run an effective consultation exercise and share what they have learned from the experience.

Further information on these consultation criteria is available at www.bis.gov.uk/bre.

If you have any queries about the manner in which this consultation has been carried out, please contact the Commission at the following address:

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2. Consultation responses: confidentiality and Freedom of Information

Freedom of Information Act 2000

The Freedom of Information Act 2000 gives the public a right of access to any information held by a public authority: in this case, the Commission. The right of access to information includes information provided in response to a consultation. The Commission will treat all responses as public documents in accordance with the Freedom of Information Act 2000 and may attribute comments and include a list of all respondents' names in any final report.

If you wish to submit a confidential response, you should clearly mark your submission as "confidential". The Commission cannot automatically consider as confidential information supplied to it by you in response to a consultation.

Please note that the Commission will disregard automatic confidentiality statements generated by an IT system.

THE NORTHERN IRELAND LAW COMMISSION

UNFITNESS TO PLEAD

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Criminal Justice Act (Northern Ireland) 1966 (c.20)
Criminal Justice (Northern Ireland) Order 1996 (SI 1996/3160 (N.I. 24))
Criminal Justice (Northern Ireland) Order 2008 (SI 2008/1216 (N.I. 1))
Juries (Northern Ireland) Order 1996 (SI 1996/1141 (N.I.6))
Justice Act (Northern Ireland) 2011 (c.24)
Lunacy (Ireland) Act 1821 (1 & 2 Geo. 4 c.33)
Mental Health Act (Northern Ireland) 1961 (c.15)
Mental Health (Northern Ireland) Order 1986 (SI 1986/595 (N.I. 4))
Northern Ireland Act 1998 (c.47)
Police and Criminal Evidence (Northern Ireland) Order 1989 (SI 1989/1341 (N.I. 2))

ENGLAND AND WALES

Coroners and Justice Act 2009 (c.25)
Criminal Appeal Act 1968 (c.19)
Criminal Justice Act 1972 (c.71)
Criminal Justice Act 2003 (c.44)
Criminal Lunatics Act 1800 (39 & 40 Geo. 3 c.94)
Criminal Procedure (Insanity) Act 1964 (c. 25)
Criminal Procedure (Insanity and Unfitness to Plead) Act 1991 (c.25)
Domestic Violence, Crime and Victims Act 2004 (c.28)
Homicide Act 1957 (c.11)
Mental Capacity Act 2005 (c.9)
Mental Health Act 1983 (c.20)
Offences Against the Person Act 1861 (c.100)
Police and Justice Act 2006 (c.48)
Powers of Criminal Courts (Sentencing) Act 2000 (c.6)
Sex Offenders Act 1997 (c.51)
Trial of Lunatics Act 1883 (46 & 47 Vict. c.38)
Youth Justice and Criminal Evidence Act 1999 (c.23)

SCOTLAND

Adults with Incapacity (Scotland) Act 2000 (asp 4)
Criminal Justice and Licensing (Scotland) Act 2010 (asp 13)
Criminal Procedure (Scotland) Act 1995 (c.46)

REPUBLIC OF IRELAND

Criminal Law (Insanity) Act 2006 (Number 11 of 2006)

NEW ZEALAND

Criminal Procedure (Mentally Impaired Persons) Act 2003 (2003 No. 115)

CANADA

Criminal Code (RSC 1985 Cc-46)

UNITED STATES OF AMERICA

California Penal Code
New York Criminal Procedure

AUSTRALIA

Crimes Act 1900 (Australian Capital Territory)
Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 (Victoria)
Criminal Code Act (Northern Territory)
Criminal Law Consolidation Act 1935 (South Australia)
Criminal Law (Mentally Impaired Accused) Act 1996 (Western Australia)
Mental Health Act 2000 (Queensland)
Mental Health (Forensic Provisions) Act 1990 (New South Wales)

GLOSSARY OF TERMS

Actus reus	The wrongful act or omission which comprises the physical element of a criminal offence.
Common law	Law established by judicial decisions.
Indictable offence	A criminal offence which is dealt with by the Crown Court.
Jurat	An elected judicial office in Jersey, responsible for ensuring law and justice is maintained.
Summary offence	A criminal offence which is dealt with by the Magistrates' Courts.
Mens rea	The mental element of a criminal offence: the mental state of the accused at the time of the offence.

FOREWORD

As Chairman of the Northern Ireland Law Commission ("*the Commission*"), it is my great pleasure to introduce this Consultation Paper to you.

The Commission is an independent statutory body, established and governed by Sections 50-52 of and Schedule 9 to the Justice (Northern Ireland) Act 2002 ("the 2002 Act"). The creation of the Commission is one of the significant reforms of the Northern Ireland legal system effected by the 2002 Act. By Section 50, the Commission is a body corporate, consisting of a Chairman and four Commissioners appointed by the Minister. Pursuant to Section 51 of the 2002 Act, the Commission is obliged to keep under review the law of Northern Ireland with a view to its systematic development and reform. Specifically, the methods prescribed for the performance of this overarching duty are codification, the elimination of anomalies, the repeal of unused legislation and the reduction of the number of separate legislative provisions. Section 51 further provides that the Commission should undertake the simplification and modernisation of the law of Northern Ireland.

Within the ambit of the broad statutory remit set out above, the Commission has certain specific statutory obligations. These are:

(a) To consider any proposals made for the reform of the law of Northern Ireland.

(b) To prepare and submit to the Minister, periodically, law reform programmes.

(c) To make recommendations to the Minister about law reform programmes and to pursue such programmes as are duly approved.

(d) Within the ambit of such programmes, to formulate, by means of draft legislation or otherwise, law reform proposals.

(e) Pursuant to any request of the Minister to prepare, periodically, comprehensive

programmes of consolidation and repeal of legislation.

(f) To provide advice and information (i) to Northern Ireland Departments and (ii) with the consent of the Department of Justice, to Departments of the Government of the United Kingdom and other authorities or bodies concerned with proposals for the reform or amendment of any branch of the law of Northern Ireland.

(g) To obtain such information as to the legal systems of such countries as appears to the Commission likely to facilitate the performance of its other duties.

The Commission is also obliged by statute to transmit to the Department:

(a) An Annual Report.

(b) Its law reform proposals, upon completion of the relevant project.

(c) Each law reform programme approved by the Minister.

All of these must be laid by Department before the Northern Ireland Assembly. Thereafter, the Commission must arrange for publication of these materials. Pursuant to Section 51(4) of the 2002 Act, in performing its duties, the Commission must consult the Law Commission of England & Wales, the Scottish Law Commission and the Law Reform Commission of the Republic of Ireland.

I return to the present Consultation Paper. The Commission has recently embarked on its Second Programme of Law Reform. One of the constituent elements of this programme is the project concerning the fitness of an accused person to plead in criminal trials. This project has been referred to the Commission by the Department of Justice. The Commission has duly accepted this

reference. The terms of the reference require the Commission to undertake the following:

- To review the current law in the Crown Court and the Magistrates' Courts (but not Youth Courts) in Northern Ireland in relation to unfitness to plead;

- To review the current operation of the *Pritchard* test, a common law test which sets criteria against which unfitness to plead can be assessed;

- To consider whether a test based on the mental capacity test which is contained in the Mental Capacity Act 2005 would be a better approach for assessing unfitness to plead or whether tests which exist in jurisdictions such as Scotland or Jersey would be better options for Northern Ireland;

- To consider whether restrictions in relation to the types of medical evidence that are currently sought to assist with the determination of unfitness to plead should be relaxed;

- To consider the current operation of hearings under the Article 49A of the Mental Health (Northern Ireland) Order 1986, which are designed to determine whether an unfit accused person has carried out the act or made the omission with which he or she has been charged.

A particular feature of this project is the interaction between certain members of society affected by mental health or learning disabilities and the criminal justice system. The subject of the fitness of an accused person to plead to the offence/s charged occupies an important position in the criminal justice system. If a determination of unfitness to plead is made by the court, a trial will not ensue. The rationale, at its simplest, is that a person lacking a rudimentary understanding of the nature and purpose of the criminal proceedings concerned is not considered a fit subject for prosecution and punishment. To prosecute and punish such a person is considered incompatible with the criminal justice system, for two basic reasons. The first is that the aims and objects of the criminal justice system are not furthered by prosecutions of this

kind. The second is that the accused person concerned may be unable to participate effectively in a trial, being deprived of the fundamental right to a fair trial in consequence.

The reach of this Consultation Paper is broad. It examines, *inter alia*, the origins and history of the current law; the underlying rationale; the legal tests which have been devised; Article 49A of the 1986 Order and the relevant case law; Article 6 of the European Convention on Human Rights; the law and practice in other jurisdictions; the role of expert evidence; joint trials and appeals; and so-called special measures.

This Consultation Paper is published in July 2012. Responses and representations from all quarters are strongly encouraged and will be most welcome. This is your opportunity to shape and influence the laws of Northern Ireland in this important sphere and I urge you not to forego it. The successful operation of the Commission is dependent upon effective and extensive engagement with society. This, in turn, enhances and fortifies the laws which govern us all, in a society governed by the rule of law. I urge all interested individuals, organisations, agencies and professions to respond accordingly.

The Honourable Mr Justice Bernard McCloskey
Chairman
Northern Ireland Law Commission

CHAPTER 1. INTRODUCTION

ORIGIN OF THE PROJECT

1.1 As part of the Northern Ireland Law Commission's Second Programme of Law Reform, the Department of Justice made a reference to the Northern Ireland Law Commission ("the Commission") which requested that the Commission considered the law relating to the unfitness of an accused person to plead in criminal proceedings in Northern Ireland. The reference asked the Commission to:

- Review the current law in the Crown Court and the Magistrates' Courts (but not Youth Courts) in Northern Ireland in relation to unfitness to plead;
- Review the current operation of the *Pritchard* test[1]: a common law test which sets criteria against which unfitness to plead can be assessed;
- To consider whether a test based on the mental capacity test which is contained in the Mental Capacity Act 2005 would be a better approach for assessing unfitness to plead or whether tests which exist in jurisdictions such as Scotland or Jersey would be better options for Northern Ireland;
- To consider whether restrictions in relation to the types of medical evidence that are currently sought to assist with the determination of unfitness to plead should be relaxed;
- To consider the current operation of the Article 49A hearing, the purpose of which is to determine whether an unfit accused person has carried out the act or made the omission with which he or she has been charged.

MENTAL HEALTH AND LEARNING DISABILITY IN THE CRIMINAL JUSTICE SYSTEM

1.2 Unfitness to plead is just one area of law where attempts are made to respond to the needs of individuals who are

[1] The *Pritchard* test is used to determine whether an individual is unfit to plead. It is discussed in more detail in chapter 2 of this consultation paper.

experiencing mental health or learning disabilities and who come into contact with the criminal justice system.

1.3 Unfitness to plead takes its place amongst other areas of law and practice which seek to recognise the specific needs of these individuals. For example, Code of Practice C[2] (Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers) made under Article 65 of the Police and Criminal Evidence (Northern Ireland) Order 1989 makes provision in relation to "mentally disordered[3] and otherwise mentally vulnerable[4]" persons who are detained in police stations in Northern Ireland. Code C includes provision for the use of appropriate adults to support "mentally vulnerable" individuals,[5] for risk assessments of detainees,[6] and for clinical treatment and attention of detainees.[7] Another example of practice within the criminal justice system which seeks to recognise the position of individuals who are living with mental illness or learning disability is found in the Public Prosecution Service Northern Ireland Code for Prosecutors.[8] This Code describes the Test for Prosecution which consists of two elements: an evidential test and a public interest test. As part of the public interest test, the Code states that one of

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[2] Currently under review – the consultation by the Department of Justice on an amended Code C concluded in March 2012. Annex E of Code C provides a summary of provisions which relate to individuals who are experiencing mental illness, learning disability or other capacity difficulties.

[3] The definition of "mental disorder" contained in the Mental Health (Northern Ireland) Order 1986 is adopted in this context.

[4] "Mentally vulnerable" is defined in paragraph 1G of Code C as a term which applies to any detainee who, because of their mental state or capacity, may not understand the significance of what is said, of questions or of their replies.

[5] Paragraph 1.7(b), paragraph 11.15 (interviews) and paragraph 16.1 (charging) of Code C.

[6] Paragraph 3.5A of Code C.

[7] See Part 9 of Code C.

[8] Available on www.ppsni.gov.uk. The Code is currently under revision. Criminal Justice Inspection Northern Ireland has made a number of recommendations in relation to responses to mental health in the criminal justice system, including recommending that the Code for Prosecutors should "devote more space to questions of fitness to plead and possible non-responsibility by virtue of mental incapacity or mental disorder" Criminal Justice Inspection Northern Ireland *Not a Marginal Issue: Mental health and the criminal justice system in Northern Ireland A follow-up review of inspection recommendations* (March 2012) at page 15. The revised Code will incorporate additional information about mental health issues with regards to victims, witnesses and accused persons.

the public interest considerations against prosecution is "where the defendant was at the time of the offence or trial suffering from significant mental or physical ill-health".[9] The Public Prosecution Service informs the Commission that it is currently working closely with partner agencies such as the Police Service of Northern Ireland and the Department of Justice in relation to enhanced information exchange between criminal justice organisations concerning individuals who are experiencing mental health issues. In relation to prisons in Northern Ireland, various schemes are in place to assist vulnerable prisoners, including the Safer Custody Strategy, Supporting Prisoners at Risk (SPAR) programme and the Vulnerable Prisoners Project.[10]

1.4 The effect of the law on unfitness to plead is not to remove from the criminal justice system every individual who may be experiencing difficulties in relation to his or her mental state. However, the law does play an important role in ensuring the removal (either permanently or temporarily) from the criminal process of individuals who are deemed by the court to be unsuited to the rigours of the criminal trial.

WHAT IS UNFITNESS TO PLEAD?

1.5 The law relating to unfitness to plead is concerned with the mental state of an accused person at the time of or during the course of his or her criminal trial. An accused person may be experiencing, for example, mental illness or learning disability to such a degree that the law recognises that he or she should not be subjected to a criminal trial. However, the origin of the law on unfitness to plead was not concerned with fairness to the accused: rather, the procedural formalities of the medieval court of law required a plea to be entered and the accused to consent to a trial by jury, failing which the trial could not proceed.[11]

1.6 Therefore, various practices arose to "encourage" accused persons to enter a plea. If a person did not offer a plea to

[9] See page 13 of the Code for Prosecutors.
[10] Northern Ireland Prison Service *Annual Report and Accounts 2010/2011* at pages 13 – 14 www.dojni.gov.uk.
[11] D Grubin 'What constitutes fitness to plead?' (1993) *Criminal Law Review* at page 749.

the court, he or she was given three warnings and then "confined to a narrow cell and starved until he either reconsidered his position or died".[12] This technique was known as "*prison forte et dure*". From 1406, the technique of "*peine forte et dure*" was developed, which required an accused, who was unable to communicate by speech, to be gradually crushed under increasingly heavy weights until he or she either entered a plea or died. The court's role was to decide whether the accused was "mute of malice, or by visitation of God".[13] Those who were considered to be "mute by visitation of God" were spared from being crushed to death and a plea of not guilty was entered on their behalf.[14]

1.7 By the time Sir Matthew Hale's work *The History of the Pleas of the Crown* was published in 1736, consideration had been given to the appropriateness of applying the criminal process to an individual who was unfit to plead by reason of "insanity":[15]

> If a man in his sound memory commits a capital offence, and before his arraignment becomes absolutely mad, he ought not by law to be arraigned during such his phrensy, but be remitted to prison until that incapacity be removed. The reason is, because he cannot advisedly plead to the indictment.[16]

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[12] D Grubin (see footnote above) at page 750.

[13] TP Rogers, NJ Blackwood, F Farnham, GJ Pickup and MJ *Watts* 'Fitness to Plead and competence to stand trial: a systematic review of the constructs and their application' *Journal of Psychiatry & Psychology* 19:4 576-596 at page 577.

[14] D Grubin, (see footnote 11) at page 750.

[15] See *R v Podola* [1960] 1 Q.B. 325 for a discussion in the judgment of Lord Parker CJ regarding the origins of the legal concept of "insanity": the common law approach was derived from a need to determine whether an accused person was "*in sana memoria*" meaning that the accused must be in good and sound memory in order to face trial.

[16] Sir Matthew Hale, *Historia Placitorum Coronae, The History of the Pleas of the Crown* (1736) Reprint Classical English Law Texts London Professional Books Ltd. (1971) at page 34 Vol 1.

DEVELOPMENT OF THE MODERN LAW ON UNFITNESS TO PLEAD

1.8 The development of the modern law on unfitness to plead in Northern Ireland owes more to the evolution of the concept in Ireland, rather than in England and Wales. The Criminal Lunatics Act 1800 is considered to be the first statutory intervention which sought to deal with individuals who were found to be "insane" at the time of indictment or at the time of their trial,[17] but this Act did not extend to Ireland.

1.9 In Ireland in the eighteenth century, specialised institutions for the care and treatment of the mentally ill were mostly absent. One asylum was founded in 1745 by Jonathan Swift, the Dean of St. Patrick's Cathedral in Dublin, but by 1800 it provided only 106 beds.[18] Asylum provision was piecemeal,[19] until the enactment of the Asylums for Lunatic Poor Act 1817 which provided for the establishment of a comprehensive network of district asylums throughout Ireland.[20] It is perhaps not altogether surprising that a statutory procedure for dealing with those individuals who have been found to be unfit to plead in Ireland was not made until 1821, by virtue of the Lunacy (Ireland) Act 1821. Section 17 of this Act made provision for individuals who were found to be "insane" upon indictment or during the trial to be ordered by the court to be "kept in strict custody, and be taken care of, until the Pleasure of the Lord Lieutenant, or other Chief Governor or Governors of Ireland… shall be known". This provision in the Lunacy (Ireland) Act 1821 was repealed by the Mental Health Act

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[17] Accused persons found to be "insane" at the time of indictment by a jury at arraignment or found to be "insane" during the trial were to be kept in custody until "His Majesty's Pleasure" was known. See Criminal Lunatics Act 1800 "An Act for the safe Custody of Insane Persons charged with Offences".

[18] R J McClelland, 'The madhouses and mad doctors of Ulster' *The Ulster Medical Journal* Volume 57 No. 2 101-120 at page 102.

[19] Poor-houses or work-houses provided accommodation for individuals experiencing mental illness or intellectual disability. See BD Kelly, 'Criminal Insanity in 19th century Ireland, Europe and the United States: Cases, contexts and controversies' (2009) 32 *International Journal or Law and Psychiatry* 362-368 at page 363.

[20] National asylum provision was limited to Dublin, Cork, Waterford and Limerick see R J McClelland, (see footnote 18) at page 104.

(Northern Ireland) 1961, and replaced by section 56(1) of that Act which made provision for a jury to make a finding that the accused had been found to be "insane" at the time of indictment or during the course of the trial, therefore preventing the trial proceeding. Section 3(2) of the Criminal Justice Act (Northern Ireland) 1966 amended section 56(1) of the Mental Health Act (Northern Ireland) 1961 to provide that a court could direct a finding of unfitness to plead if the jury finds that the accused is unfit to plead on indictment or during the course of the trial, introducing the words "unfit to plead" on to the statute book, but not affecting the operation of the provision. Section 56(3) of the Criminal Justice Act (Northern Ireland) 1966 provided that if a finding of unfitness was made, the court could order the accused to be admitted to hospital.

1.10 The Mental Health Act (Northern Ireland) 1961 was repealed by the Mental Health (Northern Ireland) Order 1986, which contains the current statutory provisions on the procedure to be followed when an individual is found to be unfit to plead in Northern Ireland. The provisions contained within the Mental Health (Northern Ireland) Order 1986 have been amended on a number of occasions, which are discussed in more detail in Chapters 2 and 3 of this consultation paper.

HOW UNFITNESS TO PLEAD DIFFERS FROM DEFENCE OF INSANITY

1.11 It is important to understand the difference between unfitness to plead and the defence of insanity. As seen from the brief history of the evolution of the concept of unfitness to plead discussed above, it can be confusing to understand that unfitness to plead and insanity are two distinct legal issues, as language has tended to be used inter-changeably in the past. However, there is an important distinction: both concepts concern the state of mind of the accused, but at different points in time. The defence of insanity requires consideration of the accused mental state at the time of committing the alleged offence, whereas unfitness to plead involves an examination of the accused's mental state at the time of the trial. Additionally, a person who is deemed to be unfit to plead will not be

required to be subjected to the rigours of a full criminal trial, but instead is currently subject to a special procedure under Article 49A of the Mental Health (Northern Ireland) Order 1986. The procedure, which in this consultation paper is referred to as a "Article 49A hearing", is designed to consider whether the accused person carried out the act or made the omission with which he or she was charged. In contrast, the defence of insanity is only available to the accused during the course of a full criminal trial.

RATE OF FINDINGS OF UNFITNESS TO PLEAD IN NORTHERN IRELAND

1.12 Unfitness to plead is an issue which arises very infrequently in trials in Northern Ireland. Statistics obtained from the Northern Ireland Courts and Tribunals Service show the following numbers of accused persons who were found to be unfit to plead in the Crown Court in Northern Ireland:

Crown Court

YEAR	NUMBER OF CASES WHERE ACCUSED PERSON WAS UNFIT TO PLEAD	OUTCOME
2001	1	Not available
2002	4	Not available
2003	5	Not available
2004	9	Not available
2005	4	Not available
2006	5	Not available
2007	2	1 accused person was unfit to plead, but he or she was found to have committed the act on one charge but acquitted on another. 1 accused person was unfit to plead, but he or she was

		found to have committed the act on all charges.
2008	2	1 accused person was acquitted (not guilty by direction). 1 accused person was unfit to plead, but he or she was found to commit the act on one charge but did not commit the act on 4 charges.
2009	4 (includes same person on 2 separate occasions).	1 accused person was unfit to plead, but he or she was not found to have committed the act charged. 1 accused person – all charges left on books. 1 accused person was found to be unfit to plead, but he or she was found to have committed the act on 6 charges but not to have committed the act on 1 charge. 1 accused person was unfit to plead, but he or she was found to have committed the acts on all charges.

2010	9	1 accused person was unfit to plead, but he or she was found to have committed the act on 2 charges and 2 charges were left on the books. 7 accused people were unfit to plead, but they were found to have committed the act on all charges. 1 accused person was unfit to plead, but he or she was found to have not committed the act on all charges.

1.13 Although these statistics demonstrate that determinations of unfitness to plead in Northern Ireland do not occur frequently, this area of the law is still important for a number of reasons.

RATIONALE FOR LAW ON UNFITNESS TO PLEAD

1.14 Although the law on unfitness to plead has evolved from the practical need for an individual to enter a plea in the medieval courts in England, the thinking on the need for such a concept has altered over time. In modern law, there appear to be two main arguments that justify the concept of unfitness to plead. First, if it is accepted that the purpose of the criminal trial is to hold an accused person accountable or answerable for the alleged wrongful conduct with which he or she has been charged[21] then it follows that there may be individuals who cannot be held to be accountable if they

[21] See RA Duff, *Answering for Crime; Responsibility and Liability in Criminal Law*, Oxford and Portland Oregon (2009) at page 37.

exhibit certain characteristics[22] which may operate to reduce or negate the culpability of the accused:[23]

> A person who lacks a rudimentary understanding of the nature and purpose of the proceedings against her is not a “fit” subject for criminal prosecution and punishment. To proceed against such a person offends the moral *dignity* of the process because it treats the defendant not as an accountable person, but as an object of the state’s effort to carry out its promises. The dignity rationale is implicated only in cases involving defendants who lack a meaningful moral understanding of wrongdoing and punishment, or the nature of a criminal prosecution.[24]

1.15 Second, the ability of the accused to be able to participate effectively in his or her own trial is a basis for the justification of the concept of unfitness to plead which has been given much consideration by the European Court of Human Rights. For example, in *Stanford v United Kingdom*[25] it was clearly stated that Article 6 of the European Convention on Human Rights (the right to a fair trial) guarantees the right of an accused person to participate effectively in his or her criminal trial. That right of effective participation was explored further in *T v United Kingdom*[26] and *V v United Kingdom.*[27] These cases are dealt with in detail in chapter 5 of this consultation paper, in the context of considering the interface between the use of

[22] This is by no means a modern idea: in ancient Greece it was recognised that certain characteristics in accused persons should make them less culpable before the law. In *Laws* by Plato, it was acknowledged that where the accused person was a “child, senile or proved to be insane” he or she should be responsible for no more than the payment of civil damages with all other penalties waived. If such an accused person killed someone, the punishment was living in exile for a year. See JM Cooper, DS Hutchinson, *Plato Complete Works*, Hackett Publishing (1997) at page 1522.

[23] A Ashworth, ‘Is the Criminal Law a lost cause?’ (2000) *Law Quarterly Review* at page 232.

[24] RJ Bonnie, ‘The Competence of Criminal Defendants: A Theoretical Reformulation’ (1992) Vol 10 291-316 *Behavioural Sciences and the Law* at page 295.

[25] App No 16757/90 at paragraph 22.

[26] App No 24724/94.

[27] App No 24888/94.

special measures to assist accused persons who may experience difficulties when giving evidence and the law relating to unfitness to plead.

STRUCTURE AND SUMMARY OF THE CONSULTATION PAPER

1.16 Chapter 2 of this consultation paper examines the common law test which is contained in *R v Pritchard*.[28] This test sets out a number of criteria against which an accused person must be assessed in order to determine whether or not he or she is unfit to plead. Criticisms of the *Pritchard* test are explored and alternative approaches are considered, including approaches which are taken in other jurisdictions, such as Jersey and Scotland. Consultees are asked to consider a number of questions, namely:

- **The Commission considers that it may be timely to revisit the *Pritchard* test and examine alternative models. Do consultees agree?**
- **The Commission believes that, in relation to a test for unfitness to plead which is based on the mental capacity test which is contained in the Mental Capacity Act 2005, a "disaggregated" approach is neither workable or desirable. An approach which looks at the mental capacity of the accused in relation to a set of decisions that the accused is required to make during the trial is a more desirable option. Do consultees agree?**
- **The Commission provisionally considers that it finds the proportionality test to be unworkable, however, the views of consultees on this point will be particularly welcomed.**
- **Consultees are invited to consider the Commission's suggested approach of incorporating a mental capacity test element into a test for determining unfitness to plead. In addition, consultees are invited to comment on the approach proposed by the Law Commission of England and Wales. If a test is adopted which is based on the mental capacity approach, the views of consultees are also welcomed in relation to the types**

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[28] (1836) 7 C & P 303.

of decisions that should be relevant to assessing the unfitness to plead of an accused. If consultees do not consider that an approach which is based on a mental capacity test is desirable, their views are sought in relation to alternative approaches taken in different jurisdictions.

- **The Commission provisionally considers that any test for unfitness to plead which is based on the decision making ability of the accused which requires the accused to demonstrate that he or she can make decisions that are in his or her best interests is a step too far. Do consultees agree?**
- **The Commission considers that if an accused has made an unwise or irrational decision, then, as in civil proceedings, that unwise or irrational decision can prompt an inquiry into his or her fitness. This seems to the Commission to be a valuable protection for the accused and may be helpful to the court and legal representatives in recognising that the accused may be experiencing difficulties. Do consultees agree?**

1.17 Chapter 3 of this consultation paper looks at the court procedure contained in Article 49A of the Mental Health (Northern Ireland) Order 1986. This procedure takes place after the court determines that the accused is unfit to plead on the basis of the application of the *Pritchard* test. The procedure is designed to determine whether or not the accused carried out the act or made the omission with which he or she has been charged. The chapter examines criticisms of the existing procedure and explores various options for its reform, drawing on the approaches taken in a number of jurisdictions. Consultees are asked to consider a number of questions, namely:

- **The Commisson acknowledges that other jurisdictions have incorporated the *mens rea* of the offence into unfitness to plead proceedings, but it has not reached any provisional conclusions in relation to the issue of the Article 49A hearing process including consideration of the *mens rea* of the offence. There appears to be both benefits and detriments in relation to adopting this approach. The Commission therefore welcomes the views of consultees on this issue.**

- **The Commission seeks the views of consultees in relation to continuing to require that the Article 49A hearing process focuses only on the conduct elements of the offence and excludes mental elements. The Commission is particularly interested in hearing the views of consultees in relation to the equality implications of this decision under section 75 of the Northern Ireland Act 1998.**
- **The Commission would be interested in hearing the views of consultees in relation to the approaches taken by Western Australia, Queensland and Canada, particularly whether it is considered that there is merit in exploring whether a specialist court could have a role in determining issues of unfitness to plead, or whether current arrangements already provide access to sufficient expertise.**
- **The Commission seeks the views of consultees in relation to the best methods of ensuring that the accused is adequately supported during the Article 49A hearing, whether that may be through legal representation or whether further assistance, such as the use of an intermediary, for example, would be beneficial.**

1.18 Chapter 4 considers a number of issues which require consideration when examining the law relating to unfitness to plead. First, the remittal for trial of a person who has previously been determined to be unfit by a court is examined. Second, appeals processes against a finding of unfitness to plead and against a finding that an unfit person has committed the act or made the omission with which he or she was charged are explored. Third, difficulties that have arisen with the application of unfitness to plead in the context of joint trials are discussed. Finally, consultees are asked to consider issues in relation to remand to hospital for the assessment of the accused. Consultees are asked to consider a number of questions, namely:

- **Rather than having a statutory test which links remittal to the recovery of the accused, perhaps it is desirable to include another element into the test which requires that the interests of justice be considered when making decisions about remitting the accused for trial.**

Consultees are asked to consider this view and provide their comments.

- **Consultees are asked to consider whether an amendment should be made to the Criminal Appeal (Northern Ireland) Act 1980 to allow for the Court of Appeal to order a re-hearing of the issue of whether the accused did the act or made the omission with which he or she was charged, or whether the current position is adequate.**
- **The Commission would be interested in the views of consultees in relation to whether it is considered that the current law in Northern Ireland is adequate or whether consideration should be given to requiring that in joint trials, fit and unfit accused persons should be dealt with separately.**
- **Consultees are asked to provide their views on the current law relating to remand to hospital for reports in order to assess an accused's mental condition. They are specifically asked to consider whether the current law provides enough protection to the accused in these circumstances.**

1.19 Chapter 5 contains a discussion of matters which are related to the main issues raised in the consideration of unfitness to plead: namely the application of "unfitness to plead" in Magistrates' Courts in Northern Ireland; and the interface between the use of special measures for accused persons who may experience difficulties when giving evidence and the law on unfitness to plead. Additionally, in this chapter, the current rules relating to the evidence which is required to inform the court whilst it makes a determination of unfitness to plead are examined. Consultees are asked to consider a number of questions, namely:

- **Consultees are asked to consider how the issue of unfitness to plead is currently dealt with the Magistrates' Court, in light of the criticisms outlined in chapter 5.**
- **Do consultees agree that a lack of a test in the Magistrates' Court, such as the one contained in *R v Pritchard*, offers adequate protection to the accused.**

- **The Commission seeks the views of consultees in relation to whether a process, such as the one contained in Article 49A of the Mental Health (Northern Ireland) Order 1986 should be adopted in the context of the Magistrates' Court.**
- **The Commission would be interested to hear whether consultees are supportive of the approach that special measures should only be used once the issue of unfitness to plead has been considered and a finding of unfitness determined. Alternatively, consultees are asked to consider whether any test for unfitness should include a requirement to consider whether the use of special measures would enable an accused person to be determined as fit to plead.**
- **Do consultees consider that when determining whether an individual is unfit to plead, the court should have the opportunity to consider evidence from experts who are not medical practitioners, in addition to the expert evidence currently required by statute.**

1.20 Chapter 6 contains an equality screening exercise which the Commission has carried out in order to meet its obligations as a public body under section 75 of the Northern Ireland Act 1998.

1.21 Consultees should note that throughout this consultation paper, the Commission has endeavoured to be consistent with language. However, the area of unfitness to plead tends towards inconsistency in the use of language. For example, the case-law which contains the criteria for unfitness against which the accused is assessed tends to refer to "unfitness to plead", whereas the Mental Health (Northern Ireland) Order 1986, which makes provision for the procedure to be followed upon a finding of unfitness, refers to "unfitness to be tried". This consultation paper has used the term "unfitness to plead" while discussing the subject, but where a case has used terms such as "unfit to stand trial" or "unfit to be tried", this terminology is used in order to reflect the wording used in the judgment. In relation to other jurisdictions, "unfitness to plead" is not necessarily the terminology adopted in either statute or case-law. The Commission has therefore referred to the law in the terms adopted in the particular jurisdiction.

CHAPTER 2. THE CURRENT LAW

INTRODUCTION

2.1 Unfitness to plead is an area of law which is currently governed by both the common law and statute. The substantive law which sets out the criteria which an individual has to satisfy before being determined to be unfit to plead is found in common law and has no statutory basis. The law in relation to the procedures which apply when an individual's fitness to plead is being assessed and the process which takes place after a finding of unfitness to plead, which determines whether an individual has carried out the act or made the omission which is the subject of the criminal offence, are found in statute: Part III of the Mental Health (Northern Ireland) Order 1986.

2.2 This chapter of the consultation paper examines the evolution of the substantive law in relation to the criteria for determining unfitness to plead and considers the schemes which exist on other jurisdictions. Chapter 3 considers the current statutory regime in relation to the procedural aspects of the law.

THE SUBSTANTIVE LAW - THE COMMON LAW

2.3 The test of unfitness to plead has its origins in the cases of *R v Dyson*[29] and *R v Pritchard*[30]*.* In *R v Pritchard*, which was a case involving an accused person who was deaf and who could not communicate by speech, the criteria for assessing unfitness to plead were set out by Alderson B as follows:

> There are three points to be inquired into. First, whether the prisoner is mute of malice or not; secondly, whether he can plead to the indictment or not; thirdly, whether he is of sufficient intellect to

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[29] (1831) 7 C & P 305 (n). In this case Esther Dyson was convicted for the murder of her illegitimate child. She was deaf and unable to communicate by speech and although she pleaded "not guilty" through an interpreter, using hand gestures, she was found to be insane and detained indefinitely.

[30] (1836) 7 C & P 303.

comprehend the course of proceedings on the trial so as to make a proper defence – to know that he might challenge any of you [the jury] to whom he might object – and to comprehend the details of the evidence, which in a case of this nature must constitute a minute investigation. Upon this issue, therefore, if you [the jury] think that there is no certain mode of communicating the details of the trial to the prisoner, so that he can clearly understand them, and be able properly to make his defence to the charge; you [the jury] ought to find that he is not of sane mind. It is not enough, that he may have a general capacity of communicating on ordinary matters.[31]

2.4 *R v Pritchard* was primarily concerned with an individual who had hearing and speech impairments, which back in 1831, appeared, unfairly, to be interpreted as implying that the individual had issues with intellectual capacity as well. The case of *R v Davies*[32] appears[33] to be the first occasion on which the issue of unfitness to plead was considered in relation to an individual who was experiencing a psychotic illness. Davies was an elderly man who had been charged with murder, who when asked to enter a plea, stood silent and then answered in a confused manner. The jury was asked to consider whether Davies was "mad" and Williams J suggested that the jury should make that decision based on the prisoner's appearance and behaviour. Unlike in *Pritchard*, the jury was not asked to consider whether Davies had "sufficient understanding" to enter a plea, but instead whether his "madness" made him incapable of properly instructing counsel.[34] This case resulted in another criterion being added to the *Pritchard* test: the defendant must be capable of properly instructing his counsel for the purpose of his defence.[35]

[31] At page 304.
[32] (1853) CLC 326.
[33] See TP Rodgers, NJ Blackwood, F Farnham, GJ Pickup & MJ Watts, (see footnote 13) at page 578.
[34] D Grubin, (see footnote 11) at page 753.
[35] Grubin notes that it is unsurprising that reference to the ability to instruct counsel was not mentioned in *Dyson* or *Prichard* as access to counsel did not become widely available until later in the 19th century. See D Grubin, (see footnote 11) at page 753.

2.5 The approach taken in *R v Pritchard* as revised by *R v Davies*, known as the *Pritchard* test or the *Pritchard* criteria, has been adopted in a number of subsequent cases such as *R v Berry*[36] and *R v The Governor of His Majesty's Prison at Stafford*.[37] In *R v Podola*[38] the above passage from *R v Pritchard* was approved by the Court of Criminal Appeal. In his judgment, Lord Parker C.J. took the common law slightly further by providing an interpretation of Alderson B's judgment in *R v Pritchard*:

> So far as "make a proper defence" is concerned, it is important to note that the words do not stand alone, but form part of a sentence the whole of which is "whether he is of sufficient intellect to comprehend the course of proceedings on the trial, so as to make a proper defence" In other words, this passage itself defines what Alderson B meant by "make a proper defence". As to the word "comprehend", we do not think that this word goes further in meaning than the word "understand". In our judgment the direction given by Alderson B is not intended to cover and does not cover a case where the prisoner can plead to the indictment and has the physical and mental capacity to know that he has the has the right of challenge and to understand the case as it proceeds.[39]

2.6 The *Pritchard* test was again confirmed as the appropriate approach to determining unfitness to plead in *R v Robertson.*[40] In that case, it was found that the fact that an accused person was unable to make decisions in his or her best interests was not sufficient to lead to a determination that the person in question was unfit to be tried. The court held that it was improper for a jury to be directed that the issue for it to consider was whether the accused is able to "properly" instruct counsel or to give "proper" evidence. In *R v Berry,*[41] the cases of *R v Pritchard* and *R v Robertson*

[36] (1875-76) LR 1 QBD 447.
[37] [1909] 2 KB 81.
[38] [1960] 1 QB 325.
[39] At page 354.
[40] (1968) 52 Cr App R 690.
[41] (1978) 66 Cr App R 156.

were again followed. In this case, the court considered that "a high degree of abnormality does not mean that [the accused] was incapable of following a trial or giving evidence or instructing counsel".[42]

2.7 The *Pritchard* test has evolved further in more recent years, most notably as a result of the judgment of the Court of Appeal in *R v John M.*[43] In this case, the accused was alleged to have committed a number of sexual offences against the grand-daughter of his partner over a period of years between 1998 and 2000. The issue of the accused's unfitness to plead was raised by the defence as he suffered from an impairment of his short term memory, a condition referred to as anterograde amnesia. This condition, the defence argued, rendered the accused incapable of following the proceedings and giving evidence in his own defence; he was therefore unfit to stand trial. The prosecution did not accept that the anterograde amnesia resulted in the accused being unfit to stand trial as he had been able to demonstrate good recollection of events in relation to the charges against him whilst he was being interviewed by police, psychiatrists and psychologists before the trial. Expert evidence which was made available to the court was not in accord. The jury[44] found that the accused was fit to plead and stand trial. He was duly convicted of the charges against him and sentenced to eight years' imprisonment.

2.8 The accused appealed to the Court of Appeal on the basis that the trial judge had misdirected the jury in relation to the *Pritchard* test, setting the threshold of the test too low and therefore making it too easy for an accused to be deemed fit to plead.

2.9 In his direction to the jury, the trial judge indicated that an accused must be capable of doing six tasks if he is to be found to be fit to stand trial. It was sufficient, he said, for the defence, on the balance of probabilities, to persuade the

[42] At page 158.
[43] [2003] EWCA Crim 3452.
[44] This case predates the changes made in the law, which in Northern Ireland were effected by section 23(2) of the Domestic Violence, Crime and Victims Act 2004. See below for further discussion.

jury that any one of the six tasks was beyond the abilities of the accused. These six tasks were:

1. Understanding the charges;
2. Deciding whether to plead guilty or not;
3. Exercising his right to challenge jurors;
4. Instructing solicitors and counsel;
5. Following the course of proceedings; and
6. Giving evidence in his own defence.[45]

2.10 The trial judge provided the jury with written explanations of each of the six tasks, although not all of these explanations were examined in the Court of Appeal judgment. In relation to task 4, "instructing solicitors and counsel", the trial judge stated:

> This means that the defendant must be able to convey intelligibly to his lawyers the case which he wishes them to advance on his behalf and the matters which he wishes them to put forward in his defence. It involves being able (a) to understand the lawyers' questions, (b) to apply his mind to answering them, and (c) to convey intelligibly to his lawyers the answers which he wishes to give. It is not necessary that his instructions should be plausible or believable or reliable, nor is it necessary that he should be able to see that they are implausible, or unbelievable or unreliable. Many defendants put forward cases and explanations which are implausible, unbelievable or unreliable. The whole purpose of the trial process is to determine what parts of the evidence are unreliable and what parts are not. This is what the jury is there for.[46]

2.11 Where task 5, "following the course of proceedings", was concerned, the trial judge provided the jury with the following direction:

[45] At paragraph 20 of the judgment.
[46] At paragraph 21 of the judgment.

> This means that the defendant must be able (a) to understand what is said by the witness and by counsel in their speeches to the jury and (b) to communicate intelligibly to his lawyers any comment which he may wish to make on anything that is said by the witnesses or counsel. Few defendants will be able to remember at the end of a court session all the points that may have occurred to them about what has been said during that session. It is, therefore, quite normal for the defendant to be provided with pencil and paper so that he can jot down notes and pass them to his lawyers either as and when he writes them, or at the end of the session. (Lawyers normally prefer not to be bombarded with too many notes while they are trying to concentrate on the evidence). There is also no reason why the defendant's solicitors' representative should not be permitted to sit beside him in court to help with the note taking process…… It is not necessary that the defendant's comments on the evidence and counsel's speeches should be valid or helpful to his lawyers or helpful to his case. It often happens that a defendant fails to see what is or is not a good point to make in his defence. The important thing is that he should be able to make whatever comments he wishes.[47]

2.12 In relation to task 6, "giving evidence in his own defence", the trial judge's directions contained the following:

> This means that the defendant must be able (a) to understand the questions he is asked in the witness box, (b) to apply his mind to answering them, and (c) to convey intelligibly to the jury the answers which he wishes to give. It is not necessary that his answers should be plausible or believable or reliable. Nor is it necessary that he should be able to see that they are implausible or unbelievable or unreliable. Many defendants and other witnesses give evidence which is either in whole or in parts implausible, unbelievable or unreliable. The whole

[47] See paragraphs 22 and 23 of the judgment.

> purpose of the trial process is to determine what parts of the evidence are reliable and what parts are not. That is what the jury is there for. Nor is it necessary that the defendant should be able to remember all or any of the matters which give rise to the charges against him. He is entitled to say that he has no recollection of those events, or indeed of anything that happened during the relevant period.[48]

2.13 The Court of Appeal was required to consider whether the trial judge's directions were indeed deficient in light of the existing case law in *R v Pritchard*, *R v Podola*, *R v Robinson*, and *R v Berry.* It was held that there was no such inadequacy, Lord Justice Keene stating that:

> When we consider the judge's directions in the present case in the light of those authorities we can find no deficiency in them. Indeed, this Court regards them as admirable directions. They do not set the test of fitness to plead at too low a level.[49]

THE *PRITCHARD* TEST

2.14 It has been suggested by a number of commentators that the *Pritchard* test is inadequate for a number of reasons. It has been said that it is based on an unduly narrow test of a defendant's intellectual abilities[50] which was never designed with the needs of individuals who may be experiencing psychotic symptoms in mind.[51] It has also been suggested that this "functional" test of capacity, where the focus is on the interaction between a person's abilities and the demands of a particular situation or task, is not assisted by the courts' reticence[52] to consider whether the accused can make decisions which are in his best

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[48] See paragraph 24 of the judgment.
[49] See paragraph 31 of the judgment.
[50] RD Mackay, BJ Mitchell and L Howe, 'A Continued Upturn in Unfitness to Plead – More Disability in Relation to Trial under the 1991 Act' (2007) *Criminal Law Review* 530 at pages 535 – 536.
[51] WJ Brookbanks and RD Mackay, 'Decisional Competence and 'Best Interests': Establishing the Threshold for Fitness to Stand Trial' (2010) Vol 12 No 2. *Otago Law Review* at page 271. Also, see TP Rogers, NJ Blackwood, F Farnham, GJ Pickup and MJ Watts, (see footnote 13) at page 578.
[52] See, for example, *R v Robertson* [1968] 3 ALL ER 557.

interests.[53] It has been argued that if an unfitness to plead test was to be reformulated, a wide range of abilities could be considered of importance, such as comprehension, reasoning ability, consistency, memory, concentration and attention, and suggestibility.[54] In light of these criticisms, it has been suggested that defendants would be better served by having a test such as the one set out in the Mental Capacity Act 2005 applied to assess their capacity to make decisions in relation to their trial.[55] This last issue is one which the Department of Justice has specifically requested the Commission to consider as part of the current reference.

2.15 It is important, therefore, to deal with the criticisms of the *Pritchard* test. There are three main issues to be considered which will be dealt with in this chapter of the consultation paper. First, whether the *Pritchard* test is too focused on the intellectual ability of the defendant; second, whether the *Pritchard* test should be replaced with a test which resembles the one set out in the Mental Capacity Act 2005; and third, whether a test to determine unfitness to plead should contain reference to the defendant being able to make rational decisions during the trial.

Intellectual ability

2.16 As already discussed above, the common law test for unfitness to plead has its origins in the cases of *R v Dyson* and *R v Pritchard.* Both these cases involved defendants who were deaf and could not communicate by speech. It seems, therefore, that the primary issue which the courts were concerned with was sensory impairment: it is debatable whether the individuals concerned were living with a learning disability in addition to their physical impairments. Certainly, in *R v Pritchard*, the defendant could read, write and gesture that he was not guilty.[56] In 1836, the ability to read and write was not universally

[53] WJ Brookbanks and RD Mackay, (see footnote 51) at page 266.
[54] TP Rogers, NJ Blackwood, F Farnham, GJ Pickup and MJ Watts, (see footnote 13) at page 581.
[55] TP Rogers, NJ Blackwood, F Farnham, GJ Pickup and MJ Watts, (see footnote 13) at page 584.
[56] At page 304 of the judgment.

enjoyed, so it was probably quite significant that Pritchard had these skills, since education up until the age of ten did not become compulsory in England until 1880.[57] However, the test in *Pritchard* specifically requires the defendant to be assessed as to whether he is of sufficient intellect to comprehend the course of proceedings on the trial so as to make a proper defence. It is this aspect of the test which has caused criticism of the *Pritchard* test in some quarters.[58] This may be despite the application of the test to defendants who are experiencing psychotic illness[59] and the evolution of the *Pritchard* test in the case of *R v John (M).*[60]

2.17 It is therefore for the Commission and consultees to consider whether the *Pritchard* test as it currently stands is adequate. The explanations of the criteria by the trial judge in *R v John (M)*, which were soundly commended by the Court of Appeal, must therefore be considered, along with possible alternatives for testing the unfitness of defendants to plead.

*A*nalysis of *R v John (M)*

2.18 Looking critically at the explanations in *R v John (M)* of the individual criteria that make up the *Pritchard* test, it appears that a slightly different approach is taken in relation to each criterion. For example, in respect of "instructing solicitors and counsel", the explanation determines that a defendant must be able to understand the lawyers' questions, apply his or her mind to answering them, and convey "intelligibly" to his lawyers the answers he or she wishes to give.[61] In respect of "following the course of the proceedings", the defendant must be able to understand what is said by witnesses and counsel and must communicate intelligibly

[57] B Simon, *Does Education Matter?* Lawrence and Wishart (London) 1985 at page 34.
[58] See for example WJ Brookbanks and RD Mackay, (see footnote 51) at page 282: "case law on fitness to plead limits the operation of the rules to people who lack the necessary intellectual or communication abilities, while excluding those who, while reasonably intelligent or articulate, are so deluded that they cannot do themselves justice".
[59] *R v Davies*, see paragraph 2.4.
[60] See paragraphs 2.7 – 2.13.
[61] At paragraph 21 of the judgment.

to his lawyers any comments that he may have in relation to the evidence. Memory is dealt with in this explanation: it is acknowledged that it is difficult for defendants to remember every point which they may have wished to raise during the evidence and that it is quite normal for them to make notes or be assisted by someone else to make notes.[62] There is, however, no specific mention of the defendant in these circumstances *applying his mind* to the evidence, though arguably that may be implied if the explanation expects the defendant to produce comments on the evidence. Regarding the explanation given by the trial judge in respect of the criteria which relates to "giving evidence in his own defence" the defendant must be able to understand the questions he or she is asked in the witness box, apply his or her mind to them and convey intelligibly to the jury the answers that he or she wishes to give.[63] The Court of Appeal judgment is silent in relation to providing explanations of the other criteria contained in the *Pritchard* test, namely understanding the charges, deciding whether to plead guilty or not and exercising his or her right to challenge jurors, although in *R v Pritchard* itself, the judgment envisaged that challenging jurors was linked to the defendant's intellect.[64]

2.19 Two recent Court of Appeal cases highlight another difficulty with the modern interpretation of the *Pritchard* test. *R v Moyle*[65] and *R v Diamond*[66] both concern accused persons whose cognitive abilities were unimpaired, but whose mental illness caused them to experience delusions. The outcomes of these cases which are discussed below have been subject to criticism.[67]

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[62] See paragraph 22 of the judgment.
[63] See paragraph 24 of the judgment.
[64] See *R v Pritchard* at page 304.
[65] [2008] EWCA Crim 3059.
[66] [2008] EWCA Crim 923.
[67] For example, in its consultation paper *Unfitness to Plead* (2010) Consultation Paper No 197, the Law Commission of England and Wales contends that the appellants' delusional states may well be such to impair their capacity to make decisions during the trial, "making a mockery of the concept of the appellants' participation in their trials". See paragraph 2.86. Also, see H Howard, 'Unfitness to Plead and the Vulnerable Defendant: An Examination of the Law Commission's Proposals for a New Capacity Test' (2011) 75 194-203 *The Journal of Criminal Law* at page 197 in which the decision of the Court of Appeal in *Moyle* that

R v Moyle

2.20 Peter Geoffrey Moyle was convicted of murder in November 2004, having been found to have killed David Brown by knocking him to the ground outside a public house and repeatedly kicking him. The deceased, who was sixty seven years of age, died of massive head injuries three weeks after the attack. Moyle appealed the conviction, claiming that he was unfit to plead at the time of his trial.

2.21 In support of his assertion of unfitness to plead, the appellant obtained psychiatric opinions in relation to his mental health. One of these opinions was from a consultant forensic psychiatrist who had been the appellant's Responsible Medical Officer when the appellant had been transferred from prison to hospital after his mental state deteriorated to such an extent that he required hospital care.[68]

2.22 The consultant and a number of other consultants were of the opinion that the appellant suffered from paranoid schizophrenia and was delusional. During the trial, the appellant confided in the consultant psychiatrist that he felt that if he was to disclose his symptoms, he would then be convicted of witchcraft and executed.

2.23 The Court of Appeal did not consider that the appellant had been unfit to plead. It was noted that his legal team and the judge found no reason to query the appellant's fitness to plead and he gave evidence in such a way that did not create doubts about his ability to understand questions and to give answers. The Court considered that the appellant showed a tactical awareness "difficult to reconcile with unfitness to plead as understood in the authorities"[69] whilst giving evidence, giving reasons for inconsistencies in his story. The Court also considered that even if the appellant failed to act in his best interests at times during the trial,

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delusions do not necessarily require a finding that a person is unable to give instructions to counsel and to understand proceedings is described as "absurd".

[68] Under sections 47 and 49 of the Mental Health Act 1983.

[69] At paragraph 39 of the judgment.

that fact did not create or contribute to a finding of unfitness to plead. The Court of Appeal concluded that:

> We do not accept that… the appellant's medical condition so impaired his ability to communicate with his legal advisers or understand proceedings that he was unfit to plead….The appellant had serious health problems which affected his attitude to other people and his behaviour generally. They could lead to his having been distracted during the trial. However, analysis of his conduct at the time of the trial does not, read with the medical evidence, demonstrate that he was unfit to plead, as defined in law. He was able to instruct his lawyers and to understand proceedings and give evidence, notwithstanding his delusions. Our conclusion is that the appellant was fit to plead.[70]

R v Diamond

2.24 This case involved the murder of a seventeen year old, whose body had been dismembered and placed in a hotel bin. Forensic tests carried out at the appellant's flat determined that the deceased's blood was present in the flat and in the communal bathroom. The appellant had a long history of psychiatric problems: six months before the killing whilst in custody for another offence, he had been diagnosed as having a personality disorder which amounted to a psychopathic disorder, but he was not diagnosed as having a mental illness. At trial, the appellant instructed his legal team that he wished to plead not guilty and he refused to undergo assessment to see whether a defence of diminished responsibility was available to him. He was duly convicted of murder and was later diagnosed as having paranoid schizophrenia. After an unsuccessful appeal, he applied to the Criminal Cases Review Commission in 2005. His case was referred to the Court of Appeal on the basis that he had admitted the killing; there was strong evidence that his responsibility for the killing was substantially impaired by his abnormality of mind; that his mental capacity was significantly impaired by his mental

[70] At paragraph 40 of the judgment.

illness at the time he gave his instructions to his defence team; and that the court should substitute a verdict of manslaughter for that of murder.

2.25 Lord Justice Thomas, giving judgment of the Court of Appeal, made a number of observations about the issue of whether the appellant had been fit to plead at the time of the trial. The Court particularly considered the scenario where an accused person was fit to plead, but lacked the capability to give instructions to his or her legal team in relation to running a defence of diminished responsibility. The Court of Appeal considered that the case-law concerning unfitness to plead was consistent, quoting the cases of *R v Berry,*[71] *R v Robertson*[72] and *R v John (M)*[73] as examples. In all these cases, despite delusional thinking or memory problems, the accused person should be deemed fit to plead if he or she satisfied the test in *Pritchard*.[74] The Court of Appeal did, however, recognise that a gap may exist in the current law:

> On the established (*Pritchard*) test, a defendant is fit to plead in cases where his mental condition may well enable him to advance successfully the defence of diminished responsibility, yet his mental condition is such that it may also prevent rational or sensible decision-making as to the conduct of his defence. Once it is concluded that the defendant is fit to plead, although it might be apparent to everyone else that there is an issue as to whether his decision-making is materially affected by his mental condition, he is entitled to refuse to have his mental condition assessed.[75]

THE COMMISSION'S PROVISIONAL VIEW

2.26 The Commission considers that although the original *Pritchard* test has evolved as a result of the interpretation contained in *John (M)*, there are aspects of the test which

[71] (1978) 66 Cr App Rep 156.
[72] (1968) 52 Cr App Rep 690.
[73] [2003] EWCA Crim 3452.
[74] At paragraph 44 of the judgment.
[75] At paragraph 46 of the judgment.

may be improved upon. It is not helpful that some of the explanations for the separate criteria in the *Pritchard* test as interpreted in *John (M)* are inconsistent or that we simply have scant guidance for some of the criteria. The decisions in *R v Moyle* and *R v Diamond* perhaps suggest that the *Pritchard* test is problematic if it is being applied to individuals who are experiencing mental illness with a delusional aspect. Although not every person who is experiencing delusions will be unfit to plead, arguably, those who are experiencing delusions which interfere with the ability to participate effectively in their trial because, for example, the delusions are interfering with the individual's ability to instruct counsel, should be capable of being deemed unfit to plead. **The Commission considers, therefore, that it may be timely to revisit the *Pritchard* test and examine alternative models. Do consultees agree?**

MENTAL CAPACITY

2.27 The Department of Justice has specifically requested in its reference to the Commission that consideration is given to replacing the *Pritchard* test with one which is based on the mental capacity test contained in the Mental Capacity Act 2005. This approach has been consulted upon by the Law Commission of England and Wales in 2010.[76] It is also an approach which has received support from a number of sources. For example, in a paper for the *Otago Law Review*, Brookbanks and MacKay report that:

> Scott-Moncrieff and Vassall-Adams argue that the failure by the English Parliament to apply tests of capacity in the Mental Capacity Act 2005 to assessments of fitness to stand trial, strains compatibility with the European Convention on Human Rights and has exposed a "yawning gap" between the outmoded test for unfitness and current medical understanding and legal practice in the field of incapacity.[77]

[76] See footnote 67.
[77] WJ Brookbanks and RD Mackay, (see footnote 51) at page 282, quoting L Scott-Moncrieff and G Vassall-Adams, 'Yawning Gap' (2006) *Counsel* 14 at page 15.

2.28 The issue of whether a mental capacity test such as the one contained in the Mental Capacity Act 2005 is appropriate for adoption in the criminal context of unfitness to plead is a timely one. The need for new mental capacity legislation along with the reform of existing mental health legislation is currently being considered in Northern Ireland, following the recommendations of the Independent Bamford Review of Mental Health and Learning Disability ("the Bamford Review") which commenced in 2002. The Bamford Review produced a series of ten reports between June 2005 and August 2007, which together represented recommendations for the radical reform and modernisation of mental health and learning disability law, the introduction of mental capacity legislation and related policy and services. The Northern Ireland Executive has accepted the bulk of the recommendations[78] and the Department for Health, Social Services and Public Safety ("DHSSPS") issued an Action Plan for the implementation of the main service proposals in October 2009.[79] In addition, the Minister of Health, Social Services and Public Safety has agreed to bring forward a single piece of legislation which will introduce, for the first time, mental capacity legislation which will empower a person with capacity to make his or her own decisions regarding treatment, care, welfare, finances and assets and provide for mechanisms in relation to substitute decision-making for individuals who lack capacity to make decisions for themselves. Furthermore, once enacted, the legislation will include provisions relating to all health interventions (including physical and mental health). The legislation will not only look at mental capacity in the civil context, but will also consider how the Bamford recommendations affect those individuals who are involved in the criminal justice system. It is for this reason that the issue of unfitness to plead was referred to the Commission as the Department of Justice wanted the issue to be reviewed, not just generally, but specifically in light of the work being carried out in this area by DHSSPS.

[78] DHSSPS, *Delivering the Bamford Vision* (June 2008).
[79] DHSSPS, *Delivering the Bamford Vision – the response of the Northern Ireland Executive to the Bamford Review of Mental Health and Learning Disability – Action Plan 2009 – 2011* (October 2009).

The Mental Capacity test

2.29 The Mental Capacity Act 2005 was enacted following recommendations that were made by the Law Commission of England and Wales in its *Report on Mental Incapacity*.[80] The intention of the Act is to provide a legislative framework to ensure that decisions and actions can be taken on behalf of people who lack the capacity to make decisions or take actions for themselves. A Code of Practice accompanies the Mental Capacity Act 2005 which offers detailed guidance on how the Mental Capacity Act 2005 is to be implemented. At the heart of the legislation and Code of Practice is a policy aim of offering protection to individuals who lack capacity, whilst respecting their autonomy to make decisions for themselves.

2.30 Section 2 of the Mental Capacity Act 2005 makes provides the following definition of capacity:

> (1) For the purposes of the Act, a person lacks capacity in relation to a matter if at the material time he is unable to make a decision for himself in relation to a matter because of an impairment of, or a disturbance in the functioning of, the mind or brain.
>
> (2) It does not matter whether the impairment or disturbance is permanent or temporary.
>
> (3) A lack of capacity cannot be established merely by reference to –
>
> (a) a person's age or appearance, or
>
> (b) a condition of his, or an aspect of his behaviour, which might lead others to make unjustified assumptions about his capacity.
>
> (4) In proceedings under this Act or any other enactment, any question of whether a person lacks capacity within the meaning of this Act must be decided on the balance of probabilities.

[80] (1995) Law Com No 231.

(5) No power which a person ("D") may exercise under this Act –

(a) in relation to a person who lacks capacity, or

(b) where D reasonably thinks that a person lacks capacity, is exercisable in relation to a person under 16.

2.31 The Mental Capacity Act 2005 therefore requires that there is a diagnosis of impairment of the mind or brain of the individual who may or may not lack capacity to make decisions. Such an impairment may be caused by mental illness or learning disability or physical causes such as dementia or acquired brain injury, for example. Although section 2 of the Mental Capacity Act 2005 does not specifically say so, an assessment of capacity is not a general assessment of the individual's decision-making, but it is to be assessed in relation to the ability to make a particular decision at the time it needs to be made.[81] The test is not a "status" approach to capacity, that is to say, individuals are not assumed to lack capacity because they are living with mental illness or have a learning disability. Nor is the test an "outcome" approach: a person cannot be found to lack capacity on the basis that his or her decision is inconsistent with conventional values or one with which the person tasked with assessing capacity disagrees.[82] It is a "functional" approach to capacity which is created by the Mental Capacity Act 2005, that is to say, the individual is assessed in relation to his or her ability to make decisions about a specific issue at a given point in time.

2.32 Section 3 of the Mental Capacity Act 2005 defines what "inability to make decisions" means:

(1) For the purposes of section 2, a person is unable to make a decision for himself if he is unable–

[81] Mental Capacity Act 2005 Code of Practice, at page 19.

[82] Although it should be noted that a person is not to be treated as being incapable of making a decision merely because he or she has made an unwise decision (section 1(4) of the Mental Capacity Act 2005). An unwise or irrational decision may trigger an investigation of a person's capacity: Mental Capacity Act 2005 Code of Practice, paragraph 2.11.

(a) to understand the information relevant to the decision,
(b) to retain that information,
(c) to use or weigh that information as part of the process of making the decision, or
(d) to communicate his decision (whether by talking, using sign language or any other means).

(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 only 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.

2.33 The Law Commission of England and Wales have provisionally recommended in their consultation paper *Unfitness to Plead*[83] that a test based on the one contained in the Mental Capacity Act 2005 should be adopted in the criminal law for determining the fitness of an accused person to plead. The argument for adopting this approach is that the current *Pritchard* test is inadequate as it is too focused on the intellect of the accused,[84] it leads to unfairness as it allows individuals with significant mental health issues to be deemed as fit to plead,[85] and the lack of emphasis on decision-making capacity calls into question the accused's ability to participate in his or her trial as required by Article 6 of the European Convention on

[83] (2010) Law Commission Consultation Paper No 197.
[84] See footnote 83 at paragraph 2.69.
[85] See footnote 83 at paragraphs 2.75 to 2.87.

Human Rights.[86] The Law Commission considers that replacing the *Pritchard* test with one which is based on the mental capacity test which is contained in the Mental Capacity Act 2005 will go some way to alleviate these problems.[87]

2.34 Mental capacity has to be assessed in relation to a decision that is required to be made by an individual. Therefore, the Law Commission of England and Wales propose that a replacement for the *Pritchard* test which is based on mental capacity principles should be as follows:

> An accused person should be found to lack capacity if he or she is unable:
> (1) to understand the information relevant to the decisions that he or she will have to make in the course of his or her trial;
> (2) to retain that information;
> (3) to use or weigh that information as part of a decision making process; or
> (4) to communicate his or her decisions.[88]

2.35 The Law Commission of England and Wales envisage that an individual should be given the opportunity to understand the information that he or she needs to make a decision by affording him or her an opportunity to have the information explained in a way which best suits the individual's needs, such as the use of simple language, visual aids or any other means.[89]

2.36 It is important to consider whether a test based on the one contained in the Mental Capacity Act 2005, or the one which may be adopted by DHSSPS in its intended new legislation,[90] is appropriate for adoption in criminal proceedings in Northern Ireland.

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[86] See footnote 83 at paragraphs 2.88 to 2.102.
[87] See footnote 83 at paragraph 3.1.
[88] At footnote 83 at paragraph 3.13.
[89] See footnote 17 of (2010) Law Commission Consultation Paper No 197.
[90] The legislation has not been published as yet, but it is expected to be broadly similar to the Mental Capacity Act 2005 in relation to a mental capacity test.

Determining competence to make decisions

2.37 As already discussed, the mental capacity test is designed to be applied to a certain decision that needs to be made at a specific time. In civil proceedings, as in criminal proceedings, there can be numerous decisions which fall to be made but it is usually a relatively straightforward exercise to identify the relevant issues and to apply the mental capacity test in order to ascertain whether the individual has the capacity to make each of those decisions. For example, an individual may be required to make decisions about a number of investments and about whether to sell his or her home to pay for nursing care. In the civil law, each decision would be looked at on an individual basis and a determination reached in relation to capacity. It may be that an individual has capacity for one decision, but not another, for example, the individual may have capacity in relation to deciding about where to live, but does not have capacity in relation to deciding how to invest a multi-million pound fortune. In civil proceedings, decisions are dealt with on a proportionate basis: the more important the decision, the more is required to demonstrate that the individual has capacity to make the decision.

2.38 In relation to unfitness to plead, an issue arises in relation to the myriad of decisions that an accused person must make during a criminal trial process. As the *Pritchard* test acknowledges, there are a number of decisions that are relevant to determining whether an accused is unfit to plead, but there are probably a vast array of other decisions that are relevant in determining whether someone is unfit to plead. For example, "deciding whether to plead guilty or not" could arguably involve a sub-set of decisions which may include decisions in relation to applicable defences, decisions in relation to whether the proceedings should take place in the Crown Court or Magistrates' Court in cases that are triable either way and decisions about the benefits of entering an early plea.

2.39 In its Consultation Paper *Unfitness to Plead*, the Law Commission of England and Wales identify two approaches to assessing an individual's ability to make decisions. First, the Law Commission identifies a "unitary approach" which

is an assessment of capacity in relation to a set of decisions. Second, the Law Commission also discuss the merits of a “disaggregated approach” which breaks the trial down into the separate constituent decisions that must be taken by the accused and applying the mental capacity test to each decision. The Law Commission of England and Wales considers that using a mental capacity test for determining whether the accused has decision-making capacity for all the purposes of the trial, a “unitary test”,[91] has the benefit of being true to the underlying rationale for having a process for determining unfitness to plead: that because of the accused’s mental or physical condition, a criminal trial is not appropriate.[92] This “comprehensive all-or-nothing approach”[93] takes account of an arguable function of the criminal trial which is to place emphasis on the defendant’s understanding of the trial process and his or her acceptance that it is a proper judgment on his or her past conduct.[94] The Law Commission of England and Wales also considers that a unitary test has the benefit of being clearer, leading to less variation in the views of the clinical professionals who are tasked with assessing competence and therefore leading to a simpler and more certain position in the law.[95]

2.40 In relation to the disaggregated approach, the Law Commission of England and Wales identifies problems with adopting this method in criminal proceedings.[96] The main problem which it identifies is the complexity of such a process which would make it very time consuming for the court and of no real benefit for the accused.[97]

2.41 The Commission considers that in criminal proceedings, it is impossible to take the civil law approach which applies the mental capacity test to each decision that an individual has to make. In the civil context, where an individual can make some decisions but not others, he or she is permitted

[91] See footnote 83 at paragraph 3.60.
[92] See footnote 83 at paragraph 3.61.
[93] See footnote 83 at paragraph 3.61.
[94] The Law Commission of England and Wales uses an argument contained in RA. Duff, *Trials and Punishment* Cambridge University Press (1986).
[95] See footnote 83 at paragraphs 3.62 and 3.61.
[96] See footnote 83 at paragraphs 3.64 to 3.78.
[97] See footnote 83 at paragraph 3.72.

to make the decisions that he or she has capacity to make, whilst a substitute decision-maker is appointed to take the decisions on behalf of the individual that he or she lacks capacity to make. This approach does not seem feasible in the criminal context. It would be a very difficult task to identify all the decisions that an accused person has to make during the course of his or her trial, not to mention the difficulties that would be caused to the court if it had to apply the mental capacity test to each and every decision if it *was* possible to identify them all. It would also be difficult to determine how a trial should proceed if an accused person was deemed to be fit to make some decisions but unfit to make other decisions, especially if it is accepted that the main mischief that the concept of unfitness to plead seeks to remedy is the inherent unfairness of subjecting individuals to a criminal process in which they struggle to participate. For those reasons, if a mental capacity test is to be adopted in relation to unfitness to plead, then a slightly modified approach would need to be taken for criminal proceedings as compared with civil proceedings. As suggested by the Law Commission of England and Wales in its consultation paper *Unfitness to Plead*, that approach would have to identify a number of main decisions that an accused is required to make. The mental capacity test would have to be applied to those decisions not as single determinations, but as part of a whole. If the accused was to demonstrate that he or she had capacity to make all the identified decisions, then he or she would be fit to plead. If the accused failed to demonstrate that he or she had capacity to make one or more of the identified decisions, then he or she would be deemed unfit to plead. **The Commission believes that, in relation to a test for unfitness to plead which is based on the mental capacity test which is contained in the Mental Capacity Act 2005, a "disaggregated" approach is neither workable nor desirable. An approach which looks at the mental capacity of the accused in relation to a set of decisions that the accused is required to make during the trial is a more desirable option. Do consultees agree?**

The importance or complexity of decisions

2.42 As mentioned in paragraph 2.37 above, in the civil test which assesses the mental capacity of an individual to make a decision, the more important or difficult the decision, the more is required of the individual in terms of demonstrating capacity. It is suggested that in criminal proceedings, any attempt to apply differing "levels" of capacity, depending upon the complexity or importance of the decision to be taken would be rather challenging. It appears to the Commission that all the decisions to be taken in criminal proceedings are potentially serious as they are inter-linked and may have an impact, first, on the way in which the accused's defence is handled and second, the final outcome of the case. The Law Commission of England and Wales[98] also sees difficulty with transplanting this aspect of the civil law mental capacity test, which it refers to as a "proportionality test", into criminal proceedings.

2.43 The Law Commission of England and Wales notes that complexity in criminal proceedings is often difficult to predict: an evidential issue which arises in the proceedings may often have more significance than first appreciated, which makes the operation of a proportionality test very difficult.[99] There is also the risk that if a proportionate approach is taken in criminal proceedings, there is a greater likelihood of inconsistent determinations in relation to the defendant's capacity during the trial. For example, a defendant may seek to appeal the finding as to capacity if his or her decision turns out to result in a negative consequence, claiming that at the time the determination was made about his or her capacity, the court was unaware of how complex the trial would, in fact, turn out to be.[100] The Commission does not consider this possibility to be an attractive outcome in criminal trials. The Law Commission of England and Wales has consulted on two provisional proposals in relation to this issue: first, that proportionality is not a feasible approach to take and second, that a judge *should* take into account the complexity of the proceedings

[98] See footnote 83 at paragraphs 3.83 to 3.94.
[99] See footnote 83 at paragraph 3.90.
[100] See footnote 83 at paragraph 3.91.

and the gravity of the outcome when making a determination regarding the accused's capacity to make a certain decision. **The Commission provisionally considers that it finds the proportionality test to be unworkable, based on the reasoning given above. However, the views of consultees on this point will be particularly welcomed.**

Which decisions should count?

2.44 As discussed above, the Law Commission of England and Wales has proposed that a mental capacity test should be applied to decisions that an accused person will have to make in relation to his or her trial. Particular decisions have not been identified, perhaps because the Law Commission of England and Wales are working on devising a psychiatric test which is intended to be applied to assess unfitness.[101] This psychiatric test was not included in the consultation paper, so it is difficult at this point to assess the proposed approach envisaged by the Law Commission of England and Wales. In the civil context, the mental capacity test contained in the Mental Capacity Act 2005 can only be applied in relation to a specific decision, so the Commission believes that it is likely that the psychiatric test being worked on by the Law Commission of England and Wales will contain reference to specific decisions that the accused is required to make during his or her trial.

2.45 It is possible to take a different approach to the one proposed by the Law Commission of England and Wales, yet still incorporate a mental capacity test element into the test for unfitness to plead.

2.46 Currently, the *Pritchard* test as interpreted by subsequent case-law contains six criteria against which the abilities of the accused are tested, namely, understanding the charges, deciding whether to plead guilty of not, exercising the right to challenge jurors, instructing solicitors and counsel, following the course of proceedings, and giving evidence in his or her own defence. The Commission considers that the current *Pritchard* test can be divided into

[101] See footnote 83 at Part 5.

two separate sets of criteria: those which pertain to the understanding of the accused person and which are therefore linked to his or her cognitive ability, and those which require decisions to be made. It is possible that those criteria which require decisions to be made could be framed in terms of a mental capacity test, which could assess the individual's capacity to make those decisions.

2.47 The Commission considers that a test of this nature could require that in order to demonstrate unfitness to plead, the accused must be shown, because of an impairment or disturbance in the functioning of his or her mind or brain, to be unable to:

- Understand the charges brought against him or her;
- Follow the course of proceedings; and
- Make decisions that he or she is required to make in relation to the trial.

2.48 The decisions that the accused is required to make could reflect the elements of the *Pritchard* test, that is to say, making a decision about pleading guilty or not, deciding to challenge jurors, making decisions in relation to instructing counsel and making the decisions that are needed when giving evidence. A mental capacity test could be applied to these decisions, therefore requiring the accused to be able to understand the information relevant to making the decision, retain that information, use or weigh that information and finally, communicate the decision.

2.49 The Commission considers that this suggested approach has merits. It enhances the *Pritchard* test by requiring consideration of not only the intellectual capabilities of the accused, but also assessing his or her capacity to make decisions. The latter aspect of this suggested approach may provide some assistance to individuals who may be experiencing delusions which have the potential to disrupt their decision-making capacity and it may offer more flexibility to the court, so that outcomes such as the decisions in *R v Moyle* and *R v Diamond* are avoided. Also, such an approach brings within the test for determining unfitness to plead individuals who may be experiencing

physical difficulties with brain function, who may be unsuited to participation in criminal proceedings by reason, for example, of serious symptoms arising from stroke or head injury.

2.50 Some research has been carried out to determine which criteria contained within the *Pritchard* test are the best indictors of unfitness to plead.[102] The unfitness to plead criteria were interpreted during this research as:

- Understanding the nature of the charge;
- Understanding the meaning of entering a plea;
- Understanding the consequence of the plea;
- Being able to adequately instruct counsel;
- Understanding the details of the evidence
- Being able to follow the proceedings.[103]

2.51 The research, carried out on the basis of assessing 479 cases where unfitness to plead had been raised as an issue, revealed that the best predictor of unfitness to plead was in relation to "ability to follow the proceedings of the trial" which, the researchers considered, correctly identified 91.25% of unfit accused persons, whilst "ability to instruct counsel" was second best and which correctly identified 90% of unfit accused.[104] Ability to understand the evidence was the next best, correctly identifying 68.75% of unfit persons. Understanding the nature of the charge, understanding the consequence of the plea and understanding the meaning of the plea performed less well, correctly identifying 28.75%, 28.75% and 25% of unfit accused persons respectively.[105] When the criteria were assessed as a set, rather than as individual criteria, the research demonstrated that a model incorporating the three issues concerned with trial (following the proceedings, instructing counsel and understanding details of the evidence) gave the strongest indicator of correctly

[102] DV James, G Duffield, R Blizard and LW Hamilton, 'Fitness to Plead. A prospective study of the inter-relationships between expert opinion, legal criteria and specific symptomatology' (2001) 31 139-150 *Psychological Medicine*.
[103] See footnote 102 at page 140.
[104] See footnote 102 at page 141.
[105] See footnote 102 at page 142.

identifying unfit accused persons. Addition of the other factors did not affect the strength of the model, suggesting that these factors could be "jettisoned without affecting the performance of the remaining criteria in predicting unfitness."[106]

2.52 This research is undoubtedly interesting and informative, but the Commission is aware that further work would need to be carried out to support the findings of the research and to the knowledge of the Commission, no such work has been carried out to date.

OTHER OPTIONS FOR REFORM

2.53 As well as the options outlined above, there are other approaches that can be taken in devising a test for determining unfitness to plead.

2.54 A number of jurisdictions which have statutory regimes setting out the criteria for assessing unfitness to plead. For example, in Australia, the Northern Territory,[107] Victoria[108] and the Australian Capital Territory[109] have statutory tests for determining unfitness to plead which bear a resemblance to the test which is contained in *Pritchard*, but which also have differences in relation to the criteria to be considered during a determination of unfitness to plead. The tests state that a person is unfit to stand trial if he or she is:

- Unable to understand the nature of the charge against him or her;
- Unable to plead to the charge and to exercise the right of challenge;
- Unable to understand the nature of the trial (that is that a trial is an inquiry as to whether the person committed the offence);
- Unable to follow the course of the proceedings;

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[106] See footnote 102 at page 146.

[107] Section 43J of the Criminal Code Act.

[108] Section 6 of the Crimes (Mental Impairment and Unfitness to be Tried) Act 1997.

[109] Section 311 of the Crimes Act 1900.

- Unable to understand the substantial effect of any evidence that may be given in support to the prosecution; or
- Unable to gives instructions to his or her legal counsel.

2.55 In Western Australia, section 9 of the Criminal Law (Mentally Impaired Accused) Act 1996 contains similar criteria, but includes a criterion which requires the accused to show ability to properly defend the charge made against him or her and omits the criteria in relation to giving instructions to legal counsel. In the Republic of Ireland, the criteria are again similar, with section 4 of the Criminal Law (Insanity) Act 2006 requiring an accused person to be able to understand the nature or course of the proceedings so that he or she can plead to the charge; instruct a legal representative; elect for a trial by jury in cases that can be tried either summarily or on indictment; make a proper defence; challenge a juror or understand the evidence.[110]

2.56 In New Zealand, the statutory test for unfitness to stand trial is contained in section 4 of the Criminal Procedure (Mentally Impaired Persons) Act 2003. A defendant who is unfit to stand trial is defined as meaning someone who is unable, due to mental impairment: to conduct a defence or instruct counsel to do so;[111] to adequately understand the nature or purpose or possible consequences of the proceedings; and to communicate adequately with counsel for the purpose of conducting a defence. These factors, however, are not prescriptive. In *P v Police*[112] it was held that a wider ranging list which was identified by the court in *R v Presser*[113] and approved by the High Court of Australia in *R v Ngatayi*[114] was consistent with and illuminated the

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[110] This statutory definition is a restatement of the common law definition of unfitness which is found in *State (at the prosecution of Noel Coughlan) v The Minister for Justice and the Resident Physician and the Governor of the Central Mental Hospital, Dundrum* [1968] ILTR 177. For further discussion see D Whelan, 'Fitness for Trial in the District Court: the Legal Perspective' (2007:2) *Judicial Studies Institute Journal* at page 124.

[111] Unfitness to stand trial is stated as including the inability to enter a plea.

[112] [2007] 2 NZLR 528.

[113] [1958] VR 45.

[114] (1980) 147 CLR 1.

test of fitness to stand trial contained in section 4. These criteria include:

- Understanding the charge;
- Ability to plead to the charge and exercising the right of challenge;
- Understanding that the proceedings before the court would be an inquiry into whether or not the accused carried out the act that he or she was charged with;
- Ability to follow, in general terms, the course of the proceedings;
- Understanding the substantial effect of any evidence given against him;
- Ability to make a defence to, or answer the charge;
- Ability to decide which defence to rely on;
- Ability to give instructions to a legal representative;
- Ability to make his version of the facts known to the court and to a legal representative. [115]

CONCLUSION

2.57 At first glance, a mental capacity test appears to be a helpful tool if used to assess the unfitness of an accused person to stand trial. After all, at it currently stands under the *Pritchard* test, unfitness to plead is concerned with the ability of an accused person to carry out certain tasks which require the accused to make decisions, for example: decisions in relation to entering a plea; deciding to instruct lawyers in relation to an issue; and deciding to challenge a juror. Following *R v John (M)*, a number (but not all) of those tasks have been explained as meaning that the accused must be able to understand the information pertinent to the task, apply his or her mind to the

[115] In New Zealand, there is debate whether failure to demonstrate one of the *Presser* criteria will result in a finding of unfitness to stand trial. This would have been the case in common law, but it is unclear whether the same result will occur now that there is statutory provision in relation to unfitness to stand trial, especially as the *Presser* criteria were described as "illuminating" section 4. See WJ Brookbanks & RD Mackay, (see footnote 51) at page 274.

information and convey his or her decision in an understandable way.[116] The *Pritchard* test, as interpreted by *R v John (M)*, therefore has some similarity to the mental capacity test, but it could not be said to completely express the thinking contained in such a test. If a mental capacity test *was* adopted, in order to be deemed fit to plead, an accused person would have to be shown, in relation to any decision, to be able to understand the information relevant to the decision, to retain that information, to use or weigh that information as part of the decision-making process and to communicate his or her decision. However, the Commission considers that if a test which is based on the one contained in the Mental Capacity Act 2005 is adopted for use in criminal proceedings to determine the unfitness of an accused person to plead, then it must be somewhat different to the test which is used in civil proceedings. The test must be applied to a set of pre-determined decisions which are pertinent to all criminal trials. Also, the test should treat those decisions as being equally important and serious.

2.58 The Commission has suggested an approach which incorporates a mental capacity test element to the existing criteria in *Pritchard.* However, this is not the only option for reform. Other jurisdictions take an approach, which although not based on a mental capacity test, offer alternatives to the *Pritchard* test. **Consultees are invited to consider the Commission's suggested approach of incorporating a mental capacity test element into a test for determining unfitness to plead. In addition, consultees are invited to comment on the approach proposed by the Law Commission of England and Wales which is outlined above. If a test is adopted which is based on the mental capacity approach, the views of consultees are also welcomed in relation to the types of decisions that should be relevant to assessing the unfitness to plead of an accused. If consultees do not consider that an approach which is based on a mental capacity test is desirable, their views are sought in relation to the alternative**

[116] See paragraphs 2.7 – 2.13 of this Consultation Paper.

approaches taken by the jurisdictions mentioned above.

RATIONAL DECISIONS AND DECISION MAKING

2.59 An argument exists that a test which assesses unfitness to plead in criminal proceedings should contain an element which requires the accused to be able to make decisions that are rational, that is to say, in his or her best interests[117] or alternatively that the accused should have the ability to demonstrate that he or she has rational thought processes.

2.60 Rational decision-making is also known as "decisional competence" which is an element which appears in tests to assess the unfitness to plead of accused persons in a number of jurisdictions. The United States of America, Scotland and Jersey are three such jurisdictions which merit specific consideration. The Department of Justice has requested that the Commission particularly considers the tests in Scotland and Jersey.

The United States of America

2.61 The basis of the law on competence to stand trial in the United States of America is the case of *Dusky v United States*.[118] Dusky was charged with kidnapping after he assisted two teenagers in raping a sixteen year old. He was diagnosed with schizophrenia, but was found competent to stand trial, although a psychiatric report produced at his trial stated that it was considered that Dusky could not properly assist counsel because of his suspicious thoughts, which included a belief that he was being framed. The trial court found him competent to stand trial and he was subsequently found guilty and sentenced to forty five years imprisonment. The United States Supreme Court ruled on appeal that competence to stand trial meant having sufficient present ability to consult with lawyers with a reasonable degree of rational understanding and whether he has a rational as well as factual understanding of the

[117] For example, see WJ Brookbanks and RD Mackay, (see footnote 51) and C Fogarty and R Mackay, 'On being insane in Jersey: again' (October 2009) *Jersey and Guernsey Law Review.*
[118] 362 U.S. 402 (1960).

proceedings against him.[119] This test of competence has been adopted in most states in the United States.

2.62 For example, the procedures for competency evaluations in New York are governed by sections 730.10 to 730.70 of the New York Criminal Procedure. Section 730.10 contains the legal test for competency in New York as "a defendant who as a result of mental disease or defect lacks capacity to understand the proceedings against him or to assist in his own defense". In California, "incompetence to stand trial" as it is known, is contained in the California Penal Code sections 1367 to 1376. Under California Penal Code 1367(a), a person cannot be tried or adjudged to punishment while he or she is "mentally incompetent". A person is mentally incompetent if "as a result of mental disorder or developmental disability, the defendant is unable to understand the nature of the criminal proceedings or to assist counsel in the conduct of a defense in a rational manner". This requirement of rationality is the element which introduces the concept of decisional competence into the law.

Scotland

2.63 In Scotland, the issue of unfitness to plead[120] has been the subject of recent legislation by the Scottish Parliament. The Criminal Procedure (Scotland) Act 1995 has been prospectively amended by section 170 of the Criminal Justice and Licensing (Scotland) Act 2010, which inserts a new section 53E to make provision for unfitness for trial.

2.64 The new provision is 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 a mental or physical condition, of participating effectively in a trial.
>
> (2) In determining whether a person is unfit for trial the court is to have regard to-

[119] At page 402 of the judgment.
[120] "Unfitness for trial" as it is referred to in that jurisdiction.

(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

(vi) 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.

(4) In this section "the court" means –

(a) as regards a person charged on indictment, the High Court or the sheriff court,

(b) as regards a person charged summarily, the sheriff court.

2.65 Section 171 of the Criminal Justice and Licensing (Scotland) Act 2010 also prospectively repeals the common law rule in relation to insanity in bar of trial which currently governs the area.

2.66 The reforms contained in section 171 of the Criminal Justice and Licensing (Scotland) Act 2010 find their origin in the work of the Scottish Law Commission which published its *Report on Insanity and Diminished Responsibility* in July 2004.[121] In the Consultation Paper which preceded the Report, the Scottish Law Commission considered whether a civil law test of capacity (which in

[121] SE/2004/92.

Scotland is contained in the Adults with Incapacity (Scotland) Act 2000) was suitable for adoption in criminal proceedings. This approach was dismissed, the Consultation Paper stating that:

> …the 2000 Act is concerned with issues of civil law arising from the intervention in the affairs of persons who are incapable in this sense. These issues are not the same as, nor even analogous to, those concerning the appropriateness of using the criminal process against certain categories of people. Our view is that confusion would result if the same term was used to cover these different legal problems.[122]

2.67 The Scottish Law Commission was clear in its view that the general rationale behind the law on unfitness to plead was that, because of a person's mental or physical condition, a criminal trial may not be an inappropriate process for that person.[123] The Discussion Paper discusses the need for an accused person to be able to participate in the trial in a meaningful way and seeks to incorporate an element of "full or rational appreciation" of the consequences of taking certain actions, such as pleading guilty, for example, or making certain decisions such as instructing counsel on certain points. An approach of this nature would mean that the accused person has to be shown to have more than a mere understanding of information, but must be able to understand the consequences of his or her decisions.[124] The Discussion Paper uses the United States case of *Dusky v United States* as an example of the effect that is desired to be achieved by incorporating an element of "rational understanding", but it is interesting to note that, despite using this example, the Scottish Law Commission does not go so far as to suggest that the accused must be shown to be capable of making decisions that are rational. On the Commission's reading of the proposals and the recommended draft statutory provision contained in the

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[122] At paragraph 4.11 of *Discussion Paper on Insanity and Diminished Responsibility* (2003) Scottish Law Commission Discussion Paper No. 122.
[123] See footnote 122 at paragraph 4.14.
[124] See footnote 122 at paragraphs 4.14 to 4.18.

Report[125] which has subsequently been incorporated into the Criminal Justice and Licensing (Scotland) Act 2010, the provision does not have a requirement that the decision must be rational or even that the decision-making process must be rational. Instead, the provision requires that the accused must be able to effectively participate in his trial, and an assessment of unfitness must include a number of considerations, which merely require the person to have "understanding" of certain criteria, such as understanding the nature of the plea, the effect of the plea, and the purpose of the trial. "Participate effectively" is undefined, as is "understanding", so it will be interesting to see how the courts interpret this provision and whether a rational decision making process must be demonstrated in order to determine an accused person's unfitness to plead.

Jersey

2.68 In *Attorney General v O'Driscoll*,[126] the Royal Court of Jersey refused to apply the *Pritchard* test and instead introduced a new test for unfitness to plead which contains a decisional competence element. The test is as follows:

> An accused person is so insane as to be unfit to plead to the accusation, or unable to understand the nature of the trial if, as a result of unsoundness of mind or inability to communicate, he or she lacks the capacity to participate effectively in the proceedings.
> In determining this issue, the Superior Number shall have regard to the ability of the accused:-
> (a) to understand the nature of the proceedings so as to instruct his lawyer and make a proper defence;
> (b) to understand the substance of the evidence;
> (c) to give evidence on his own behalf; and
> (d) to make rational decisions in relation to his participation in the proceedings (including whether or not to plead guilty), which reflect true and informed choices on his part.[127]

[125] At page 82 of *Report on Insanity and Diminished Responsibility* (2004) No. 92.
[126] [2003] J.L.R 390.
[127] [2003] J.L.R 390 at page 402, paragraph 9.

2.69 The test was qualified by the following statement:

> It will not be sufficient in itself to justify a finding of unfitness to plead that an accused person is someone of limited intellect or someone who, for other reasons, might find the criminal process puzzling or difficult to follow. I envisage that some evidence of a clinically recognised condition leading to incapacity would be required before a finding of unfitness could be made. In this connection, it is worth underlining an important distinction between the process of adjudicating on unfitness to plead in Jersey and in other parts of the British Isles. In Jersey, the duty of adjudication is placed not on a jury[128] but on the Jurats, who are a mature and experienced body of judges upon whom considerable reliance to arrive at a considered and reasonable conclusion can be placed.[129]

2.70 The test in *O'Driscoll* was utilised in *Harding,*[130] a case which involved an accused who had a long history of psychiatric disorder, self-harm and violence to others.[131] Harding was charged with offences including assault and attempted robbery. Two psychiatrists were appointed to report on her mental health as part of the criminal proceedings. Both of them diagnosed a Borderline Personality Disorder. One psychiatrist was asked to assess the accused's unfitness to plead and he concluded that she was, in his opinion, fit. At trial, the accused dispensed with the services of her legal team and represented herself. She was duly convicted.

2.71 Whilst in custody, the accused attacked a prison health care worker, cutting her neck with a broken bottle. As a result of this incident, she was tried for attempted murder. The services of the two psychiatrists who had previously

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[128] Of course, in England and Wales and Northern Ireland, the issue is now dealt with by the judge rather than the jury.

[129] [2003] J.L.R 390 at paragraph 32.

[130] [2009] J.R.C 198.

[131] See the discussion of this case in RD Mackay, 'Unfitness to Plead – Some Observations on the Law Commission's Consultation Paper' (2011) Issue 6 *Criminal Law Review* 433.

assessed the accused were sought again. Both agreed about the diagnosis and did not consider that her cognitive abilities were so impaired that she would fail to meet the first three tests in *O'Driscoll*; however, they did not agree about the fourth test in *O'Driscoll*, that is to say, the accused's ability to make rational decisions. One psychiatrist thought that the accused was only intermittently capable of making rational decisions, whilst the other considered that she lacked the ability to make rational decisions. In his judgment, Commissioner Clyde-Smith stated:

> For the purposes of the *O'Driscoll* test the court has to have regard to the ability of the defendant to make rational decisions in relation to her participation in the proceedings which reflect true and informed choices on her part: "rational" in this context to be given its ordinary meaning namely based on or in accordance with reason or logic. In this case it was clear from the evidence of both experts that, at any given moment, the defendant had that ability but that …….in the context of multiple snap shots or even a film, her condition, and in particular her changes in emotional state, would impact upon her thought processes and ability to make rational decisions.
>
> We are concerned not with a snap shot in time but with the capacity of the defendant to participate effectively at her trial i.e. in the whole course of the trial likely to span a number of days. Taking into account the evidence of the experts and all the circumstances of the case as outlined in the joint narrative, the Jurats concluded, on a balance of probabilities, that her impairment by reason of this condition, by which she was severely affected, was sufficiently substantial to render her incapable of participating effectively over the course of her trial.[132]

[132] At paragraph 38 and 39.

2.72 Whether Harding would have been found unfit to plead if she had been subject to the *Pritchard* test is open to argument, but it has been suggested that it is unlikely.[133] Therefore, if decisional competence is included in a test which is used to assess unfitness to plead, a different outcome may result, compared with the application of the *Pritchard* test in its current form. It therefore falls to be considered whether decisional competence *should* form part of a test for unfitness to plead.

Should decisional competence form part of a test to assess unfitness to plead?

2.73 It has been suggested[134] that including an element of decisional competence in the test to determine unfitness to plead is beneficial.

> Arguably, the fact that an accused is not *capable* of acting in his or her best interests should send a signal that he may be unfit to stand trial, since his inability to understand what is appropriate for him has grave potential to alienate the fact-finder and lead to an unjust conviction.[135]

2.74 However, it is important to understand what is meant by "decisional competence". In Jersey, *O'Driscoll* stated that the accused was required to demonstrate ability that he or she could make rational decisions which reflect true and informed choices, whilst in *Harding,* "rational" was interpreted as meaning based on or in accordance with reason or logic, which suggests that it is the process of decision-making that must be rational, rather than the decision itself.[136]

2.75 The Commission considers that "decisional competence" can have two interpretations: one which focuses on the decision-making process and one which focuses on the outcome of that process. This view is supported by academic commentary:

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[133] RD Mackay, (see footnote 131) at page 437.
[134] WJ Brookbanks & RD Mackay, (see footnote 51).
[135] WJ Brookbanks & RD Mackay, (see footnote 51) at page 265.
[136] RD Mackay, (see footnote 131) at page 438.

> A defendant who is able to understand information relevant to a decision and is able to appreciate the "meaning" of the decision in his or her situation may nonetheless lack the capacity to use logical processes to compare the benefits and risks of decisional options…. What is important here is the decisional *process*, not its *outcome*, although an outcome considered by others to be irrational obviously may signal a problem with the defendant's reasoning process. A defendant's capacity to weigh information in order to make rational choices, consistent with starting premises and assigned values, may be impaired by psychotic thought disorder, delirium and dementia, extreme phobia or panic, anxiety, euphoria and depression. As this summary…… demonstrates, the legal "test" for decisional competence can be made more or less demanding.[137]

2.76 In addition, the dictionary meaning of "rational" also supports this view. "Rational" is defined in the Concise Oxford English Dictionary[138] as having the two separate meanings: "being endowed with reason, reasoning"; and "sensible, sane, moderate, not foolish or absurd".

2.77 When the test which is now contained in the Mental Capacity Act 2005 was being devised by the Law Commission of England and Wales,[139] there was recognition that there was a difference between types of competence. Three types were identified: "status", "outcome", and "functional". "Status" refers to an approach which identifies certain groups as lacking capacity; "outcome" refers to an assessment of capacity based on an evaluation of the result of a person's decision-making, for example, whether the outcome is considered to be wise or sensible; and "functional" refers to the process by which a person comes to a decision.[140] Decisional capacity can therefore be said to have the potential to fall within two of these types: "outcome" where the rationality of the decision

[137] RJ Bonnie, (see footnote 24) at page 306.
[138] *Concise Oxford Dictionary* Oxford Clarendon Press 6th Edition (1976).
[139] See footnote 80.
[140] See footnote 80 at page 32.

is the deciding factor or "functional" where the narrower view of decisional competence as described above is taken.

2.78 In its Report on *Mental Incapacity*, the Law Commission of England and Wales rejected using the "outcome" method of assessing capacity and instead favoured the "functional approach" which it considered the more appropriate and which was supported by the greatest number of respondents to the consultation. This approach also avoided unwelcome aspects of the "outcome" method which tends to indicate incapacity when a decision is made which is inconsistent with conventional values or with which the person tasked with assessing capacity disagrees.[141]

2.79 Likewise, in its Consultation Paper *Unfitness to Plead*, the Law Commission of England and Wales rejects an "outcome" approach of decisional competence, stating:

> Ultimately, the critical divide between the decisions we think the law should permit is not between irrational and unwise decisions but between decisions taken by those who do and those who do not have capacity to function rationally.[142]

2.80 In other words, it is the presence of a process of reasoning or processing information that should indicate capacity, rather than an outcome focused approach which requires a rational, or in other words, wise, decision.

2.81 The Commission provisionally considers that this is the correct approach to take. The approach avoids the problem that capacity can be assessed according to a subjective determination of the rights or wrongs of a decision by an evaluator who, in reaching that subjective determination, may take account of considerations which may not altogether be relevant to the accused's own beliefs or values. The Commission also notes that, in the context of criminal trials (and indeed in civil proceedings) inclusion of a test of decisional competence in the form of being able to

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[141] See footnote 80 at page 33.
[142] See footnote 83 at paragraph 3.53.

make decisions in one's own interests sets a very high standard for accused persons to meet. It appears to the Commission that decisional competence of this nature is "the cherry on the top" of decision making: making decisions which are truly in one's best interests is difficult and requires a great deal of personal insight, reflection and maturity. **The Commission provisionally considers that any test for unfitness to plead which is based on the decision-making ability of the accused which requires the accused to demonstrate that he or she can make decisions that are in his or her best interests is a step too far. Do consultees agree?**

2.82 **The Commission considers, however, that if an accused has made an unwise or irrational decision, then, as in civil proceedings, that unwise or irrational decision can prompt an inquiry into his or her fitness. This seems to the Commission to be a valuable protection for the accused and may be helpful to the court and legal representatives in recognising that the accused may be experiencing difficulties. Do consultees agree?**

CHAPTER 3. ARTICLE 49A HEARINGS

INTRODUCTION

3.1 Article 49 of the Mental Health Order makes provision in relation to the process to be undertaken during a trial on indictment when a question arises as to the accused person's unfitness to be tried.[143] Article 49(2) provides that the question of fitness to be tried must be determined by the court as soon as it arises, unless the court, having regard to the nature of the alleged mental condition of the accused, considers that it is expedient or in the interests of the accused to postpone consideration of the question of fitness until any time up until the opening of the case for the defence.[144] In these circumstances, if the issue of fitness has not yet been considered and the jury returns a verdict of not guilty in relation to the accused, then the question of fitness shall not be determined at all.[145]

3.2 Article 49(4) of the Mental Health Order provides that the question of whether an accused is unfit to be tried or not is to be decided by the court sitting without a jury.[146] In order to make a determination of fitness to be tried, the court[147] requires the oral evidence of a medical practitioner who is appointed by the Mental Health Commission for Northern Ireland for the purposes of making medical recommendations for compulsory admissions to hospital under Part II of the Mental Health (Northern Ireland) Order 1986. The court also requires the medical or written evidence of one other medical practitioner.[148]

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[143] By virtue of Article 49(9) of the Mental Health (Northern Ireland) Order 1986, "unfit to be tried" includes unfit to plead.
[144] Article 49(3)(a) of the Mental Health (Northern Ireland) Order 1986.
[145] Article 49(3)(b) of the Mental Health (Northern Ireland) Order 1986.
[146] This provision was amended by section 23(2) of the Domestic Violence, Crime and Victims Act 2004. Formerly, the jury was tasked with making the determination of fitness.
[147] Formerly the jury.
[148] Article 49(4A) of the Mental Health (Northern Ireland) Order 1986 as inserted by Article 48(a) of the Criminal Justice (Northern Ireland) Order 1996.

3.3 If the court finds that an accused person is unfit to be tried, Article 49A[149] of the Mental Health (Northern Ireland) Order 1986 puts in place a procedure for determining whether an accused person, who has been deemed to be unfit upon the application of the *Pritchard* test, actually carried out the act or made the omission with which he or she has been charged.[150]

ARTICLE 49A OF THE MENTAL HEALTH (NORTHERN IRELAND) ORDER

3.4 If the court finds that the accused person is unfit to plead following the application of the *Pritchard* test, a "trial of the facts" takes place as prescribed by Article 49A of the Mental Health (Northern Ireland) Order 1986. At the point when the issue of unfitness of the accused person is determined, the trial will either not proceed at all or will cease to proceed if it has commenced.[151] A jury[152] will then determine whether the accused carried out the act or acts or omissions with which he or she was charged. The jury will make this assessment based on the evidence which has been given already in the trial (if any) or on evidence that may be adduced by the prosecution and by the person appointed by the court to put the case for the defence of the accused.[153] If the jury is satisfied that the accused person did carry out the act or make the omission with which he or she was charged, then it shall make a finding that the accused did that act or made that omission.[154] If the jury is not satisfied that there is evidence that the accused carried out the act or made the omission, then it

[149] Article 49A was inserted into the Mental Health (Northern Ireland) Order by Article 49 of the Criminal Justice (Northern Ireland) Order 1996.
[150] The equivalent provision in England and Wales is section 4A of the Criminal Procedure (Insanity) Act 1964 which was inserted by the Criminal Procedure (Insanity and Unfitness to Plead) Act 1991.
[151] Article 49A(2).
[152] Article 49A(5) provides that where a question of fitness is determined after the arraignment of the accused, the jury which was tasked with trying the accused will hear the evidence and make a finding that the accused carried out the act or made the omission with which he or she was charged, otherwise a jury will be sworn in for the purpose of making the finding.
[153] Article 49A(2).
[154] Article 49A(3).

must return a verdict of acquittal, as if the trial had proceeded and the accused had been fit to plead.[155]

3.5 Prior to the enactment of Article 49A and its equivalent in England and Wales, (section 4A of the Criminal Procedure (Insanity) Act 1964), accused persons who had been deemed unfit to plead had been detained in hospital without any trial or determination of whether they had actually committed the act with which they had been charged.[156] This situation had caused concern for many years before the changes to the law were effected. In 1975, the *Report of the Committee on Mentally Abnormal Offenders*[157] ("the Butler Report") identified the shortcomings of the law, with particular concern being expressed that a person who was committed to hospital must remain there until the Home Secretary decided otherwise, which could result in long periods of detention,[158] sometimes for the lifetime of the individual.[159] The Butler Report recommended that a "trial of the facts" should take place to determine whether or not the individual had actually committed the act with which he or she was charged. The purpose of this recommendation was to enable the jury to return a verdict of "not guilty" where the evidence against the individual is insufficient for a conviction.[160]

3.6 A Private Members Bill, introduced by Edward Leigh MP[161] on 16th April 1986 sought to address the inherent

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[155] Article 49A(4).
[156] The original effect of the Criminal Procedure (Insanity) Act 1964 and the Mental Health (Northern Ireland) Order 1986 as unamended.
[157] Cmnd. 6244 (October 1975).
[158] Writing in 1991, DH Grubin reports that some patients have been held under the Criminal Procedure (Insanity) Act 1964 without trial or discharge for many years. Five of the detained patients had been in hospital since 1976 and five since 1977. Other patients were in hospital for longer than those periods. See DH Grubin, 'Unfit to Plead, Unfit for Discharge' (1991) 1 3 *Criminal Behaviour and Mental Health* 282-294 at page 289.
[159] See paragraph 10.18 of the Report.
[160] See paragraph 10.24 of the Report.
[161] The motivation for this Private Members Bill was the case of Glen Pearson, a constituent of Mr Leigh's, who was alleged to have stolen £5.40 and three light bulbs, and as a consequence of being found unfit to plead, was detained in hospital for an indefinite period, but released three months later after a public outcry (*Hansard*, (HC), 16 April 1986, vol 95, cc 873-4).

unfairness contained in the Criminal Procedure (Insanity) Act 1964, however, this Bill did not proceed to Second Reading.

3.7 Five years later, the Criminal Procedure (Insanity and Unfitness to Plead) Bill[162] was introduced into the House of Commons and received widespread support, as the trial of the facts was considered to:

> Greatly reduce the possibility of an innocent person being compulsorily detained in hospital for an offence that he did not commit.[163]

3.8 There was also support for providing more options within the Bill for the disposal of individuals who had been determined by the court to be unfit to plead, as concern had grown that compulsory hospital treatment in every case had not been appropriate on medical grounds and might be disproportionate in view of the nature of the offence.[164]

3.9 However, although the reforms did indeed remove an obvious unfairness, Article 49A hearings have been the subject of a number of cases which have considered both the correct interpretation of the statutory provision and its compatibility with the European Convention on Human Rights: *R v Antoine;*[165] *R v Grant;*[166] *R v H;*[167] a decision of the European Court of Human Rights regarding admissibility in *Antoine v United Kingdom*;[168] and *R v Chal.*[169]

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[162] Another Private Members Bill, this time introduced by Mr John Greenway MP.
[163] Parliamentary Under-Secretary of State for the Home Department (Peter Lloyd MP) commending the Bill (*Hansard*, (HC), 19th April 1991, vol 189, cc 724-31).
[164] Again, see Parliamentary Under-Secretary of State for the Home Department (Peter Lloyd MP) commending the Bill (*Hansard*, (HC),19th April 1991, vol 189,cc 724-31).
[165] [2000] UKHL 20.
[166] [2001] EWCA Crim 2644.
[167] [2003] UKHL 1.
[168] Application No. 62960/00.
[169] [2007] EWCA Crim 2647.

R v Antoine

3.10 *R v Antoine* involved the murder of a 15 year old, Michael Earridge, in a South London flat, by two other young people, David McCallum and Pierre Antoine, who was aged 16 at the time of the murder in December 1995. The murder was apparently a sacrifice to the devil. McCallum stabbed the victim a number of times in the chest in the presence of Antoine, after Antoine had prevented the victim from leaving the flat and had struck him. McCallum pleaded not guilty to murder but guilty to manslaughter on the ground of diminished responsibility: his plea was accepted by the Crown and he was duly committed to hospital under a hospital order pursuant to sections 37 and 41 of the Mental Health Act 1983.

3.11 Antoine took a different approach to the charges that had been made against him. It was contended that he was unfit to plead and the jury[170] heard evidence from three psychiatrists and subsequently found that Antoine was unfit to plead. It appeared that the psychiatrists considered that Antoine was suffering from paranoid schizophrenia.

3.12 Since Antoine was deemed to be unfit to plead, the procedure contained in section 4A[171] of the Criminal Procedure (Insanity Act) 1964[172] was followed. A second jury was empanelled to determine the question of whether Antoine had actually carried out the act of killing the deceased. Before the hearing was commenced, the judge was requested to give a ruling on the question of whether Antoine was entitled to raise the issue of, and seek to prove, diminished responsibility in respect of the murder. Counsel sought this ruling because if the jury found that the killing had been carried out when Antoine was acting as a result of diminished responsibility, the judge would not be obliged to make a hospital order directing that Antoine's discharge be restricted without limit of time. The judge considered the issue and stated that the question gave rise

[170] This case predates the changes made by the Domestic Violence, Crime and Victims Act 2004.
[171] Equivalent to Article 49A of the Mental Health (Northern Ireland) Order 1986.
[172] As substituted by section 2 of the Criminal Procedure (Insanity and Unfitness to Plead) Act 1991.

to two questions. First, there was the question of what the prosecution had to prove to cause the jury to make a finding under section 4A(3)[173] that Antoine had done the act that he was accused of. Second, there was the question of whether Antoine was entitled to raise the issue of, and seek to prove, diminished responsibility in relation to the murder.[174]

3.13 In relation to the first question regarding the prosecution's case, the judge considered that *R v Egan (Michael)*[175] was the correct authority to follow, meaning that the Crown had to prove both the *actus reus* of murder and the appropriate *mens rea*. In relation to the second question regarding Antoine's access to the partial defence of diminished responsibility, the judge ruled that on the wording of section 2 of the Homicide Act 1957, that the defence could not be raised at the hearing under section 4A(2) of the Criminal Procedure (Insanity) Act 1964.

3.14 On appeal to the Court of Appeal,[176] Antoine challenged the judge's ruling that he could not raise the issue of diminished responsibility. The Court of Appeal dismissed the appeal and held that the judge had been correct. Lord Bingham of Cornhill stated:

> [Section 2 of the Homicide Act 1957] provided a tightly-drawn solution to a narrowly-defined problem, but it was a solution which applied only where the case against the defendant established all the ingredients of murder, both as to *actus reus* and to *mens rea*. Thus, as the only question arising

[173] Equivalent to Article 49A(3) of the Mental Health (Northern Ireland) Order 1986.

[174] Diminished responsibility is a statutory defence which first appeared in England and Wales by virtue of section 2 of the Homicide Act 1957 c.11. It has subsequently been reformulated and is now contained in section 52 of the Coroners and Justice Act 2009 c.25. The defence is a partial defence to murder, reducing it to manslaughter. The purpose is to allow the court to avoid the mandatory life sentence which a conviction for murder requires, giving flexibility in sentencing for those who experienced "an abnormality of mental functioning" at the time of committing the offence – see AP Simester, JR Spence, GR Sullivan and GJ Virgo, *Simester and Sullivan's Criminal Law Theory and Doctrine* Hart Publishing, Oxford and Portland, Oregon (2010) at page 715.

[175] [1998] 1 Cr. App. R. 121.

[176] [1999] 3 W.L.R. 1204.

> under section 4A(2) is whether the jury is satisfied that the defendant has done the act charged against him as murder, no question of diminished responsibility could arise. On a determination under section 4A(2) the defendant would not, in any event, be liable to be convicted of murder within the meaning of section 2(3) of the Act of 1957, since section 4A(1) and (2) provide that on a finding of unfitness the trial shall not proceed, and it is not open to the jury to find the defendant guilty of murder but only that he did the act charged against him as murder….The whole purpose of sections 4 and 4A is to protect a person who is unfit to stand trial against the verdict of guilty. The procedure under section 4A(2) for determining whether the defendant did the act or made the omission charged against him as the offence is to protect the defendant against the making of an order under section 5(2) of the Act of 1964 in circumstances where he is not shown to have done the act charged against him. Section 2 of the Act of 1957 only comes into play where all the ingredients of murder are established against the defendant.[177]

3.15 The judgment was appealed to the House of Lords. The question which fell to be determined was where a jury had to determine whether an accused person had carried out the act of murder under the provisions of section 4A(2) of the Criminal Procedure (Insanity) Act 1964, was it possible for the accused person rely on the partial defence of diminished responsibility which is contained in section 2 of the Homicide Act 1957. The Lordships were also invited to consider a second question, which was whether the jury had to be satisfied of more than the *actus reus* of the offence or whether it also had to be satisfied of the *mens rea* under the provisions of section 4A(2) of the Criminal Procedure (Insanity) Act 1964.

3.16 In relation to the first question, the House of Lords held that the provisions of section 2 of the Homicide Act 1957 could not apply to a hearing under section 4A of the Criminal

[177] At page 1214.

Procedure (Insanity) Act 1964 and therefore the defence of diminished responsibility was unavailable to Antoine and any other accused person who was in a similar position. Lord Hutton considered that section 2 of the Homicide Act 1957 only applies if the accused is charged with murder and would be liable to be convicted of murder if the trial was to proceed, since section 2(3) of the Homicide Act 1957 states that "a person, but for this section would be liable …to be convicted of murder, shall be liable instead to be convicted of manslaughter". Under section 4A of the Criminal Procedure (Insanity) Act 1964, after the accused has been found to be unfit to stand trial, the trial can no longer proceed: therefore the accused was no longer liable to be convicted of murder.[178]

3.17 As regards the second question, Lord Hutton considered the decision in *Attorney-General's Reference (No. 3 of 1998).*[179] In that case, the court was concerned with section 2(1) of the Trial of Lunatics Act 1883 which provided for a special verdict to be made by the jury if it appeared to them that an accused person did the act or omission with which he was charged, but that he or she was insane at the time he or she carried out the act or omission. If a special verdict was returned by the jury, the court was obliged to order that the accused was kept in custody as a "criminal lunatic". Section 2(1) was duly amended by section 1 of the Criminal Procedure (Insanity) Act 1964 and a verdict of "not guilty by reason of insanity" replaced the former special verdict. Where a verdict of "not guilty by reason of insanity" was returned, the court was obliged to order the admission of the defendant to hospital subject to an order restricting his discharge without limit of time.[180] Lord Hutton noted that both section 2(1) of the Trial of Lunatics Act 1883 and section 4A of the Criminal Procedure (Insanity) Act 1964 refer to the words "did the act or omission charged".[181]

3.18 The *Attorney-General's Reference (No. 3 of 1998)* concerned a judgment where it was determined that the

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[178] At paragraph 18.
[179] [1999] 3 W.L.R. 1194.
[180] Section 5 of the Criminal Procedure (Insanity) Act 1964 and section 5 of, and Schedule 1 to, the Criminal Procedure (Insanity and Unfitness to Plead) Act 1991.
[181] At paragraph 28.

accused was fit to plead, but it was agreed between the defence and prosecution that he was legally insane at the time when he committed the offence in question, which was aggravated burglary. The accused believed that he was Jesus, surrounded by evil and danger and he was looking for a house with a light on so that he could enter it to be protected from evil. The judge considered that he was bound to follow the case of *R v Egan (Michael),*[182] in which it had been stated that the prosecution had the burden of proving all the relevant elements of the offence: in other words, the *actus reus* and *mens rea*. The evidence of a psychiatrist was that the accused was unable to form the necessary criminal intent to satisfy the *mens rea* required for the offence of aggravated burglary. Accordingly, the judge ruled that there was no evidence of the required intent for the offence and directed the jury to acquit the defendant. As Lord Hutton, in his judgment in *Antoine,* commented:

> Therefore, a man who had committed very violent acts at a time when he was insane and did not realise that his acts were wrong was set at liberty.[183]

3.19 The Attorney-General brought a reference under section 36 of the Criminal Justice Act 1972 which asked the Court of Appeal to consider what elements of a criminal offence had to be proved when an inquiry was brought under the Trial of Lunatics Act 1883 to determine whether the defendant had carried out the act or omission in relation to which he had been brought before the court. The Court of Appeal held that the prosecution was required to prove the elements of the *actus reus* of the crime in question, but not the *mens rea*.[184]

3.20 In the judgment, Judge L.J. (as he then was) gave two reasons for the approach which was taken by the Court of Appeal. First, he considered it significant that he wording used in the Trial of Lunatics Act 1883 was "did the act or made the omission", which he considered was a significant departure from the language used in the Criminal Lunatics

[182] [1998] 1 Cr. App. R. 121.
[183] At paragraph 32.
[184] At page 1203 of the judgment.

Act 1800, which had previously formed the law in this area. The Criminal Lunatics Act 1800 had used the words "committed the offence". Judge L.J. considered that:

> The difference is material. The original phrase "committed the offence" appears to encompass the relevant act, together with the necessary intent. By contrast, "act" and "omission" do not readily extend to intention. This change of language, apparently quite deliberate, has been left unamended for over a century and for all present purposes remains in force.[185]

3.21 The second reason given by Judge L.J. for the Court of Appeal considering that the *mens rea* did not need to be proved by the prosecution was because in an insanity case, the issue of *mens rea* ceases to be relevant. He relied on the judgment of *Felstead v The King,*[186] in which it was held that if a person was insane at the time of committing an act, then he or she could not have a *mens rea* as his or her state of mind could not be shown to be "felonious" or "malicious".[187]

3.22 In his judgment in *Antoine*, Lord Hutton considered that the judgment in *R v Egan* was inconsistent with the judgment in *Attorney-General's Reference (No. 3 of 1998)*. He stated that in his opinion the correct approach was the one taken in *Attorney-General's Reference (No. 3 of 1998).*[188] Therefore, he held that a jury, when making a determination under section 4A(2) of the Criminal Procedure (Insanity) Act 1964 should not consider the issue of *mens rea*.[189] Lord Hutton made reference to the intention of Parliament in its drafting of section 4A(2) and stated that Parliament could not have intended the risk that would arise to the public if the *mens rea* of the accused was considered during the section 4A(2) hearing:[190] the risk

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[185] At page 1198 of the judgment.
[186] [1914] A.C. 534.
[187] At this time, feloniousness or maliciousness were the standards set when assessing *mens rea*.
[188] At paragraph 38.
[189] At paragraph 41.
[190] At paragraph 41.

being that if a defendant who killed another person and was charged with murder was insane at the time of the killing and was unfit to plead at the time of the trial because of that insanity, then the jury would have to acquit the defendant and let him or her go free. This would be the outcome, since during the section 4A hearing, it could be demonstrated that the necessary *mens rea* for murder could not be proved because of the insanity which was present at the time of the commission of the offence.[191] Lord Hutton stated that the purpose of section 4A of the Criminal Procedure (Insanity) Act 1964:

> …in my opinion, is to strike a fair balance between the need to protect a defendant who has, in fact, done something wrong and is unfit to plead at his trial and the need to protect the public from a defendant who has committed an injurious act which would constitute a crime if done with the requisite *mens rea*. The need to protect the public is particularly important where the act done has been one which caused death or physical injury to another person and there is a risk that the defendant may carry out a similar act in the future. I consider that the section strikes this balance by distinguishing between a person who has not carried out the *actus reus* of the crime charged against him, and a person who has carried out an act (or made an omission) which would constitute a crime if done (or made) with the requisite *mens rea*.[192]

3.23 Lord Hutton also took the opportunity to consider whether, during the section 4A hearing, the jury could take into account other defences such as accident or mistake or self defence, which the accused could have raised if he had been found fit to plead. Lord Hutton considered that "such defences almost invariably involve some consideration of

[191] This is to be contrasted with the position where an accused is fit to plead, but successfully demonstrates that he or she was insane at the date of the offence. In these circumstances, the accused is found "not guilty by reason of insanity" but is then subject to a hospital order.
[192] At paragraph 49.

the mental state of the defendant".[193] He considered that the issue should be resolved in the following way. He stated that if there is objective evidence which raises the issue of mistake, accident, involuntariness[194] or self defence, then the jury should not find that the accused did the act alleged unless it is satisfied beyond reasonable doubt on all the evidence that the prosecution has disproved the defence. He gave an example of an accused who hit a victim with his fist and caused his death. He stated that under section 4A of the Criminal Procedure (Insanity) Act 1964, it would be open to the jury to acquit a defendant charged with manslaughter if a witness gave evidence that the victim had attacked the defendant with a knife before the defendant struck him. Lord Hutton expressed the view that the accused could not rely on any of the above defences in the absence of a witness whose evidence raises the defence.[195] However, Lord Hutton reserved his opinion in relation to the question of whether it would be open to the defence to call witnesses to raise the defence of provocation, on the basis that the defence of provocation is only relevant if the jury are satisfied that the defendant had the requisite *mens rea* for murder.[196]

R v Grant

3.24 *R v Grant* concerned the compatibility with the European Convention of Human Rights of section 4A of the Criminal Procedure (Insanity) Act 1964. The case related to the killing of her boyfriend by Heather Grant, who was charged with murder but subsequently found unfit to plead. A jury later found that Grant had carried out the stabbing of her boyfriend, after a hearing under section 4A of the Criminal Procedure (Insanity) Act 1964. During the section 4A hearing, evidence of a lack of intent on the part of Grant or the defence of provocation were not permitted by the trial judge to be considered by the jury. This ruling by the trial judge formed the basis of an appeal to the Court of Appeal.

[193] At paragraph 53.
[194] For example, an accused person commits an assault when he kicks out and strikes another person during the course of an uncontrollable seizure brought about by a medical condition.
[195] At paragraph 54.
[196] At paragraph 55.

3.25 In respect of whether Grant should have been able to raise the issue of lack of intent, the Court of Appeal held that:

> it was clearly not open to her to contend that she lacked the intent requisite for murder. That falls squarely within the territory of *mens rea* which, as the House of Lords [in *Antoine*] held, is not a matter for the jury to consider under s4A(2).[197]

3.26 However, the Court of Appeal considered that the issue of whether the defence of provocation could be raised at the section 4A hearing merited more examination. In cases of murder, provocation is an extenuating circumstance which is sufficient to cause the murder charge to be reduced to one of manslaughter. However, all the elements of murder must be present before the defence of provocation can be considered. Therefore, it must be shown that the requisite intent to kill or cause grievous bodily harm is present (the *mens rea*) as well as the *actus reus* of the offence.

3.27 The Court of Appeal considered that the defence of provocation could not sensibly be considered in the context of section 4A of the Criminal Procedure (Insanity) Act 1964, if section 4A is merely concerned with the *actus reus* of the offence. It would be impossible to draw conclusions in relation to whether the charge of murder had been made out if the *mens rea* could not be considered. If the charge of murder could not be determined, then the defence of provocation was unavailable for consideration.

3.28 Furthermore, the Court of Appeal considered that the defence of provocation required the examination of the accused's state of mind at the time of committing the offence.[198] If section 4A(2) required the consideration of the

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[197] At paragraph 42 of the judgment.

[198] At the time of the judgment, in England and Wales, the defence of provocation, which is a partial defence to murder, existed at common law and supplemented by section 3 of the Homicide Act 1957. A defence of provocation required an accused to demonstrate that something was said or done in consequence of which the accused lost self-control. The defence also requires a jury to consider whether a reasonable person would have lost control in those circumstances and if so, whether the reasonable person would have acted as the accused did. Section 54 of the Coroners and Justice Act 2009 has replaced the common law defence and accordingly section 3 of the Homicide Act 1957.

"act" only, then Parliament had deliberately acted to omit consideration of "the offence" as a whole, therefore removing any necessity to consider the *mens rea* of the accused.[199]

R v H

3.29 *R v H*[200] involved a thirteen year old boy who was charged with two offences of indecent assault against a girl aged fourteen. Before his trial he was examined by psychiatrists who agreed that he was unfit to stand trial. In June 2000, a jury which had been empanelled to decide whether he was unfit to be tried decided that he was unfit. A different jury later found that he had done the acts alleged against him pursuant to section 4A of the Criminal Procedure (Insanity) Act 1964. The decision of this jury was appealed against, on the basis that the procedure under section 4A was incompatible with Article 6 of the European Convention on Human Rights. The Court of Appeal rejected that argument and there was a subsequent appeal to the House of Lords to determine whether the procedure under section 4A amounted to the determination of a criminal charge for the purposes of Article 6 of the European Convention on Human Rights and also to determine whether a finding that an accused person did the act alleged violate the presumption of innocence afforded by Article 6(2) of the European Convention.

3.30 Lord Bingham of Cornhill stated that he considered that it was clear that the domestic law of England and Wales did not treat the section 4A procedure as being the determination of a criminal charge, as the statutory provision specifically stated that when a finding of unfitness is made, the trial no longer proceeded. He noted that the jury had no power to convict (although could acquit), no verdict of "guilty" was available and there was no punishment available to the court. Lord Bingham did not consider that the applicability of section 1(1)(b) of the Sex Offenders Act 1997 to an accused who had been found to have carried out the act with which he or she had been

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[199] At paragraph 44 of the judgment.
[200] [2003] UKHL 1.

charged after a section 4A procedure was not indicative as a punishment, as he considered that the notification requirements put in place by the Sex Offenders Act 1997 were designed to protect the public rather than punish an individual.[201] He was also of the view that the European Convention case-law had never held a proceeding to be criminal in nature without an adverse outcome for the accused in the form of a penalty.[202]

3.31 Lord Bingham went on to comment that he considered that it would be highly anomalous if section 4A was to be held to be incompatible with the European Convention on Human Rights, since section 4A had been designed to offer protection to accused persons who were unable to defend themselves at trial as a result of their unfitness. He argued that the provision was beneficial to unfit accused persons as the facts of their actions were formally and publically investigated in open court with counsel representing the interests of the accused.[203]

Antoine v United Kingdom

3.32 Following the judgment of the House of Lords, an application was made on behalf of Antoine to the European Court of Human Rights.[204] The basis of the application was that Antoine was unable to participate effectively in the hearing under section 4A of the Criminal Procedure (Insanity) Act 1964 or confront the witnesses against him, which it was alleged was in contravention of Article 6(1) and 3(d) of the European Convention on Human Rights. A complaint was also made under Article 3 of the Convention that Antoine was living under the threat of a further prosecution and the difficulties that posed to his rehabilitation as he could not co-operate with those responsible for his care in case anything he said was used against him at trial. Antoine claimed that his on-going detention in hospital amounted to a denial of his right to

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[201] The non-punitive nature of the order was recognised in *Ibbotson v United Kingdom* (1998) 27 EHRR CD 332.
[202] At paragraph 19 of the judgment.
[203] At paragraph 18 of the judgment.
[204] Application No. 62960/00.

liberty and security of person under Article 5 of the Convention and also infringed Article 6(2).

3.33 The Court considered the merits of the case in a decision as to admissibility on 13th May 2003. It was observed that in the Crown Court, after hearing evidence from three psychiatrists, the jury was directed by the judge to find that Antoine was unfit to plead and stand trial. Consequently, by virtue of section 4A(2) of the Criminal Procedure (Insanity) Act 1964, the trial came to an end with:

> ..the applicable legislation recognising, in accordance with the case-law of this Court, that it is generally unfair to try a defendant who has been found to be incapable of participating effectively in the proceedings.[205]

3.34 The Court noted that under the provisions of the Criminal Procedure (Insanity) Act 1964, Antoine could have been acquitted of the charge against him, but following the finding of unfitness to be tried, it was not possible to convict him. The Court considered that as a result, the proceedings under section 4A of the Criminal Procedure (Insanity) Act 1964 did not concern the determination of a criminal charge and there was no longer any threat of conviction to the accused. It was argued by Antoine's legal representatives that the possibility of an acquittal brought the proceedings within the scope of Article 6 of the Convention, since this enabled the court to make a final decision regarding the criminal charge. The Court was not convinced, however, that this argument was enough to make the proceedings criminal for the purposes of Article 6 of the Convention. It considered that the lack of the possibility of a conviction and the absence of any punitive sanctions were the more compelling arguments. The Court considered that although hospital orders could be imposed on defendants in criminal trials and would necessarily impose loss of liberty for the individual concerned, it could not be argued that an order of this nature is a measure of retribution or deterrence, unlike the imposition of a prison sentence.

[205] At page 6 of the decision.

3.35 The Court acknowledged that the section 4A hearings had strong similarities with procedures at a criminal trial, but it noted that the proceedings were primarily concerned with the *actus reus* of the offence. The Court, agreeing with Lord Hutton's judgment in the House of Lords, stated that the section 4A hearing served the purpose of striking a fair balance between the need to protect a person who had done nothing wrong but was unfit to stand trial and the need to protect the public from a person who had committed an act which would have been a crime if it had been carried out with the appropriate *mens rea*.

3.36 The purpose of section 4A, the Court considered, was to determine whether the accused had committed an act which resulted in the need for a hospital order to be made for the protection of the public. The Court concluded that the section 4A hearing did not involve the determination of a criminal charge and therefore the question as to whether the legislative provision was compatible with the requirements under Article 6 of the Convention that the accused must be able to participate in his or her trial did not arise.

3.37 In relation to claims that Antoine's rights under Articles 3, 5 and 6 of the Convention were infringed due to his indefinite detention in hospital and the risk that anything that he said about the killing may be later used against him at a subsequent trial, the Court considered that the hypothetical threat of future proceedings was not enough to constitute torture or inhuman and degrading treatment under Article 3 of the Convention. The Court noted that if no section 4A hearing had taken place and Antoine had been committed to hospital without having faced criminal charges, it would still have been open for the Crown Prosecution Service to bring a prosecution at a later date, as there is no time limit on bringing proceedings for murder.

3.38 The Court also did not find any contravention of Article 5(1) of the Convention. It considered that there was no dispute that Antoine was being lawfully detained as a person of unsound mind, but the detention had followed proceedings which had offered "the strong procedural guarantees of a fair, public and adversarial hearing before an independent

tribunal and with full legal representation".[206] It was also noted that although his detention was of an indefinite duration, Antoine was subject to regular reviews under the Mental Health Act 1983 to monitor his health with a view to his release.

3.39 In relation to the complaint under Article 6(2) of the Convention, which states that everybody charged with a criminal offence shall be presumed innocent until proved guilty according to law, the Court found the complaint to be premature. It considered that Antoine was not being presumed guilty of any criminal offence. The Court commented that if future statements made by Antoine to doctors were used against him at a future trial, issues may arise concerning a breach of the privilege against self-incrimination under Article 6 of the Convention. However, the Court stated that it was by no means certain that such an event would arise or that the domestic law could not provide remedies against the use of such statements during a trial.

3.40 Having given its reasons, the Court therefore unanimously declared that Antoine's application was inadmissible.

R v Chal

3.41 *R v Chal*[207] concerned the question of whether the court has power to allow the introduction of hearsay evidence in proceedings under section 4A of the Criminal Procedure (Insanity) Act 1964.

3.42 The facts of the case were was follows. In June 2006, the appellant was working on a building site in Coventry with three other men. One day, when they were having lunch, the appellant suddenly picked up a sledgehammer and hit one of the other men on the head with it. The victim suffered a severe brain injury which left him unconscious and in a persistent vegetative state. The appellant was arrested, charged with an offence under section 18 of the Offences Against the Person Act 1861 and subsequently

[206] At page 8 of the decision.
[207] [2007] EWCA Crim 2647.

found unfit to plead under section 4A of the Criminal Procedure (Insanity) Act 1964.

3.43 At the section 4A hearing, the jury found that the appellant did the act with which he was charged and a hospital order was duly made. The appellant appealed against his conviction on the basis that the trial judge had erred in allowing hearsay evidence to be admitted under section 116 of the Criminal Justice Act 2003. The hearsay evidence in question was an eyewitness account of the attack by the appellant's work colleague who had disappeared by the time of the trial and was unable to be traced.

3.44 It was argued by the appellant's counsel that the proceedings under section 4A of the Criminal Procedure (Insanity) Act 1964 were not criminal in nature, relying on the decision of the House of Lords in *R v H* which is discussed above. In that case, which specifically looked at the issue of whether section 4A hearings were compatible with Article 6 of the European Convention on Human Rights, Lord Bingham had considered that the proceedings were not criminal in nature.[208]

3.45 Lord Justice Toulson considered that section 4A contained two fundamental provisions which gave guidance about the way in which it was to be operated. First, the decision about whether the accused committed the act with which he or she was charged is to be decided by a jury. Second, section 4A requires that the jury is to make a finding, if, and only if, it is satisfied that he or she did the act and must acquit the accused if it is not satisfied. Although the Criminal Procedure (Insanity) Act 1964 does not specifically say so, the Court of Appeal stated that the jury must be satisfied to the criminal standard of proof, in other words, beyond reasonable doubt.[209]

3.46 Lord Justice Toulson also stated that it was important to remember the purpose of section 4A. He considered that the purpose was to avoid the detention of a person unless

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[208] See paragraph 3.29 of this consultation paper.
[209] See paragraph 24 and 25 of the judgment.

a jury at a criminal trial would have found that he or she did the act alleged or conversely that an accused would be detained if a jury was satisfied that he or she did the act. In order to achieve that result, the Court of Appeal considered it imperative that the rules of evidence and criminal procedure that would be applied in a criminal trial, should be applied to the section 4A hearing.[210] In relation to the specific issue of the admissibility of hearsay, Lord Toulson made it clear that the Court of Appeal considered that the draftsman of the Criminal Justice Act 2003 would have intended hearsay evidence to be admissible in section 4A hearings.[211] He went to conclude that in the Court's judgment, hearsay was admissible and it was not necessary for the Court to determine which was the correct analysis: statutory interpretation of the intention behind the Criminal Justice Act 2003 or whether in section 4A hearings, the court should adopt the same rules of evidence as those in criminal proceedings. That determination, Lord Toulson stated, was a point "of purely intellectual interest which it is unnecessary for us formally to decide for present purposes."[212]

COMMENTS ON CASE-LAW

3.47 It is more than clear that up to this point, the domestic courts have interpreted section 4A of the Criminal Procedure (Insanity) Act 1964 (and by extension, its equivalent in Northern Ireland, Article 49A of the Mental Health (Northern Ireland) Order 1986) to require consideration of only the *actus reus* of the offence with which the accused has been charged and have rejected attempts made by defence teams to have the *mens rea* of the offence incorporated into the process.

3.48 Both the domestic courts and the European Court of Human Rights have been content to view the Article 49A hearing as a process which falls outside of criminal proceedings and therefore does not invoke the protections for the accused which are afforded by Article 6 of the European Convention on Human Rights. Arguments in

[210] At paragraph 26 of the judgment.
[211] At paragraph 33 of the judgment.
[212] At paragraph 34 of the judgment.

relation to the non-compliance with Article 6 of the European Convention on Human Rights in relation to the effective participation of the accused in the proceedings have, to date, been unsuccessful. Having said that, it is worth noting that the decision as to admissibility in *Antoine v United Kingdom*, although binding in the sense that it cannot be appealed against, does not prevent another case with similar complaints being taken against the United Kingdom again. Whether or not a similar approach would be taken again by the Court is a matter for those tasked with determining admissibility of applications to the Court, but it is possible that another attempt to question Article 49A's compliance with Article 6 of the European Convention on Human Rights will occur in the future.

ARTICLE 6 PROTECTIONS

3.49 It cannot be denied that Article 6 of the European Convention on Human Rights offers valuable and necessary protections to ensure that individuals receive a fair trial. However, domestic case-law and the decision as to admissibility in *Antoine v United Kingdom* demonstrate that currently, the Article 49A hearing is viewed as neither criminal or civil proceedings and as a result, falls outside the protections offered by Article 6 of the Convention. In its consultation paper *Unfitness to Plead*, the Law Commission of England and Wales has argued that the introduction of consideration of the *mens rea* of the offence during an Article 49A hearing would bring the unfit accused person within the protection of Article 6 of the European Convention on Human Rights.[213] Whether inclusion of the *mens rea* of the offence removes all the arguments[214] why Article 49A hearings fall out-with Article 6 of the European Convention of Human Rights, remains to be seen, but it would certainly put the unfit accused on a more equal footing with accused persons who are fit to plead.

3.50 It is not just the issue of Article 6 compatibility that may suggest the need to incorporate the *mens rea* of the offence into the Article 49A hearing. There are other

[213] See footnote 83 at paragraph 6.138.
[214] See paragraphs 3.10 – 3.23 above – discussion of *Antoine v United Kingdom*.

arguments that may be persuasive for the purposes of deciding whether to take this approach. The limited availability of defences that can be relied upon by the accused during an Article 49A hearing, the nature of certain offences and adherence to the duty placed on public bodies in Northern Ireland to promote equality of opportunity under section 75 of the Northern Ireland Act 1998 all merit consideration.

DEFENCES

3.51 Consideration of the mental element of the offence is arguably beneficial to the accused as it puts them on an equal footing with accused persons who are subject to the rigours of the criminal trial process. For example, if a person is determined by a court to be unfit to plead in circumstances where he or she has been charged, for example, with assault, he or she is limited in his or her ability to raise defences during the Article 49A hearing, since it is stated in *Antoine* that certain defences cannot be raised unless there is evidence from another witness that raises the defence.[215]

3.52 Although it seems unfair that defences are limited to the accused during an Article 49A hearing, some defences may be difficult to raise because of the fact that the accused has been deemed unfit to plead. If the unfitness is caused, for example, by an inability to instruct counsel, the accused may be unable or may find it very difficult to instruct counsel that he or she wishes to have the defence raised. If the unfitness is caused, for example, by inability to give evidence, then the court may be able to rely on psychiatric evidence of the accused's mental state at the time of the offence which is brought before the court, but the accused may not be in a position to provide the psychiatrist with much insight into his or her condition at the time of the offence, requiring the expert to rely on other sources of evidence such as medical records. Defences which may be problematic for unfit accused persons to raise include partial defences to murder such as diminished responsibility and loss of control. In Northern Ireland, where

[215] At paragraph 54 of the judgment.

diminished responsibility is concerned, section 53 of the Coroners and Justice Act 2009 states that a defendant is not to be convicted of murder if he or she is suffering from an abnormality of mental functioning which arises from a recognisable mental condition and which substantially impairs the defendant's ability to:

- Understand the nature of his or her conduct;
- Form a rational judgment; or
- Exercise self control.

3.53 In relation to the partial defence of loss of self control, section 54 of the Coroners and Justice Act 2009 requires the defendant to demonstrate that the killing occurred because he or she lost self control, the loss of self control had a "qualifying trigger" and a person of the defendant's age and gender with a normal degree of tolerance and self-restraint, in the same circumstances as the defendant found him or herself, might have reacted in the same or a similar way to the defendant. Section 55 defines the meaning of "qualifying trigger". Within the definition, the mental state of the defendant at the time of the killing is relevant: section 55(4)((b) states that the loss of self control is attributable to things said or done to the defendant which caused him or her to have a justifiable sense of being seriously wronged. For example, it may prove difficult for a person who is deemed to be unfit to plead to provide instructions to his or her legal representatives in relation to these defences or to give evidence about his or her state of mind at the time of the offence.

3.54 It should also be noted that defences which are partial defences to murder will not provide the same outcome for the accused in an Article 49A hearing as they would do in a criminal trial. In a criminal trial, the partial defence, if successfully proved, will result in an a conviction on the grounds of the lesser charge of manslaughter and sentencing will no longer be the mandatory life sentence which is required for murder. In relation to Article 49A hearings, the effect of successfully proving a partial defence to murder will not, in all likelihood, alter the disposal which the court makes in relation to the accused,

as the disposals are not punitive, but designed to afford care and treatment for the accused.

3.55 Other defences also require the accused to demonstrate his or her mental state at the time of the offence. Any defence which seeks to negate the *mens rea*[216] will necessarily require consideration of the mental state of the accused at the time of the offence. As discussed, a finding of unfitness may make it very difficult for an accused person to give the evidence required for the defence to be made out or the accused may be unable to instruct his or her legal representatives that the defence is even available.

3.56 Although there are obvious practical problems with examining the *mens rea* of a person who is deemed to be unfit to plead and allowing defences to be considered during an Article 49A hearing process, there is another difficulty that would have to be addressed before the *mens rea* of the offence could be considered. This problem arises in relation to individuals whose mental illness or learning disability means that they are unfit to plead and who were experiencing the same illness or disability at the time of the offence.

3.57 In order to prove that an individual committed an offence, the prosecution must prove, beyond reasonable doubt, that the individual committed the act or made the omission (the *actus reus*) and had the required mental state at the time of the offence (the *mens rea*). During an Article 49A hearing process, if *mens rea* is to be considered, then the prosecution is required to prove that the accused carried out his or her actions with the necessary mental element. Setting aside the practicalities of doing so, which are discussed above, a more fundamental issue arises which was identified by Lord Hutton in *R v Antoine*. If the accused was experiencing such illness or disability at the time of the offence that it is not possible to prove that he or she had the necessary *mens rea* to carry out that offence, then it is potentially open to the defence team to rely on the inability of the prosecution to prove the necessary *mens rea*, resulting in an acquittal of the accused. In *Antoine*, Lord

[216] Examples include the defence of mistake and infanticide.

Hutton was particularly concerned about this possibility as he considered that it may result in people being acquitted who were dangerous to the general public.

3.58 However there is a way of mitigating against the risk. The method of avoiding this outcome is to ensure that the prosecution can adduce evidence that the accused was "insane"[217] at the time of the offence and make available during the Article 49A hearing process a verdict which finds that the accused is not guilty because of "insanity",[218] thus opening up a range of disposals for the court to consider.[219] By requiring the court to consider this verdict, the question of the accused's mental state at the time of the offence is considered and this may result in some amelioration against the concern that some "dangerous"[220] individuals are acquitted. In England and Wales, section 6 of the Criminal Procedure (Insanity) Act 1964 states that the prosecution can adduce evidence of insanity "on a trial for murder". Arguably, in England and Wales, section 4A of the Criminal Procedure (Insanity) Act 1964 is not a trial, since section 4A(2) states that the trial should not proceed or further proceed when it is determined that an accused person is unfit to plead. In Northern Ireland, section 2(3) of the Criminal Justice Act (Northern Ireland) 1966 is the local equivalent to section 6 of the Criminal Procedure (Insanity) Act 1964. That statutory provision allows the prosecution to assume the burden of proving that the accused person who is "on a charge" for an offence was insane at the time of the offence, whilst section 5(3) of the Criminal Justice Act (Northern Ireland) 1966 allows the prosecution to assume

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[217] An "insane person" in Northern Ireland is defined in section 1 of the Criminal Justice Act (Northern Ireland) 1966 as being a person who suffers from mental abnormality which prevents him or her from (a) appreciating what he or she is doing; or (b) from appreciating what he or she is doing is either wrong or contrary to law or (c) from controlling his or her own conduct.

[218] This approach is seen in the various Australian jurisdictions which take *mens rea* into account and in Scotland – see below.

[219] Article 50A(2) of the Mental Health (Northern Ireland) Order 1986 contains the disposals available to the court: a hospital order, guardianship order, a supervision and treatment order and an order for absolute discharge.

[220] "Dangerousness" is a term which is used in the mental health field to mean "an unpredictable and untreatable tendency to inflict or risk serious, irreversible injury or destruction or to induce others to do so" or "a propensity to cause serious physical injury or lasting physical harm" MIND *Dangerousness and mental health: the facts* www.mind.org.uk.

the burden of proving that an accused person who is "on a charge of murder" was insane at the time of the offence. The wording of the Criminal Justice Act (Northern Ireland) 1966 is obviously different to its counterpart in England and Wales. Whether the wording "on a charge" as opposed to "on a trial" effects a difference when it comes to determining whether sections 2 and 5 of the Criminal Justice Act (Northern Ireland) 1966 can be utilised during a hearing under Article 49A of the Mental Health (Northern Ireland) Order 1986 is a matter for debate.

3.59 However, it is worth noting that not every person who is deemed to be unfit to plead will necessarily be demonstrated to have been "insane" at the time that the offence was committed, yet may have been experiencing a mental state at the time of the offence which may result in the prosecution being unable to prove that the unfit accused had the necessary *mens rea* to commit the offence. Therefore, if the *mens rea* of the offence is to be considered during the Article 49A hearing, then there is the possibility that more people will be acquitted than under the current law. These people would therefore not be eligible for any of the care and treatment disposals which are available to the court and would be reliant on the civil mental health law if they needed assistance in managing their illness or condition.

NATURE OF THE OFFENCE

3.60 Most offences are constituted by a *mens rea* and an *actus reus* element. However, for some offences, the *mens rea* element is needed to put the *actus reus* of the offence into context to allow it to be understood as an offence. An example of this type of offence is having an offensive weapon in a public place: having the weapon in a public place is only an offence if the accused intends to use it to cause injury. Likewise, it might be problematic if the accused has been charged with an inchoate offence. Inchoate offences such as encouraging or assisting crime require the accused to carry out actions with the intent to encourage or assist another person to carry out an offence whilst believing that the offence will be committed. Actions

of the unfit accused viewed alone, without consideration of the *mens rea*, may appear quite meaningless.

3.61 The secondary participation of an accused in an offence also has potential to cause difficulties during an Article 49A hearing. Secondary participation is a common law concept which allows an individual who encourages, assists or causes another person to commit an offence to be liable to the same degree as the perpetrator. Secondary participation may require that the accused knew what the perpetrator of the offence was intending to do. If the *mens rea* is not considered during the Article 49A hearing, then the actions of the unfit accused are unlikely to be enough to demonstrate his or her involvement in the offence that he or she was charged with.

SECTION 75 OF THE NORTHERN IRELAND ACT 1998

3.62 In the Northern Ireland specific context, it is also important to consider the duty placed on public authorities by section 75(1) of the Northern Ireland Act 1998. Section 75(1) places a duty on public authorities when carrying out their functions in relation to Northern Ireland to have due regard to the need to promote equality of opportunity between various categories of people, including those with disabilities and those without. The Article 49A hearing as it currently stands may create a differential impact between the way that people who are fit to stand trial are treated and the way in which people who are unfit to stand trial are treated. The Equality Screening exercise included in chapter 6 of this consultation paper explores this issue in more detail, as does the Equality Impact Assessment consultation paper which the Commission has published in relation to this project.

INCORPORATION OF THE *MENS REA* IN OTHER JURISDICTIONS

3.63 Various jurisdictions have procedures for assessing the culpability of accused persons who have been determined to be unfit to plead which take account of the *mens rea* element of the offence with which the accused person has been charged. Examples of these jurisdictions are New

South Wales and Victoria in Australia, Scotland and New Zealand. Each jurisdiction has a slightly differing approach and these will be discussed in turn below.

New South Wales

3.64 In New South Wales, where a defendant is determined to be unfit to plead and likely to remain so for a period of twelve months or more,[221] the court must obtain the advice of the Director of Public Prosecutions as to whether further proceedings will be taken against the accused. A special hearing to assess whether the accused person committed the offence with which he or she was charged must be conducted unless the Director of Public Prosecutions advises that no further action will be taken against the accused.[222] The purpose of the special hearing is to ensure that, despite the unfitness of the accused, the person is acquitted unless it can be proved beyond reasonable doubt that the person committed the offence with which he or she was charged.[223] Section 21 of the Mental Health (Forensic Provisions) Act 1990 is concerned with the nature and conduct of the special hearing. Section 21(1) states that the special hearing is to be conducted as if it was a criminal trial, whilst section 21(3) permits the accused person to raise any defence which he or she could raise if the matter had proceeded by way of a criminal trial as opposed to the special hearing procedure. In this way, the mental elements of the offence and defences are brought within the scope of the special hearing process. The verdicts available to the court at the conclusion of the special hearing are contained in section 22(1) and are:

- Not guilty of the offence
- Not guilty on grounds of mental illness
- That on the limited evidence available, the accused person committed the offence; or
- That on the limited evidence available, the accused person committed an offence available as an alternative to the offence charged.

[221] Section 19 of the Mental Health (Forensic Provisions) Act 1990.
[222] Section 19(1).
[223] Section 19(2).

3.65 In Victoria,[224] the Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 states that if the accused is unlikely to become fit to plead within a twelve month period, then a special hearing must be held within three months of the determination of unfitness.[225]The purpose of the special hearing is to determine whether the accused is guilty of the offence, is not guilty of the offence because of mental impairment, or committed the offence charged or an offence which is available as an alternative.[226] Section 16(1) requires the special hearing to be conducted as if it was a criminal trial, with section 16(2) permitting the accused to raise any defence that could be raised if the accused was being tried in a criminal court, including the defence of mental impairment.[227] The findings open to the court upon concluding the special hearing are first: not guilty of the offence; second: not guilty of the offence because of mental impairment; or third: the accused committed the offence charged or an offence available as an alternative.[228]

Scotland

3.66 The approach is Scotland is different again. Section 55 of the Criminal Procedure (Scotland) Act 1995 introduced a procedure of examination of the facts which is similar to the one introduced in England and Wales by the Criminal Procedure (Insanity and Unfitness to Plead) Act 1991, but which varies in a significant way in that the mental element of the offence may be considered by the court.

3.67 Section 55(1) states that if the court is satisfied beyond reasonable doubt that the accused person did the act or made the omission constituting the offence and that on the balance of probabilities, there are no grounds for acquitting the accused, then the court must make a finding to that effect[229] or acquit the accused if it is not so satisfied.[230] An

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[224] The procedure in the Northern Territory is almost identical to Victoria (see the Criminal Code Act).
[225] Section 12(5).
[226] Section 15.
[227] A defence which is broadly similar in nature, but not identical, to the defence of insanity in Northern Ireland.
[228] Section 17(1).
[229] Section 55(2).

acquittal of the accused is subject to section 55(4) which states that if it appears to the court that the person was "insane" at the time of offence, the court is permitted to state that the acquittal is on the ground of insanity.

New Zealand

3.68 In New Zealand, before a finding of unfitness to stand trial can be made by the court, section 9 of the Criminal Procedure (Mentally Impaired Persons) Act 2003 requires the court to consider whether, on the balance of probabilities, the evidence against the accused is sufficient to establish that the accused caused the act or omission with which he or she was charged. This "involvement" hearing is intended to act as a filter to remove an innocent person from the proceedings before an assessment of his or her unfitness to stand trial is made.[231] Once that determination has been made, the issue of unfitness is then considered by the court. If the accused is found to be unfit, then various disposals are available to the court by virtue of sections 24 and 25 of the Criminal Procedure (Mentally Impaired Persons) Act 2003, such as hospital detention, detention in a secure facility under the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003, or release of the accused.

3.69 Although the New Zealand approach is different from the Article 49A hearing process in that it requires an assessment of the accused person's involvement in the alleged offence prior to a determination of unfitness, the approach is interesting because of the evolution of the section 9 process from a position where the focus was on the *actus reus* of the alleged offence to one which may include mental elements of the offence as well.

3.70 The Guide to the Criminal Procedure (Mentally Impaired Persons) Act 2003 clearly states that section 9 of the Act requires consideration of the accused's *physical* responsibility for the offence.[232] However, this approach

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[230] Section 55(3).

[231] WJ Brookbanks, 'Special hearings under CPMIPA' (2009) *New Zealand Law Journal* 30 at page 430.

[232] See www.justice.govt.nz at page 7 of the Guide.

was examined in *R v Te Moni.*[233] The issue in this case was whether section 9 required consideration only of the *actus reus* of the offence of rape or whether the *mens rea* of the offence could be considered too. The court held that merely considering the *actus reus* of the offence did not set a sufficiently high threshold to meet the objective of section 9, which was considered to ensure that a court has made a finding of criminal culpability before the sanctions which can apply to a person who is unfit to stand trial can be imposed.[234] The court also held that in relation to the offence of rape, the *actus reus* (penetration) could not be the only consideration, as the offence necessarily required consideration of whether the penetration was lawful or unlawful. The court therefore decided that the section 9 determination must be whether non-consensual penetration took place, which necessarily must examine whether the accused believed that consent had been forthcoming, therefore going beyond the *actus reus* of the offence.[235]

3.71 **The Commission acknowledges that other jurisdictions have incorporated the *mens rea* into unfitness to plead proceedings, but it has not reached any provisional conclusions in relation to the issue of the Article 49A hearing process including consideration of the *mens rea* of the offence. There appears to be both benefits and detriments in relation to adopting this approach. The Commission therefore welcomes the views of consultees on this issue.**

OTHER OPTIONS FOR REFORM

3.72 As well as reforming the Article 49A hearing to incorporate the *mens rea* of the offence, there are two other options that the Commission wishes consultees to consider. First, retaining the Article 49A hearing in its current form, that is to say, requiring consideration of the *actus reus* only, and second, dispensing with the hearing altogether.

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[233] [2009] NZCA 560.

[234] At paragraph 79.

[235] At paragraph 81.

Retaining the Article 49A hearing as it is: South Australia and the Australian Capital Territory

3.73 South Australia and the Australian Capital Territory each have a procedure which is similar to the Article 49A hearing in the sense that only the *actus reus* of the offence is considered and there is no consideration of the *mens rea*.[236] In South Australia, if there are reasonable grounds to suppose that a person is mentally unfit to stand trial, the court may order an investigation into the mental fitness of the accused.[237] The investigation may be supported by the production of psychiatric reports,[238] and if a report suggests that the accused is mentally unfit to stand trial but there is a reasonable prospect that he or she will regain the necessary mental capacity over the subsequent twelve months, then the court may adjourn the trial for up to twelve months.[239] If the court determines that the accused is unfit to stand trial, section 269M.B of the Criminal Law Consolidation Act 1935 states that the trial should be limited to the objective elements of the offence, which are further defined as being elements of the offence which are not subjective. Subjectivity in this context is defined by section 269A of the Criminal Law Consolidation Act 1935 as meaning voluntariness, intention, knowledge or some other mental state that is an element of the offence. Under this scheme, it is also not possible to consider defences which might be available to the accused person by virtue of Section 269 M.B.[240]

3.74 In the Australian Capital Territory, the Crimes Act 1900 makes provision for the procedure to be followed when an accused person is determined to be unfit to plead. The approach taken is similar to the one adopted in South Australia, as the court is required to consider whether the accused will become fit within a twelve month period.[241] If

[236] In relation to South Australia, the Criminal Law Consolidation Act 1935 Part 8A Div 3 is the relevant provision, whilst in relation to the Australian Capital Territory, section 316(9)(c) of the Crimes Act 1900 governs this area.
[237] Section 269J of the Criminal Law Consolidation Act 1935.
[238] Section 269K(1).
[239] Section 269K(2).
[240] This provision was enacted by the Criminal Law Consolidation (Mental Impairment) Amendment Act 2000.
[241] Section 315A(4).

the accused is not likely to become fit within this period, a special hearing is to be conducted[242] "as nearly as possible as if it were an ordinary criminal proceeding".[243] However, the purpose of that hearing is to ensure that the accused should be acquitted unless it can be proved beyond reasonable doubt, on the evidence available, that the accused engaged in the *conduct* required to demonstrate the offence with which the accused was charged.[244] By placing this focus on conduct, the mental elements of the offence are excluded.

3.75 Continuing to limit the trial of the facts to the *actus reus* or the conduct element of the offence in the Northern Ireland context is an option to be considered. Although a "do nothing" approach cannot be described as reform, as such, it is also an important principle of law reform to recognise that the law is functioning adequately and is therefore not in need of change. In this chapter, the current law in relation to the Article 49A hearing has been examined and at this present time, both domestic courts and the European Court of Human Rights appear to be satisfied with the current arrangements.

3.76 Having said that, it must always be remembered that the European Court of Human Rights has only considered this issue in a decision as to inadmissibility. It is possible that another case may be brought forward for consideration and a different outcome may result if the applicant can demonstrate that there is a case to be heard in relation to a breach of Article 6 of the European Convention on Human Rights.

3.77 Additionally, when the Butler Committee[245] first recommended that there should be a trial of the facts, it envisaged that the process should include consideration of both the conduct and mental elements of the offence with which the accused was charged.[246] The recommendations of the Committee envisaged that the prosecution should be

[242] Section 315C(a) (Supreme Court) and section 315C(b) (Magistrates' Court).
[243] Section 316(1).
[244] Section 316(9)(c).
[245] See paragraph 3.5 above.
[246] See footnote 157 at paragraph 10.24.

required to not only prove the *actus reus* of the offence, but also the mental state which is required for the offence. The Committee considered that the prosecution would be able to prove the necessary *mens rea* and it was considered that this could be achieved by inference from the evidence before the court.[247]

3.78 **The Commission seeks the views of consultees in relation to continuing to require that the Article 49A hearing process focuses only on the conduct elements of the offence and excludes mental elements. The Commission is particularly interested in hearing the views of consultees in relation to the equality implications of this decision under section 75 of the Northern Ireland Act 1998.**

Dispensing with the hearing: Western Australia, Queensland and Canada

3.79 Two Australian jurisdictions, Western Australia and Queensland, have not taken the route of adopting a procedure such as the Article 49A hearing. Likewise, in Canada, there is no equivalent procedure to the one contained in Article 49A of the Mental Health (Northern Ireland) Order 1986.

3.80 In Western Australia, the Criminal Law (Mentally Impaired Accused) Act 1996 states that the presiding judicial officer shall decide whether an accused person is fit to stand trial, after inquiring into the issue and informing himself or herself in any way that he or she thinks appropriate.[248] If a finding of unfitness is made during summary trials, if the court is satisfied that the accused will not become fit to stand trial within six months of the finding of unfitness, the court must make an order to release the accused or make a custody order in relation to the accused, without deciding the issue of guilt or innocence.[249] If the court considers that the accused will become fit to stand trial within six months, the case must be adjourned.[250] The same process applies

[247] See footnote 157 at paragraph 10.25.
[248] Section 12(1).
[249] Section 16(2)(a) and (5)(a) and (b).
[250] Section 16(2)(b).

to trials on indictment.[251] In relation to summary proceedings and trials on indictment, a custody order cannot be made unless the judge is satisfied that a custody order is appropriate, having regard to:

- the strength of the evidence against the accused;
- the nature of the alleged offence and the alleged circumstances of its commission;
- the accused's character, past history, age, health and mental condition; and
- the public interest.

3.81 In Queensland, the issue of an accused person's unfitness for trial and unsoundness of mind when the alleged offence was committed can be referred to a specialist Mental Health Court.[252] The Mental Health Court[253] consists of a Supreme Court Judge and two psychiatrists.[254] It is not bound by the rules of evidence and the accused does not have to appear in court if it is considered that it is expedient that he or she does not appear and that non-attendance is also in his or her best interests.[255] The Court also has the power to appoint a person to assist the accused at the hearing.[256] If, however, the accused person wishes to elect to be tried for the offence in a criminal court, the Attorney General must ensure that proceedings against the person are continued within twenty-eight days of the accused person's election to go to trial being received.[257]

3.82 By virtue of section 288(2) and (3) of the Mental Health Act 2000, the Mental Health Court may detain the accused

[251] See section 19.
[252] Section 288 of the Mental Health Act 2000.
[253] "Mental Health courts have been conceived in response to the dramatic increase in mentally disordered persons entering the criminal justice system in many jurisdictions that has followed the process of deinstitutionalisation. They represent an innovative approach to addressing the needs of people who have been alienated and marginalised by both the criminal justice and mental healthcare systems by applying therapeutic jurisprudence paradigms in an attempt to reduce the criminalisation of mentally disordered persons." WJ Brookbanks and RD Mackay, (see footnote 51) at page 281.
[254] Section 382.
[255] Section 409.
[256] Section 410.
[257] Section 312.

person for involuntary treatment or care if he or she is unfit for trial and the unfitness is of a permanent nature. The Mental Health Court must detain the accused person for involuntary treatment or care if the unfitness is of a non-permanent nature. In relation to permanent unfitness, the court must take into account a number of criteria before making an order for involuntary detention, namely the seriousness of the offence, the person's treatment or care needs, and the protection of the community.[258]

3.83 In Canada, there is no equivalent to the Article 49A hearing. Instead, section 672.33 (1) of the Criminal Code puts in place a process which requires an inquiry to be held no later than two years after the finding of unfitness of the accused and thereafter every two years until either the accused is found to be fit enough to be tried or is acquitted. Acquittal will occur when the court determines as a result of the inquiry that there is insufficient evidence to put the accused on trial.[259] Where the accused is found to be permanently unfit and does not pose a significant threat to the public, the court can order that proceedings are stayed.[260]

3.84 These approaches are very different to the current Article 49A procedure. The Western Australia approach appears to have a similarity to the position which existed in Northern Ireland prior to the Criminal Justice (Northern Ireland) Order 2006, when accused persons who were found unfit to plead were hospitalised without a formal investigation in relation to their culpability for the offence with which they were charged. A limited assessment of guilt or innocence, such as that contained within the Western Australia model, seems unfair to the accused person, who may have found himself or herself involved in criminal proceedings whilst being completely innocent. The criteria for making a custody order, by taking into account issues such as the

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[258] Section 288(4).
[259] Section 672.33(6).
[260] Section 672.851(1). This amendment was made to the Criminal Code following the decision of the Supreme Court in *R v Demers* [2004] SCC 46 which concluded that the indefinite subjection of an accused to the Criminal Code process was unconstitutional as it was a violation of liberty under the Canadian Charter of Rights and Freedoms.

nature of the offence, the accused's personal characteristics, and past history and the public interest could well result in the detention of individuals who are blameless. For these reasons, the Commission is not minded to view this approach as an option for reform of the law in Northern Ireland, although consultees are of course, welcome to disagree.

3.85 The Queensland approach is interesting in the sense that it takes the decision-making in relation to unfitness to stand trial out of the criminal court proceedings and places it within the remit of a specialist court which has specific expertise in mental health matters. If this approach was adopted in Northern Ireland, it would be a novel approach to dealing with the issue. It is very much a direction which is based on the health needs of an individual rather than one which is based on a criminal process. The approach has attracted positive comment by some academics:

> In the complex area of unfitness to stand trial, a mental health court offers the prospect of considerable legal and medical expertise being brought to bear in resolving outstanding issue of mental health status and because of the nature of its jurisdiction, would reduce the risk of mentally impaired and unfit defendants processing through the court system with their mental health needs unrecognised.[261]

3.86 However, under the Queensland approach, the seriousness of the offence is considered as a criterion affecting involuntary detention and treatment, and there does not appear to be any consideration of whether or not the individual has actually carried out the act or omission with which he or she was charged. If followed, this approach may take Northern Ireland back to the position which existed before the creation of the Article 49A hearing. It is assessment of "guilt" which is an aspect of the Article 49A hearing which the Commission considers is important. An additional consideration to be taken into

[261] WJ Brookbanks & RD Mackay, (see footnote 51) at page 282.

account with the Queensland approach is the question of the cost of setting up such a specialist court.

3.87 The Canadian approach appears to be motivated by the objective to engage the accused in the criminal process. The accused can only be acquitted if it appears that there is insufficient evidence to proceed with the criminal proceedings. If it appears that the accused is never going to be fit to stand trial, then the proceedings against him or her can be stayed. The Commission is not attracted to this model for two reasons. First, there is no assessment of whether the accused has actually carried out the act or made the omission with which he or she was charged. The Commission considers that this element is important as it removes the "innocent" from the court processes at an early stage. Second, the Canadian model is reliant on the recovery time of an unfit accused person. The Commission notes that the time taken to recover sufficiently to become fit to be tried will vary from individual to individual and this factor may add significant delay to the criminal process. One benefit of the Article 49A hearing is that it can take place as soon as a finding of unfitness is made.

3.88 The Commission is wary of removing the protections afforded by the Article 49A hearing, that is to say, the benefits of having a court (with a jury) assess whether or not a person has actually committed the act with which he or she was charged. The Commission sees merit in having an assessment of "guilt" determined in a court setting by a jury. Having said that, **the Commission would be interested in hearing the views of consultees in relation to the approaches taken by Western Australia, Queensland and Canada, particularly whether it is considered that there is merit in exploring whether a specialist court could have a role in determining issues of unfitness to plead, or whether current arrangements already provide access to sufficient expertise.**

REPRESENTATION OF THE ACCUSED DURING THE ARTICLE 49A HEARING

3.89 The Commission is also seeking the views of consultees in relation to the representation and support for the accused

during the Article 49A hearing. In *R v Norman*,[262] the Court of Appeal commented that if it is determined that an accused is unfit to plead, then it is the court's duty under section 4A(2) of the Criminal Procedure (Insanity) Act 1964[263] to carefully consider who is the best person to be appointed by the court to put the case for the defence. The Court of Appeal considered that the person is not necessarily the person who has represented the accused up to that point, but it is the responsibility of the court to ensure that the person appointed is the right person for the "difficult task".[264] It was noted that the responsibility placed on this person is quite different to that which is placed on an advocate who can take instructions from a client.[265]

3.90 **The Commission seeks the views of consultees in relation to the best methods of ensuring that the accused is adequately supported during the Article 49A hearing, whether that may be through legal representation or whether further assistance, such as the use of an intermediary, for example, would be beneficial.**

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262 [2008] EWCA Crim 1810.

263 The equivalent to Article 49A.

264 At paragraph 34 (iii) of the judgment.

265 It is interesting to note that during the second reading of the Criminal Procedure (Insanity and Unfitness to Plead) Bill (as it then was), John Greenaway MP stated that a person should be appointed by the court to put the case for the defence and he envisaged that a guardian ad litem would be appointed to safeguard the accused's interests and ensure that he or she had legal representation during the section 4A hearing (*Hansard,* HC Deb 01 March 1991 vol 186 cc1269-81.

CHAPTER 4. REMITTAL, APPEALS, JOINT TRIALS AND REMAND TO HOSPITAL

REMITTAL OF THE ACCUSED FOR TRIAL

4.1 Any consideration of the issues raised when an accused person is unfit to plead and therefore unable to participate in a criminal trial must include an examination of the process which takes place when an unfit individual regains his or her health and becomes fit to plead.

4.2 Article 50A(7) of the Mental Health (Northern Ireland) Order 1986 makes provision for the remittal for trial of an accused person who is detained in hospital when that individual no longer requires medical treatment.

4.3 Where a finding has been made that a person was unfit for trial and he or she did the act or made the omission with which he or she was charged, the Department of Justice[266] may remit the person for trial if the medical officer responsible for the individual's care notifies the Department that the accused no longer requires medical treatment. In all other cases, R.D. Mackay states that it is left to the Prosecution Services to decide whether it is in the public interest to mount a prosecution.[267] The Prosecution Services are well placed to consider whether a prosecution should proceed, based on the strength of evidence and the public interest of pursuing the proceedings.

4.4 As the legislation is currently drafted, if the Department of Justice makes the decision to remit the accused for trial, then the court is obliged to hear the case. There is no statutory obligation on the court or the Department to consider whether the retrial is in the interests of justice. It may be that there may be such delay between the date of the offence and the date of the trial, caused by the hospitalisation, that the evidence of witnesses may be

[266] By virtue of Article 4(1) and Schedule 1 of the Northern Ireland Act 1998 (Devolution of Policing and Justice Functions) Order 2010 (S.I. 2010 No. 976).

[267] RD Mackay, 'AAPL Practice Guideline for the Forensic Psychiatric Evaluation of Competence to Stand Trial: An English Perspective' (2007) 35 *Journal of the American Academy of Psychiatry and the Law* 501-4 at page 502.

adversely affected and the ability of the accused to have a fair trial may be impaired.

4.5 The Commission considers that the current statutory arrangements are restrictive and do not offer the court or the Department an opportunity to consider whether a trial *should* take place. There is more to be considered than the recovery of the accused to good health. **Rather than have a statutory test which links remittal to the recovery of the accused, perhaps it is desirable to include another element into the test which requires the interests of justice also to be considered when making decisions about remitting the accused for trial. Consultees are asked to consider this view and provide their comments.**

APPEALS

4.6 Section 13A(1) of the Criminal Appeal (Northern Ireland) Act 1980 makes provision for the accused to appeal against a finding that he or she was unfit to be tried and also against a finding that he or she did the act or made the omission with which he or she was charged.

4.7 Section 13A(3) states that the Court of Appeal shall allow an appeal if it considers that a finding is unsafe and shall dismiss an appeal in any other circumstance. Where an appeal is allowed against a finding that the appellant is unfit to be tried, then the appellant may be tried for the offence by virtue of section 13A(6) of the Criminal Appeal (Northern Ireland) Act 1980.[268]

4.8 Where the Court of Appeal allows an appeal against a finding that the appellant did the act or made the omission with which he or she was charged, the Court is limited in the remedial action that it can order. Section 13A(8) only

[268] The current appeals process has its roots in the recommendations of the Third Report of the Criminal Law Revision Committee Criminal Procedure (Insanity) Cmnd. 2149 (September 1963) – see paragraph 9. Previously, the Atkin Committee on Insanity and Crime ((1923) Cmnd. 8932) had considered that no right of appeal should be given, because in practice, the accused must have put forward the plea that he was insane.

permits the Court of Appeal to quash the finding, but does not allow the Court to order a re-hearing.

4.9 This limitation is potentially problematic, as the case of *R v Norman*[269] demonstrates.

4.10 *R v Norman* involved an accused, suffering from Huntington's disease, who had been charged with the offence of child abduction. Whilst he was on remand in prison, he was seen by three psychiatrists in relation to the question of his unfitness to plead. Each psychiatrist was of the opinion that the accused was not fit to plead. The accused was duly found to be unfit to plead under section 4 of the Criminal Procedure (Insanity) Act 1964 and the hearing under section 4A of the 1964 Act in relation to whether he had committed the abduction of the child took place shortly afterwards. A jury found that he accused had indeed committed the act, but there was delay of a number of months before a hospital order was made in respect of the accused. The accused appealed against the finding of the jury that he had abducted the child.

4.11 In its judgment, the Court of Appeal commented[270] that under the present legislation, the court cannot order a retrial of the issue of whether the accused did the act with which he was charged, save in very limited circumstances.[271] A retrial was not possible under the terms of section 16(4) of the Criminal Appeal Act 1968 if an appeal against a finding that the accused did the act or made the omission with which he or she was charged was successful. In these circumstances, the finding that the accused did the act with which he was charged is to be quashed and a verdict of acquittal directed to be recorded. The Court of Appeal considered that this limitation in its powers was problematic and stated that it was hoped that Parliament would act to remedy the lacuna.

4.12 **Consultees are asked to consider whether an amendment should be made to the Criminal Appeal**

[269] [2008] EWCA Crim 1810.
[270] At paragraph 34(iv) of the judgment.
[271] Procedural irregularity which would permit a new hearing: see *R v O'Donnell* [1996] 1 Cr App R 286 and *R v Hussein* [2005] EWCA Crim 3556.

(Northern Ireland) Act 1980 to allow for the Court of Appeal to order a re-hearing of the issue of whether the accused did the act or made the omission with which he or she was charged, or whether the current position is adequate.

JOINT TRIALS

4.13 The statutory procedure contained in the Mental Health (Northern Ireland) Order 1986 does not make specific provision in relation to the procedure to be followed when a trial involves more than one defendant. A potential problem arises when one of the defendants becomes unfit to plead during the course of the trial.

4.14 If one of the defendants does become unfit during the course of the trial, there is the possibility that the issue of whether the unfit defendant carried out the offence or made the omission with which he or she was charged, can be tried by the same jury that is tasked with trying the other, fit, defendants. Article 12(3) of the Juries (Northern Ireland) Order 1996 provides that where a jury has tried, or been selected to try, an issue, the court may try another issue with that jury, if both parties to the other issue consent to that course of action.

4.15 In the case of *R v B, W, S, H and W,*[272] the Court of Appeal considered the applicable law in England and Wales. In this jurisdiction, the law is slightly different to Northern Ireland: section 11(4) of Juries Act 1974 states that a jury selected by any one ballot shall try only one issue.[273] In *R v B, W, S, H and W*, it was argued that the jury which was tasked with determining the guilt or innocence of the fit co-accused, should not also make a determination in relation to whether an unfit co-accused carried out the act or made the omission with which he or she was charged. This argument was unsuccessful, with the Court of Appeal stating that it was not inescapable that there must be separate

[272] [2008] EWCA 1997.

[273] Section 11(5) makes various exceptions to this general rule, including the ability of a jury to consider whether an unfit defendant carried out the act or made the omission with which he or she was charged under section 4 of the Criminal Procedure (Insanity) Act 1964.

proceedings in relation to the fit and unfit defendants. It was considered that if the proceedings could be fairly and justly conducted simultaneously, then that approach should be taken, saving trauma to the witnesses as they would not have to give their evidence more than once.[274]

4.16 Although the law in England and Wales and Northern Ireland in relation to juries is different, there is still an issue to be considered in Northern Ireland as a result of the judgment of the Court of Appeal in *R v B, W, S, H and W.*

4.17 There may be an unwanted consequence that arises from permitting a jury to participate in the Article 49A hearing whilst also being tasked with determining the guilt or innocence of any co-accused. It would be very easy for the co-accused's defence to be based on blaming the unfit co-accused person for the wrong-doing. The unfit co-accused would undoubtedly be at a disadvantage in relation to the fit co-accused as he or she may be unable to refute the allegations. However, Article 12(3) of the Juries (Northern Ireland) Order 1996 offers some protection for the unfit co-accused in these circumstances as consent is required before the jury could try both the issue of the fit co-accused's guilt or innocence and the issue to be determined under the Article 49A hearing in respect of the unfit co-accused.

4.18 **The Commission would be interested in the views of consultees in relation to whether it is considered that the current law in Northern Ireland is adequate or whether consideration should be given to requiring that in joint trials, fit and unfit accused persons should be dealt with separately.**

REMAND TO HOSPITAL FOR REPORTS

4.19 The Commission would also wish to seek the views of consultees in relation to the ability of the Crown Court to remand the accused in custody in order to assess his or her mental condition. Under the provisions of Article 42 of the Mental Health (Northern Ireland) Order 1986, the

[274] See paragraph 27 of the judgment.

Crown Court can remand an accused person for admission to a hospital for a report on his or her mental condition. This power is exercisable in relation to any person who is awaiting trial for an offence which is punishable with imprisonment or an individual who has been arraigned, but not yet sentenced or otherwise dealt with by the court.[275] Various safeguards are put in place for the accused: there must be oral evidence from a medical practitioner (who has been appointed for the purposes of Part II of the Mental Health (Northern Ireland) Order 1986) that there is reason to suspect that the accused person is suffering from mental illness or severe mental impairment[276] and that it would be impracticable for the medical report to be made if the accused was remanded on bail.[277] There are also time limits for the remand of the accused in hospital,[278] and he or she is afforded the opportunity to obtain (at his or her own expense) an independent report on his or her mental condition from a medical practitioner, and may apply to the court for his or her remand to hospital to be terminated.[279] The Commission considers that Article 42 of the Mental Health (Northern Ireland) Order 1986 is an important provision for allowing the courts to obtain expert evidence in relation to an individual's health. However, the Commission considers that the protections currently offered to the accused person may be in need of review. **Consultees are asked to provide their views on the current law and to specifically address the issue of whether the current law provides enough protection to the accused in these circumstances.**

[275] Article 42(2)(a).
[276] Article 42(3)(a) of the Mental Health (Northern Ireland) Order 1986.
[277] Article 42(3)(b) of the Mental Health (Northern Ireland) Order 1986.
[278] An accused is not to be remanded for more than 28 days at a time or for more than 12 weeks in total if there is more than one period of remand by virtue of Article 42(7) of the Mental Health (Northern Ireland) Order 1986.
[279] Article 42(8) of the Mental Health (Northern Ireland) Order 1986.

CHAPTER 5. OTHER ISSUES

INTRODUCTION

5.1 This chapter looks at three issues which may be considered as part of an evaluation of the current law relating to unfitness to plead. These issues are: the current position regarding "unfitness to plead" in the Magistrates' Courts in Northern Ireland; the use of special measures for vulnerable accused persons and the relationship with the law on unfitness to plead; and the expert evidence which is made available to the court when it is tasked with making a determination in relation to unfitness of an accused person.

"UNFITNESS TO PLEAD" IN MAGISTRATES' COURTS

5.2 The current law relating to "unfitness to plead" in Magistrates' Courts in Northern Ireland is very different from that which applies in the Crown Court. It is not even referred to as "unfitness to plead" as such in the relevant legislation. This position has been described as "paradoxical".[280] The Mental Health (Northern Ireland) Order 1986 contains the provisions which relate to the powers of the Magistrates' Court in Northern Ireland in relation to accused persons who may be experiencing mental ill-health or learning disabilities.

5.3 Article 44(4) of the Mental Health (Northern Ireland) Order 1986 provides that:

> (4) Where a person is charged before a court of summary jurisdiction with any act or omission as an offence and the court would have power, on convicting him of that offence, to make an order under paragraph (1) [a hospital or guardianship order] then, if the court is satisfied that the accused did the act or made the omission charged, the court may, if it thinks fit, make such an order without convicting him.

[280] TP Rogers, NJ Blackwood, F Farnham, GJ Pickup and MJ Watts, (see footnote 13) at page 579.

5.4 The Magistrates' Court can only make a hospital or guardianship order if the accused person is convicted of an offence which is punishable on summary conviction with imprisonment.[281] A hospital order can only be made by a Magistrates' Court if the court is satisfied, on the oral evidence of a medical practitioner who has been appointed for the purposes of Part II of the Mental Health (Northern Ireland) Order 1986 by the Mental Health Commission,[282] and on the written or oral evidence of one other medical practitioner, that the defendant is suffering from mental illness or severe mental impairment of a nature or degree which warrants his or her detention in hospital for medical treatment.[283] The court must also be of the opinion that a hospital order is the most suitable disposal for the defendant, having regard to all the circumstances of the case, including the defendant's character and past history and the other disposals which are available in the case.[284] A guardianship order can only be made by a Magistrates' court if:

- the defendant is sixteen years of age or over;
- the court is satisfied on the oral evidence of a medical practitioner appointed for the purposes of Part II of the Mental Health (Northern Ireland) Order 1986, and on the oral or written evidence of one other medical practitioner, that the defendant is suffering from mental illness or "severe mental handicap" of a nature and degree which warrants his reception into guardianship;
- the court is satisfied on the written or oral evidence of an approved social worker that a guardianship order is necessary in the interests of the welfare of the defendant; and
- the court is of the opinion, having regard to all the circumstances of the case, including the nature of the offence and the character and past history of the defendant and to the other disposals available to the

[281] Article 44(1) of the Mental Health (Northern Ireland) Order 1986.
[282] That is to say, those appointed for the purposes of assessing an individual in the context of compulsory admittance to hospital.
[283] Article 44(2)(a) of the Mental Health (Northern Ireland) Order 1986.
[284] Article 44(2)(b) of the Mental Health (Northern Ireland) Order 1986.

court, that the most suitable disposal is a guardianship order.[285]

There appears to be no statutory mechanism for returning the accused to court if mental state is improved.[286]

5.5 In addition to Article 44, Article 42(1) of the Mental Health (Northern Ireland) makes provision for a court of summary jurisdiction to remand the accused into the care of the Department of Health, Social Services and Public Safety for admission to hospital for a report on his or her mental condition. Article 42(2)(b) of the Mental Health (Northern Ireland) Order 1986 provides that this power is exercisable in relation to various categories of accused persons: first, a person who has been convicted by the court of an offence which, on summary conviction, is punishable by imprisonment and second, a person who has been charged with such an offence if the court is satisfied that he or she did the act or omission with which he or she was charged or third, if the person has consented to the court exercising this power.[287] The powers of the court will only be exercised if the court is satisfied, having heard the oral evidence of a medical practitioner, that there is reason to suspect that the accused person is suffering from mental illness or severe mental impairment and the court considers that it would be impracticable for a report to be made if the accused was remanded on bail.[288]

5.6 There is a body of case law which considers the issues raised by the statutory provisions which are described above. In *Singh v Stratford Magistrates Court*,[289] the meaning of section 37(3) of the Mental Health Act 1983,

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[285] Article 44(3) of the Mental Health (Northern Ireland) Order 1986.
[286] TP Rogers, NJ Blackwood, F Farnham, GJ Pickup and MJ Watts, (see footnote 13) at page 579.
[287] The Crown Court also has power under Article 42(2)(a) to remand an accused person into the care of the Department for admission to hospital for a report on his or her mental condition. This power is exercisable in relation to a person who is awaiting trial for an offence punishable by imprisonment or who has been arraigned in relation to such an offence, but had not yet been sentenced or otherwise dealt with by the court.
[288] Article 42(3) of the Mental Health (Northern Ireland) Order 1986.
[289] [2007] EWCH 1582 (Admin).

which is the equivalent of Article 44(4) of the Mental Health (Northern Ireland) Order 1986, was examined.

5.7 In his judgment, Lord Justice Hughes stated that he considered that section 11 of the Powers of Criminal Courts (Sentencing) Act 2000 (which is broadly equivalent to Article 42(1) and (2) of the Mental Health (Northern Ireland) Order 1986) should be read in conjunction with section 37(3) of the Mental Health Act 1983. Read in this way, if the possibility of a hospital or guardianship order is being contemplated by the court, an adjournment for medical examination and a report can be allowed.[290] He further considered that although section 37(3) did not provide for a trial of the issue of unfitness to plead, as would occur in a trial on indictment by virtue of the operation of section 4A of the Criminal Procedure (Insanity) Act 1964, section 37(3) was sufficiently flexible to allow consideration of the mental state of the accused. Lord Justice Hughes referred to the case of *R(P) v Barking Youth Court*[291] in which the Court of Appeal had held that a Magistrates' court ought not to have embarked upon a trial of the issue of unfitness to plead as the Crown Court is obliged to do under section 4A of the 1964 Act. Instead, the factual question of whether the accused had done the act or made the omission should have been determined. The court then should have considered whether a section 37(3) order might be appropriate and subsequently should have sought to obtain medical reports for that purpose. Lord Justice Hughes considered that this approach demonstrated the flexibility of the section 37(3) procedure as it did not have to be preceded by a determination on the unfitness of the accused to plead, but rather it could be based more broadly on the mental state of the accused, providing that the acts or omissions which had been alleged were proved.[292] This approach was endorsed in *Blouet v Bath & Wansdyke Magistrates' Court.*[293]

5.8 The Magistrates' court therefore has the power to obtain a medical report in relation to the accused person in relation

[290] See paragraph 11 of the judgment.
[291] [2002] 2 Cr App Rep 294.
[292] See paragraph 33 of the judgment.
[293] [2009] EWHC 759 (Admin).

to his or her mental condition. It is also possible for a Magistrates' Court to make a hospital or guardianship order without having convicted the accused person, provided that the court is satisfied that the accused did the act or made the omission with which he or she was charged. However, the process which is contained in the Mental Health (Northern Ireland) Order 1986 is not the same as the process for determining unfitness to plead in Crown Court proceedings.

Criticisms of the Magistrates' Courts process

5.9 There are a number of difficulties that are immediately apparent in relation to the Magistrates' courts' powers. First, there is no guidance in the legislation in relation to how an accused person who may be experiencing difficulties in understanding the trial process is recognised. It is likely that in practice, recognition will depend upon the vigilance of the legal representatives of the accused, the prosecution and the District Judge. Second, it does not appear that the court is obliged to consider the *Pritchard* test to determine which accused persons are unfit to be tried. Third, there is no procedure provided for in the legislation which is akin to the Article 49A procedure which is available in relation to accused persons in the Crown Court. Fourth, the disposals which are available to the court do not mirror those which are available to the Crown Court. Disposals, however, are not an issue which the Commission has been asked to consider by the Department of Justice, therefore, this difficulty will not be examined further.

5.10 In relation to the first criticism, it would be useful to have a provision which makes it clear that the issue of unfitness in the Magistrates' Court is a matter which can be raised by the defence, prosecution or the court itself. Not only would it make it clear where the responsibilities for identifying possible unfitness lie, it would be helpful to accused persons in general to have awareness of unfitness raised amongst the legal professions and the courts. **The Commission would welcome the views of consultees on this issue.**

5.11 The second criticism, that is, a lack of a test such as the one in *Pritchard,* may raise issues in relation to the fairness of the process in the Magistrates' court. The benefit of having a test such as the one in *Pritchard* is to allow the accused to be tested against a certain set of criteria or skills for the purposes of determining whether he or she can participate in the trial and can understand certain key elements of the trial process. The current law in relation to the Magistrates' courts appears to put the focus, not on the accused person's abilities, but on the fact of his or her illness or impairments. This approach seems to be unsatisfactory as it cannot be desirable that an accused person can be faced with serious disposals such as hospital or guardianship orders merely because he or she is being tried for an offence which attracts a sentence of imprisonment; he or she can be demonstrated (albeit with medical evidence) that he or she is mentally ill or has severe learning difficulties; and that a hospital or guardianship order is the best method of disposal. An approach which is based on the abilities of the accused to participate and understand the trial process seems to the Commission to offer more protection to the accused. **Do consultees agree that a lack of a test in the Magistrates' Court, such as the one contained in *R v Pritchard*, offers adequate protection to accused persons?**

5.12 The third criticism of the current procedure in the Magistrates' Court is that, although Article 44(4) of the Mental Health (Northern Ireland) Order 1986 does make provision for the court to consider whether the accused did the act or made the omission with which he or she was charged, this process is not the same as the one which is prescribed by Article 49(A) of the Mental Health (Northern Ireland) Order 1986 in relation to trials on indictment. Whilst Article 49(A) clearly envisages a determination of unfitness to have been made by the court before a trial of the facts can commence, Article 44(4) has no such requirement. The process under Article 44(4) merely requires the court to have power to make a hospital or guardianship order, disposals which appear to be based on the mental state of the accused. Article 49(A) makes it clear that once a determination of unfitness has been made, the trial stops,

and the prosecution and the defence put forward the evidence in relation to whether the accused did the act or made the omission with which he or she was charged and the court (in this case, the jury) makes a determination in relation to whether the accused carried out the act or made the omission in question. In contrast, Article 44(4) requires an examination of whether the accused carried out the act or made the omission with which he or she was charged only in limited circumstances, that is, where the penalty for the offence is imprisonment and offers only limited disposals.

5.13 Other jurisdictions have a similar process for determining unfitness to plead in Magistrates' Courts (or the equivalent in the relevant jurisdiction) to the one which is adopted for the Crown Court (or equivalent). In Western Australia, for example, section 11 of the Criminal Law (Mentally Impaired Accused) Act 1996 makes provision for the process in the Supreme Court or District Court to apply to a court of summary jurisdiction. The Australian Capital Territory has a process of determining unfitness to plead which applies in the Supreme Court or the Magistrates' court by virtue of section 310 of the Crimes Act 1900.

5.14 **The Commission seeks the views of consultees in relation to whether a process, such as the one contained in Article 49A of the Mental Health (Northern Ireland) Order 1986 should be adopted in the context of Magistrates' courts.**

"SPECIAL MEASURES"

5.15 The ability of defendants to participate effectively in their trial is an issue which the European Court of Human Rights has considered on a number of occasions. In *Stanford v United Kingdom,*[294] the Court held that Article 6 of the European Convention on Human Rights,[295] when read as a whole, guarantees the right of an accused person to participate effectively in his or her criminal trial.[296] Although there was held to be no violation of Article 6 in this

[294] App No 16757/90.
[295] Right to a fair trial.
[296] At paragraph 26 of the judgment.

particular case, the Court stated that effective participation includes not only an accused's right to be present during the trial, but also to hear and follow the proceedings, rights which the court considered were "implicit in the very notion of an adversarial procedure".[297]

T v United Kingdom and *V v United Kingdom*

5.16 An accused's right to effective participation in his or her trial was further explored in the cases of *T v United Kingdom*[298] and *V v United Kingdom*[299] which were heard jointly by the European Court of Human Rights. The applicants in each case were individuals who had been tried and convicted of abducting and murdering a two year old boy when they were both eleven years of age. Their trial had been conducted with the formality which is usual in trials of adult accused persons. The judge and counsel wore wigs and gowns, but some modification of the criminal process was evident in light of the defendants' age, as the hearing day was shortened to reflect school hours, the boys were seated beside social workers in a specially raised dock and a ten minute break was afforded every hour. Their parents and lawyers were seated near them. The judge had also made it clear that he would adjourn the proceedings when the social workers or defence lawyers indicated to him that either of the defendants was showing signs of tiredness or stress, which occurred on one occasion during the trial.

5.17 The applicants claimed that during their trial, Articles 3[300] and 6 of the Convention on Human Rights had been breached. The Article 3 arguments are not relevant for the purposes of this paper. Where Article 6 of the Convention was concerned, the Court was concerned that the formality and ritual of the court process "must at times have seemed incomprehensible and intimidating for a child of eleven" and there was evidence that the raised dock, designed to enable the defendant's to see the proceedings, "had the effect of increasing the applicant's sense of discomfort

[297] At paragraph 26 of the judgment.
[298] App No 24724/94.
[299] App No 24888/94.
[300] "No one shall be subjected to torture or inhuman or degrading treatment or punishment".

during the trial, since he felt exposed to the scrutiny of the press and public".[301] The Court was also concerned that expert evidence indicated that the post traumatic stress suffered by T and the lack of any therapeutic work carried out with him since the offence, had limited his ability to instruct lawyers and testify adequately in his own defence.[302] Where V was concerned, there was evidence that his emotional maturity was that of a younger child and that he was likely to be too traumatised and intimidated to give his account of the offence to his lawyers or to the court. He was also unable to follow or understand the proceedings as he spent most of the time counting in his head or making shapes with his shoes.[303]

5.18 For these reasons, the Court held by sixteen votes to one that there had been a violation of Article 6 of the Convention in respect of the applicants' trials, relying on the principle expressed in *Stanford v United Kingdom*, that Article 6, read as a whole, guarantees the right of the accused to participate effectively in his criminal trial. On this occasion, the trials of T and V had not permitted their effective participation in the trial process.[304]

S.C. v United Kingdom

5.19 In the case of *S.C. v United Kingdom,*[305] the European Court of Human Rights again decided that there had been a violation of Article 6 of the Convention in the case of an eleven year old boy who had been convicted of a number of offences, including the attempted robbery of an elderly lady. The boy's legal representatives had obtained a number of medical reports in respect of the boy which indicated that he experienced behavioural difficulties and significant learning disabilities. The Court held that the boy had been unable to effectively participate in his trial as it was considered that "effective participation" presupposed that the accused has a broad understanding of the nature of the trial process and of the consequences for him of that

[301] At paragraph 86 of the judgment.
[302] At paragraph 87 of the judgment.
[303] At paragraph 89 of the judgment.
[304] At paragraph 89 of App No 24724/94 and paragraph 91 of App No 24888/94.
[305] ECHR Application No. 60958/00 15 June 2004.

trial process. The Court considered that the accused should be able to understand the broad thrust of what is said in court, with the assistance of an interpreter, lawyer, social worker or a friend, if necessary. In the light of the evidence presented to the Court in relation to the level of the accused's comprehension of the trial process, the Court concluded that the boy was not capable of effectively participating in his trial.

5.20 As the Convention jurisprudence has developed, domestic legislation has been enacted to take account of the need to ensure that defendants are able to participate more effectively in criminal proceedings. As a result of a recognition of the need to extend protections to vulnerable accused persons whilst they are involved in the trial process, a number of legislative protections have been put in place. These protections are similar, but not identical, to the provision made in the Youth Justice and Criminal Evidence Act 1999 and the Criminal Evidence (Northern Ireland) Order 1999 in relation to vulnerable and intimidated witnesses, which are known as "special measures".

5.21 Special measures are a range of methods which are designed to assist certain witnesses to give evidence in criminal proceedings. The statutory scheme of special measures contained in the Youth Justice and Criminal Evidence Act 1999 and the Criminal Evidence (Northern Ireland) Order 1999 was the first attempt[306] to put in place an organised scheme for assisting witnesses who may have characteristics which would make them have particular difficulties whilst giving evidence in court, or who may be facing intimidation from other parties because they had been required to give evidence.

[306] The statutory scheme of special measures has its basis in the 1997 Labour Party manifesto which contained a commitment that "greater protection will be provided for victims in rape and serious sexual offence trials and for those subject to intimidation, including witnesses" (www.labour-party.org.uk/manifestos/1997).

5.22 The special measures scheme has operated in Northern Ireland since 1st December 2003.[307] Where defendants are concerned, a number of statutory provisions have been enacted to offer protection to individuals who may be in need of additional support during the course of the trial. For example, section 47 of the Police and Justice Act 2006 inserted a new section 33A into the Youth Justice and Criminal Evidence Act 1999, making provision to allow certain accused persons to give their evidence by way of live television link, if it is in the interests of justice for them to do so. Accused persons under the age of eighteen can give evidence by live television link if their ability to participate in the proceedings is compromised by their level of intellectual ability or social functioning, or they would be able to participate more effectively in the proceedings if live television link was used.[308] An accused person over the age of eighteen may give evidence by way of live television link if he or she suffers from a mental disorder or otherwise has a significant impairment of intelligence or social functioning and cannot participate effectively in the proceedings, or if the use of live television link would enable him or her to participate more effectively in the proceedings.[309] In Northern Ireland, Article 82 of the Criminal Justice (Northern Ireland) Order 2008 inserted a new Article 21A into the Criminal Evidence (Northern Ireland) Order 1999, effecting the same reform as in England and Wales.

5.23 Further amendments have been made to the Criminal Evidence (Northern Ireland) Order 1999 by the Justice Act (Northern Ireland) 2011, which mirror amendments made in England and Wales by the Coroners and Justice Act 2011. These recent amendments are of particular interest to this consultation paper, as they provide for statutory protections for accused persons and not just witnesses. Article 21A of the Criminal Evidence (Northern Ireland) Order 1999 has been recently further amended by the substitution of a new Article 21A by section 19 of the Justice Act (Northern

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[307] Article 4(1)(b), (2) – (5) and Article 5 were commenced by the Criminal Evidence (Northern Ireland) Order 1999 (Commencement No. 2) Order 2003 (SR 2003 No.476).
[308] Section 33A (4)(a) and (b).
[309] Section 33A(5).

Ireland) 2011. The new section 21A[310] adds a provision which allows for an accused person to give evidence by live link if he or she has a physical disability or disorder which compromises his or her ability to give oral evidence in court and it is in the interests of justice for the accused person to give evidence by live link.[311]

5.24 Section 12 of the Justice Act (Northern Ireland) 2011 inserts a new Article 21BA into the Criminal Evidence (Northern Ireland) Order 1999. Article 21BA allows certain accused persons to give their evidence to the court with the assistance of an intermediary if that is necessary to ensure that the accused has a fair trial. For the purposes of that provision, "intermediary" is defined as a person who has the function of communicating questions to the accused and relaying the accused's answers to the questioner and to explain those questions or answers so that they may be understood. For accused persons under the age of eighteen, Article 21BA(5) provides that eligibility for assistance by an intermediary is determined by whether the accused's ability to participate effectively in the proceedings is compromised by his level of intellectual ability or social functioning. For accused persons over the age of eighteen, Article 21BA(6) provides that the accused person is eligible for assistance from an intermediary if he suffers from a mental disorder or otherwise has a significant impairment of intelligence or social functioning and is therefore unable to participate effectively in the proceedings.[312]

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[310] Commenced on 5th July 2011 by the Justice (2011) Act (Commencement No. 1) Order (Northern Ireland) 2011 S.R. 2011 No. 224.

[311] It should also be noted that section 14 of the Justice Act (Northern Ireland) 2011 made provision for live link to be used for patients who are detained in hospital under Part III of the Mental Health (Northern Ireland) Order 1986, that is to say, patients who are involved in criminal proceedings or under sentence. This provision has been in effect since 5th July 2011 and was designed to avoid disturbing patients during their treatment, avoid Health Trust staff being away from wards for lengthy periods of time and to help reduce costs and manage risk (see NIO *Consultation on the statutory special measures to assist vulnerable and intimidated witnesses give their best evidence in criminal proceedings* (18 March 2010) at page 49.

[312] In England and Wales, these reforms are contained in section 104 of the Coroners and Justice Act 2009, which inserts a new section 33BA into the Youth Justice and Criminal Evidence Act 1999.

5.25 The use of "special measures" for accused persons who may find difficulties in participating fully in their trial provides for an interesting but difficult issue when considering the issue of unfitness to plead: namely, should a test to determine unfitness to plead take account of the role that special measures can play in increasing an accused person's ability to effectively participate in criminal proceedings. The interface between the use of the court's protective powers to assist the accused person and the law on unfitness to plead had attracted judicial comment recently. In *R v Walls*,[313] Lord Justice Thomas made reference to the use of the courts' inherent powers[314] to allow intermediaries to assist the accused which are set out in *R(C) v Sevenoaks Youth Court.*[315] He stated that:

> Plainly consideration should be given to the use of these powers or other ways in which the characteristics of a defendant evident from a psychological or psychiatric report can be accommodated with the trial process so that his limitations can be understood by the jury, before a court takes the very significant step of embarking on a trial of fitness to plead.[316]

Special measures and unfitness to plead

5.26 Unfitness to plead has not been an issue which has been considered during the development of "special measures" for accused persons and as a result, the difference between persons who are unfit to plead and those who are fit to plead, but who need assistance to give evidence, has not attracted much attention from the courts or from academic commentary. There are obviously individuals who will never be fit to plead in criminal proceedings because, for example, of learning disability or severe mental illness, whether the assessment of their unfitness is carried out under the *Pritchard* test or any other test which

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[313] [2011] EWCA Crim 443.

[314] These powers are in addition to section 33 BA(3) and (4) of the Youth Justice and Criminal Evidence Act 1999 as inserted by the Coroners and Justice Act 2009 *R v Erskine* [2009] EWCA Crim 1425.

[315] [2009] EWHC 3088.

[316] At paragraph 37 of the judgment.

may replace it. However, it must be asked whether there are a group of individuals who would be deemed unfit to plead under the current test or another test, but with the use of special measures might become fit and therefore become able to participate effectively in their trial.

5.27 The use of intermediaries, in particular, may be influential for this group of individuals, as an intermediary's role is to assist an individual to understand questions and give understandable answers. However, it is important to note that the current definition of "intermediary" under Article 21B of the Criminal Evidence (Northern Ireland) Order 1999 envisages a narrow role for the intermediary: merely to assist the accused to understand questions that are put to him or her during the trial and give understandable answers. It is not the role of the intermediary to explain the trial process or the pros and cons of entering a certain plea, for example.

5.28 As the *Pritchard* test currently stands, use of an intermediary could, in theory, affect the fitness of an individual who had demonstrated that he or she could fulfil all the *Pritchard* test criteria apart from "giving evidence on his own behalf". If consideration of special measures was built into the test, an accused who, without consideration of special measures, would have failed to meet the *Pritchard* test and therefore would have been deemed unfit to plead, could well be deemed to be fit to plead since the intermediary could assist the accused to give evidence on his or her own behalf. In this instance, the use of special measures would have the effect of making an individual fit to plead and therefore making him or her eligible for the full trial process. The same issue would potentially arise if a test for unfitness to plead was adopted that was based on the mental capacity test contained in the Mental Capacity Act 2005.[317] An intermediary could assist an individual to understand questions which he or she is asked whilst giving evidence and could help the accused to communicate his or her answers during that evidence

[317] In a test of this nature, two aspects could be affected by the use of an intermediary: first, the ability of the accused to understand information in relation to certain decisions, and second: the ability of the accused to communicate his decisions.

session.[318] Therefore, it is possible that an accused who would not have been deemed fit to plead because he or she could not give evidence on his or her own behalf, with the use of special measures, could be deemed to be fit to plead.[319]

5.29 Although special measures were designed to protect the accused and increase his or her participation in the trial process, the Commission is not entirely sure that it is appropriate to use special measures in such a way that it is possible that their use causes an "unfit" accused to become fit. The individual has not changed: he or she will still be experiencing the health or learning difficulties that would have determined his or her unfitness if special measures were not used. If found to have carried out the act or made the omission that he or she has been charged with, that individual might be better served by the disposals which are available following a determination of unfitness,[320] rather than the disposals which are available following a criminal trial, where the focus is on sentencing and rehabilitation rather than medical treatment and care.

5.30 A counter-argument against the above approach is that including a consideration of the effect of special measures in any test to determine unfitness to plead will promote the use of special measures for accused persons and will also facilitate participation in the trial process for individuals, increasing the numbers of people who would be subject to the criminal process by removing them from an Article 49A hearing process. These are the main arguments for this approach which are suggested by the Law Commission of England and Wales in its consultation paper *Unfitness to*

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[318] It should be noted that in the mental capacity test contained in the Mental Capacity Act 2005, the "communication" aspect of the test envisages that communication can take forms other than speech and intermediaries would certainly have a role to play in assisting an individual to demonstrate their capacity to make a decision.

[319] Though it should be noted that the mental capacity test contained in the Mental Capacity Act 2005 envisages that communication can be by speech, sign language or by other means (section 3(1)(d), whilst understanding can be assisted by various aids, such as simple language, visual aids or other means (section 3(2)).

[320] Currently, a hospital order, guardianship order, a supervision and treatment order or absolute discharge.

Plead.[321] The Law Commission of England and Wales also mentions concerns that special measures are often overlooked[322] and judicial decisions to invoke special measures often lapse by the end of the trial.[323] In addition, the Law Commission of England and Wales states that learning disability is often a hidden issue which may not always be picked up on.[324] For these reasons, the Law Commission suggests that having consideration of special measures as part of a test to determine unfitness to plead would have the benefit of promoting the use of special measures in criminal proceedings in England and Wales.

5.31 In Northern Ireland, the Northern Ireland Office consulted on the use of special measures in the jurisdiction.[325] There had not been an evaluation of the operation of special measures since they were first introduced in 2003 and 2004.[326] Research[327] conducted to support the consultation process demonstrated that in 2006, 117 out of 201 special measures applications were granted in the Crown Court,[328] whilst 330 out of 377 applications were granted in the Magistrates' courts.[329]

5.32 A response to the consultation exercise was published by the Northern Ireland Office in March 2010.[330] In this response, it was stated that there appeared to be consensus amongst consultees that the policies relating to special measures were "broadly right",[331] although there

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[321] See footnote 83 at paragraphs 4.19 to 4.21.

[322] See footnote 83 at paragraph 4.20. This contention is supported by qualitative research reported in TP Rogers, N Blackwood, F Farnham, G Pickup and M Watts, 'Reformulating Fitness to Plead: a qualitative study' 20(6) *Journal of Forensic Psychiatry & Psychology* 815-834 at page 828.

[323] See footnote 83 at paragraph 4.12.

[324] See footnote 83 at paragraph 4.11.

[325] Northern Ireland Office *Special Measures: an evaluation and review* (February 2009).

[326] See paragraph 3.4 of the consultation paper.

[327] See paragraph 3.5 of the consultation paper.

[328] There were 114 cases in which these applications were sought: multiple special measures applications were sought in a number of cases.

[329] There were 279 cases in which these applications were sought: multiple special measures applications were sought in a number of cases.

[330] Northern Ireland Office *Consultation on the statutory special measures to assist vulnerable and intimidated witnesses give their best evidence in criminal proceedings* (18 March 2010).

[331] See paragraph 6 of the consultation paper.

were a few implementation issues which had been highlighted during the consultation process. Annex A of the response identified a number of the issues which had caused concern for consultees. Issues included early identification of those who would benefit from special measures and the difficulties caused by aggressive cross-examination. The non-commencement of a number of provisions relating to special measures (the use of intermediaries and video-recording cross-examination and re-examination) was also identified as a problem by some consultees. Overall, though, consultees appeared to be generally satisfied with the effect of special measures and understanding of their effect by key-players in the criminal justice system. There does not appear to be the same difficulties experienced in Northern Ireland with special measures that the Law Commission of England and Wales have highlighted as occurring in the jurisdiction in which it operates.

5.33 On balance, the Commission is inclined to consider that special measures should only be considered by the court once the issue of unfitness to plead has been considered and a finding of fitness determined. Once fitness has been determined, consideration of special measures should take place as currently provided for by the various legislative provisions, which respects the purpose for which the measures were originally designed. It seems to the Commission to be inherently unfair that special measures should be used to "make" an accused fit to plead so that he or she is then deemed able to withstand the rigours of a criminal trial. For these people, the Commission is concerned that the disposals available on a full criminal trial may not be the most appropriate for the individual's needs: those available on an Article 49A hearing process may be the better option and offer more flexibility for the court. **The Commission would be interested to hear whether consultees are supportive of this approach or whether they consider that any test for unfitness should include a requirement to consider whether the use of special measures would enable an accused person to be determined as fit to plead.**

THE EXPERT EVIDENCE AVAILABLE TO THE COURT WHEN DETERMINING UNFITNESS TO PLEAD

5.34 Under the current law in Northern Ireland, Article 49(4A) of the Mental Health (Northern Ireland) Order 1986 provides that the court cannot make a determination as to the unfitness to plead of the accused, except on the oral evidence of a medical practitioner who has been appointed by the Mental Health Commission for Northern Ireland for the purposes of assessing patients who have been compulsorily admitted to hospital for assessment and on the written or oral evidence of one other medical practitioner.[332] This requirement was inserted into the Mental Health (Northern Ireland) Order 1986 by the Criminal Justice (Northern Ireland) Order 1996. This change in the law is different from the approach taken in England and Wales, which was effected by the Criminal Procedure (Insanity and Unfitness to Plead) Act 1991. In England and Wales, there is a provision requiring that a determination of unfitness cannot be made "except on the oral or written evidence of two or more registered medical practitioners at least one of whom is duly approved."[333]

5.35 A clinical approach to assessing unfitness to plead is described by Bowden in *Seminars in Practical Forensic Psychiatry*:

> Assessment of fitness to plead requires time, patience and a suitable location for the examination(s). Usually the case is one of severe functional psychosis or learning disability….. in practice, the psychiatrist is looking for a global view of whether or not the accused knows what's going on and can give instructions of some form to his lawyer.[334]

5.36 Criticisms have been made of the assessment process have been made by a number of commentators in relation

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[332] See Article 9 of the Mental Health (Northern Ireland) Order 1986.

[333] Section 4(6) of the Criminal Procedure (Insanity) Act 1964 as amended by section 2 of the Criminal Procedure (Insanity and Unfitness to Plead) Act 1991.

[334] *Seminars in Practical Forensic Psychiatry* edited by D Chiswell and R Cope Gaskell (1995) chapter five at page 111.

to the process in England and Wales. For instance, it has been suggested that legal criteria have been applied inconsistently by different psychiatrists on different occasions,[335] psychiatrists make assessments without consulting the legal team and the nature of unfitness itself may lead to fluctuations in an accused's condition over time and the danger that accused persons may be feigning illness or malingering.[336] However, the Commission is unaware of any evidence which suggests that the disparity in professional approach which has been noted in England and Wales exists in Northern Ireland. Perhaps this problem has been avoided due to the size of the jurisdiction which has far fewer experts that specialise in matters of this nature.

5.37 There have been a small number of cases which have considered the issue of expert evidence. *R v Walls*[337] was concerned with the timeliness of seeking expert advice, whilst in *R v Ghulam*[338] the Court of Appeal considered the expert evidence which was needed for a determination of unfitness to plead and the need for agreement between medical experts before a decision regarding unfitness to plead could be made by the court. The Northern Ireland decision of *R v Robert McCullough*[339] provides local consideration of the requirement for expert evidence and the meaning of Article 49 of the Mental Health (Northern Ireland) Order 1986.

R v Walls

5.38 *R v Walls* concerned an accused who had been charged with two counts of sexual assault on a child and false imprisonment. A jury found the accused to be guilty of the offences and the court ordered that a pre-sentence report

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[335] This criticism is based on both qualitative study and also findings of Grubin (DH Grubin, 'Unfit to Plead in England and Wales, 1976 – 1988: a survey' *British Journal of Psychiatry* 158 540 – 548) and Mackay and Kearns (RD Mackay and G Kearns, 'An upturn in Fitness to Plead? Disability in relation to the trial under the 1991 Act' *Criminal Law Review* 532-546).

[336] TP Rodgers, N Blackwood, F Farnham, G Pickup and M Watts, (see footnote 322) at page 827.

[337] [2011] EWCA Crim 443.

[338] [2009] EWCA Crim 2285.

[339] [2011] NICC 42.

be prepared. The court was duly provided with a pre-sentence report and a psychological report which had been requested by the Probation Service. The psychological report revealed that from the age of twelve, the accused had attended a special school for children with moderate learning difficulties, had left school at the age of sixteen and lived on his own, but struggled with independent living skills such as cooking, cleaning and care. He had been given an IQ test which found that he had an IQ of between 63 and 71, the extremely low to borderline range of intelligence. He was sentenced to a community order with a supervision requirement and was required to complete the Sex Offender Treatment Programme.

5.39 Subsequent to his conviction, Walls saw a forensic consultant psychiatrist who concluded that he was presently unfit to stand trial and would probably have been unfit to plead at the time of the trial. On the basis of this report, Walls appealed his conviction.

5.40 In giving the judgment of the Court of Appeal, Lord Justice Thomas drew attention to the case of *R v Erskine*[340] in which the Lord Chief Justice of England and Wales, Lord Judge, had emphasised the importance of a timely assessment of unfitness to plead and the duty on the trial judge in relation to the issue:

> Assuming that the defendant is legally represented (and in cases like these, he will normally be represented by leading and junior counsel, as well as solicitors) his legal representatives are the persons best placed to decide whether to raise the issue of fitness to plead, and indeed to seek medical assistance to resolve the problem. There is a separate and distinct judicial responsibility to oversee the process so that if there is any question of the defendant's fitness to plead, the judge can raise it directly with his legal advisers. Unless there is contemporaneous evidence to suggest that notwithstanding his plea and the apparent satisfaction of his legal advisers and the judge that

[340] [2009] EWCA Crim 1425.

> he was fit to tender it and participate in the trial, it will be very rare indeed for a later reconstruction, even by distinguished psychiatrists who did not examine the appellant at the time of trial, to persuade the court that notwithstanding the earlier trial process and the safeguards built into it that the appellant was unfit to plead, or close to being unfit or that his decision to deny the offence and not advance diminished responsibility can properly be explained on this basis. The situation is, of course, different if, as in *Erskine*, serious questions about his fitness to plead were raised in writing or expressly before the judge at the trial.[341]

5.41 Lord Justice Thomas concluded that in cases where it was not clear that an accused was unfit and there had to be an assessment of the available evidence, the court was required to rigorously examine the evidence of psychiatrists and then subject the evidence to careful analysis against the *Pritchard* test. It was not enough, except in clear cases, that psychiatrists agree about the issue of fitness. The court would be failing in its duty to both the public and the defendant if it did not rigorously examine the evidence and reach its own conclusion.[342]

R v Ghulam

5.42 The case of *R v Ghulam* involved an appeal against a conviction for burglary. On the first day of trial, a letter was produced by the defence from a trainee psychiatrist which stated that the accused would not be able to stand trial as it would deteriorate his physical and mental health. It was the view of the trainee psychiatrist that the accused suffered from an anxiety and depressive disorder which was complicated by a high misuse of alcohol.

5.43 The judge refused to postpone the trial on the basis of the letter as he considered that the reason given was not that the accused was unfit to plead, that is to say, the test set by *Pritchard*, but rather that the stress of the trial would

[341] At paragraph 22 of the judgment, quoting paragraph 89 of *R v Erskine* [EWCA] Crim 1425.
[342] At paragraph 38 of the judgment.

exacerbate existing health problems. The trial therefore went ahead. Counsel for the accused made an application to the court for the fitness of the accused to be considered after the judge had begun his summing up to the jury. Another letter was produced from the trainee psychiatrist which this time addressed the *Pritchard* test and concluded that in his opinion, the accused was unfit to plead. The judge heard the application but refused it and the accused was duly convicted of burglary and sentenced to two years imprisonment. The accused appealed the conviction on the basis that when the application in relation to his fitness was made, the judge should have discharged the jury and then directed that the issue of unfitness should be tried.

5.44 The Court of Appeal noted that in the normal course of a trial, the issue of unfitness to plead should arise before or at the very beginning of the proceedings. However, section 4 of the Criminal Procedure (Insanity) Act 1964 requires the issue to be tried as soon as it arises. Therefore the judge was required to determine the question of unfitness when it was raised at the end of the trial.[343] However, section 6 of the Criminal Procedure (Insanity) Act 1964 requires that there is evidence from two or more registered medical practitioners, one of whom is approved for the purposes of the Mental Health Act 1983. The Court of Appeal interpreted section 6 as requiring that the evidence of the two or more registered medical practitioners would have to be in accordance as to whether the accused was unfit to plead, since the Court considered that it would be anomalous if the accused was found fit to plead if a consultant psychiatrist considered that he or she was fit, but a general practitioner considered that the accused was unfit to be tried.[344] Since the trial judge could not have made a determination that the accused was unfit to plead without the evidence of another doctor who was approved under the Mental Health Act 1983, the Court of Appeal considered that the judge was entitled to consider the conduct of the accused during the course of the trial and on that basis he was entitled to consider whether or not he could accept the medical evidence of the doctor.[345]

[343] At paragraph 14 of the judgment.
[344] At paragraph 16 of the judgment.
[345] At paragraph 21 of the judgment.

5.45 The Court of Appeal therefore considered that the trial judge was entitled to make a determination that the accused was fit to plead, having found that his own observations were inconsistent with those of the doctor. The trial judge's refusal to discharge the jury was a matter for his own discretion and accordingly, the appeal was dismissed.[346]

R v McCullough

5.46 The defendant in this case was a sixty-two year old man who had been accused of various counts of sexual offences, including sexual assault, buggery and gross indecency. He pleaded guilty to the charges, but before his trial commenced, questions were raised in relation to his unfitness to plead. Four expert opinions were sought: three from psychiatrists and one from a psychologist.

5.47 The medical opinions agreed on the difficulties that McCullough experienced: low IQ, unable to read or write and difficulties in remembering dates, although he could recall significant events.

5.48 The trial judge, Smyth J, applying the *Pritchard* test declined to make a finding of unfitness, despite concerns expressed by one of the psychiatrists who considered that the defendant would be overwhelmed by the trial and as a result become anxious to please and therefore might make concessions.[347]

5.49 In addition to his determination in relation to the fitness of the defendant to be tried, Smyth J specifically drew attention to an interpretative point in relation to Article 49(4) and (4A) of the Mental Health (Northern Ireland) Order 1986. This provision requires that:

> (4) The question of fitness to be tried shall be determined by the court without a jury.
> (4A) The court shall not make a determination under paragraph (4) except *on [italics added]* the

[346] At paragraph 22 of the judgment.
[347] See paragraph 11 of the judgment.

oral evidence of a medical practitioner appointed for the purposes of Part II[348] by the Commission and on the written or oral evidence of one other medical practitioner.

5.50 Smyth J stated that in his opinion, the effect of Article 49(4) and (4A) meant that the court is not to make a determination of unfitness unless the determination is supported by the evidence. He considered that if the opinion of the second doctor disagrees with that of the first or does not support it, it would be difficult to envisage the court being able to make a determination *on*[349] such evidence. He held the view that the evidence of the two doctors must be in agreement with each other and support the determination of unfitness,[350] which is a similar approach to that taken by the Court of Appeal in *R v Ghulam.*

Conclusion

5.51 It is open to question whether it was the intent of the legislature to give Article 49(4A) the meaning which was afforded to it in *R v McCullough*, or whether it was intended that the provision merely enabled the court to seek a specified number of expert opinions. The provision appears on the statute book as a result of the recommendations of the Butler Report[351] which made the recommendations because it was considered that statutory provision needed to be made as there had been cases where there had not been evidence from two doctors. This seems to support the latter explanation of the legislative intent.

5.52 The Commission considers that there is a need to ensure that the court has access to appropriate expert opinion on an accused person's unfitness to plead, but is not convinced that there should be a statutory provision requiring two experts in agreement before a determination of unfitness can occur. It would be rather problematic if two experts gave evidence clearly at odds with one another. It

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[348] Of the Mental Health (Northern Ireland) Order 1986.
[349] See italics above.
[350] At paragraph 17 of the judgment.
[351] See footnote 157 at paragraph 10.41.

is suggested that this might be restrictive on the court, which has the task of assessing the evidence brought before it regarding the question of unfitness. Unfitness is a legal test which is informed by expert clinical opinion, not a clinical test carried out for the purposes of diagnosis or treatment.[352] It is important to remember that the onus of determining unfitness ultimately lies with the court. **Perhaps a better approach is to follow the wording of the statute which applies in England and Wales, which was effected by the Criminal Procedure (Insanity and Unfitness to Plead) Act 1991, which clearly sets out that the opinion of a minimum of two medical practitioners is sought. Do consultees agree?**

5.53 A question also arises in relation to whether the expert opinion of professionals other than those within the medical professions should supplement the current statutory provision for expert opinion. On one hand, there is an argument that in order to assist the court as much as possible in its determination of the question of unfitness, there might be benefit in extending the current provision to allow the court to not only have the benefit of hearing from the experts currently prescribed in statute, but also to allow the court to have discretion to permit other experts, perhaps non-medical, to give opinions in relation to the unfitness of the accused. Other professions who could usefully contribute to the mass of evidence in individual cases could be clinical psychologists, educational psychologists and social workers, for example. Members of these professions may have valuable insights into the question of unfitness, for example, they may have worked closely with the accused over a number of years and know him or her well.

5.54 On the other hand, there is an argument that the finding of unfitness to plead leads to the possibility of the accused person being subject to a disposal which involves loss of his or her liberty, if he or she is found to have done the act

[352] In this regard, note page 23 of *Court Work Final Report of a Scoping Group* College Report CR147 Royal College of Psychiatrists London January 2008 "[Medical expert witnesses'] primary expertise is their psychiatric knowledge, skill and experience, and not their legal knowledge, familiarity with court procedure or skill in giving evidence."

he or she has been accused of. In these circumstances, Article 5 of the European Convention on Human Rights requires Member States to ensure that detention on the basis of mental ill-health takes place only after seeking the opinion of a medical expert.[353] Having said that, the determination of unfitness to plead does not lead to the potential for a loss of liberty: the subsequent trial of the facts is the process which could lead to such a loss.[354] The Commission considers that it is possible to take account of the views of experts other than those currently prescribed in statute for the purposes of the unfitness to plead determination, whilst respecting Article 5 by requiring the court to consider the evidence of medical experts whilst determining the correct disposal under Article 49(A) of the Mental Health Northern Ireland (Order) 1986 for those accused who are found to have done the act or made the omission with which he or she was charged.

5.55 The Commission is therefore interested in the views of consultees in relation to this matter. **Do consultees consider that when determining whether an individual is unfit to plead, the court should have the opportunity to consider evidence from experts who are not medical practitioners, in addition to the expert evidence currently required by statute?**

[353] See *Winterwerp v Netherlands* App No. 6301/73 and *Varbanov v Bulgaria* App No 31365/96.
[354] This point is also made by RD Mackay, (see footnote 131) at page 439.

CHAPTER 6. SECTION 75 OF THE NORTHERN IRELAND ACT 1998 EQUALITY SCREENING

Part 1. Policy scoping

Information about the policy

Name of the policy

The title of this policy is "Unfitness to Plead in Criminal Proceedings".

Is this an existing, revised or new policy?

This policy is seeking to revise and improve existing policy.

What is it trying to achieve? (intended aims/outcomes)

As part of the Northern Ireland Law Commission's Second Programme of Law Reform, the Department of Justice made a reference to the Northern Ireland Law Commission ("the Commission") which requested that the Commission considered the law relating to the unfitness of an accused person to plead in criminal proceedings in Northern Ireland. The reference asked the Commission to:

- Review the current law in the Crown Court and Magistrates' Court in Northern Ireland in relation to fitness to plead: the reference does not include the Youth Court in Northern Ireland;
- Review the current operation of the *Pritchard* test: a common law test which sets criteria against which unfitness to plead can be assessed;
- To consider whether a test based on the mental capacity test which is contained in the Mental Capacity Act 2005 would be a better approach for assessing unfitness to plead or whether tests which exist in jurisdictions such as Scotland or Jersey would be better options for Northern Ireland;
- To consider whether restrictions in relation to the types of medical evidence that are currently sought to assist

with the determination of unfitness to plead should be relaxed;

- To consider the current operation of the Article 49A hearing, the purpose of which is to determine whether an unfit accused person has carried out the act or made the omission with which he or she has been charged.

Are there any Section 75 categories which might be expected to benefit from the intended policy? If so, explain how.

People who may be unfit to plead in Northern Ireland are assessed using the test which is set out in *R v Pritchard* ("the *Pritchard* test"). If an individual is determined to be unfit to plead on the basis of the application of the *Pritchard* test, the individual is subject to a hearing under Article 49A of the Mental Health (Northern Ireland) Order 1986 ("an Article 49A hearing"). The unfit individual will therefore not be subject to a criminal trial, although, if he or she recovers sufficiently, a criminal trial may then proceed.

Unfitness tends to be as a result of mental illness or learning disability, potentially therefore the operation of the *Pritchard* test creates a differential impact on people who are living with a disability. However, the Commission does not consider that this impact is necessarily adverse, as the application of the *Pritchard* test results in individuals being able to access disposals which are concerned with care and treatment of illness or disability, rather than criminal disposals which are designed to punish and offer opportunities for rehabilitation of behaviour.

The Commission is proposing to amend the current operation of the *Pritchard* test which sets the criteria against which unfitness to plead can be assessed. It is suggested by the Commission that the introduction of a test based on mental capacity, such as the one which is contained in the Mental Capacity Act 2005, may result in a test which is based less on intellectual ability and instead considers the individual's ability to make decisions in relation to his or her trial.

The purpose of the Article 49A hearing is to determine whether the individual has committed the *actus reus* of the offence with which he or she has been charged: the mental element of the offence, the *mens rea*, is not considered. The Article 49A hearing as it

currently stands creates a differential impact between the way that people who are fit to stand trial are treated within the criminal justice system, and the way in which people who are unfit to stand trial are treated within that system. In relation to individuals who are fit to stand trial, the prosecution have to prove both the *actus reus* and the *mens rea* of the offence. For individuals involved in an Article 49A hearing, only the *actus reus* needs to be proved. The effect of this is that individuals who are unfit to plead may not have an opportunity to raise defences that fit individuals may be able to raise during their trial. Since unfitness tends to be as a result of mental illness or learning disability, potentially there is an adverse affect on people who are living with a disability. The Commission is consulting on whether the current law should be amended in this respect.

Who initiated or wrote the policy?

The Northern Ireland Law Commission is responsible for devising the policy.

Who owns and who implements the policy?

The Northern Ireland Law Commission will make recommendations to government, who will decide whether to adopt the recommendations and duly implement them.

Implementation factors

Are there any factors which could contribute to/detract from the intended aim/outcome of the policy/decision?

There are no financial or legislative factors which could contribute to or detract from the intended aim or outcome of the policy.

Main stakeholders affected

Who are the internal and external stakeholders (actual or potential) that the policy will impact on?

There are a number of stakeholders who are potentially affected by the policy, for example, the Police Service of Northern Ireland, the Public Prosecution Service Northern Ireland, the Northern Ireland Courts and Tribunals Service, the Department of Justice,

defendants in the criminal justice system, legal representatives and members of the judiciary and interested voluntary sector organisations.

Other policies with a bearing on this policy

There are no other policies which have a direct bearing on this policy, however, the work of the Department of Health, Social Services and Public Safety in relation to mental health and mental capacity is relevant.

Available evidence

There is very limited statistical information available in respect of unfitness to plead in criminal proceedings in Northern Ireland. The Commission was, however, provided some relevant data from the Northern Ireland Courts and Tribunal Service which is outlined below.

In the absence of more specific quantitative data relating to this policy, the Commission draws upon general population, criminal justice and mental health statistics and publications of relevance to many of the section 75 groupings. Where appropriate and Northern Ireland statistics are unavailable, the Commission has considered relevant research conducted in other jurisdictions, namely the United Kingdom and Republic of Ireland. This evidence is contained in the next section of this screening document.

The Northern Ireland Courts and Tribunal Service have provided statistics of the number of accused persons who were found to be unfit to plead in the Crown Court in Northern Ireland.

CROWN COURT

YEAR	NUMBER OF CASES WHERE ACCUSED PERSON WAS UNFIT TO PLEAD	OUTCOME
2001	1	Not available
2002	4	Not available
2003	5	Not available
2004	9	Not available
2005	4	Not available
2006	5	Not available

2007	2	1 accused person was unfit to plead, but he or she was found to have committed the act on one charge but acquitted on another. 1 accused person was unfit to plead, but he or she was found to have committed the act on all charges.
2008	2	1 accused person was acquitted (not guilty by direction). 1 accused person was unfit to plead, but he or she was found to commit the act on one charge but did not commit the act on 4 charges.
2009	4 (includes same person on 2 separate occasions).	1 accused person was unfit to plead, but he or she was not found to have committed the act charged. 1 accused person – all charges left on books. 1 accused person was found to be unfit to plead, but he or she was found to have committed the act on 6 charges but not to have committed the act on 1 charge. 1 accused person

		was unfit to plead, but he or she was found to commit the acts on all charges.
2010	9	1 accused person was unfit to plead, but he or she was found to have committed the act on 2 charges and 2 charges were left on the books. 7 accused people were unfit to plead, but they were found to have committed the act on all charges. 1 accused person was unfit to plead, but he or she was found to have not committed the act on all charges.

What evidence/information (both qualitative and quantitative) have you gathered to inform this policy? Specify details for each of the Section 75 categories.

<table>
<tr><th>Section 75 category</th><th>Details of evidence/information</th></tr>
<tr><td>Religious belief</td><td>
The 2001 Census data (www.nisranew.nisra.gov.uk) indicates that 44% of the overall Northern Ireland population and 44% of persons of working age (16-64) have a Catholic community background.
Average Percentages of Prisoners by Religion, Jan – June 2011, (Equality and Diversity reports, Northern Ireland Prison Service) show the following breakdown of prisoners by their religion:
<table>
<tr><th></th><th>Catholic</th><th>Protestant</th></tr>
<tr><td>Hydebank Wood Young Offenders Centre (excludes adults)</td><td>56%</td><td>34%</td></tr>
<tr><td>HMP Maghaberry (excludes young adults and separated prisoners)</td><td>54%</td><td>24%</td></tr>
<tr><td>HMP Magilligan (excludes young adults)</td><td>56%</td><td>35%</td></tr>
</table>
The study shows that the incidence of prisoners who are Catholics is slightly higher in each prison in Northern Ireland than those prisoners who are Protestant or have not specified a religion.
The Review of Northern Ireland Prison Service, (Prison Review Team, Final Report October 2011) suggested that there was a disproportionate number of Catholics within the prison population. This is particularly more pronounced in lower age groups (under 30), therefore resulting in a higher percentage of young Catholics in the prison population.
</td></tr>
</table>

The Northern Ireland Courts and Tribunals Service Exit Survey 2009 provides a breakdown of court users according to their religious beliefs. The statistics includes a breakdown of the religious belief of all court users using both the civil and criminal courts. The Exit Survey states that out of 2237 people surveyed, the majority of respondents were at court on criminal business (58.3%). However, these figures include legal representatives, prosecutors, police personnel, victims and witnesses, as well as defendants. The Exit Survey contained the following information in relation to the religious belief of the respondents:

Religious belief	**Frequency**	**Percent**
Catholic	1061	47.4
Presbyterian	361	16.1
Church of Ireland	269	12.0
Methodist	42	1.9
Baptist	13	0.6
Free Presbyterian	19	0.8
Brethren	5	0.2
Protestant - not specified	216	9.7
Other Christian	33	1.5
Buddhist	2	0.1
Jewish	1	0.0
Muslim	4	0.2
Any other religion please describe	18	0.8
No religion	149	6.7
Refusal/missing	44	2.0
Total	2237	100.0

Other religions represented in the survey included:

- Orthodox
- Church of England/Scotland
- Church of the latter Day Saints
- Pentecostal
- Humanist
- Lutheran
- Agnostic
- Russian/Russian Orthodox.

<table>
<tr><td></td><td>The Commission has been unable to locate specific statistics indicating the religious opinion of those with mental illness or learning disability in Northern Ireland.

The Commission has not been able to identify statistics outlining the religious beliefs of those who are unfit to plead in either the Magistrates’ courts or the Crown Court in Northern Ireland.</td></tr>
<tr><td>Political opinion</td><td>The Probation Board Northern Ireland (PBNI) carried out an equality census in June 2010. This survey indicated that 50% of offenders under the supervision of the PBNI in June 2010 stated that they did not hold a political opinion, 16% stated that they held a Unionist political opinion and 15% stated that they held a Nationalist opinion. Four percent of offenders preferred not to reveal their political opinion (see Restorative Practice Policy: Equality Screening 2011 (www.pbni.org.uk)).

The Commission has not been able to identify statistics outlining the political opinion of those who are unfit to plead in either the Magistrates’ courts or the Crown Court in Northern Ireland.</td></tr>
<tr><td>Racial group</td><td>The 2001 Census (www.nisranew.nisra.gov.uk/census) indicates that 99% of the Northern Ireland population is ‘white’.

The Northern Ireland Courts and Tribunals Service Exit Survey 2009 provides a breakdown of court users according to their ethnic groups and identify that out of 2237 people surveyed, 98.4% of respondents surveyed reported their ethnic group as ‘white’. However, these figures include legal representatives, prosecutors, police personnel, victims and witnesses, as well as defendants.

<table>
<tr><th>Ethnic group</th><th>Frequency</th><th>Percentage</th></tr>
<tr><td>White</td><td>2202</td><td>98.4</td></tr>
<tr><td>Chinese</td><td>3</td><td>0.1</td></tr>
<tr><td>Irish Traveller</td><td>2</td><td>0.1</td></tr>
<tr><td>Indian</td><td>2</td><td>0.1</td></tr>
<tr><td>Bangladeshi</td><td>6</td><td>0.3</td></tr>
<tr><td>Other Asian</td><td>1</td><td>0</td></tr>
<tr><td>Black - African</td><td>4</td><td>0.2</td></tr>
<tr><td>Mixed ethnic group</td><td>2</td><td>0.1</td></tr>
</table></td></tr>
</table>

Other	3	0.1
Refusal/missing	12	0.5
Total	2237	100.0

Northern Ireland Prison Population (2009) statistics and data provided to the Commission by the Department of Justice, indicate that 94% of the average prison population and 91% of the average remand population in 2009 were classified as 'white'. The complete breakdown is outlined in the table below:

Ethnic Group of Remand Prisoner	**Percentage**
White	91%
Chinese	5%
Black	1%
Irish Traveller	1%
Mixed ethnic group	0.2%
Other ethnic group	1%

There does not appear to be specific statistics outlining the racial group breakdown of those who are unfit to plead in either the Magistrates' courts or the Crown Court in Northern Ireland.

Age

Population Estimates for the UK, England and Wales, Scotland and Northern Ireland – Mid 2010 (21st December 2011) (www.statistics.gov.uk) indicate that 21.1% of persons in Northern Ireland are aged within the 15 – 29 year old age band.

The Northern Ireland Prison Population (2009) statistics (available on www.dojni.gov.uk) and data provided by the Department of Justice indicate that 47% of the average prison population and 55% of the average remand population were aged 17 – 29. It is stated in the Northern Ireland Assembly Hansard on 8th Jan 2008 (www.niassembly.gov.uk/Assembly-Business/Official-Report/) that the average age of those sentenced to custody in 2006 was 27 years of age, whilst a quarter were aged 21 years or under.

The Northern Ireland Courts and Tribunals Service Exit Survey provides the following data in relation to the age of court users during 2009 and shows that out of 2237 people surveyed, 49.4% of court users during this period were under 35 years old. However, these figures include

legal representatives, prosecutors, police personnel, victims and witnesses, as well as defendants. The table below details the breakdown:

Age	Frequency	Percentage
under 17 years	11	0.5
17-25 years	476	21.3
26-35 years	618	27.6
36-45 years	591	26.4
46-55 years	326	14.6
56-65 years	153	6.8
over 65	36	1.6
Refusal/missing	26	1.2
Total	2237	100.0

The Northern Ireland Assembly Research Paper *Prisoners and Mental Health* (9th March 2011) (www.niassembly.gov.uk) reports that there is an ageing population in Northern Ireland prisons. People aged over 60 are the fastest growing age group in the prison population and it was stated that dementia will become an increasing mental health issue (at page 8).

The Mindwise Northern Ireland Appropriate Adult Scheme Annual Report (2010-2011) (www.mindwisenv.org/) reported that in terms of those persons requiring an appropriate adult, 45% were juveniles. *The Evaluation of the Northern Ireland Appropriate Adult Scheme, Mindwise*, by University of Ulster and the University of San Diego, found that during 2009/10, Appropriate Adults attended 1382 cases in 23 PSNI stations. Approximately 60% involved in these cases were juveniles (at page 3).

The Ministry of Justice publication *Statistics of Mentally Disordered Offenders 2007 England and Wales* (5 February 2009: www.moj.gov.uk) note that most restricted patients detained in hospital were aged between 21 and 59 years (51% were aged between 21-39 and 39% were aged between 40 -59).

The Commission has been unable to locate specific statistics in relation to the age breakdown of those who are unfit to plead in either the Magistrates' courts or the

	Crown Court in Northern Ireland.
Marital status	The 2001 Census (www.nisranew.nisra.gov.uk/census) indicates that 33% of persons over the age of 16 in Northern Ireland were single. *Northern Ireland Prison Population statistics* (2009) (www.dojni.gov.uk) indicate that 76% of the average prison population and 80% of the average remand population in 2009 were single people. The Northern Ireland Courts and Tribunals Service Exit Survey (2009) provides data in relation to the marital status of court users. Of 2237 people surveyed, 75% indicated that they were single. Figures include legal representatives, prosecutors, police personnel, victims and witnesses as well as defendants in criminal proceedings. The Commission has been unable to locate specific statistics in relation to marital status in relation to those who are unfit to plead in Northern Ireland.
Sexual orientation	The Probation Board Northern Ireland (PBNI) carried out an equality census in June 2010. This survey indicated that 94% of offenders under the supervision of the PBNI in June 2010 stated that they were heterosexual, 1% stated that they were gay, 1% stated that they were bi-sexual and 4% did not provide an answer (see *Restorative Practice Policy: Equality Screening 2011* (www.pbni.org.uk)). Statistics in relation to the sexual orientation of those who are unfit to plead do not appear to be available in Northern Ireland.
Men and women generally	*Population Estimates for the UK, England and Wales, Scotland and Northern Ireland – Mid 2010* (21st December 2011) (www.statistics.gov.uk) indicate that 49% of the population of Northern Ireland is male. The *Digest of Information on the Northern Ireland Criminal Justice System* (2012) (www.dojni.gov.uk) states that 87%

of suspects arrested in Northern Ireland were male and 87% of all those prosecuted were male in 2010/11. Eighty six percent of all those proceeded against in the Magistrates' Court were male compared to 92% males in the Crown Court.

Northern Ireland Prison Population statistics (2009) (www.dojni.gov.uk) indicate that 97% of the average prison population (based on persons over 17 years old) and 95% of the average remand population were male in 2009.

The Northern Ireland Courts and Tribunals Service Exit Survey 2009 provides the following information. However, these figures include legal representatives, prosecutors, police personnel, victims and witnesses, as well as defendants:

	Frequency	**Percentage**
Male	1351	60.4
Female	873	39.0
Refusal/missing	13	0.6
Total	2237	100.0

The Northern Ireland Appropriate Adult Scheme, which provides mandatory support at police stations for juveniles and vulnerable adults in police stations, identified that 86% of persons detained and using their services during 2010/ 11 were male (*NIAAS Annual Report 2010-2011).*

The Mindwise Northern Ireland Appropriate Adult Scheme Annual Report (2010-2011) (www.mindwisenv.org/) reported that in terms of those persons requiring an appropriate adult, 14% were female and 86% were male. *The Evaluation of the Northern Ireland Appropriate Adult Scheme, Mindwise*, by University of Ulster and the University of San Diego, found that during 2009/10, Appropriate Adults attended 1382 cases in 23 PSNI stations. Approximately 84% of cases involved males and 16% involved females (at page 3).

In its 2002 paper *People with a learning disability who offend: forgiven but forgotten* (Occasional Paper OP63) the Irish College of Psychiatrists/Coláiste Síciatraithe na hÉireann report at page 13 that of those people with a

learning disability who offend, young males are over-represented. The Irish College of Psychiatrists/Coláiste Síciatraithe na hÉireann, in their 2007 report *People with a learning disability who offend: forgiven but forgotten?* reported that out of 373 patients identified, 297 were male (80%) and 76 were female (20%). It was further reported that the male/female ratio of 4:1 is in keeping with forensic psychiatric learning disability services in the UK (at page 19).

The Commission has been unable to locate specific statistics in relation to the gender breakdown of those who are unfit to plead in either the Magistrates' court or the Crown Court in Northern Ireland.

Disability

The 2001 Census (www.nisranew.nisra.gov.uk) indicates that 20% of the Northern Ireland population and 17% of persons of working age (16-64) had a limiting long-term illness.

The Northern Ireland Courts and Tribunals Service Customer Exit Survey 2009 asked respondents whether they considered themselves as having a disability as defined under the Disability Discrimination Act 1995. The results are outlined in the table below, however, these figures include legal representatives, prosecutors, police personnel, victims and witnesses, as well as defendants:

	Frequency	**Percentage**
Yes	175	7.8
No	2043	91.3
Refusal/missing	19	.8
Total	2237	100.0

The Ministry of Justice *Statistics of Mentally Disorder Offenders 2007 England and Wales* (www.moj.gov.uk) examines the number of restricted patients detained in hospital by legal category and type of mental disorder:

Legal category	**Unfit to plead**	**All legal categories**
Mental Illness	56	2639
Mental Illness with other disorders	4	306

Psychopathic disorders		493
Mental impairment	9	219
Mental impairment with psychopathic disorders	1	40
Severe mental impairment	4	13
Not known	170	196
All mental disorders	244	3906

Various publications provide useful statistical evidence outlining the prevalence and nature of disabilities in the criminal justice system in Northern Ireland and the United Kingdom. This evidence is outlined below:

- 16% of people placed in custody meet one or more of the assessment criteria for mental disorder (Criminal Justice Inspectorate *Not a marginal Issue: Mental health and the criminal justice system in Northern Ireland,* March 2012*)*;
- 64% of sentenced male prisoners and 50% of female prisoners are personality disordered. 78% of male prisoners on remand are personality disordered. This is estimated to be 3 or 4 times greater than the general population (Criminal Justice Inspection Northern Ireland *Not a Marginal Issue* (2010) at page 7);
- 64% of male and 50% of female sentenced prisoners have a personality disorder; 12 and 14 times the level of the in the general population. Also 7% of male and 14% of female sentenced prisoners have a psychotic disorder, 14 and 23 times the level in the general population respectively (*Reducing Re-offending by Ex-prisoners, Report by the Social Exclusion Unit,* Office of the Deputy Prime Minister, July 2002);
- 95% of young prisoners aged 15 to 21 suffer from a mental disorder. 80% suffer from at least two mental health problems. Nearly 10% of female sentenced young offenders reported already having been admitted to a mental hospital at some point (*Report by the Social Exclusion Unit,* Office of the Deputy Prime Minister, July 2002);
- 20-30% of all offenders have learning disabilities

or difficulties that interfere with their ability to cope with the criminal justice system (Nancy Loucks with Jenny Talbot *No One Knows Identifying and supporting prisoners with learning disabilities: the views of prison staff in Northern Ireland* (2007);

- In the UK, 70% of sentenced prisoners have four or five major mental health disorders (Northern Ireland Assembly, *Research and Library Service Paper- Prisoners and Mental Health, Paper 46/11* 9 March 2010. Also *Bromley Briefings Prison Fact-file* December 2010, Prison Reform Trust).

The Prison Reform Trust has compiled a table comparing the prevalence of mental illness or learning disability within the prison population with that of the general public. This table is replicated below:

Characteristic	**General Population**	**Prison Population**
Numeracy at or below Level 1 (level expected for an 11 year-old)	23%	65%
Reading ability at or below Level 1	21-23%	48%
Suffers from two or more mental disorders	5% of men and 2% of women	72% of male sentenced prisoners and 70% of female sentenced prisoners
Psychotic disorder	0.5% of men and 0.6% of women	7% of male sentenced prisoners and 15% of female sentenced prisoners.

(Adapted from the Social Exclusion Unit Report, "Reducing reoffending by ex-prisoners", July 2002. Replicated in Bromley Briefings Prison Fact-file December 2010, Prison Reform Trust).

The Prison Reform Trust undertook a study in 2006 which

examined the issues around prisoners with learning difficulties and learning disabilities in Northern Ireland. (*Prison Reform Trust, No One Knows, Identifying and supporting prisoners with learning difficulties and learning disabilities: the views of prison staff in Northern Ireland*.) The study stated that published research on prevalence of learning disabilities amongst prisoners in Northern Ireland is very limited, and referred to research in the Republic of Ireland (*Murphy et al.* 2000) that indicated that 29% of prisoners as having an IQ of less than 70, (which is generally considered the UK and international definition of a learning disability, see pages 1 and 3.) The Prison Reform Trust also identified recent research in England and Wales that indicated the following:

- 7% of prisoners have an IQ of less than 70, and a further 25% have an IQ of less than 80 (generally considered as having a "borderline" learning disability) (*Mottram* 2007);
- 20 – 50% of men in prison have a specific learning disability (*Disability Rights Commission* 2005);
- 20% of prison population has some form of "hidden disability" that "will affect and undermine their performance in both education and work settings' (*Rack* 2005).

Lord Bradley's review of people with mental health problems or learning disabilities in the criminal justice system (*The Bradley Review* April 2009) states that prisoners have significantly higher rates of mental health problems than the general public. This is shown in the table below:

	Prisoners	General Population
Schizophrenia and delusional disorder	8%	0.5%
Personality disorder	66%	5.3%
Neurotic disorder (e.g. depression)	45%	13.8%
Drug dependency	45%	5.2%
Alcohol dependency	30%	1.5%

(Sources: Singleton N et al, 1998, Psychiatric morbidity among prisoners in England and Wales Singleton N et al, 2001, "Psychiatric morbidity among adults living in private

households, 2000: Technical report", as cited in the Bradley Report.)

The Mindwise Northern Ireland Appropriate Adult Scheme Annual Report (2010-2011) (www.mindwisenv.org/) reported that in terms of those persons requiring an appropriate adult, 55% were mentally vulnerable. *The Evaluation of the Northern Ireland Appropriate Adult Scheme, Mindwise*, by University of Ulster and the University of San Diego, found that during 2009/10, Appropriate Adults attended 1382 cases in 23 PSNI stations. Approximately 40% of cases involved mentally vulnerable adults (at page 3).

The Irish College of Psychiatrists/Coláiste Síciatraithe na hÉireann, in their 2007 report *People with a learning disability who offend: forgiven but forgotten?* reported that out of 373 patients identified, the most frequently represented group was males in severe range of learning disability, aged between 25 and 54 years (31%). The second most frequently represented group was males in the moderate range of learning disability, aged between 25 and 54 years (23%) (at page 19).

Hospital statistics in relation to Northern Ireland published by the Department of Health, Social Service and Public Safety relating to Feb 2011 state that the highest proportion (45.4%) of all learning disability inpatients were aged 45 – 64. A further 41.7% were aged 19 – 44, 8.3% were 65 & over and 4.6% were under 18. (*Age Group - Northern Ireland Hospital Statistics: Mental Health & Learning Disability* (2010/11) at page 18).

In terms of the age of those detained and the length of time they were detained for, the tables below show the difference between those persons with learning disability and those with mental health issues.

The following table provides statistics on learning disability inpatients resident at 17 February 2011, including patients on Home Leave. (*Northern Ireland Hospital Statistics: Mental Health & Learning Disability* (2010/11)):

	Age in years								
Length of Stay	0 - 15	16 - 18	19 - 24	25 - 34	35 - 44	45 - 54	55 - 64	65 - 74	75 +	All Ages
0-6 months	7	2	10	9	8	15	10	0	1	62
7-12 months	1	2	2	2	6	1	1	1	0	16
>1-2 years	2	0	2	5	5	6	2	0	0	22
>2-3 years	0	1	3	3	7	2	2	1	0	19
>3-5 years	0	0	3	11	2	8	6	4	0	31
>5-10 years	0	0	5	8	7	9	6	2	1	40
>10-20 years	0	0	0	11	8	8	5	0	2	33
>20-30 years	0	0	0	1	14	7	6	3	1	32
>30 years	0	0	0	0	6	26	28	9	2	71
Total	10	5	25	48	63	82	66	20	7	326

The following table provides statistics in relation to mental illness inpatients resident at 17 February 2011, including patients on Home Leave. (*Northern Ireland Hospital Statistics: Mental Health & Learning Disability* (2010/11)):

	Age in years									
Length of Stay	0 - 15	16 - 18	19 - 24	25 - 34	35 - 44	45 - 54	55 - 64	65 - 74	75 +	All Ages
0-6 months	16	18	46	91	88	97	76	81	91	604
7-12 months	4	2	3	6	9	14	12	9	8	67
>1-2 years	0	0	2	10	3	7	7	5	6	41
>2-3 years	0	0	0	2	8	3	2	5	6	26
>3-5 years	0	2	2	6	9	12	16	3	9	59
>5-10 years	0	0	0	3	10	12	7	15	14	61
>10-20 years	0	0	0	3	3	16	14	4	2	42
>20-30 years	0	0	2	1	0	6	8	1	0	18
>30 years	1	0	1	1	2	0	7	5	1	18
Total	22	24	56	112	132	167	149	128	137	936

Dependants

The 2001 Census (www.nisranew.nisra.gov.uk) indicates that 36% of households in Northern Ireland have dependants.

The Northern Ireland Courts and Tribunals Customer Exit Survey (2009) indicates that 36% of criminal defendants surveyed have dependent children.

	The Probation Board Northern Ireland (PBNI) carried out an equality census in June 2010. This survey indicated that 48% of offenders under the supervision of the PBNI in June 2010 have dependant responsibilities, with 45% of those having dependant children (see Restorative Practice Policy: Equality Screening 2011 (www.pbni.org.uk). The *Review of Northern Ireland Prison Service conditions, management and oversight of all prisons* Prison Review Team (October 2011) (www.dojni.gov.uk) states that women in prison are very likely to be the main or sole careers for children. The Commission has been unable to locate statistics in relation to the number of persons who are unfit to plead in Northern Ireland who have or do not have dependents.

Needs, experiences and priorities

Taking into account the information referred to above, what are the different needs, experiences and priorities of each of the following categories, in relation to the particular policy/decision? Specify details for each of the Section 75 categories.

Section 75 category	Details of needs/experiences/priorities
Religious belief	Although there is some indication that Catholics are disproportionately represented in prison populations in Northern Ireland, there is no evidence that people of differing religious beliefs have any particular needs, experiences and priorities in relation to this policy. Religion is not a relevant factor in considering whether an individual is unfit to plead in criminal proceedings.
Political opinion	There is no evidence that people of differing political opinion have any particular needs, experiences and priorities in relation to this policy. Political opinion is not a relevant factor in considering whether an individual is unfit to plead in criminal proceedings.
Racial group	There is no evidence that people of different racial groups have any particular needs, experiences and

	priorities in relation to this policy. Racial grouping is not a relevant factor in considering whether an individual is unfit to plead in criminal proceedings.
Age	The reference of this project to the Commission does not include consideration of unfitness to plead in the context of Youth Courts. However, young adults are disproportionately represented in the various stages of the criminal justice system. Also, age is an issue which may affect whether an individual is fit or unfit to plead in criminal proceedings. The Commission therefore considers that it is reasonable to believe that people of differing ages may have different needs, experiences and priorities in relation to this policy.
Marital status	Although there is evidence that single persons are disproportionately represented in the various stages of the criminal justice system, the Commission has found no evidence of different needs, experiences or priorities in relation to this policy. Marital status is not a relevant factor in considering whether an individual is unfit to plead in criminal proceedings.
Sexual orientation	There is no evidence that people of differing sexual orientation have any particular needs, experiences and priorities in relation to this policy. Sexual orientation is not a relevant factor in considering whether an individual is unfit to plead in criminal proceedings.
Men and women generally	Although there is evidence that males are disproportionately represented in the various stages of the criminal justice system, the Commission has found no further evidence of different needs, experiences or priorities in relation to this policy. Gender is not a relevant factor in considering whether an individual is unfit to plead in criminal proceedings.
Disability	The Commission considers that there is evidence indicating that people who are living with a disability or disabilities may have particular needs, experiences and priorities in relation to this policy. The law in relation to unfitness to plead in criminal proceedings is most likely to apply to individuals who are experiencing mental illness or learning disability, for example.

Dependants	There is no evidence that people with or without dependants have any particular needs, experiences and priorities in relation to this policy. Having, or not having, dependants is not a relevant factor in considering whether an individual is unfit to plead in criminal proceedings.

Part 2. Screening questions

1. What is the likely impact on equality of opportunity for those affected by this policy, for each of the Section 75 categories?

Section 75 category	Details of policy impact	Level of impact? minor/major/none
Religious belief	The Northern Ireland Law Commission does not consider that the policy has an impact on people of different religious belief.	None.
Political opinion	The Northern Ireland Law Commission does not consider that the policy has an impact on people of different political opinion.	None.
Racial group	The Northern Ireland Law Commission does not consider that the policy has an impact on people of different racial groups.	None.
Age	The Northern Ireland Law Commission considers that this policy may have a potential impact on people of differing ages. Age may be an issue which may impact upon whether an individual is determined by a court to be unfit to plead, therefore it is reasonable to give further consideration to the	Minor.

	question of whether there may be potential opportunities to better promote equality of opportunity for people of differing ages under this policy.	
Marital status	The Northern Ireland Law Commission does not consider that the policy has an impact on people of different marital status.	None.
Sexual orientation	The Northern Ireland Law Commission does not consider that the policy has an impact on people of different sexual orientation.	None.
Men and women generally	The Northern Ireland Law Commission does not consider that the policy has an impact on people of different genders.	None.
Disability	The Northern Ireland Law Commission considers that this policy has a potential impact on some people who are living with a disability. This policy affects persons with mental illness and/ or learning disability and it is reasonable to give further consideration to the question of whether there may be potential opportunities to better promote equality of opportunity for people living with disabilities under this policy.	Major.
Dependants	The Northern Ireland Law Commission does not consider that the policy has an impact on people who have or do not have dependants.	None.

2. Are there opportunities to better promote equality of opportunity for people within the section 75 equality categories?

Section 75 category	If **Yes**, provide details	If **No**, provide reasons
Religious belief		The Northern Ireland Law Commission does not consider that this policy provides opportunities to better promote equality of opportunity for people of different religious beliefs.
Political opinion		The Northern Ireland Law Commission does not consider that this policy provides opportunities to better promote equality of opportunity for people of different political opinions.
Racial group		The Northern Ireland Law Commission does not consider that this policy provides opportunities to better promote equality of opportunity for people of different racial groups.
Age	Although Youth Courts are not included as part of the reference to the Commission from the	

	Department of Justice, the Commission considers that age may be an issue which may have a bearing on an individual's unfitness to plead in criminal proceedings. It is suggested that enhancing the *Pritchard* test to take account of a mental capacity of the individual to take decisions in relation to his or her trial may promote equality of opportunity for people of differing ages, as a mental capacity-based test is individual focussed and considers issues other than intellectual capacity.	
Marital status		The Northern Ireland Law Commission does not consider that this policy provides opportunities to better promote equality of opportunity for people of different marital status.
Sexual orientation		The Northern Ireland Law Commission does not consider that this policy provides opportunities to better promote equality of opportunity for people of different sexual orientations.
Men and women generally		The Northern Ireland Law Commission does not consider that this policy provides

		opportunities to better promote equality of opportunity for people of different genders.
Disability	Enhancement of the *Pritchard* test to take account of a mental capacity test may promote equality of opportunity for individuals, as it looks beyond intellectual ability and considers a person's capacity to make decisions in relation to their trial. The current law only permits the court to look at the *actus reus* of an offence during an Article 49A hearing. The Commission is seeking views on whether the *mens rea* of the offence should also be considered, which would increase the ability of the accused to raise defences during the hearing.	
Dependants		The Northern Ireland Law Commission does not consider that this policy provides opportunities to better promote equality of opportunity for people who have or do not have dependants.

3. To what extent is the policy likely to impact on good relations between people of different religious belief, political opinion or racial group?

Good relations category	Details of policy impact	Level of impact minor/major/none
Religious belief	The Commission does not consider that this policy is likely to impact on good relations between people of different religious beliefs.	None.
Political opinion	The Commission does not consider that this policy is likely to impact on good relations between people of different political opinions.	None.
Racial group	The Commission does not consider that this policy is likely to impact on good relations between people of different racial groups.	None.

4. Are there opportunities to better promote good relations between people of different religious belief, political opinion or racial group?

Good relations category	If **Yes**, provide details	If **No**, provide reasons
Religious belief		No, the subject matter of this policy does not lend an opportunity to better promote good relations between people of different religious beliefs.

Political opinion		No, the subject matter of this policy does not lend an opportunity to better promote good relations between people of different political opinions.
Racial group		No, the subject matter of this policy does not lend an opportunity to better promote good relations between people of different racial groups.

Additional considerations

Multiple identity

Generally speaking, people can fall into more than one section 75 category. Taking this into consideration, are there any potential impacts of the policy/decision on people with multiple identities?
(*For example; disabled minority ethnic people; disabled women; young Protestant men; and young lesbians, gay and bisexual people).*

Any proposals for the reform of unfitness to plead law and practice would seem to have a potential impact primarily on younger males who are living with a disability, given that young men are over-represented in the criminal justice system.

Provide details of data on the impact of the policy on people with multiple identities. Specify relevant section 75 categories concerned.

See above.

Part 3. Screening decision

If the decision is not to conduct an equality impact assessment, please provide details of the reasons.

The Commission has decided that it is necessary to conduct an Equality Impact Assessment in relation to this policy.

If the decision is not to conduct an equality impact assessment the public authority should consider if the policy should be mitigated or an alternative policy be introduced.

Not applicable.

If the decision is to subject the policy to an equality impact assessment, please provide details of the reasons.

Given the potential impacts of this policy that have been identified during the screening exercise, the Commission considers that an Equality Impact Assessment should be carried out.

Mitigation

Can the policy/decision be amended or changed or an alternative policy introduced to better promote equality of opportunity and/or good relations?

The Commission intends to consult on a number of options for the reform of this area of law.

Timetabling and prioritising

Factors to be considered in timetabling and prioritising policies for equality impact assessment.

If the policy has been "screened in" for equality impact assessment, then please answer the following questions to determine its priority for timetabling the equality impact assessment.

On a scale of 1-3, with 1 being the lowest priority and 3 being the highest, assess the policy in terms of its priority for equality impact assessment.

Priority criterion	Rating (1-3)
Effect on equality of opportunity and good relations	2
Social need	1
Effect on people's daily lives	1
Relevance to a public authority's functions	2

Part 4. Monitoring

The Northern Ireland Law Commission is not responsible for monitoring the effect of this policy as this role is the responsibility of the implementing Department.

Part 5. Approval and Authorisation

Screened by:	Position/Job Title	Date
Clare Irvine	Principal Legal Officer	1st June 2012
Approved by:		
Ken Miller	Acting Chief Executive	1st June 2012

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