

Northern Ireland Law Commission

Consultation on Equality Impact Assessment

Unfitness to Plead

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INTRODUCTION

Background to the Northern Ireland Law Commission

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 to 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 the 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 Chairman, who must hold the office of 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. There is also a Chief Executive, who is appointed from the legal professions.

These positions are currently held by:

Chairman:	The Honourable Mr Justice McCloskey
Chief Executive:	Ms Judena Goldring MA, BLegSc, Solicitor
Acting Chief Executive:	Mr Ken Millar
Commissioner:	Professor Sean Doran (Barrister-at-Law)
Commissioner:	Mr Neil Faris (Solicitor) (until June 2012)
Commissioner:	Mr Robert Hunniford (Lay Commissioner)
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Section 75 of the Northern Ireland Act 1998

Section 75 of the Northern Ireland Act 1998 requires public authorities (in this instance, the Commission) to ensure that they carry out their functions having due regard to the need to promote equality of opportunity between:

- persons of different religious belief, political opinion, racial group, age, marital status or sexual orientation;
- between men and women generally;
- between persons with or without a disability; and
- between persons with or without dependants.

The Commission is also required to have regard to the desirability of promoting good relations between persons of different religious belief, political opinion or racial group.

The Commission's Draft Equality Scheme (available on www.nilawcommission.gov.uk) sets out how the Commission seeks to fulfil these obligations in carrying out its functions.

Equality Screening Analysis

The Commission has conducted an Equality Screening Analysis of the proposals outlined in the consultation paper *Unfitness to Plead* to assess if the policy potentially impacts upon equality of opportunity and/or good relations. The Equality Screening Analysis Form is contained in the consultation paper, *Unfitness to Plead*, which can be viewed on the Commission's website: www.nilawcommission.gov.uk. Alternatively, hard copies can also be made available on request.

In deciding whether or not it was necessary to carry out an Equality Impact Assessment, the Commission considered the following four screening questions and the revised guidance provided in the Equality Commission's *Section 75 of the Northern Ireland Act 1998: A Guide for Public Authorities* (April 2010). The four questions are:

- (i) What is the likely impact on equality of opportunity for those affected by this policy, for each of the Section 75 equality categories?
- (ii) Are there opportunities to better promote equality of opportunity for people within the Section 75 categories?
- (iii) To what extent is the policy likely to impact on good relations between people of different religious belief, political opinion or racial group?
- (iv) Are there opportunities to better promote good relations between people of different religious belief, political opinion or racial group?

On the basis of the answers to these questions, which are contained in the above-mentioned consultation paper, the Commission has decided to conduct an Equality Impact Assessment.

1. THE AIMS OF THE POLICY

1.1 Name and brief description of the policy

Unfitness to Plead

A full discussion of the issues under consideration by the Commission can be found in the consultation paper: *Unfitness to Plead*. It must be emphasised that the issues discussed in the consultation paper do not represent the final recommendations of the Commission but rather the full range of reform options under consideration.

As part of the Commission's Second Programme of Law Reform, the Department of Justice made a reference to 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 Commission duly accepted the reference. The issues to be addressed by the Commission may be summarised as follows:

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

The Commission is responsible for devising the policy and will send its recommendations, in a final Report, to the Department of Justice pursuant to section 52(1) of the Justice (Northern Ireland) Act 2002.

1.2 Aims of the policy

The main objectives of this project are to make recommendations which aim to:

- (a) Review the current law and consider whether it is in need of reform;
- (b) Ensure that the law identifies individuals in the criminal justice system who are deemed by the court to be unsuited to the rigours of the criminal trial;
- (c) Review the law on unfitness to plead to ensure that it conforms with the requirements of European Convention on Human Rights (particularly the right to a fair trial);
- (d) Review the current operation of the *Pritchard* test which currently sets the criteria against which unfitness to plead can be assessed;
- (e) Determine whether the current operation of the Article 49A hearing is satisfactory, or whether it should be revised to include the examination of the *mens rea* of the offence with which the accused has been charged, which, in turn, may facilitate the accused to raise certain defences.

1.3 Implementation and related policies

The Commission has responsibility for devising the policy and sending its recommendations to the Department of Justice in a report, which is laid by the Department of Justice before the Northern Ireland Assembly. If the recommendations of the Commission are accepted by the Department of Justice, the Department would be responsible for taking forward the introduction into the Northern Ireland Assembly of any Bill drafted in response to the recommendations of the Commission. The passing of legislation would ultimately be a matter for the Northern Ireland Assembly. The adoption of any complementary administrative arrangements would be a matter for the Department and any other relevant public body.

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.

1.4 Who is affected by the policy?

The individuals and organisations that the unfitness to plead proposals are most likely to impact upon are as follows:

- (i) Defendants;
- (ii) Lawyers acting in criminal cases;
- (iii) Judges;
- (iv) The training bodies of lawyers and judges;
- (v) The Law Society;
- (vi) The Bar Council;
- (vii) Other statutory and non statutory agencies who work within the criminal justice system;
- (viii) The public generally, particularly with regards to public confidence in the criminal justice system;
- (ix) The Public Prosecution Service;
- (x) The Police Service of Northern Ireland;
- (xi) The Northern Ireland Assembly;
- (xii) The Northern Ireland Prison Service;
- (xiii) The Department of Justice;
- (xiv) The Department of Health, Social Services and Public Safety;
- (xv) Forensic psychiatrists and other medical professionals;
- (xvi) Interested voluntary sector groups.

The Commission does not consider that there are any groups which may be expected to benefit from the policy but which do not.

1.5 Conclusions of the screening process

Having carried out a screening process under section 75 of the Northern Ireland Act 1998, the Commission concluded that an EQIA should be conducted.

2. CONSIDERATION OF AVAILABLE DATA AND RESEARCH

Data relied on for Screening and EQIA

The Commission has considered the sources of data listed in Appendix 4 of the Equality Commission *Practical Guidance on Equality Impact Assessment* (2005) and has considered material produced by the following agencies with a view to obtaining statistical information on unfitness to plead that may be relevant and that may facilitate consideration of the potential equality impact of the unfitness to plead proposals:

Northern Ireland Prison Service;
Police Service of Northern Ireland;
Northern Ireland Statistics and Research Agency;
Northern Ireland Courts and Tribunals Service;
Northern Ireland Assembly Research and Library Service;
Department of Justice; and
Department of Health, Social Services and Public Safety.

There is very limited statistical information available in respect of unfitness to plead in criminal proceedings in Northern Ireland. Very few cases involving defendants who are deemed to be unfit to plead occur each year in Northern Ireland. For example, statistics obtained from the Northern Ireland Courts and Tribunals Service (see Equality Screening Exercise which is contained in the consultation paper *Unfitness to Plead*) reveal that in 2010, 9 people were deemed to be unfit to plead, in 2009, 4 cases involving 2 people who were deemed to be unfit to plead occurred and in 2008, 2 people were deemed to be unfit to plead.

The issues raised by unfitness to plead in criminal proceedings are not issues which have attracted a great deal of attention amongst Government departments, the criminal justice system as a whole, statistical agencies or voluntary sector groups. In addition, in this area, the gathering of qualitative data is difficult, perhaps for a number of reasons. These reasons may include inaccessibility to patients in hospital who may have been deemed unfit to plead and the risks involved in disrupting the healthcare treatment of individuals who have been found to be unfit to plead whilst information is sought. In addition, there is no specific representative group for individuals who have been found to be unfit to plead during criminal proceedings, although other groups may represent these individuals as part of their wider remit.

In the absence of more specific qualitative 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 where specific Northern Ireland statistics are unavailable, the Commission has considered relevant research conducted in other jurisdictions, namely the United Kingdom and Republic of Ireland. The following sources have therefore specifically been of utility to the Commission in carrying out its duties under section 75 of the Northern Ireland Act 1998:

- Census 2001 (www.nisranew.nisra.gov.uk);
- *Population Estimates for the UK, England and Wales, Scotland and Northern Ireland – Mid 2010* (21st December 2011) (www.statistics.gov.uk);
- *Average Percentages of Prisoners by Religion (Jan – June 2011)* Equality and Diversity Reports, Northern Ireland Prison Service;
- *The Review of Northern Ireland Prison Service*, Prison Review Team, Final Report, October 2011 (www.dojni.gov.uk);

- *Bamford Review of Mental Health and Learning Disability: Forensic Services Working Committee Consultation Report* (2008);
- *Northern Ireland Courts and Tribunals Service Customer Exit Survey* (2009) (www.courtsni.gov.uk);
- *The Probation Board for Northern Ireland Restorative Practice Policy: Equality Screening 2011* (www.pbni.org.uk);
- *The Northern Ireland Prison Population in 2009*, Research and Statistical Bulletin 2/2010 (www.dojni.gov.uk);
- *Digest of Information on the Northern Ireland Criminal Justice System* (2012) (www.dojni.gov.uk);
- *Review of the Youth Justice System in Northern Ireland* (September 2011) (www.dojni.gov.uk);
- *The Youth Justice Agency Provisional Workload Statistics* (April - September 2011 Statistical Bulletin 5/2011);
- *Northern Ireland Appropriate Adult Scheme Annual Report 2010-2011*;
- *Demographic information regarding initial admissions to the Juvenile Justice Centre Youth Justice Agency* (2009);
- *Northern Ireland Appropriate Adult Scheme Annual Report 2010-2011 Mindwise* (www.midwisenv.org/);
- *The Bradley Review*, April 2009;
- *Statistics of Mentally Disordered Offenders 2007 England and Wales* Ministry of Justice (5 February 2009) (www.moj.gov.uk);
- *Not a Marginal Issue: Mental Health and the criminal justice system in Northern Ireland* Criminal Justice Inspection Northern Ireland (March 2010);
- *No One Knows, Identifying and supporting prisoners with learning difficulties and learning disabilities: the views of prison staff in Northern Ireland* Prison Reform Trust (Loucks and Talbot) (2007);
- *Prisoners and Mental Health* Northern Ireland Assembly Research Paper (9th March 2011) (www.niassembly.gov.uk);
- *Hansard* (www.niassembly.gov.uk/Assembly-Business/Official-Report/);
- *Reducing Re-offending by Ex-prisoners*, Social Exclusion Unit, Office of the Deputy Prime Minister (July 2002);
- *People with a learning disability who offend: forgiven but forgotten?* The Irish College of Psychiatrists/Coláiste Síciatraithe na hÉireann (2007);
- *Northern Ireland Hospital Statistics: Mental Health and Learning Disability (2010/11)* (www.dhsspsni.gov.uk).

The consultation paper, *Unfitness to Plead*, has been widely circulated to groups and individuals representative of the interests of section 75 groupings, including those included in the *Guidance on the Distribution of Departmental Publications and Consultation Documents* which is published by the Office of the First and Deputy First Ministers. Alongside specific questions relating to the reform of the law and practice relating to unfitness to plead, the consultation paper includes an initial screening exercise and invites the views of consultees on the preliminary conclusions reached. Consultees are also invited to draw the Commission's attention to any data which may be relevant to any screening. Consultees are also encouraged to provide views in relation to the discussions advanced and the conclusions reached in this EQIA consultation.

3. ASSESSMENT OF IMPACTS

3.1 Approach adopted to assessment of impacts

Using the information gathered, which is outlined above in chapter 2 of this paper, the Commission is required to consider whether there is, or there is likely to be, a differential impact, whether direct or indirect, upon the section 75 groups. If an adverse effect on any of the groups is identified, the Commission is required to assess whether the policy is unlawfully discriminatory. If the policy is not unlawful, the *Practical Guidance on Equality Impact Assessment* published by the Equality Commission (February 2005) states that policy makers are to consider whether there is any alternative measure which would achieve the aim desired without any differential impact. The *Practical Guidance on Equality Impact Assessment* states that a number of questions may be helpful in assessing impact of policies (at page 24):

- Does the quantitative data reveal any differential impact on any of the groups?
- Does the qualitative or evaluative data reveal any differential impact on any of the groups?
- Is there a difference in the conclusions reached using quantitative and qualitative methods? How can the difference be reconciled?
- Is the differential impact an adverse one?
- Is the policy directly or indirectly discriminatory? If the policy is not directly or indirectly discriminatory, does it still have an adverse impact?
- Is the policy intended to increase equality of opportunity by permitting or requiring affirmative or positive action or action to redress disadvantages? Is it lawful?
- Is there any alternative measure which would achieve the desired aim without the adverse impact identified?
- Is there any measure which would mitigate the adverse impact identified? Are there additional measures which would further equality of opportunity in the context of this policy?

In the consultation paper *Unfitness to Plead*, the Commission outlines the various strengths, weaknesses and criticisms of the current law in Northern Ireland regarding unfitness to plead. The overall aim of this consultation paper is to examine and evaluate the law in this area and determine whether the current law is in need of reform. The Commission has examined the models in place in other jurisdictions, and has asked consultees to provide their views and comments on the current law and any proposals for reform. The overall aim of the project is to evaluate the system and to identify any modifications (if any) that can be made to the current law. The Commission is committed to mainstreaming section 75, so that equality of opportunity is built into the policy making process from the outset.

On the basis of the information outlined above in chapter 2 of this paper, the Commission considers in this section any differential impact that the provisional policy proposals contained in the consultation paper *Unfitness to Plead* may have on each of the section 75 groupings. The Commission also considers whether those impacts are adverse or discriminatory and whether there are any opportunities which may be available to the Commission to promote equality of opportunity.

3.2 Religious belief

A number of sources considered by the Commission for the purpose of the equality screening exercise indicate that there are slightly higher proportions of Catholic persons represented in the criminal justice system. For example, the Equality and Diversity reports published by the Northern Ireland Prison Service (Jan - June 2011) show that 56% of prisoners in Hydebank Wood Young Offenders Centre, 54% of prisoners in HMP Maghaberry and 56% of prisoners in HMP Magilligan are

from a Catholic community background. The Northern Ireland Courts and Tribunals Service Exit Survey 2009 states that out of 2237 people surveyed, the majority of respondents who were at court (58.3%) were attending in relation to criminal business. Although these statistics include legal representatives, prosecutors, police personnel, victims and witnesses as well as defendants, the survey indicated that 47.4% of those surveyed were Catholic. This was the greatest percentage of any religion which was represented in the survey. The evidence also suggested that the disproportionate number of Catholics was more pronounced in lower age groups (under 30) therefore resulting in a higher percentage of young Catholics in the prison population (The Review of Northern Ireland Prison Service, Prison Review Team, Final Report, October 2011).

The Commission is of the view that, although one religion in particular appears to be over-represented in the criminal justice system, it does not follow that the proposed policy has an adverse impact on people of different religions. The available evidence revealed no differential impact (in terms of differing needs, experiences or priorities) for people of differing religious beliefs in relation to this policy. Religion is not a relevant factor in considering whether an individual is unfit to plead in criminal proceedings.

3.3 Political opinion

The available evidence¹ revealed no differential impact (in terms of differing needs, experiences or priorities) for people of differing political opinions in relation to this policy. Political opinion is not a relevant factor in considering whether an individual is unfit to plead in criminal proceedings.

3.4 Racial group

The quantitative data indicates that the vast majority of court users and prison populations in Northern Ireland are “White”. For example, the Northern Ireland Courts and Tribunals Service Exit Survey 2009 indicates that 98.4% of court users who were surveyed reported their racial groups as “White”. This survey, however, included legal representatives, prosecutors, police personnel, victims and witnesses as well as defendants. The 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 “White”.

The Commission is of the view that, although one racial group in particular appears to be over-represented in the criminal justice system, it does not follow that the proposed policy has an adverse impact on people of different racial groups. The available evidence revealed no differential impact (in terms of differing needs, experiences or priorities) for people of differing racial groups in relation to this policy. Racial grouping is not a relevant factor in considering whether an individual is unfit to plead in criminal proceedings.

3.5 Age

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.

¹ See consultation paper *Unfitness to Plead* chapter 6.

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	Percent
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 Department of Justice *Review of the Youth Justice System in Northern Ireland* (September 2011) (www.dojni.gov.uk) states that in any one year, up to 10,000 young people come into contact with the criminal justice system. This represents 5% of the total population of young people in Northern Ireland aged 10-17 (at page 31). The *Review* also states that the number of young people tried in the Crown Court is small – 54 in 2010 – which represents less than 2% of the disposals made by the Crown Court (see page 39).

The Youth Justice Agency *Provisional Workload Statistics* (April - September 2011 Statistical Bulletin 5/2011) at page 1 reports that the total number of statutory orders received by the Youth Justice Agency between April to September 2011 was 814 (Attendance Centre Order, Community Responsibility Order, Reparation Order, Diversionary Youth Conference Plan, Youth Conference Centre and sentenced to Juvenile Justice Centre). This compares to 1746 statutory orders being made in 2010/11, 1639 in 2009/10 and 1565 statutory orders being made in 2008/2009. Between April to September 2011, there was an average daily population of 29 in the Juvenile Justice System, compared with 26 in both 2010/11 and 2009/10 and 27 in 2008/09. There were 284 admissions to the Juvenile Justice Centre between April and September 2011, 24 aged 10-13, 25 aged 14, 49 aged 15, 106 aged 17 and 80 aged 17+.

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 data indicates that young adults and young people are significantly represented in the criminal justice system. Although the reference of this project does not include consideration of unfitness to plead in the context of Youth Courts, the Commission is of the view that age is an issue which may impact whether an individual is fit or unfit to plead in criminal proceedings. Age is an issue which may have a bearing on whether an individual is found to be unfit to plead in criminal proceedings, as developmental maturity may affect understanding of the court process and an individual's ability to participate in that process, which is a particularly pertinent consideration when a young person is being tried in the Crown Court. Also, older persons may be experiencing certain diseases which may affect ability to participate in a trial process, such as Alzheimer's Disease or other forms of dementia. The Commission therefore considers that people of differing ages may have different needs, experiences and priorities in relation to this proposed policy. As a result, the Commission considers that in relation to this issue, there is a differential impact on people of differing ages. It must then be considered whether this impact is an unlawful or a negative one.

Age therefore has the potential to contribute to a finding of unfitness to plead in criminal courts in Northern Ireland. The current test in *R v Pritchard* is based upon a number of criteria which, it is argued by a number of commentators, depends too much upon an individual's intellectual capacity (see chapter 2 of the Consultation Paper *Unfitness to Plead* (www.nilawcommission.gov.uk)). The Commission suggests that a test which takes account of both an individual's understanding and his or her mental capacity to make certain decisions in relation to his or her trial may promote equality of opportunity for people of differing ages. The Commission suggests that if this form of test is adopted, equality of opportunity is promoted, since any test which incorporates consideration of the mental capacity and decision-making ability of individuals will take into account factors which may include not only understanding, but retention of information, processing of information and communication. Any such test would therefore potentially be fairer for people who may be experiencing particular issues because of their age. The Commission therefore suggests that any new test for unfitness to plead in criminal proceedings which is based on mental capacity and decision-making ability of the accused may have a positive impact on this section 75 group.

3.6 Marital Status

Quantitative data indicates that single persons are disproportionately represented in the criminal justice system. The Northern Ireland Prison Population statistics (2009) indicate that 76% of the average prison population and 80% of the average remand population in 2009 are single people. The Northern Ireland Courts and Tribunals Service Exit Survey (2009) revealed that out of 2237 people surveyed, 75% indicated that they were single.

The Commission is of the view that, although single people in particular appear to be over-represented in the criminal justice system, it does not follow that the proposed policy has an adverse impact on people who are unmarried or not in a civil partnership. The available evidence revealed no differential impact (in terms of differing needs, experiences or priorities) for people of differing marital status in relation to this policy. Marital status is not a relevant factor in considering whether an individual is unfit to plead in criminal proceedings.

3.7 Sexual orientation

The Probation Board for Northern Ireland carried out an equality census in June 2010. This survey indicated that 94% of offenders who were under supervision 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.

The Commission is of the view that, although heterosexual people in particular appear to be over-represented in the criminal justice system, it does not follow that the proposed policy has an adverse impact on people of differing sexual orientations. The available evidence revealed no differential impact (in terms of differing needs, experiences or priorities) for people of differing sexual orientations in relation to this policy. Sexual orientation is not a relevant factor in considering whether an individual is unfit to plead in criminal proceedings.

3.8 Gender

The *Digest of Information on the Northern Ireland Criminal Justice System* (2012) 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) 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	Percent
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) 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 is of the view that, although males in particular appear to be over-represented in the criminal justice system, it does not follow that the proposed policy has an adverse impact on people of differing gender. The available evidence revealed no differential impact (in terms of differing needs, experiences or priorities) for people of differing gender in relation to this policy. Gender is not a relevant factor in considering whether an individual is unfit to plead in criminal proceedings.

3.9 Disability

Quantitative data gathered for the purposes of the Equality Screening exercise contained in the Commission's Consultation Paper *Unfitness to Plead* indicates that the unfitness to plead proposals have a potential impact on persons with a 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 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	Percent
Yes	175	7.8
No	2043	91.3
Refusal/missing	19	0.8
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 other 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 within the general population. Also 7% of male and 14% of female sentenced prisoners have a psychotic disorder, 14 and 23 times the level within 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. Eighty percent 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 (N Loucks with J 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);
- Research commissioned by the Youth Justice Board in 2006 found that 19% of 13 to 18 year olds in custody had depression, 11% suffered from anxiety, 11% had post-traumatic stress disorder and 5% displayed psychotic symptoms (Chitsabeau et al, *Mental Health needs of young offenders in custody and in the community* (2006) Vol. 188 British Journal of Psychiatry 534-540;
- The Prison Reform Trust states that research suggests that the prevalence of mental ill-health for young people in contact with the criminal justice system range from 25% to 81%, being highest for those in custody (*Bromley Briefings Prison Factfile* (December 2010)).

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 affecting prisoners living 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 have 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 living 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%	11.5%

(Source: 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?* stated 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 relation to the age of those detained and the length of time for which they were detained, the tables below show the difference between those persons living with learning disability and those living with mental health issues.

The following table provides statistics on inpatients living with learning disability 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 inpatients living with mental illness 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

The Commission has identified the following potential issues relating to unfitness to plead for persons living with a disability:

(i) A Mental Capacity test:

It has been suggested by some commentators that the current test which assesses whether a defendant is unfit to plead could be improved upon (see the Commission's Consultation Paper *Unfitness to Plead* chapter 2). In its consultation paper, the Commission has suggested amending the current test of unfitness to plead, which is contained in *R v Pritchard*. The Commission considers that as well as there being criticisms that the current test relies too much on an assessment of an individual's intellectual capacity, the interpretation of *R v Pritchard* in the case of *Re John (M)* may result in an inconsistent approach to the application of the criteria which constitute the *Pritchard* test. The decisions of the Court of Appeal in *R v Moyle* and *R v Diamond* also perhaps highlight difficulties with the *Pritchard* test as it currently stands. In these cases, individuals who were experiencing mental illness with delusional aspects were deemed to be fit to plead. Although delusions will not always affect an individual's ability to participate effectively in his or her trial, there will arguably be occasions when participation will be adversely affected.

In the consultation paper, the Commission has suggested a modification of the *Pritchard* test to include an assessment of an individual's ability to make certain decisions in relation to his or her trial, based on the test which is contained in the Mental Capacity Act 2005. The Commission considers that a test of this nature may be beneficial since 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 also considers a person's capacity to make certain decisions in relation to their trial. Therefore, in order to be deemed fit to plead, an accused person would have to be shown 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.

(ii) Article 49A Hearing:

Chapter 3 of the consultation paper *Unfitness to Plead* considers the operation of Article 49A of the Mental Health (Northern Ireland) Order 1986. Article 49A puts in place a process to determine whether an individual, who has been deemed unfit to plead as a result of the application of the *Pritchard* test, has carried out the act or made the omission with which he or she has been charged (the "*actus reus*" of the offence). The purpose of the Article 49A hearing is to solely determine whether the individual has committed the *actus reus* of the offence with which he or she has been charged and no consideration is made in relation to the *mens rea* or mental element of the offence, such as the intention to commit the offence. The Article 49A hearing is a different process to a full criminal trial, and only takes place after a determination of unfitness to plead. The outcomes of the Article 49A hearing are also different to the outcomes of a full criminal trial, as the disposals available to the court are based on care and treatment of the individual.

It could be argued that, as it currently stands, the Article 49A hearing 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. It could also be argued that this differential impact is justified (and may indeed be a positive impact) as individuals who are deemed unfit to plead are diverted from the rigours of a full criminal trial and may be able to access appropriate care and treatment disposals which may be beneficial to their health or other needs. The views of consultees are invited in relation to this issue.

The Article 49A hearing currently does not permit the *mens rea* of the offence to be considered by the court. The effect of this approach is that various defences may not be available to the individual who

has been deemed unfit to plead. Although it is possible to raise some defences if the individual is able to give evidence and instruct his or her legal representatives in this regard, it may not be possible to raise defences without supporting evidence that the defence is available. However, there are practical difficulties with extending the Article 49A hearing to include consideration of the *mens rea* of the offence which are discussed in more detail in chapter 3 of the consultation paper *Unfitness to Plead*. The difficulties being that (a) individuals who are unfit to plead may be unable to give evidence or to instruct counsel in relation to the raising of a defence and (b) that the defence may be able to gain an acquittal by relying on the prosecution being unable to prove that the individual who is unfit to plead lacked the necessary *mens rea* to commit the offence because he or she was experiencing a similar mental state at the time when the offence was committed. The views of consultees are sought in relation to this issue, particularly in relation to whether it is considered that the current law operates to create an adverse impact upon individuals who are living with a disability.

3.10 Dependants

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

The Probation Board for 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 is of the view that the available evidence revealed no differential impact (in terms of differing needs, experiences or priorities) for people with or without dependants in relation to this policy. In any event, whether an individual has or does not have dependants is not a relevant factor in considering whether an individual is unfit to plead in criminal proceedings.

4. CONSIDERATION OF MEASURES WHICH MAY MITIGATE ANY ADVERSE IMPACT; AND ALTERNATIVE POLICIES WHICH MIGHT BETTER ACHIEVE THE PROMOTION OF EQUALITY OF OPPORTUNITY

In assessing the impact of various policy options, the Equality Commission's *Practical Guidance on Equality Impact Assessment* (2005) at page 30 suggests that the following questions are considered:

- How does each option further or hinder equality of opportunity?
- How does each option reinforce or challenge stereotypes which constitute or influence equality of opportunity?
- What are the consequences for the group concerned and for the public authority of not adopting an option more favourable to equality of opportunity?
- How will the relevant representative groups be advised of the new or changed policy or service?
- If an economic appraisal is necessary – What are the costs of implementing each option? Will the social and economic benefits to the relevant group of implementing the option outweigh the costs to the public authority or other groups?
- Does the public authority have international obligations which would be breached by, or could be furthered by, each of the options?

As the policy proposals contained in the consultation paper *Unfitness to Plead* are not yet settled, the Commission considers that it is premature to consider measures which may mitigate any adverse impact or to consider alternative policies which might better achieve the promotion of equality of opportunity. The Commission anticipates that the views of consultees will assist in the formulation of policy proposals which will promote equality of opportunity under section 75 of the Northern Ireland Act 1998.

5: FORMAL CONSULTATION

5.1 Consultation methods

The Commission wishes to consult as widely as possible on the findings included in this Equality Impact Assessment consultation and the provisional conclusions reached and invites all interested parties to respond.

Consultees are encouraged to read this document in conjunction with the consultation paper *Unfitness to Plead* and the Equality Screening Analysis which is contained within the consultation paper. The consultation paper is available on the Commission's website (www.nilawcommission.gov.uk) and can be made available in hard copy on request. The consultation paper can be made available in an alternative format or language, if requested by consultees. Individual meetings or meetings with groups of stakeholders can be facilitated by the Commission.

This Equality Impact Assessment consultation will be forwarded by email to interested consultees, including representatives of section 75 stakeholder groups and any members of the public who request a copy. A copy of the Equality Impact Assessment consultation will also be made available on the Commission's website.

5.2 Responding to this consultation

Interested parties are invited to comment on the provisional conclusions reached in this Equality Impact Assessment. **The formal consultation period for this Equality Impact Assessment commences on 16th July 2012 and the closing date for responses is 19th October 2012.**

Responses should be sent to:

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6. DECISION BY PUBLIC AUTHORITY AND PUBLICATION OF REPORT ON RESULTS OF EQUALITY IMPACT ASSESSMENT

Decision making and consultation feedback

Whilst finalising recommendations in relation to the policy, the Commission will take into account any Equality Impact Assessment and consultation carried out in relation to the policy as it is required to do by virtue of Schedule 9 paragraph 9(2) of the Northern Ireland Act 1998.

The outcome of this Equality Impact Assessment will be published in the Commission's Report on *Unfitness to Plead*. The Report will be made available by email or in hard copy to all interested consultees, including representatives of section 75 stakeholder groups and any members of the public who request a copy. A copy of the Report will also be made available on the Commission's website.

7. MONITORING FOR ADVERSE IMPACT IN THE FUTURE AND PUBLICATION OF THE RESULTS OF SUCH MONITORING

The role of the Commission

As indicated above (paragraph 1.3), the Commission has responsibility for devising the law reform policy and making recommendations to the relevant Government department. However, the decision to implement any of the Commission's recommendations lies with the responsible Northern Ireland Department, which in this instance is the Department of Justice.

Where the Department has implemented a recommendation of the Commission, the Department will monitor the implemented policy, or any legislation which is enacted as a result of the adoption of the policy, for adverse impact on the promotion of equality of opportunity.