Northern Ireland
Law Commission
promoting law reform in Northern Ireland

Report

Unfitness to Plead

NILC 16 (2013)

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UNFITNESS TO PLEAD

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Laid before the Northern Ireland Assembly by the Department of Justice under Section 52 of the Justice (Northern Ireland) Act 2002 (as amended by paragraph 10 of Schedule 13 to the Northern Ireland Act 1998 (Devolution of Policing and Justice Functions) Order 2010)

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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 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 that programme.
The Chair of the Commission is drawn from the High Court Bench; four of the Commissioners are drawn from the legal professions and one is appointed from outside the legal professions.

The legal team for this project is:

Project lawyer:	Clare Irvine LLB, Solicitor
Legal Researchers:	John Clarke LLB
	Sara Duddy LLB, LLM, Solicitor (until June 2012).

The Commissioner leading the project was Dr Venkat Iyer and the CEO, Judena Goldring, sat on the steering group.

THE NORTHERN IRELAND LAW COMMISSION

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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 that law and justice is maintained.
Mens rea	The mental element of a criminal offence: the mental state of the accused at the time of the offence.
Summary offence	A criminal offence which is dealt with by the Magistrates' court.

INTRODUCTION

CONSULTATION

The unfitness to plead project was referred to the Northern Ireland Law Commission ("the Commission") by the Department of Justice and forms part of its Second Programme of Law Reform. The Commission issued a consultation paper[1] on 16th July 2012, which was distributed to a significant number of interested individuals, organisations and professions. The Commission was also represented on a number of consultation groups which had been set up by the Department of Justice in order to consider proposals to extend forthcoming mental capacity legislation to the criminal justice system in Northern Ireland.[2] During the course of the project, the Commission has met with a number of representatives from the voluntary sector, the forensic psychiatric profession, the Criminal Bar Association, Northern Ireland Courts and Tribunals Service and the Public Prosecution Service of Northern Ireland.

The Commission received a number of insightful consultation responses which have been of great assistance during its deliberations on the subject of unfitness to plead in criminal proceedings. A full list of consultees who responded to this paper or met with the Commission, together with details of the membership of the Department of Justice consultation groups is included at the back of this Report. The Commission would like to extend its thanks to each and every individual and organisation who took the time to participate in the consultation process and to share their expertise.

[1] Northern Ireland Law Commission, *Unfitness to Plead*, (NILC 13 (2012)).
[2] The Department of Justice published a consultation paper on 6th July 2012 *Consultation on proposals to extend Mental Capacity legislation to the Criminal Justice System in Northern Ireland and implications for Mental Health powers*. Available on www.dojni.gov.uk.

THE TERMS OF THE REFERRAL

The Department of Justice requested that the Commission undertake a project in which the law relating to the unfitness of an accused person to plead in criminal proceedings in Northern Ireland would be reviewed. The reference specifically 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*[3] test: a common law test which sets criteria against which unfitness to plead can be assessed;
- 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;
- 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;
- consider the current operation of the Article 49A[4] hearing, the purpose of which is to determine whether an accused person has carried out the act or made the omission with which he or she has been charged.

The aspect of the reference which requests the Commission to consider whether a test based on the mental capacity test which is contained in the Mental Capacity Act 2005[5] is a timely one. The need for mental capacity legislation in Northern Ireland, along with the reform of existing mental health legislation, is currently being considered by the Department of Health, Social Services and Public Safety. This work follows the recommendations of the Independent Bamford Review of

[3] The *Pritchard* test is discussed in more detail below.
[4] Article 49A of the Mental Health (Northern Ireland) Order 1986.
[5] This legislation extends to England and Wales only.

Mental Health and Learning Disability ("the Bamford Review") which was commenced in 2002. The Bamford Review resulted in the production 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 and the introduction of mental capacity legislation with related policy and services. Most of the recommendations of the Bamford Review have been accepted by the Northern Ireland Executive[6] and the Department of Health, Social Services and Public Safety ("DHSSPS") has issued an Action Plan for the implementation of the main service proposals.[7] In addition, work is well advanced for the production 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 for substitute decision-making for individuals who lack capacity to make decisions on their own behalf. This legislation will not only look at mental capacity in the civil context, but will also consider how the Bamford recommendations affect individuals who may be involved in the criminal justice system. The Department of Justice is taking forward this strand of the work, having issued a consultation paper in July 2012.[8] As unfitness to plead is an issue which forms part of the response of the criminal justice system in relation to both mental illness and learning disability, the Department of Justice wanted the law in this area to be reviewed, not only generally, but specifically in the context of the work being carried out by itself and DHSSPS.

[6] Department of Health, Social Services and Public Safety, *Delivering the Bamford Vision* (June 2008).
[7] 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).
[8] See footnote 2 above.

CHAPTER 1. THE CURRENT LAW

WHAT IS UNFITNESS TO PLEAD?

1.1 Unfitness to plead is just one area of law which attempts to respond to the needs of individuals who are experiencing mental illness or learning disabilities and who come into contact with the criminal justice system. It takes its place amongst other areas of law and practice which seek to recognise the specific needs of individuals who are living with mental ill-health or learning disability. In the consultation paper,[9] the Commission highlights a number of other responses that the criminal justice system has made to make provision for these specific needs. For example, Code of Practice C (Code of Practice for the Detention, Treatment and Questioning by Police Officers) made under Article 65 of the Police and Criminal Evidence (Northern Ireland) Order 1989 makes provision in relation to "mentally disordered[10] and otherwise mentally vulnerable"[11] persons who are detained in police stations in Northern Ireland. The Northern Ireland Appropriate Adult Scheme also provides a service which offers advice, support and assistance to individuals who have been arrested and are being questioned in a police station.[12] 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.[13] In prisons in Northern Ireland, various schemes are in place to assist vulnerable prisoners, including the Samaritans Listener Scheme in Maghaberry and Magilligan prisons and a weekly programme in

[9] At paragraph 1.3.
[10] In this context, the definition of "mental disorder" which is contained in the Mental Health (Northern Ireland) Order 1986 is adopted.
[11] "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.
[12] See *Northern Ireland Appropriate Adult Scheme Annual Report 2011-2012* available on www.mindwisenv.org.
[13] Available on www.ppsni.gov.uk.

Hydebank Wood, run by the Public Initiative for the Prevention of Suicide and Self Harm (PIPS).[14]

THE ROLE OF THE LAW ON UNFITNESS TO PLEAD

1.2 It is important to understand that the role of the law of unfitness to plead is not to remove from the criminal justice system every individual who may be experiencing difficulties in relation to mental illness or learning disability. However, the law in this area is essential as it ensures the removal (either temporarily or permanently) from the criminal justice process of individuals who are deemed by the court to be unsuited to coping with the rigours of a criminal trial.

UNFITNESS TO PLEAD AND THE DEFENCE OF INSANITY

1.3 It is also important to understand the difference between the law relating to unfitness to plead and the law relating to the defence of insanity in criminal proceedings. Whilst the defence of insanity concerns an individual's "mental state" at the time of the commission of an offence, the unfitness of an accused person to plead relates to the mental state of an accused person at the time of or during his or her criminal trial. An accused person may be experiencing, for example, a mental illness or learning disability to such a degree that the law recognises that he or she should not be subjected to the trial process.

1.4 At present, the modern law is contained in both the common law and in statute. The test for unfitness to plead is contained in common law and is known as the *Pritchard* test, whilst various procedural aspects of the law are contained in the Mental Health (Northern Ireland) Order 1986. In this chapter, the Commission reviews both the common law and the statutory provisions which together form the law on unfitness to plead in Northern Ireland. In chapter 2, the Commission examines the

[14] Northern Ireland Prison Service *Annual Report and Accounts 2011 – 12* at pages 21 - 22: www.dojni.gov.uk.

common law which is contained in the *Pritchard* test and makes recommendations for reform, whilst in chapter 3 the Commission discusses Articles 49 and 49A of the Mental Health (Northern Ireland) Order 1986.

THE COMMON LAW: THE *PRITCHARD* TEST

1.5 The current test for unfitness to plead has its origins in the cases of *R v Dyson*[15] and *R v Pritchard*.[16] In *R v Dyson*, the accused was convicted for the murder of her illegitimate child. She was deaf and unable to communicate by speech and although she was able to plead "not guilty" through an interpreter by using hand gestures, she was found to be insane and detained indefinitely. In *R v Pritchard*, the accused was also deaf and was unable to communicate by speech. In this case, the criteria for assessing unfitness to plead were set out by Alderson B:

> There are three points to be inquired into. First, whether the prisoner is mute of malice or not; secondly, whether he can plead to the indictment or not; thirdly, whether he is of sufficient intellect to comprehend the course of proceedings on the trial so as to make a proper defence – to know that he might challenge any of you [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 to properly 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 if communicating on ordinary matters.[17]

[15] (1831) 7 C & P 305(n).
[16] (1836) 7 C & P 303.
[17] At page 304.

1.6 The test in *R v Pritchard* was later extended by *R v Davies*.[18] Whilst *R v Dyson* and *R v Pritchard* were both cases in which the accused was deaf and unable to communicate by speech, *R v Davies* concerned an elderly man who may have been experiencing a psychotic illness. Davies had been charged with murder and when he was asked to enter a plea, was silent and then responded in a confused manner. The jury was asked to consider whether Davies was "mad", with Williams J suggesting that the jury should make that decision based on the man'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" rendered him incapable of instructing his legal representatives.[19] The case therefore resulted in another criterion being added to the existing *Pritchard* test: the accused must be capable of properly instructing his or her counsel in order to conduct a defence.

1.7 The *Pritchard* test, as extended by *Davies*, was adopted in a number of subsequent cases.[20] In *R v Podola*, Alderson B's judgment in *Pritchard* was approved by the Court of Criminal Appeal, and developed further by Lord Parker C.J. who stated that:

> 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 the 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

[18] (1853) CLC 326.
[19] D Grubin, 'What constitutes fitness to plead?' (1993) *Criminal Law Review* at page 753.
[20] See *R v Berry* (1875-76) LR 1 QBD 447; *R v The Governor of His Majesty's Prison at Stafford* [1909] 2 KB 81; and *R v Podola* [1960] 1 QB 352.

prisoner can plead to the indictment and has the physical or mental capacity to know that he has the right of challenge and to understand the case as it proceeds.[21]

1.8 Other cases since *Podola* have confirmed that *Pritchard* is the correct approach to follow,[22] but it is the judgment of the Court of Appeal in *R v John (M)*[23] which has recently been the most influential in the development of the *Pritchard* test. In this case, the issue of the accused's unfitness to plead was raised by the defence because he suffered from an impairment of his short term memory, a condition known as anterograde amnesia. Having been determined to be fit to plead by the trial judge, the defence appealed on the basis that the trial judge had misdirected the jury in relation to the *Pritchard* test, setting the threshold too low and therefore making it too difficult for the accused to be deemed unfit to plead.

1.9 The trial judge had identified that the accused must be capable of carrying out six tasks if he or she was to be found fit to stand trial. If, on the balance of probabilities, the jury determined that any one of the six tasks was beyond the capabilities of the accused, then he or she must be found to be unfit to plead. The six tasks were:

1. understanding the charges;
2. deciding whether to plead guilty or not;
3. exercising his or her right to challenge jurors;
4. instructing solicitors and counsel;
5. following the course of proceedings; and
6. giving evidence in his or her own defence.[24]

1.10 The trial judge provided the jury with written explanations of each of the six tasks, although not all of these were discussed by the Court of

[21] At page 354.
[22] See *R v Robertson* (1968) 52 Cr App R 690 and *R v Berry* (1978) 66 Cr App R 156.
[23] [2003] EWCA Crim 3452.
[24] At paragraph 20 of the judgment.

Appeal. In relation to task 4, "instructing solicitors and counsel", the trial judge had explained that:

> 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 to (a) 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 them 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. The whole purpose of the trial process is to determine what parts of the evidence are unreliable and what parts are not. That is what the jury is there for.[25]

1.11 In providing an explanation for task 5, "following the course of proceedings", the trial judge directed:

> 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 lawyer either as and when he writes them, or at the end of the session....There is also no reason why the defendant's solicitors' representative should not be permitted to

[25] At paragraph 21 of the judgment.

> 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.[26]

1.12 In relation to task 6, "giving evidence in how own defence", the trial judge's directions were as follows:

> 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 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.[27]

1.13 The Court of Appeal considered whether the trial judge's directions were deficient, given the existing case law in *R v Pritchard*, *R v Podola*, *R v Robinson* and *R v Berry*. The court concluded that there was no inadequacy in the directions given, Lord Justice Keene stating that:

[26] See paragraphs 22 and 23 of the judgment.
[27] See paragraph 24 of the judgment.

> 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.[28]

THE STATUTORY PROVISIONS

1.14 Although the substantive test for unfitness to plead is contained in the common law, a number of procedural aspects of the law are contained in statute, namely the Mental Health (Northern Ireland) Order 1986. There are three main provisions: Articles 49, 49A and 50A. Article 49 makes provision for the process which is to be undertaken during a trial on indictment when a question arises in relation to the accused person's unfitness to be tried.[29] Article 49A contains provisions which take effect when a person has been found to be unfit to plead. Particularly, Article 49A makes provision for a "trial of the facts" to be taken forward, in order to determine whether the accused person who has been found to be unfit to plead, has actually carried out the act or made the omission with which he or she has been charged. Article 50A contains provisions in relation to disposals which are available to the court when a finding of unfitness (or insanity) is determined. Since the issue of disposals is not a topic which the Commission has been asked to look at by the Department of Justice, there is no need to discuss Article 50A in any more detail in this report.

Article 49

1.15 As mentioned above, Article 49 of the Mental Health (Northern Ireland) Order 1986 makes provision for the process to be followed during a

[28] See paragraph 31 of the judgment.
[29] Article 49(9) of the Mental Health (Northern Ireland) Order 1986 provides that "unfitness to be tried" includes unfitness to plead.

trial on indictment when a question arises in relation to an accused person's unfitness to plead.

1.16 The question of unfitness of the accused to plead can be raised by the defence "or otherwise"[30] which raises the possibility of the question of unfitness being raised by the prosecution, or indeed, even the court itself. The question of unfitness is to be determined as soon as it arises,[31] although, if the court, having had regard to the supposed mental condition of the accused, considers that it is expedient to do so and in the interests of the accused, consideration of the question of unfitness can be postponed until any time up to the opening of the case for the defence,[32] or, if the jury returns a verdict which acquits the accused before the question of unfitness arises, then the question shall not be determined at all.[33]

1.17 The question of unfitness to plead is to be determined by the court without a jury.[34] In order to make the determination of unfitness, the court requires the oral evidence of a medical practitioner who is appointed by the Regulation and Quality Improvement Authority[35] 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 oral or written evidence of one other medical practitioner.[36]

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[30] See Article 49(1).
[31] See Article 49(2).
[32] See Article 49(3)(a). This provision is designed to allow the case against the accused to be tested, to see if there is a possibility of the case being dismissed due to there being no case to answer, before the court is tasked with considering whether the issue of unfitness to plead is relevant.
[33] See Article 49(3)(b).
[34] See Article 49(4). 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 unfitness.
[35] Formerly the Mental Health Commission. From 1st April 2009, the functions of the Mental Health Commission were transferred to the Regulation and Quality Improvement Authority by virtue of section 25 of the Health and Social Care Reform (Northern Ireland) Act 2009.
[36] 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.

Article 49A

1.18 If the court finds that an accused person is unfit to plead, Article 49A 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 following the application of the *Pritchard* test, actually carried out the act or made the omission with which he or she has been charged.

1.19 The process to be taken forward under Article 49A of the Mental Health (Northern Ireland) Order 1986 is as follows. If a determination of unfitness to plead is made by the court, the trial shall not proceed or continue, if it has already commenced.[37] The jury[38] is then given the responsibility of determining whether the accused did the act or made the omission with which he or she was charged. The jury will base this determination on any evidence which has been already given in the trial or, if the trial has not commenced, on any evidence which may be adduced by the prosecution or the defence.[39]

1.20 If the jury is satisfied that the accused has done the act or made the omission with which he or she has been charged, it will make a finding to that effect.[40] If the jury is not satisfied that the accused has done the act or made the omission in question, then a verdict of acquittal is to be returned.[41]

[37] Article 49A(2).
[38] If the question of unfitness was determined after arraignment of the accused, the determination of whether the accused carried out the act or made the omission with which he or she was charged must be made by the jury which was trying the accused. (Article 49A(5) as inserted by section 23(5) of the Domestic Violence, Crime and Victims Act 2004).
[39] Article 49A(2)(a) and (b).
[40] Article 49A(3).
[41] Article 49A(4).

CASE LAW

1.21 There have been a number of significant cases which have considered the application of section 4A of the Criminal Procedure (Insanity) Act 1964 (which is the equivalent of Article 49A in England and Wales), namely *R v Antoine*,[42] *R v Grant*,[43] *R v H*,[44] *Antoine v United Kingdom*[45] and *R v Chal*.[46] These cases consider the correct interpretation of the statutory provision, as well as its compatibility with the European Convention on Human Rights. The relevant issues in each case are discussed in turn below.

R v Antoine

1.22 *R v Antoine* was a case concerned with the murder of a 15 year old, Michael Earridge, in a South London flat, by two other young people, David McCallum and Pierre Antoine 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 assaulted the victim and had prevented him from leaving the flat. 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.

1.23 Antoine, who had been aged 16 at the date of the killing, 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[47] heard evidence from three psychiatrists and subsequently found that Antoine was unfit

[42] [2000] UKHL 20.
[43] [2001] EWCA Crim 2644.
[44] [2003] UKHL 1.
[45] Application No. 62960/00.
[46] [2007] EWCA Crim 2647.
[47] This case was heard before the changes that were made by the Domestic Violence, Crime and Victims Act 2004. At this time, the jury, rather than the court, made the determination of unfitness to plead.

to plead. It appeared that psychiatric opinion was that Antoine was suffering from paranoid schizophrenia.

1.24 Since Antoine was deemed to be unfit to plead, the procedure contained in section 4A[48] of the Criminal Procedure (Insanity Act) 1964[49] was invoked. 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 defence of, and seek to prove, diminished responsibility[50] 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.

1.25 The judge considered the issue and stated that it gave rise to two questions. First, there was the question of what the prosecution had to prove to cause the jury to make a finding[51] that the accused had carried out the act that he had been accused of. The answer to this question hinged on the interpretation of "did the act or made the omission charged against him as the offence" which is the test set out in section 4A(2) of the Criminal Procedure (Insanity) Act 1964. Second, there was the question of whether Antoine was entitled to raise the defence of diminished responsibility.

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[48] Equivalent to Article 49A of the Mental Health (Northern Ireland) Order 1986.
[49] As substituted by section 2 of the Criminal Procedure (Insanity and Unfitness to Plead) Act 1991.
[50] Diminished responsibility is a statutory defence which, in England and Wales, was first contained in section 2 of the Homicide Act 1957. It has subsequently been reformed and reformulated and is now contained in section 52 of the Coroners and Justice Act 2009. 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 experience "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.
[51] Under section 4A(3), which is the equivalent of Article 49A(3) of the Mental Health (Northern Ireland) Order 1986.

1.26 In relation to the first question, regarding the prosecution's role, the judge determined that *R v Egan (Michael)*[52] was the correct authority to follow, meaning that the Crown had to prove both the *actus reus* of the murder and the *mens rea*. In relation to the second question regarding Antoine's ability to access the defence of diminished responsibility, the judge ruled that on the wording of section 2 of the Homicide Act 1957, the defence could not be raised at the hearing under section 4A(2) of the Criminal Procedure (Insanity) Act 1964.

1.27 On appeal,[53] Antoine challenged the trial judge's ruling that he could not raise the defence of diminished responsibility. The Court of Appeal dismissed the appeal and held that the trial judge was correct in his decision. 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 *mens rea*. Thus, as the only question arising 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 4(A)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 charges 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

[52] [1998] 1 Cr. App. R. 121.
[53] [1999] 3 W.L.R. 1204.

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 he 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.[54]

1.28 The case was further appealed to the House of Lords. The question which fell to be considered was whether, 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, it was possible for the accused person to rely on the partial defence of diminished responsibility. Their Lordships were also invited to consider a second question: whether, under the provisions of section 4A of the Criminal Procedure (Insanity) Act 1964, the jury had to be satisfied of more than merely the *actus reus* of the offence with which the accused person had been charged or whether it also had to be satisfied of the *mens rea* of the offence.

1.29 In relation to the first question, the House of Lords held that the defence of diminished responsibility could not be raised during a hearing under section 4A of the Criminal Procedure (Insanity) Act 1964. Lord Hutton noted that the defence, which was then contained in 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 plead, the trial can no longer proceed: therefore, the accused is no longer liable to be convicted of murder.[55]

[54] At page 1214 of the judgment.
[55] At paragraph 18 of the judgment.

1.30 As regards the second question, Lord Hutton considered the decision in *Attorney-General's Reference (No. 3 of 1998)*.[56] In that case, the court had considered the law relating to section 2(1) of the Trial of Lunatics Act 1883 as amended by section 1 of the Criminal Procedure (Insanity) Act 1964. Section 2(1) of the Trial of Lunatics Act 1883 had provided for a special verdict to be made by the jury if it appeared to them that an accused person did the act or made the omission with which he or she was charged, but that he or she was insane at the time of the commission of the offence. 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". When section 2(1) was duly amended by section 1 of the Criminal Procedure (Insanity) Act 1964, a verdict of "not guilty by reason of insanity" replaced the former special verdict. However, both provisions made reference to the verdicts being available if the accused "did the act or omission charged".[57]

1.31 The circumstances of the case which resulted in the *Attorney-General's Reference (No. 3 of 1998)* were that the accused, who had been charged with aggravated burglary, was determined to be fit to plead, but it had been agreed between the defence and prosecution that he was legally insane at the time when he committed the offence. The accused believed that he was Jesus and he was surrounded by evil and danger. He stated that he had been looking for a house with a light on, so that he could be protected from evil. The trial judge had ruled that he was bound to follow the case of *R v Egan (Michael)*, in which it had been stated that the prosecution had the burden of proving all the relevant elements of the offence: that is to say, the *actus reus* and the *mens rea*. The evidence of a psychiatrist who had examined Egan 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 trial judge ruled that there was no evidence of the

[56] [1999] W.L.R. 1194.
[57] At paragraph 28 of the judgment.

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. [58]

1.32 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 made the 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* of the offence.[59]

1.33 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 the 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 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

[58] At paragraph 32 of the judgment.
[59] At page 1203 of the judgment.

quite deliberate, has been left unamended for over a century and for all present purposes remains in force.[60]

1.34 The second reason given by Judge L.J. for the Court of Appeal considering that the *mens rea* of the offence 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 *Felstead v The King*[61] in which it was held that if a person was insane at the time of committing an act, then his or her *mens rea* could not be demonstrated as his or her state of mind could not be shown to be "felonious" or "malicious".[62]

1.35 Considering the circumstances presented in Antoine's case, Lord Hutton was of the view that the judgment in *R v Egan (Michael)* was inconsistent with the judgment of the Court of Appeal 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).*[63] 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*. 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: the risk 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 continued mental state, 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 would not be possible to demonstrate the required *mens rea* for murder, because of the mental state of the

[60] At page 1198 of the judgment.
[61] [1914] A.C. 534.
[62] At this time, feloniousness or maliciousness were standards to be met when assessing *mens rea* in respect of various offences.
[63] At paragraph 38 of the judgment.

accused at the time of the commission of the offence.[64] 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 charges 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*.[65]

1.36 Lord Hutton also took the opportunity to explore 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 may have been able to raise if he had been found fit to plead and had been subject to the usual trial process. Lord Hutton considered that "such defences almost invariably involve some consideration of the mental state of the defendant".[66] He considered that the issue should be resolved in the following way. He stated that if there was objective evidence which raises the issue of mistake, accident, involuntariness[67]

[64] This scenario 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 those circumstances, the accused is found "not guilty by reason of insanity" but is subject to disposals such as a hospital order.
[65] At paragraph 49 of the judgment.
[66] At paragraph 53 of the judgment.
[67] For example, if an accused person commits an assault when he or she kicks out and strikes another person during the course of an uncontrollable seizure brought about by a medical condition.

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. Lord Hutton gave an example of an accused person 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 mentioned defences in the absence of a witness whose evidence raises or supports the defence.[68] However, Lord Hutton reserved his opinion in relation to the question of whether it would be open to the defence to call witness to raise the defence of provocation, on the basis that the defence of provocation is only relevant if the jury is satisfied that the defendant had the requisite *mens rea* for murder.[69]

R v Grant

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

[68] At paragraph 54 of the judgment.
[69] At paragraph 55 of the judgment. Though note the changes made to the defence as a result of the Coroners and Justice Act 2009.

1.38 Concerning the issue 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).[70]

1.39 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 a partial defence which, if raised successfully, reduces a charge of murder 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.

1.40 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.

1.41 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 the commission of the offence.[71] If section 4A(2) required

[70] At paragraph 42 of the judgment.
[71] 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 by virtue of section 3 of the Homicide Act 1957. A defence of provocation required the accused to demonstrate that something was said or done, in consequence of which the accused lost self-control. The defence also

consideration of the *actus reus* 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.[72]

R v H

1.42 *R v H* concerned a thirteen year old boy who was charged with two offences of indecent assault against a girl who was aged fourteen. Before his trial, H 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 or not H was unfit to be tried decided that he was, indeed, unfit. A different jury later found that H had done the acts of indecency with which he had been charged, pursuant to section 4A of Criminal Procedure (Insanity) Act 1964. The decision of the 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.[73] The Court of Appeal rejected that argument and there was a subsequent appeal to the House of Lords to determine whether a finding that an accused person carried out the act with which he or she had been charged violated the presumption of innocence afforded by Article 6(2) of the European Convention on Human Rights.

1.43 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 proceeds. 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

required 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 section 3 of the Homicide Act 1957.

[72] At paragraph 44 of the judgment.

[73] Right to a fair trial.

Sex Offenders Act 1997 to an accused who had been found to have carried out the act with which he or she had been charged following a section 4A hearing was indicative of 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.[74] He also observed that the European Convention case-law had never held a proceeding to be criminal in nature without it having an adverse outcome for the accused in the form of a penalty.[75]

1.44 Lord Bingham went on to comment that he considered that it would be highly anomalous if section 4A of the Criminal Procedure (Insanity) Act 1964 was 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 their actions were formally and publically investigated in open court, with counsel representing the interests of the accused.[76]

Antoine v the United Kingdom

1.45 Following the judgment of the House of Lords, an application was made to the European Court of Human Rights. 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 witnesses who gave evidence against him. It was contended that this state of affairs 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[77] of the Convention that Antoine was living under the threat of a further prosecution and that posed

[74] The non-punitive nature of the order was recognised in *Ibbotson v United Kingdom* (1998) 27 EHRR CD 332.
[75] At paragraph 19 of the judgment.
[76] At paragraph 18 of the judgment.
[77] Prohibition on torture or inhuman or degrading treatment or punishment.

difficulties to him because he could not co-operate with those responsible for his care, in case anything he said during his treatment was used against him at trial. Antoine also claimed that his on-going detention in hospital amounted to a denial of his right to liberty and security of person under Article 5 of the Convention and also infringed his Article 6(2) rights.[78]

1.46 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.[79]

1.47 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 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 in nature for the purposes of Article 6 of the Convention. The Court viewed the lack of the possibility

[78] Presumption of innocence until proven guilty.
[79] At page 6 of the decision.

of a conviction and the absence of any punitive sanctions as more compelling considerations. 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.

1.48 The Court acknowledged that the section 4A hearing had strong similarities with procedures at a criminal trial, but it noted that the procedures 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*.

1.49 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 requirement under Article 6 of the Convention that the accused must be able to participate in his or her trial did not arise.

1.50 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 in a subsequent trial, the Court ruled that the hypothetical threat of future proceedings was not enough to constitute torture or inhuman or 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 to the Crown Prosecution Service to bring a prosecution at a later date, as there is no time limit on bringing proceedings for murder.

1.51 The Court also did not find any contravention of Article 5(1) of the Convention. It noted 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".[80] 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.

1.52 In relation to the complaint under Article 6(2) of the Convention, 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. Having given its reasons, the Court therefore unanimously declared that Antoine's application was inadmissible.

R v Chal

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

[80] At page 8 of the decision.

1.54 The facts of the cases were as follows. In June 2006, the appellant was working on a building site in Coventry with three other men. One day, whilst they were having lunch, the appellant suddenly picked up a sledgehammer and hit one of his colleagues over 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 found unfit to plead under section 4A of the Criminal Procedure (Insanity) Act 1964.

1.55 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.

1.56 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 considered whether section 4A hearings were compatible with Article 6 of the European Convention on Human Rights, Lord Bingham had concluded that the proceedings were not criminal in nature.[81]

1.57 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 jury is to decide whether the accused committed the act with which he or she had been charged. Second, action 4A requires the jury to make a decision if, and only if, it is

[81] See paragraphs 1.42 – 1.44 above.

satisfied that he or she did the act and must acquit the accused if it is not so satisfied. Although the Criminal Procedure (Insanity) Act 1964 does not specifically say so, Lord Justice Toulson stated that the jury must be satisfied to the criminal standard of proof, in other words, beyond reasonable doubt.[82]

1.58 Lord Justice Toulson also stated that it was important to remember the purpose of section 4A. He considered that its purpose was to avoid the detention of a person unless 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 with which he or she had been charged. In order to achieve that result, Lord Toulson considered it imperative that the rules of evidence and criminal procedure that would be applied in a criminal trial should be applied during the section 4A hearing.[83] In relation to the specific issue of the admissibility of hearsay evidence, Lord Justice 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.[84] He went on 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 Justice Toulson stated, was a point "of purely intellectual interest which it is unnecessary for us formally to decide for present purposes".[85]

[82] See paragraphs 24 and 25 of the judgment.
[83] See paragraph 26 of the judgment.
[84] At paragraph 33 of the judgment.
[85] See paragraph 34 of the judgment.

CHAPTER 2. THE COMMON LAW: THE *PRITCHARD* TEST

INTRODUCTION

2.1 In this chapter, criticisms of the existing common law relating to unfitness to plead are examined, the views of consultees discussed and considered, and options for reform explored. However, before the existing law and recommendations for reform are discussed, it is important to consider the purpose of the law on unfitness to plead and to examine whether the reason for its existence is still a valid one.

WHAT IS THE PURPOSE OF THE LAW RELATING TO UNFITNESS TO PLEAD?

2.2 In its consultation paper, the Commission detailed the development of the modern law relating to unfitness to plead.[86] When the law originated, its purpose was not concerned with fairness to the accused. The procedural formalities of the medieval courts required a plea to be entered and the accused to consent to a trial by jury or else the trial could not proceed.[87] Therefore, the law was more concerned with compelling individuals to enter a plea. Prior to 1406, a practice known as *prison forte et dure* was adopted to determine whether an accused person could enter a plea. This unpleasant process involved the accused person who refused (or who was unable) to enter a plea being given three warnings, then, if no plea was duly entered, he or she "was confined to a narrow cell and starved until he either reconsidered his position or died."[88] After 1406, a technique known as *peine forte et dure* was devised, which required an accused, who was unwilling or unable to enter a plea, to be crushed under increasingly heavy weights until he or she entered a plea, or died. The court's role was to determine whether the accused was "mute of malice, or by visitation of

[86] See paragraphs 1.5 – 1.10 of the consultation paper.
[87] D Grubin, (see footnote 19) at page 749.
[88] D Grubin, (see footnote 19) at page 750.

God".[89] If an accused person was deemed to be "mute by visitation of God", his or her life was spared and a plea of not guilty entered on his or her behalf.[90]

2.3 Since that time when the law was concerned only with the practicalities of ensuring that an individual entered a plea, there has been an evolution in the law towards recognising the need to ensure that fairness is demonstrated by the courts towards accused persons who may be unfit to plead. There appears to be two basic arguments for ensuring such fairness in the trial process. First, if it is accepted that the purpose of a criminal trial is to hold guilty individuals accountable for wrong-doing, then it must also be accepted that some individuals cannot be held accountable if they have certain characteristics which may operate to reduce or entirely remove their culpability.[91] Second, the European Court of Human Rights has 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.[92] Whichever argument is accepted as the most persuasive, it is clear that the law on unfitness to plead has an important role to play in ensuring fairness in the trial process by identifying individuals who are unsuited to the rigours of a criminal trial because of illness or learning disability and removing them (temporarily or otherwise) from the trial process. However, that is not to say that every individual who is experiencing difficulties with mental ill-health, brain function or learning disability should be deemed to be unfit to plead: instead, each individual's ability to participate in criminal proceedings must be assessed.

2.4 The Commission considers that the modern rationales of participation and fairness that underpin the law on unfitness to plead are valid and

[89] 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.
[90] D Grubin, (see footnote 19) at page 750.
[91] See consultation paper at paragraph 1.14.
[92] See consultation paper at paragraph 1.15.

any proposals for reform should be developed so that these foundational principles are respected.

THE *PRITCHARD* TEST

2.5 Currently, the *Pritchard* test, which is discussed in detail in chapter one of this report, determines whether an individual is unfit to plead. However, the test has been subject to criticism. In the consultation paper, the Commission considered a number of criticisms of the *Pritchard* test, as well as options for reform of the law in this area.[93] The Commission identified three main issues for consideration by consultees which formed part of the terms of reference for the project which had been set by the Department of Justice. These were: whether it is timely for the *Pritchard* test to be revisited and reviewed, given the criticisms that it has received; 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 make reference to the defendant being able to make rational decisions during the trial, a position which has been explored in jurisdictions such as Scotland and Jersey.

Time to review the *Pritchard* test?

2.6 The consultation paper[94] discussed criticisms of the *Pritchard* test made by a number of commentators. There is a contention that the test is inadequate since it is based on an unduly narrow test of a defendant's intellectual abilities[95] and was never devised with the needs of individuals who may be experiencing psychotic symptoms in mind.[96] The Commission noted in the consultation paper[97] that the

[93] See chapter 2 of the consultation paper.
[94] See chapter 2 of the consultation paper from paragraph 2.14 onwards.
[95] 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* 53 at pages 535 – 536.
[96] 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.

individuals involved in the cases of *R v Dyson* and *R v Pritchard* were both deaf and were unable to communicate by speech. It therefore appears that the primary issue which the courts were concerned with during the trials was sensory impairment and its consequences, and it is debatable whether the individuals in question were living with a learning disability at all. As pointed out in the consultation paper, Pritchard could read, write and gesture that he was not guilty,[98] and in 1836, literacy was not a skill which was universally enjoyed, since education up until the age of ten did not become compulsory in England until 1880.[99] The Commission noted, however, that the *Pritchard* test does require the defendant to be assessed to determine whether he or she is of sufficient intellect to comprehend the course of proceedings of the trial in order to make a proper defence. It appears to be this aspect of the test which has caused criticism of the *Pritchard* test,[100] despite the application of the test to defendants who are suffering from psychotic illness[101] and the evolution of the *Pritchard* test in the case of *R v John (M)*.[102]

2.7 In the consultation paper, the Commission considered the operation of *R v Pritchard* in light of the decision in *R v John (M)*. Its provisional conclusion[103] was that, although the interpretation of the test in *R v John (M)* had taken the test forward, there were aspects of the test or the interpretation of the test which gave some cause for concern. Particularly, the Commission considered, it was not helpful that some of the explanations for the separate criteria within the *Pritchard* test were inconsistent and some criteria lacked explanation following the

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Also, see TP Rodgers, NJ Blackwood, F Farnham, GJ Pickup and MJ Watts, (see footnote 89) at page 577.

[97] At paragraph 2.16.

[98] At page 304 of the judgment.

[99] B Simon, *Does Education Matter?* Lawrence and Wishart (London) 1985 at page 34.

[100] See for example WJ Brookbanks and RD Mackay, (see footnote 96) at page 282: "case law on fitness to plead limits the operation of the rules to people who lack the necessary intellectual or communication skills, whilst excluding those who, while reasonably intelligent or articulate, are so deluded that they cannot do themselves justice".

[101] See R v Davies (see footnote 18 for citation).

[102] See discussion above.

[103] See paragraph 2.26.

decision in *R v John (M)*. The Commission also drew attention to two Court of Appeal decisions in *R v Moyle*[104] and *R v Diamond*[105] which might suggest that the *Pritchard* test is problematic if it is being applied to individuals who are experiencing mental illness with a delusional aspect.[106] Both these judgments have been subject to criticism. For example, in its consultation paper *Unfitness to Plead*,[107] the Law Commission of England and Wales stated that the appellants' delusional states may have been enough to impair their capacity to make decisions during the trial, "making a mockery of the concept of the appellants' participation in their trials".[108] Academic criticism has also been directed towards the decision in *Moyle*, with the decision of the Court of Appeal that delusions do not necessarily require a finding that a person is unable to give instructions to counsel and to understand proceedings being described as "absurd".[109]

2.8 The Commission asked consultees to consider whether it is timely to revisit the *Pritchard* test and examine alternative models. All but one of the consultees who responded to the question agreed that it was appropriate and timely to consider possible reform of the *Pritchard* test. The consultee who disagreed with the need to review the *Pritchard* test stated that it was considered that the current law "served the needs of mentally disordered offenders well and that it has proven to be fit for

[104] [2008] EWCA Crim 3059. In this case, an appellant who was considered by a number of consultant psychiatrists to be suffering from paranoid schizophrenia was not considered by the Court of Appeal to have been unfit to plead. This was despite the appellant having confided in a consultant psychiatrist during the trial that he felt that if he was to disclose his symptoms, he would be then convicted of witchcraft and executed.

[105] [2008] EWCA Crim 923. In this case, the Court of Appeal considered the situation where an individual may be deemed to be 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 if, despite delusional thinking or memory problems, the accused was deemed to be fit to plead if he or she satisfied the test in *Pritchard*. However, the Court of Appeal did recognise that a gap may exist in the current law as "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." (See paragraph 46 of the judgment).

[106] See consultation paper at paragraphs 2.19 – 2.25.

[107] (2010) Consultation Paper No 197.

[108] (2010) Consultation Paper No 197 at paragraph 2.86.

[109] 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.

purpose." This consultee responded from the viewpoint of practitioners who have a direct interface with issues of unfitness in criminal proceedings, therefore the Commission considered that this was a particularly interesting response.

2.9 Having carefully considered both the existing law, the criticisms that have been made of the current law and the views of consultees, the Commission has concluded that the application of the *Pritchard* test works generally well, but there is a case to be made for further refinement of the substance of the test. However, having said that, the Commission recognises that it is important to ensure that any reform is both beneficial and workable. As a result, the Commission considers that the existing law is in need of enhancement, rather than a fundamental overhaul. It therefore falls to be determined what shape any enhancement of the existing law should take.

A mental capacity approach

2.10 In the consultation paper, the Commission examined whether the *Pritchard* test should be replaced with one based on the mental capacity test contained in the Mental Capacity Act 2005, which is applicable in England and Wales. This approach was the one consulted upon by the Law Commission of England and Wales in 2010.[110] It is also an approach which has received support from a number of academic sources.[111] In referring the *Unfitness to Plead* project to the Commission, the Department of Justice had specifically requested that this issue be examined and considered.

2.11 One of the consultees who responded to the consultation paper asked why the Commission was consulting on whether the test should be based on the one contained in the Mental Capacity Act 2005, rather

[110] See footnote 107.
[111] See WJ Brookbanks and RD Mackay, (see footnote 96) at page 282 and L Scott-Moncrieff and G Vassall-Adams, 'Yawning Gap' (2006) *Counsel* 14 at page 15.

than the new test which is proposed in new Mental Capacity legislation being devised for Northern Ireland. This is a valid query and one which is easily answered. The new Northern Ireland legislation is currently in the process of being drafted and it would not be appropriate for the Department of Justice or the Commission to refer to that draft legislation whilst policy is still being settled and drafts prepared. However, it is likely that any mental capacity test which may be contained in the draft legislation will resemble the mental capacity test which is contained in the Mental Capacity Act 2005, and that provides a justification for the Commission to choose to refer to that particular legislative test throughout the consultation paper and this report.

What is "mental capacity"?

2.12 In the consultation paper, the Commission described the origin of the Mental Capacity Act 2005[112] and examined the law relating to mental capacity in some detail.[113] In short, the mental capacity test which is contained in the Mental Capacity Act 2005 is founded on two basic definitions: the meaning of mental capacity and the definition of "inability to make decisions".

Definition of "mental capacity"

2.13 Section 2 of the Mental Capacity Act 2005 contains the following definition of mental 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.

[112] See paragraph 2.29 of the consultation paper.
[113] See paragraphs 2.30 to 2.43 of the consultation paper.

(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 if this Act must be decided on the balance of probabilities.

(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.

Definition of "inability to make decisions"

2.14 Section 3 of the Mental Capacity Act 2005 defines what "inability to make decisions" means for the purposes of the Act. The definition is as follows:

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

2.15 In order to assess whether or not a test for unfitness to plead in criminal proceedings should be based on the mental capacity test which is contained in the Mental Capacity Act 2005, the Commission is required to assess whether or not the mental capacity test is actually relevant to the law relating to unfitness to plead.

Relevance of the mental capacity test

2.16 There are undoubtedly some aspects of the test which is contained in the Mental Capacity Act 2005 which could be incorporated into a revised unfitness to plead test. For example, section 2(1) of the Mental Capacity Act 2005 is transferable, in the sense that it identifies the reason for the incapacity to make decisions as being an impairment of, or a disturbance in the functioning of, the mind or brain. The *Pritchard* test may not go so far as to state specifically that unfitness to plead is caused by such impairments or disturbances, but it is, in the Commission's opinion, the assumption which underpins the law in this area.

2.17 The Commission also considers that it is possible to adopt a similar approach to the one contained in section 2(2) of the Mental Capacity Act 2005. This approach would recognise that it does not matter whether any impairment or disturbance to the functioning of the mind or brain is permanent or temporary. This is not a new concept in relation to unfitness to plead: it is already a feature of the current law as it is recognised that recovery of an individual may result in remittal for trial.[114]

2.18 The protections for the individual which are included in section 2(3) are also transferable. Section 2(3) states that a lack of capacity cannot be established merely by reference to a person's age or appearance or any condition or behaviour which might lead others to make assumptions about his or her capacity. Unfitness to plead is a legal test which relies upon an assessment of expert opinion of an individual's ability to participate in a trial process. It is possible for the court, having weighed the expert evidence, to come to a different conclusion than the experts, although in reality, this will be a rare occurrence. It is unlikely that the court would base any finding of unfitness to plead on any anything other than expert evidence or the observations of the individual's performance in the trial process. However, the inclusion of a provision which is similar to section 2(3) would have the effect of confirming the importance of seeking expert medical opinion when assessing whether an individual is unfit to plead.

2.19 In relation to section 3 of the Mental Capacity Act 2005, there are various aspects of the definition of "inability to make decisions" which appear to be already somewhat similar to the existing test for unfitness to plead contained in *Pritchard* as interpreted in *R v John (M).* In particular, a number of the definitions of the criteria which make up the *Pritchard* test use language which is similar to that used in the

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

definition in section 3. Both the definition of "inability to make decisions" and the definitions contained in the *Pritchard* test criteria identify phases to be undertaken when an individual is required to make decisions. The mental capacity approach is much more refined, with "understanding", "retention of information", "use or weighing of information" and "communication" identified. The *Pritchard* test criteria, as interpreted in *R v John (M)*, is less refined, but nonetheless, abilities such as "understanding", "applying his mind" and "conveying intelligible answers" are identified. Of course, it is doubtful that the judge who interpreted the *Pritchard* test criteria had the concept of mental capacity and decision making uppermost in his mind at the time of delivering his judgment, but it is plain to see that he was thinking about the *Pritchard* test criteria in terms of the cognitive activities that an individual must perform when carrying out the tasks which are identified within the test.

2.20 A central tenet of the mental capacity test which is contained in the Mental Capacity Act 2005 is that an individual's decision-making ability is to be assessed in relation to a particular decision at the time that the decision needs to be made.[115] The test is not a "status" approach to capacity, in other words, individuals are not assumed to lack capacity because they are living with mental illness or have a learning disability. The test is not an "outcome" orientated approach either: a person is not to be determined to lack capacity to make a decision on the basis that the decision is inconsistent with conventional values or one with which the person who is tasked with assessing capacity disagrees.[116] The test contained in the Mental Capacity Act 2005 is therefore a "functional" test, that is to say, the individual is assessed in relation to make decisions about a specific issue at a given point in time. The Commission considers that a functional test of this nature is in keeping

[115] Mental Capacity Act 2005 Code of Practice, at page 19.
[116] Section 1(4) of the Mental Capacity Act 2005 states that a person is not to be regarded as being incapable of making a decision merely because he or she has made an unwise decision. However, the Mental Capacity Act 2005 Code of Practice indicates that an unwise or irrational decision may trigger an investigation of a person's capacity (paragraph 2.11).

with the purpose of the law relating to unfitness to plead. A functional test is capable of assisting with the identification of individuals who, at a certain point in time (that is to say, at the time of the trial), are incapable of performing certain tasks which are crucial to determining whether they should be subjected to the rigours of criminal proceedings.

2.21 Additionally, another transferable aspect of the mental capacity test contained in the Mental Capacity Act 2005 is in relation to unwise decisions. The Commission considers that, as in civil proceedings, if the accused person makes an unwise or irrational decision prior to or during the trial, this may be viewed as a prompt to an inquiry into his or her fitness to plead.

2.22 However, despite the existence of several provisions or concepts which are applicable to a test for unfitness to plead, other aspects of the test contained in the Mental Capacity Act 2005 do not easily transfer. Particularly, the test contained in the Mental Capacity Act 2005 only applies to individuals over the age of sixteen. In this respect, a mental capacity based approach to unfitness to plead causes some difficulty. The *Pritchard* test applies to Crown Court proceedings, with no apparent age limits placed on those who seek to apply it. The Commission does not consider that limiting a new test for unfitness to plead based on a mental capacity approach to those over the age of sixteen is wise or to be desired. One consultee raised this issue in some detail and the Commission agrees that removing protections from individuals is a retrograde step. In reality, it is likely that young people who find themselves involved in Crown Court proceedings who are unfit to plead may be handled in different ways to adults, however, removing the (at least) theoretical application of the law on unfitness to plead from these individuals cannot be recommended by the Commission. This is not the only area in which a mental capacity based approach cannot transfer wholesale to the law on unfitness to plead and further examples of divergence will be discussed below.

Standard of proof

2.23 Under the mental capacity test contained in the Mental Capacity Act 2005, a lack of capacity must be proved on the balance of probabilities. In relation to unfitness to plead, the defence must prove unfitness on the balance of probabilities, but the prosecution must prove it beyond reasonable doubt.[117] The Commission does not consider that this position should be altered, therefore this particular aspect of the mental capacity test is not relevant for the purposes of any reform of the law relating to unfitness to plead.

Assessment of competence to make decisions

2.24 In the consultation paper,[118] the Commission examined issues in relation to the assessment of competence to make decisions. It was noted that the mental capacity test which is contained in the Mental Capacity Act 2005 is designed to be applied to a certain decision which needs to be made at a certain point in time. It was suggested that in civil law, there may be many decisions which an individual needs to make which may be scrutinised for the purposes of ascertaining whether he or she has capacity to make that decision. However, it usually should be a relatively straightforward exercise to identify the individual decisions that may have to be made by that individual. For example, an individual may be making decisions about selling a property, buying a new home or moving into a care home. In the civil law, each of those decisions would be identified, the individual's capacity to make each decision assessed and a determination in relation to whether the individual has the capacity to make the specific decision made.

[117] See John E. Stannard, *Northern Ireland Criminal Procedure*, Sweet and Maxwell (2000).
[118] At paragraphs 2.37 – 2.41.

2.25 It is important to examine decision-making within the criminal trial process in order to determine whether this approach which applies to the civil law is applicable in the criminal context. The consultation paper considered the difficulties in identifying separate decisions within the criminal trial process and examined the reasoning of the Law Commission of England and Wales in its consultation paper *Unfitness to Plead.* The Law Commission of England and Wales had considered that there are two ways of assessing an individual's ability to make decisions. First, a "unitary approach" could be taken which looks at an assessment of capacity in relation to a set of decisions. Second, a "disaggregated approach" could be taken which necessitates identifying all the decisions which an individual needs to make during a trial process and applying the mental capacity test to each decision, as it is required to be made. The Law Commission of England and Wales stated in the consultation paper that it considered that the unitary test, or in other words, a test which determines whether an individual has decision-making capacity for all the purposes of the trial, 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.[119] The Law Commission of England and Wales viewed this "comprehensive all-or-nothing approach"[120] as taking account of an arguable function of the criminal trial process, which is to place emphasis on the accused's understanding of that process and his or her acceptance that the process is a proper judgment on past conduct. The Law Commission of England and Wales also considered that the unitary test had the benefit of being clearer, would lead to less variation in the views of clinical professionals who were tasked with assessing fitness and would therefore result in simpler and more certain law in this area.[121]

[119] (2010) Consultation Paper No 197 at paragraph 3.60.
[120] (2010) Consultation Paper No 197 at paragraph 3.61.
[121] (2010) Consultation Paper No 197 at paragraphs 3.61 and 3.62.

2.26 In relation to the "disaggregated approach", the Law Commission of England and Wales identified problems with adopting this method in criminal proceedings, suggesting that the complexity of such a process would make it very time consuming for the court and would be of no real benefit to the accused.[122]

2.27 In the consultation paper, the Commission's provisional view was that it was persuaded by the arguments advanced by the Law Commission of England and Wales in relation to the unitary and disaggregated approaches to assessing capacity to make decisions during the trial.[123] The Commission considered that it does not really make sense in a criminal context to adopt processes which would have the effect of facilitating a position where an individual could be found to have capacity to make decisions in relation to one aspect of the trial, but to lack capacity in relation to another aspect. An individual will either be fit or unfit to plead: there is no other outcome available to the individual in these circumstances. However, the Commission asked consultees to provide their views on the issue.

2.28 In the main, consultees agreed with the Commission's provisional view that a disaggregated approach would be unworkable. Two consultees disagreed with the Commission, but did not offer any suggestions in relation to how such a complex process could be managed in order to avoid delay in proceedings. These consultees did not specifically address the inherent difficulties of a disaggregated approach which could result in the court finding that an accused person was fit to participate in some aspects of the trial and not in others. Having considered the position fully, the Commission's view is that its provisional recommendation is the correct one: a disaggregated approach would be simply unworkable.

[122] (2010) Consultation Paper No 197 at paragraph 3.72.
[123] See consultation paper at paragraph 2.41.

"Proportionality"

2.29 In the civil law context, it is possible that the individual has capacity to make one decision, but not other decisions. In the consultation paper, the Commission suggested that an individual may have capacity to make a decision about where he or she would prefer to live, yet may not be able to make a decision about investing a multi-million pound fortune. In civil proceedings, therefore, decisions are dealt with on the basis of proportionality: the more difficult or important the decision, the more is required to demonstrate that the individual has capacity to make the decision.

2.30 Where criminal proceedings are concerned, the Commission had suggested in the consultation paper[124] that it would be difficult to apply such a principle. Any attempt to differentiate between the complexity of decisions that fall to be made during the trial process and apply differing "levels" or "degrees" of capacity to each decision would be challenging. The Commission held the view that all of the decisions to be taken in criminal proceedings are potentially serious and very much inter-linked: small decisions taken by an accused person may have a significant outcome in terms of not only the way in which a defence is handled but also the conclusion of the case. In the consultation paper, the Commission was very much persuaded by the views of the Law Commission of England and Wales in relation to this issue, which was referred to as the "proportionality test" in its consultation paper on *Unfitness to Plead*.[125] However, despite this provisional view, the Commission asked consultees to consider the issues raised and provide their comments.

2.31 There was a limited response from consultees in relation to this issue. Of the consultees who specifically addressed the question posed by

[124] See consultation paper at paragraphs 2.42 – 2.43.
[125] Consultation Paper No 197 – for further discussion on the arguments see consultation paper at paragraph 2.43.

the Commission, two agreed with the Commission and one consultee queried the Commission's provisional view. The consultees who agreed with the Commission commented that a proportionality approach would be unworkable or would pose significant challenges in a criminal justice environment. The consultee who disagreed with the Commission noted the importance of a proportionality approach, but also suggested that it was perhaps possible to take into account the complexity of the proceedings at the point at which the unfitness to plead of the accused person was to be assessed. It should also be noted that one of the consultees who responded in support of the Commission's provisional view commented that it was difficult to see how a proportionality approach could be avoided, as it is a key aspect of any determination of mental capacity.

2.32 Having carefully considered the issues again and having taken into account the views of consultees, the Commission's provisional view remains unchanged. The Commission considers that a "proportionality test" would be an unattractive addition to any test for unfitness to plead. It is simply not workable to assess the relative importance of decisions which are to be taken during a trial. Even if it was possible to identify which decisions were more important than others, any such approach would lead to inconsistency and a lack of clarity in the law, as the importance of any identifiable decisions to be taken within a trial could only be judged in the context of the facts and circumstances of each individual trial. It appears to the Commission to be undesirable that the application of a test for unfitness to plead should rely on an assessment of the complexity of a decision. Firstly, the complexity of a particular decision may not be immediately apparent until the outcome of that decision is examinable. Secondly, there is the possibility that such an approach would mean that the test for unfitness to plead would become dependant on the type of trial, rather than the characteristics of the accused person. For example, if a "proportionality test" is adopted, an individual who is required to take decisions in relation to instructing counsel in a highly complex fraud trial, may have to satisfy a

higher "degree" of capacity or fitness than an accused person who is charged with a simple theft. That approach is not endorsed by the Commission. For those reasons, the Commission does not consider that a "proportionality test" is suitable in the context of assessing an accused person's unfitness to plead.

Revising the *Pritchard* test?

2.33 As seen above, the Commission has considered the main principles of the mental capacity test which is contained in the Mental Capacity Act 2005 and has highlighted that some of the aspects of that test and its associated principles are transferable to an unfitness to plead test. However, the Commission has also identified that some of the aspects of a mental capacity approach and its associated principles do not easily transfer into the criminal justice context.

2.34 This position was identified and discussed in the consultation paper. As a result, the Commission had suggested[126] that a new test may incorporate the elements of a mental capacity approach that were transferable to an unfitness to plead test. Therefore, the Commission asked consultees to comment on the following proposed test which incorporates certain elements of a mental capacity approach: that in order to demonstrate that he or she is unfit 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 the proceedings; and
- make decisions that he or she is required to make in relation to the trial.

[126] See consultation paper at paragraphs 2.47 to 2.49.

2.35 The Commission had suggested that the decisions that an accused person would be required to make would reflect the elements of the *Pritchard* test which it would be possible to interpret as decisions. After all, a mental capacity test can only be applied in respect of a decision which needs to be taken by an individual. Therefore, the decisions falling to be made by the accused person would be: making a decision about pleading guilty or not; making decisions when instructing solicitors and counsel; and making decisions when giving evidence in his or her own defence. The accused person would have to be able to understand the information relevant to these decisions, retain that information, use or weigh that information as part of the process of making the decision and communicate the decision. Where the element of communication is concerned, the Commission considers that the individual should be able to use alternative means of communication, such as sign language. However, any form of alternative means of communication which may also assist with an individual's *understanding* should be treated with caution. The use of special measures is discussed in more detail in chapter 5.

2.36 All but one of the consultees who commented on the Commission's suggestion for a revised test for unfitness to plead were supportive of the incorporation of a mental capacity approach into aspects of the test. One consultee, although supportive of the suggested approach, commented that all of the elements of the *Pritchard* test could be framed in terms of the language used in the mental capacity test. The Commission, however, is not convinced that this is possible. The mental capacity approach which identifies the steps that a person must be capable of demonstrating in order to show that they can make a decision simply does not make sense when applied to the *Pritchard* criteria which relate to basic understanding, that is to say, the criteria which require "understanding the charges" and ability to "follow the course of the proceedings". The consultee in question pointed out that there is a close link between the criterion requiring "understanding the charges" and the criteria which can be linked to actual decisions

required during the course of the trial. The Commission agrees with this observation: the criteria are necessarily linked as they relate to the accused person's ability to participate in the whole trial process. A failure to satisfy one of the criteria will mean, as it currently does under the existing *Pritchard* test, that the accused person is unfit to plead and will therefore no longer be subject to the trial process.

2.37 The consultee who did not support a mental capacity approach to a test for unfitness to plead commented that a mental capacity based test did not appear to confer any advantages when compared with the current law.

2.38 The Commission had also asked consultees to consider whether there were any other decisions which were relevant in assessing whether an individual is unfit to plead.[127] They were also asked to consider alternative approaches to reforming the *Pritchard* test, such as those taken in Australia, the Republic of Ireland and New Zealand.[128] Consultees concurred with the Commission that the elements already in place by virtue of the *Pritchard* test were relevant, however, no suggestions were made for the expansion of the existing criteria contained in the test.

The case in favour of a revision of the Pritchard test

2.39 The Commission considers that the modification of the *Pritchard* test which is suggested in the consultation paper does confer certain advantages. The effect of the proposed change is a modest one: it is not intended that the new test radically alters the law relating to unfitness to plead, resulting in any widening of scope of the current law. One advantage that the modified test does confer is that the criteria in the *Pritchard* test, as interpreted in *R v John (M)*, would be clarified in terms that better recognise the cognitive processes involved

[127] See consultation paper at paragraph 2.58.
[128] See consultation paper at paragraphs 2.53 to 2.56.

in making decisions. It is also considered that these recommendations will be of assistance in a number of ways. Such a test may assist those who are tasked with providing professional assessments for the purposes of determining unfitness to plead and the court in its role in determining the fitness of an accused person to plead. Such an approach may also provide some clarity to accused persons, their representatives and advisers. The Commission considers that such a reform may also offer the beneficial side-effect of raising awareness of the important issues surrounding unfitness to plead amongst those who play key roles in the criminal justice system. The Commission is aware, as a result of the work undertaken during this project, that unfitness to plead is somewhat over-looked as a subject. Great efforts are being made by the criminal justice sector to increase awareness and understanding of mental ill-health and learning disability within the criminal justice system in Northern Ireland, so it is important that the law relating to unfitness to plead is understood to be an important aspect of the criminal justice response to such issues. The Commission considers that not only is reform warranted in relation to this area of law: it is also necessary to ensure that adequate awareness-raising and training in relation to the law on unfitness to plead is offered to professionals who work within the criminal justice system.

RECOMMENDATION

2.40 **The Commission recommends that the current *Pritchard* test for determining unfitness to plead in criminal proceedings is modified so that the language used reflects that used in the Mental Capacity Act 2005. Therefore, 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 the proceedings; and**
- **make decisions that he or she is required to make in relation to the trial.**

2.41 **The decisions in relation to the trial that the accused person is required to make are in relation to deciding whether to plead guilty or not, exercising the right to challenge jurors, instructing solicitors and counsel and giving evidence in his or her own defence. The Commission does not consider that any case has been made out for extending the list to include other criteria.**

2.42 **The Commission recommends that the accused person who is required to make the identified decisions during the trial will have to be able to understand the information relevant to the decision, retain that information, use or weigh the information as part of the decision-making process and communicate any decision.**

2.43 As outlined above, the Commission has identified that various other aspects of the scheme which are in place by virtue of the Mental Capacity Act 2005 can and should be replicated for the purposes of the law relating to unfitness to plead. However, it is important to note that the recommendations made by the Commission cannot fully replicate the whole approach and all the principles which are contained in, or flow from, the Mental Capacity Act 2005. The Commission recognises the benefits of the aspects of the law on mental capacity which have been identified in this report, however, it also recognises that the mental capacity approach and principles must only be used in appropriate ways within this area of law.

2.44 The reference from the Department of Justice requested that the Commission consider whether a test based on the Mental Capacity Act 2005 would be a better approach for assessing unfitness to plead than the test which currently forms the law in this area in Northern Ireland,

that is to say, the *Pritchard* test. The answer to this particular aspect of the reference is "yes": a test *based* on the one contained in the Mental Capacity Act 2005 is, in the Commission's opinion, a better approach than the current test for unfitness to plead. There are elements of the mental capacity approach which will enhance the existing test, but the approach contained in the Mental Capacity Act 2005 cannot be adopted wholesale. The result is a recommendation which proposes a modest reform: one which will modernise the language used in the existing common law and will update an area of law by infusing it with pertinent aspects of the Mental Capacity Act 2005. It is not anticipated that these reforms will result in many more individuals being determined to be unfit to plead than at present. The Commission is content with this position as it views the concept of unfitness to plead as having an important, but narrow, role in the criminal process, that is, to identify those who are unable to effectively participate in their trial and provide them with suitable care and treatment.

RATIONAL DECISION-MAKING

2.45 The Commission was asked by the Department of Justice 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. Not only does this report seeks to provide the Department of Justice with an answer to the first element of its request, but the report also seeks to examine the second element of the test, that is to say whether an unfitness to plead test should have an element of "decisional competence", as appears to be the case in Scotland and Jersey.

The Scottish provisions relating to 'effective participation' and 'understanding'

2.46 The referral of the *Unfitness to Plead* project to the Commission by the Department of Justice specifically asked the Commission to consider the tests for unfitness to plead which are available in Scotland and Jersey. The consultation paper duly considered both jurisdictions.[129] In Scotland, section 170 of the Criminal Justice and Licensing (Scotland) Act 2010, which inserts a new section 53E into the Criminal Procedure (Scotland) Act 1995, has recently been commenced on 25th June 2012.[130] The new Scottish provisions, which apply to criminal proceedings commenced on or after 25th June 2012,[131] implement the recommendations of the Scottish Law Commission which are contained in its report on *Insanity and Diminished Responsibility.*[132] In its discussion paper,[133] which preceded the report, the Scottish Law Commission had examined the need for an accused person to be able to participate in his or her trial in a meaningful way and had suggested incorporating a requirement for "full or rational appreciation" of the consequences of taking certain actions, such as entering a guilty plea.[134] However, neither the recommendations made by the Scottish Law Commission, nor the resulting legislation appear to go as far as requiring that the accused must be able to demonstrate that he or she can make rational decisions. Rather, the emphasis appears to be on the effective participation of the accused in the trial, which is to be demonstrated by the ability to carry out certain tasks, such as understanding the nature of the charge made against him or her, understanding the purpose of the trial, following the course of the trial and instructing counsel, amongst other important tasks.[135] However, it appears that the terms "effective participation" and "understanding" are

[129] See consultation paper paragraphs 2.59 – 2.72.
[130] See the Criminal Justice and Licensing (Scotland) Act 2010 (Commencement No. 10 and Savings Provisions) Order 2012.
[131] See Article 3 of the above-mentioned Commencement Order.
[132] SE/2004/92 (July 2004).
[133] *Discussion Paper on Insanity and Diminished Responsibility* (2003) Scottish Law Commission Discussion Paper No. 122.
[134] See Discussion Paper No. 122 at paragraphs 4.14 – 4.18.
[135] See consultation paper at paragraph 2.64 for the full text of the new section 53E.

undefined in the legislation, so it remains to be seen how the courts will interpret the provision.

The Jersey 'rational decision' test

2.47 Where Jersey is concerned, the consultation paper examined the law applicable in that jurisdiction.[136] In *Attorney General v O'Driscoll*,[137] the Royal Court of Jersey refused to apply the *Pritchard* test when assessing unfitness to plead and, instead, introduced a new test which contained a decisional competence element. The test was 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.[138]

2.48 The test was supported by the following explanation:

> 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

[136] See consultation paper at paragraphs 2.68 – 2.72.
[137] [2003] J.L.R 390.
[138] [2003] J.L.R at page 402 at paragraph 9.

> 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[139] but on the Jurats, who are a mature and experienced body of judges upon whom considerable reliance to arrive at considered and reasonable conclusion can be placed.[140]

2.49 The test in *O'Driscoll* was further examined in *Harding*,[141] a case involving an accused who had a long history of psychiatric disorder, self-harm and violence to others. In this case, an issue arose over the accused's ability to meet the last of the four criteria in *O'Driscoll,* that is to say, whether the accused could make rational decisions in relation to her participation in the proceedings which reflected true and informed choices on her part. In his judgment, Commissioner Clyde-Smith interpreted "rational decisions" in the following way:

> 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.

[139] Following changes in England and Wales in 1991 and Northern Ireland in 1996, the issue is now dealt with by a judge rather than a jury.
[140] [2003] J.L.R 390 at paragraph 32.
[141] [2009] J.R.C 198.

Decisional competence forming part of a test to assess unfitness to plead

2.50 It has been suggested by some commentators that any test for assessing unfitness to plead should contain an element which considers the decisional competence of the accused.[142] However, it appears from an examination of examples of the jurisdictions which have recommended or developed a test with a decisional competence element, that there are two possible interpretations of the meaning of decisional competence.

2.51 In the consultation paper,[143] the Commission explored the two possible meanings, concluding that the term "decisional competence" could mean a decision based on or in accordance with reason or logic, which suggests that the process of decision-making must be rational or that the decision itself must be rational. In other words, one meaning relates to the rationality of decision-making process, whilst the other is concerned with the outcome of the process.

2.52 In the consultation paper, the Commission provisionally considered that including an element of decisional competence, in the sense that the decision or outcome must be rational, sets an overly high standard to be met by accused persons. The Commission commented that making decisions which are rational or in one's best interests is difficult and requires a great deal of insight, reflection and maturity.[144] The Commission asked consultees to give consideration to this provisional view and provide their comments.

2.53 The response to the Commission's provisional view was limited. However, the consultees who did response to this particular issue were not supportive of a test for unfitness to plead incorporating an element

[142] See for example WJ Brookbanks and RD Mackay, (see footnote 96) at page 271.
[143] See consultation paper paragraphs 2.73 – 2.81.
[144] See consultation paper at paragraph 2.81.

of decisional competence. One particular consultee commented that such an approach would be “subjective and difficult to apply”.

2.54 Having considered this matter again in light of the views of the consultees who expressed an opinion, the Commission’s provisional view is unchanged. The Commission considers that a test which would require the accused to demonstrate in order to be fit to plead that he or she can make rational decisions that are in his or her best interests would set the bar too high in terms of fitness to plead.

RECOMMENDATION

2.55 **The Commission recommends no change in the law in this area.**

CHAPTER 3. THE STATUTORY PROVISIONS

ARTICLES 49 AND 49A OF THE MENTAL HEALTH (NORTHERN IRELAND) ORDER 1986

3.1 In the consultation paper, the Commission examined both Article 49 and Article 49A of the Mental Health (Northern Ireland) Order 1986.

Article 49

3.2 Article 49 of the Mental Health (Northern Ireland) Order serves several functions. First, Article 49(2) provides that the question of unfitness to plead should be determined as soon as the issue arises. Second, Article 49(3) provides that consideration of the question of unfitness can be postponed until any time up until the opening of the case for the defence, if it is expedient to do so and in the interests of the accused. Article 49(3) also provides that if the jury returns a verdict of acquittal before the question of unfitness falls to be determined, then the issue of unfitness will not be explored. Third, Article 49(4) provides that the court without a jury will determine the question of unfitness. Finally, Article 49(4A) makes provision for the expert evidence which is required by the court to make a determination in relation to unfitness to plead. The issues surrounding expert evidence are discussed later in this paper and therefore will not be discussed further in this chapter.

3.3 It is not the intention of the Commission to suggest any reform to Article 49 of the Mental Health (Northern Ireland) Order 1986. The provision offers both flexibility to the court, as well as protections to the accused. Not only can the issue of unfitness to plead be raised at any point in the trial, but it can also be postponed (importantly, if this is in the interests of the accused) in order for the court to assess whether or not there is a case to answer by the accused. This latter feature allows the accused valuable protection, as a weak case against him or her

may result in acquittal without the need to investigate whether the accused is unfit to plead. Not only does this mechanism create a potential "exit point" from the criminal proceedings for the accused, it also serves to avoid determinations in relation to unfitness to plead which may attract the prospect of care and treatment disposals.

3.4 For these reasons, the Commission is not minded to recommend any reform of Article 49 of the Mental Health (Northern Ireland) Order 1986.

Article 49A

3.5 In the consultation paper, the Commission examined the current operation of Article 49A of the Mental Health (Northern Ireland) Order 1986.

3.6 It appeared to the Commission that there were arguments for amending Article 49A to require the consideration of not only the *actus reus* of the offence, but also the *mens rea.*

3.7 The arguments which supported the inclusion of the consideration of the *mens rea* of the offence were as follows. In its consultation paper *Unfitness to Plead*,[145] the Law Commission of England and Wales advanced the contention that the introduction of the *mens rea* of the offence into the Article 49A hearing process would bring the unfit accused person within the protection of Article 6 of the European Convention on Human Rights, therefore offering valuable and necessary protections to the individual.

3.8 Additionally, the Commission highlighted in the consultation paper[146] that, presently, unfit accused persons are limited by the case-law from raising certain defences. In *Antoine*, it is stated that an unfit accused

[145] (2010) Law Commission Consultation Paper No. 197.
[146] See paragraph 3.51 of the consultation paper.

person cannot raise certain defences unless there is evidence from another witness that supports the defence.[147]

3.9 In the consultation paper, the Commission also mentioned the potential difficulties caused by the nature of some offences if they were to be considered in the context of an Article 49A hearing.[148] The offences which may cause difficulty are those which require the *mens rea* of the offence to be considered in order to put the *actus reus* element of the offence into context and to allow it to be understood as an offence. Examples given in the consultation paper include the offence of having an offensive weapon in a public place: having a weapon in a public place is only an offence if the accused intends to use it to cause injury. Likewise, inchoate offences, such as encouraging or assisting crime require the accused to carry out certain actions with the intent to encourage or assist another person to carry out an offence, whilst believing that the offence will be committed. Without consideration of the *mens rea* of these offences, the actions of the accused may seem quite meaningless.

3.10 The Commission also raised the effect of section 75 of the Northern Ireland Act 1998, which 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 a number of categories of people, including those with and without disabilities. It was suggested in the consultation paper[149] and in the Equality Impact Assessment which was published alongside the consultation paper,[150] that the current effect of the Article 49A hearing may create a differential impact between the way in which people who are fit to stand trial and those who are unfit to plead are treated.

[147] At paragraph 54 of the judgment.
[148] See paragraph 3.60 of the consultation paper.
[149] See consultation paper at paragraph 3.62.
[150] See the Commission's website: www.nilawcommission.gov.uk.

3.11 The *mens rea* of the offence has been incorporated into the equivalents of the Article 49A hearing in various jurisdictions. In the consultation paper, the Commission examined the law in New South Wales and Victoria in Australia, Scotland and New Zealand.[151] In New South Wales, section 21(3) of the Mental Health (Forensic Provisions) Act 1990 makes provision for an accused person to raise any defence which would be available to him or her if it had been possible to proceed with a criminal trial, rather than a special hearing. In Victoria, section 12(5) of the Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 makes provision for a special hearing to be conducted for those who are unfit to be tried. These special hearings must be conducted as if they were criminal trials, section 16(2) permitting the accused to raise any defence that could be raised if the accused was being tried in a criminal court.

3.12 In Scotland, section 55(1) of the Criminal Procedure (Scotland) Act 1995 states that if the court is satisfied beyond reasonable doubt that the unfit accused person did the act or made the omission with which he or she was charged, and that on the balance of probabilities that there are no grounds for acquitting the accused, then the court must make a finding to that effect or dismiss the accused.

3.13 The law in New Zealand is different to that which is in effect in Northern Ireland, as section 9 of the Criminal Procedure (Mentally Impaired Persons) Act 2003 creates an "involvement" hearing, which is designed to act as a filter to remove an innocent person from criminal proceedings, before any assessment of unfitness to plead is made.[152] Despite the difference, the law in New Zealand is particularly interesting because it has evolved to require the court to consider the *mens rea* of the offence. 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

[151] See consultation paper at paragraphs 3.64 – 3.71.
[152] Se consultation paper at paragraph 3.68.

for the offence.[153] However, in *R v Te Moni*,[154] the court interpreted section 9 as requiring consideration of the mental elements of the offence also.[155]

3.14 The question of whether consideration of the *mens rea* of the offence should be included in the Article 49A hearing process is a difficult one. It is an issue which the Commission has spent considerable time discussing, both within the Commission and with various stakeholders. In the consultation paper, the Commission outlined the potential difficulties with reforming the current Article 49A hearing process by requiring consideration of the *mens rea* of the offence and the availability of defences to the unfit accused person. These difficulties can be practical in nature: for example, an accused person who has been deemed to be unfit to plead because he or she may not be able to instruct legal representatives, may not be able to provide instructions to his or her legal representatives in relation to defences which may be available to him or her. A more fundamental difficulty arises when it is required to prove the *mens rea* of the offence. It may be very difficult for the prosecution to demonstrate that the unfit accused person had the necessary *mens rea* at the date of the commission of the offence if the individual who is unfit to plead was experiencing the same illness or disability at the time of the commission of the alleged offence. The defence could rely on the inability of the prosecution to prove the necessary *mens rea* and the unfit accused person would be acquitted. This was a source of concern which was identified by Lord Hutton in *R v Antoine*.

3.15 The Commission pointed out that it was possible to ameliorate against this difficulty by ensuring that the scope of section 3 of the Criminal Justice Act (Northern Ireland) 1966 allows the prosecution to assume the burden of proving that an accused person who is on a charge of

[153] See www.justice.govt.nz at page 7 of the Guide.
[154] [2009] NZCA 560.
[155] See paragraph 3.70 of the consultation paper for discussion.

murder was insane at the time of the commission of the offence. If such insanity was proven, then the care and treatment disposals which are available to the court upon such finding of insanity could be accessed. However, it must be noted that not every individual who has been found to be unfit to plead will have been legally "insane" at the date of the commission of the offence. Therefore, anyone tasked with analysing or developing policy in this particular area will have to be aware that the incorporation of the consideration of the *mens rea* of the offence into an Article 49A-type hearing may have the consequence that an outright acquittal would follow more frequently than under the current law.

3.16 The consultation paper asked consultees to provide their views in relation to whether or not the *mens rea* of the offence should be a factor which is required to be considered during the Article 49A hearing. The views expressed by consultees were mixed: some consultees were very much in favour of the Article 49A hearing incorporating consideration of the *mens rea* of the offence on the basis that such an approach would help to equalise the position of unfit accused persons with fit individuals who were capable of standing trial. Other consultees were against such a reform of the current Article 49A hearing process.

3.17 The Commission has weighed the arguments for and against the incorporation of the *mens rea* of the offence into the Article 49A hearing. This is a difficult issue and one which poses a conundrum for the policy developer. On the one hand, it is important to ensure as far as possible that accused persons who are unfit to plead and who are innocent of the offence brought against them are afforded an opportunity to exit the criminal justice system, where they clearly do not belong. On the other hand, it is important to examine the purpose of the Article 49A hearing process. The Commission has found it helpful to view the Article 49A hearing process in the following way. As a matter of principle, the Commission has accepted that there is a need

to retain the concept of unfitness to plead within the law in Northern Ireland. Such retention recognises the jurisprudence from the European Court of Human Rights, which requires Member States to ensure that accused persons must be capable of effectively participating in their trials. It is therefore accepted that effective participation is a necessary element of the trial process in order to satisfy the requirements of Article 6 of the European Convention on Human Rights. It necessarily follows that there will be individuals who have been charged with criminal offences who cannot effectively participate in the trial process, so it must be determined how the criminal law makes provision for these individuals.

3.18 One method of making provision for individuals in these circumstances is the removal of the Article 49A hearing altogether. However, this would potentially return the law to the way it was prior to the creation of the hearing by Criminal Procedure (Insanity and Unfitness to Plead) Act 1991 (in England and Wales) and the Criminal Justice (Northern Ireland) Order 1996. This is not a realistic proposal: after all, Article 49A hearings were an invention designed to ameliorate against a situation where accused persons who were deemed to be unfit were detained in hospital without any determination of whether they had actually committed any criminal act. *The Report of the Committee on Mentally Abnormal Offenders*[156] identified that this approach had short-comings, not least that it lacked any consideration of the strength of the evidence against the individual.[157] Of course, at that time, hospital orders could be made for long periods of time, the duration of which was subject to the discretion of the Home Secretary, so an exit point for an innocent unfit accused person was particularly needed. In more recent years, after the implementation of the Mental Health (Northern Ireland) Order 1986 and its equivalent in England and Wales, the Mental Health Act 1983, individuals who were subject to hospital orders as a result of the operation of the criminal justice system had access to

[156] Cmnd. 6244 (October 1975).
[157] See paragraph 10.24 of the Report.

the Mental Health Review Tribunal, which in certain circumstances could order release from their detention.

3.19 Regardless of the availability of the review mechanisms offered by the Mental Health Review Tribunal, or whatever body may replace it following the reform of the Mental Health (Northern Ireland) Order 1986 by the Department of Health, Social Services and Public Safety, there is still a strong argument for offering unfit accused people an opportunity to have themselves removed from the criminal justice system after a determination of unfitness to plead. It seems to the Commission that it would be undesirable for a criminal court to make care and treatment disposals in relation to an individual who did not carry out the act or make the omission with which he or she was charged. Access to care and treatment for mental ill-health or learning disability for these individuals is perhaps better left to regimes operating within the civil law in these circumstances. Otherwise, the role of the criminal court changes and instead of carrying out its traditional trial function, it becomes an alternative route to compulsory treatment for mental ill-health or learning disability. Since the Mental Health (Northern Ireland) Order 1986 and its successor which is proposed by the Department of Health, Social Services and Public Safety already has, or will have, a route for compulsory treatment, it seems illogical to create an alternative, court-based route for individuals who have no reason to continue to be the subject of criminal proceedings.

3.20 So, if it is accepted that it is necessary to "screen" unfit accused persons to identify those who have no reason to continue to be the subject of criminal proceedings, or in other words, retain the Article 49A hearing process, should the court be tasked with assessing whether the unfit accused person committed the *actus reus* of the offence or both the *mens rea* and the *actus reus*?

3.21 The Commission has concluded that the status quo should be retained at present. There are a number of reasons why the Commission has come to this conclusion.

3.22 The Commission is influenced by the decision as to admissibility in *Antoine v the United Kingdom* which considered whether the current Article 49A hearing process, or section 4A process in England and Wales, gave rise to a complaint under Article 6 of the European Convention on Human Rights that Antoine was unable to effectively participate in the hearing which affected him. The Court did not consider that the hearing process is criminal in nature, given that no conviction was possible under the section 4A hearing process. In support of this reasoning, the Court noted that the proceedings were principally concerned with the *actus reus* of the offence, "whether the applicant had carried out an act or made an omission which would have constituted a crime if done or made with the requisite *mens rea*".[158] The Court also accepted the rationale for the section 4A hearing process which had been described by Lord Hutton when he considered Antoine's case in the House of Lords.[159] The Court stated that it was satisfied that the essential purpose of the proceedings was to consider whether the applicant had committed an act, the dangerousness of which would require a hospital order in the interests of the protection of the public.[160]

3.23 Although its views have been expressed in a decision as to admissibility, rather than in a judgment, it is clear that the European Court of Human Rights does not consider, at this point in time, that the section 4A hearing (or its Northern Ireland equivalent, the Article 49A hearing) offends against Article 6 of the European Convention on

[158] See page 6 of the judgment.
[159] Lord Hutton had stated that the purpose of the section 4A hearing served the purpose of striking a fair balance between the need to protect a person who had, in fact, done nothing wrong and was unfit to plead at his trial and the need to protect the public from a person who had committed an injurious act which would have been a crime if carried out with the appropriate *mens rea* (*R v Antoine* [2000] UKHL 20 at paragraph 49).
[160] See page 7 of the judgment.

Human Rights.[161] A recent judgment, *Valeriy Lopata v Russia*,[162] considers the Russian Government's contention that its processes for the treatment of Mr Lopata after a finding that he was mentally ill were equivalent to those contained in section 4A of the Criminal Procedure (Insanity) Act 1964 and were not to be considered as criminal proceedings, therefore, by virtue of the decision as to admissibility in *Antoine v the United Kingdom*, were not in breach of Article 6 of the Convention. The Court did not accept this argument noting differences in the practical operation of the processes in place in each country and concluding that the processes that Mr Lopata was subjected to were criminal proceedings within the meaning of Article 6(1) of the Convention on Human Rights. It therefore appears, at the present time, that the interpretation of the purpose and effect of section 4A still has weight.

3.24 Recent domestic case-law also has a bearing on the question of whether the Article 49A hearing process should include consideration of the *mens rea* of the offence as well as the *actus reus*. *R v MB*[163] concerned an appellant who had been charged with voyeurism contrary to section 67(1) of the Sexual Offences Act 2003, having been found lying on his back, looking under the door of a cubicle in the changing rooms of a sports centre. Section 67(1) provides that a person commits an offence if –

> (a) for the purpose of obtaining sexual gratification, he observes another person doing a private act, and
>
> (b) he knows that the other person does not consent to being observed for his sexual gratification.

[161] Another decision as to admissibility in *Kerr v the United Kingdom* (Application No. 63356/00) endorses the decision in *Antoine v the United Kingdom*. In *Kerr*, the Court also dismisses the argument that even if Article 6 of the Convention in its civil aspect is applicable to the section 4A process, the procedure has not been shown to be unfair (see page 11 of the judgment).

[162] Application No. 19936/04 (30th October 2012).

[163] [2012] EWCA Crim 770.

3.25 The appellant was found to have Asperger's syndrome and a learning disability which was reflected in an IQ score of 66. It was determined that he was unfit to plead. The issue arose as to whether the jury, during the section 4A hearing, should be limited to considering whether the appellant had carried out the *actus reus* of the offence, or whether it was obliged to also consider the *mens rea*.

3.26 The trial judge directed the jury that it need only concern itself with considering whether the *actus reus* of the offence had been carried out, that is to say whether "observation" of a private act of another person had occurred. This direction formed the part of the basis of an appeal to the Court of Appeal which is relevant for the purposes of this discussion.

3.27 It was submitted to the Court of Appeal on behalf of the appellant that the trial judge had erred in his direction to the jury. It was contended that the jury should have been directed to consider not only whether the appellant had observed a private act of another person, but also whether that observation was "for the purpose of sexual gratification". It was argued that this "mental" element of the offence was part of the *actus reus* and therefore could not be divorced from it.

3.28 The Court of Appeal agreed with the submissions which had been made to it by the appellant's legal representatives. The Court considered that the link between deliberate observation and the purpose of sexual gratification of the observer is central to the statutory offence of voyeurism. It was stated that it had to be accepted that, for the offence of voyeurism, two actions have to be considered: the action "aimed at the outside world",[164] that is to say, the observation of the private act of another person, and the action which "is going on in the consciousness of the observer",[165] that is to say the obtaining of sexual gratification.

[164] See paragraph 64 of the judgment.
[165] See paragraph 64 of the judgment.

3.29 The Court of Appeal concluded that when a jury was considering, by virtue of section 4A of the Criminal Procedure (Insanity) Act 1964, whether an unfit accused person had carried out the act which formed part of the offence of voyeurism, the jury should consider whether the individual had observed another person doing a private act for the purposes of obtaining sexual gratification. The Court of Appeal stated that "that omnibus activity is the "injurious act". Although the activity has two components, they are indissoluble; together then are the relevant "act"."[166]

3.30 The Court of Appeal decision in *R v MB* is very helpful, as it may provide guidance for dealing with offences where the *actus reus* may not be readily separated from a mental element of the offence. However, it is also important to note that the decision does not call for a wholesale consideration of the *mens rea* of an offence in every instance. Indeed, in relation to the offence of voyeurism, there is another crucial mental element which must be present in order to demonstrate that the offence has been committed: section 67(1)(b) of the Sexual Offences Act 2003 requires that the offender *knows* that the victim does not consent to being observed for the purposes of the sexual gratification of the offender. The Court of Appeal stopped short of considering that this additional mental element, which is quite separate from the *actus reus* of the offence, should be considered during a hearing under section 4A of the Criminal Procedure (Insanity) Act 1964. Perhaps the correct interpretation of the decision in *R v MB* is that it facilitates consideration of the mental element of the offence, but only if that mental element is so connected to the *actus reus* of the offence that it cannot be readily separated and therefore in effect can be regarded as part of the act in question.

[166] See paragraph 65 of the judgment.

THE COMMISSION'S VIEW ON WHETHER THE MENTAL ELEMENT OF THE OFFENCE SHOULD BE CONSIDERED IN AN ARTICLE 49A HEARING

3.31 The law is obliged to recognise that there are individuals who cannot effectively participate in criminal proceedings or are unfit to undergo the rigours of a trial process, yet it is desirable that a process is in place which recognises that unfit accused persons should be acquitted if that is the appropriate outcome. The Commission considers that the current Article 49A hearing process facilitates both these aims. The incorporation of the requirement to consider the *mens rea* of the offence, in the Commission's view, creates a very real danger for the unfit accused person. Such an incorporation of consideration of the *mens rea* would make the Article 49A hearing process akin to a trial, creating the risk that the unfit accused person would be subjected to a trial in which he or she could not participate. This cannot be an outcome that the Commission can recommend.

3.32 The Commission recognises that the current Article 49A hearing process has been interpreted by the courts to develop the meaning of what consideration of the *actus reus* of the offence actually means. Current case-law does facilitate the consideration of certain defences in certain situations and the case-law is also evolving to take account of criminal offences where some mental elements of the offence are inextricably linked to the *actus reus* of the offence. The Commission is not minded to disturb this evolution of Article 49A. The provision creates a process which is not a full trial, but offers the unfit accused person an opportunity of acquittal. In the Commission's view, the current construction of the law seeks to reconcile worthy aims: the aim to recognise that some individuals should not be subjected to a criminal trial because of ill-health or learning disability and the aim to allow these individuals to exit the criminal justice system at the earliest possible opportunity if there is a justification for such an exit. There is a balance between reconciling these aims, whilst not creating a process which, in effect, becomes a trial. Reforming the Article 49A hearing so

that the *mens rea* of the offence must also be demonstrated creates a real risk that the unfit accused person will be subject to a trial in which he or she has already been determined to be unable to participate. That outcome is illogical. Only a trial can determine the guilt or innocence of the accused. If an unfit person recovers sufficiently to be able to participate in a trial, then he or she will have the opportunity to have the question of guilt or innocence determined. Until then, the current law offers the best protection for the individual both in terms of recognising his or her inability to participate in a trial and offering an appropriate end to criminal proceedings.

RECOMMENDATION

3.33 **The Commission has concluded that interference in the current balance of the law at this time may cause more harm than good. It, therefore, recommends that there should no change in the law in this area at this stage.**

SUPPORT FOR THE UNFIT ACCUSED PERSON DURING THE ARTICLE 49A HEARING

3.34 In their responses to the consultation paper, a number of consultees raised the issue of support for unfit accused persons during the Article 49A hearing. One consultee suggested that supporters should be in place to assist unfit accused persons who are living with a learning disability to participate in the Article 49A proceedings, whilst other consultees were of the view that individuals should have access to a fully-trained advocate during the hearing.

3.35 The Commission has considered the comments of the consultees and has concluded that there is merit in allowing an unfit accused person to have access to a supporter during the Article 49A hearing process. Although the unfit accused will have access to legal representatives, there is benefit in allowing the court to permit the engagement of a

supporter, who can act to assist any legal team and the court in engaging with the accused to help him or her understand the court process, in so far as that may be possible. The Commission envisages that such a supporter would be suitably qualified to carry out the role, a matter which is best left for the court to determine in any particular case. The Commission considers that the presence of such an individual would offer valuable protection for the accused; however, the Commission does not see the need for the supporter to carry out an advocacy role, given that the accused person will be represented by lawyers.

RECOMMENDATION

3.36 **The Commission therefore recommends that the court may appoint a suitably qualified person to act as a supporter to the unfit accused person during an Article 49A hearing.**

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

REMITTAL OF THE ACCUSED FOR TRIAL

4.1 A consequence of finding that an accused person is unfit to plead, and therefore unable to participate in a criminal trial process, is that a process must be put in place to take account of the person regaining their health and becoming 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 has previously been found to be unfit to plead and, as a result, has been detained in hospital, but who has since recovered and no longer requires medical treatment.

4.3 A person may be remitted for trial by virtue of Article 50A(7) if the medical officer responsible for the care of the individual notifies the Department of Justice that he or she no longer requires treatment for a mental disorder.[167]

4.4 In the consultation paper, the Commission noted that there is no statutory obligation on the Department, or on the court once the individual has been remitted for trial to consider whether, for example, it is in the interests of justice to proceed with the trial. The Commission suggested that the current system may be too restrictive and asked consultees to consider this issue and provide their views.

4.5 There was a limited response to the question which was posed by the Commission in the consultation paper. Those consultees who responded commented that they saw merit in the approach suggested

[167] Formerly the Secretary of State – see 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).

by the Commission, but there did not appear to be particularly strong support for an amendment to be made to the current law.

4.6 Having considered the views of consultees and having reflected upon the issue, the Commission is content that no change to the current law is necessary. The roles of the Public Prosecution Service and the court, the Commission considers, are sufficiently developed to ensure adequate protection for the accused person who finds himself or herself remitted for trial. It is therefore not intended to make any recommendations in relation to this issue.

4.7 There is, however, one other issue which is pertinent to the question of remittal for trial. Currently, under Article 50A(7), the onus is on the medical practitioner who has responsibility for the care of the unfit accused person to initiate the process which results in remittal when the individual is no longer in need of medical treatment in hospital. The Commission considers that this process is undoubtedly necessary, but is a process which can be initiated by the individual necessary as well? The Commission has considered this question and concludes that, in the Commission's opinion, the answer is no. Individuals who are detained in hospital under the current Part III of the Mental Health (Northern Ireland) Order 1986 have access to the Mental Health Review Tribunal, which offers an opportunity to review the continuation of detention in hospital and the possibility of discharge, whether conditionally or absolutely. Any person who has been deemed to be unfit to plead and takes the view that they are no longer in need of medical assistance and wish to have their situation reviewed has access to the Mental Health Tribunal. The Commission considers that any further process which would initiate inquiry into the recovery of the individual is therefore superfluous: with the caveat, however, that communication streams between those with responsibility for the medical care of the individual and those within the criminal justice system have to be in place. Since these ends can be achieved without the need for legislative intervention, the Commission is satisfied that its

comments above will suffice and no formal recommendations are required to be made.

APPEALS

4.8 In the consultation paper, the Commission asked consultees 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.

4.9 Currently, 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 plead and also against a finding that he or she did the act or made the omission which is the subject of the charge.

4.10 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 in relation to a finding that the appellant is unfit to plead, then the appellant may be subject to a trial in relation to the offence alleged.[168]

4.11 Where an appeal is allowed against a finding that the appellant did the act or made the omission which is the subject of the charges, the remedial action available to the Court is limited. Section 13A(8) only permits the Court of Appeal to quash the finding, but there is no facility to allow the Court to order a re-hearing.

4.12 In the consultation paper, the Commission highlighted the case of *R v Norman*.[169] In this case, the Court of Appeal commented[170] that there were very limited circumstances in which a re-hearing could be ordered

[168] Section 13A(6) of the Criminal Appeal (Northern Ireland) Act 1980.
[169] [2008] EWCA Crim 1810.
[170] At paragraph 34(iv) of the judgment.

into the issue of whether the accused did the act or made the omission with which he or she was charged.[171] The Court of Appeal noted that this limitation in its powers was problematic and stated that it was a lacuna which Parliament could act to remedy.

4.13 The Commission asked consultees to consider whether such an amendment to the Criminal Appeal (Northern Ireland) Act 1980 would be beneficial.

4.14 The consultation response to this question was limited, with only two consultees specifically addressing the issue. However, these consultees were supportive of an amendment to the Criminal Appeal (Northern Ireland) Act 1980 to allow for a re-hearing of the issue of whether the accused did the act or made the omission with which he or she was charged.

4.15 Having considered the issue further and having taken into account the views expressed by the consultees who responded to the question, the Commission considers that this change in the law would be sensible and would offer both flexibility to the Court and valuable protection to accused persons.

RECOMMENDATION

4.16 **The Commission recommends that section 13A of the Criminal Appeal (Northern Ireland) Act 1980 should be amended to allow a re-hearing of the issue of whether an unfit accused person carried out the act or made the omission which is the subject of charges brought against him or her.**

[171] The limited circumstances in which a re-hearing could be permitted involved procedural irregularity. See, for example, *R v O'Donnell* [1996] 1 Cr App R 286 and *R v Hussein* [2005] EWCA Crim 3556.

JOINT TRIALS

4.17 In the consultation paper, the Commission explored issues raised when a trial involves more than one accused person, one of whom is an unfit defendant. Case-law in England and Wales[172] has determined that there need not be separate proceedings in relation to the fit and unfit defendants, if the proceedings could be fairly and justly conducted simultaneously, saving trauma to witnesses as they would not have to give their evidence more than once.[173]

4.18 In the consultation paper, the Commission noted that there may be an unwanted consequence in allowing the same jury to determine both the outcome of an Article 49A hearing and the guilt of a fit co-accused. Potentially, the unfit accused would be at a disadvantage, as he or she may not be in a position to refute any allegations made against him or her by the fit defendant. However, the Commission drew the attention of consultees to Article 12(3) of the Juries (Northern Ireland) Order 1996, which allows for a jury, which has been selected for one purpose, to try another issue with the consent of the parties involved in the other issue. The Commission asked consultees to consider whether the consent element of Article 12(3) was adequate to protect an unfit accused who has a fit co-accused, or whether separate provision is required to ensure that fit and unfit accused persons are dealt with separately.

4.19 The consultation response was very limited, with only one consultee expressing an opinion on the matter. However, this consultee wished to "strongly express" the view that fit and unfit defendants should be dealt with separately, as this course of action is in the interests of the parties to the proceedings. The consultee noted that if an unfit accused person was subject to a hospital order, proceedings could be drawn out for many months. This would be to the detriment of the fit party or parties,

[172] *R v B, W, S, H and W* [2008] EWCA 1997.
[173] See paragraph 27 of the judgment.

who would experience delay in the trial if the court had to wait for the recovery of the unfit accused in order for all the parties to be tried together. The Commission considers that this is a point which is well made. It is therefore necessary to examine the existing law in order to determine whether it is flexible enough to offer protection to the unfit accused, yet also provide safeguards for fit defendants to ensure that their trials are not delayed until an unfit person has recovered sufficiently to be able to be tried.

4.20 The Commission has considered the issue and reflected on the current statutory provision. It appears to the Commission that the current statutory regime does not prevent a jury from trying more than one issue, if the parties to the proceedings consent to that course of action. Therefore, the legislation potentially facilitates to a certain degree both the separation of the trial of a fit defendant and any proceedings in relation to an unfit accused person and a joint process. The Commission considers that the current position can be strengthened somewhat by allowing the jury to hear more than one issue in relation to fit and unfit defendants, with the consent of the parties, if the court considers, in all the circumstances of the case that it is in the interests of justice to do so. A provision such as this would require that the court considers all the circumstances of the case and makes a determination on all relevant factors, rather than just the consent of the parties to the case. This seems like a fairer outcome for both fit and unfit defendants who may be involved in a joint trial. A provision like this also may be fairer to witnesses and victims, as the court may also consider the needs of those who may be obliged to give evidence more than once, if the trial of the fit accused person and the trial of the facts of the unfit person were separated.

REMAND TO HOSPITALS FOR REPORTS

4.21 In the consultation paper,[174] the Commission asked consultees to consider the effect of Article 42 of the Mental Health (Northern Ireland) Order 1986. Article 42 relates to the ability of the Crown Court to remand the accused in custody in order to assess 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.[175] Although certain safeguards have been put in place for the protection of the accused,[176] the Commission suggested that these protections may be in need of review.

4.22 Since the work of the Law Commission on unfitness to plead feeds into the wider review of mental capacity, mental health and the criminal justice system which is being undertaken by the Department of Justice, the Commission and the Department of Justice have discussed the issue and have come to an agreement that this particular aspect of the law is best dealt with by the Department. The Department is reviewing all criminal justice court powers in relation to hospital detention and it seems best, in the interests of consistency and a comprehensive approach to policy development in this area, for the Department to take the lead for policy decisions in this particular area. The Commission has provided the Department with feedback in relation to the consultation response to this area, which was substantially in favour of reviewing the current provision made by Article 42. This feedback will be used by the Department to assist in the review of this criminal

[174] See paragraph 4.19 of the consultation paper.
[175] Article 42(2)(a).
[176] 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 and that it would be impracticable for the medical report to be made if the accused was remanded on bail (see Article 42(3)). There are also time limits put in place relating to the detention of the accused (see Article 42(7)) and the facility for the accused to request his or her own medical reports and make an application to the court to have the remand terminated (see Article 42(8)).

justice power. The Commission therefore does not intend to make any recommendations in relation to Article 42 of the Mental Health (Northern Ireland) Order 1986.

CHAPTER 5. OTHER ISSUES

SPECIAL MEASURES

5.1 In the consultation paper,[177] the Commission discussed the interface between the law relating to unfitness to plead and the use of "special measures" for vulnerable accused persons in criminal proceedings.

5.2 Special measures are a range of protections which are designed to assist certain witnesses when they are giving evidence in criminal proceedings. The Youth Justice and Criminal Evidence Act 1999, which is applicable in England and Wales, and its Northern Ireland equivalent, the Criminal Evidence (Northern Ireland) Order 1999 put in place a statutory scheme to protect certain witnesses. Particular characteristics which may make it more difficult for witnesses to give evidence have been identified in the legislation, such as mental illness, learning disability, age or physical disability. The legislation also recognises that people who face intimidation because of the evidence that they will give face particular difficulties in criminal proceedings. Various special measures have been prescribed to assist "vulnerable" witnesses: the removal of wigs and gowns; the use of screens, live television link, intermediaries and aids to communication; and the giving of evidence in private or by pre-recorded video are examples of the measures made available to certain witnesses by the Criminal Evidence (Northern Ireland) Order 1999.[178]

5.3 Although special measures were originally devised to offer protection to "vulnerable" witnesses, recent statutory provision has been made to recognise the needs of "vulnerable" accused persons. A new Article 21A has been substituted into the Criminal Evidence Order (Northern Ireland) 1999 by section 19 of the Justice Act (Northern Ireland) 2011. The new Article 21A makes provision for an accused person to give evidence by live television link if he or she has a physical disability or

[177] See consultation paper at paragraph 5.15 – 5.33.
[178] See Articles 11-18 of the Criminal Evidence (Northern Ireland) Order 1999.

disorder which compromises his or her ability to give oral evidence in court and that it is in the interests of justice for the accused person to give evidence by live television link. Provision is also made for accused persons who are under the age of eighteen. If such an accused person's ability to participate effectively in the proceedings as a witness is compromised by his or her level of intellectual ability or social functioning, and use of live television link would enable the accused to participate more effectively, then the court can direct that an accused under the age of eighteen can give evidence by live link. For accused persons over the age of eighteen, live link is also available. It must be demonstrated that the accused person suffers from a mental disorder[179] or has a significant impairment of intelligence and social functioning and, as a result, the accused is unable to effectively participate in the proceedings. The court can direct that live link can be used by the accused if its use would enable him or her to participate more effectively in the proceedings.

5.4 Section 12 of the Justice Act (Northern Ireland) 2011 makes further provision in respect of "vulnerable" accused persons. Section 12 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 such assistance is necessary to ensure that the accused has a fair trial. The definition of "intermediary" in this context is a person who has the function of communicating questions to the accused, relaying the accused's answers to the questioner and explaining those questions and answers so that they may be understood. In relation to 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 or her level of intellectual ability or social functioning. As regards accused persons who are over the age of

[179] Within the meaning of the Mental Health (Northern Ireland) Order 1986.

eighteen, Article 21BA(6) provides that the accused person is eligible for assistance from an intermediary if he or she suffers from a mental disorder within the meaning of the Mental Health (Northern Ireland) Order 1986 or otherwise has a significant impairment of intelligence or social functioning and is, as a result, unable to participate effectively in the proceedings.

5.5 In the consultation paper, the Commission examined whether any test of unfitness to plead should take account of the role that special measures can play in increasing an accused person's ability to effectively participate in criminal proceedings. The issue has received some judicial comment: in *R v Walls*,[180] Lord Justice Thomas made reference to the use of the court's inherent powers to allow intermediaries to assist the accused.[181] 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.[182]

5.6 The Commission noted that it is obvious that there will always be a group of individuals who are deemed to be unfit to plead, under the *Pritchard* test or any test which may replace it, regardless of the use of special measures, because of the severity of the degree of learning disability or mental illness which the accused person is living with. However, a question arises as to whether certain individuals who would be unfit to plead by virtue of the operation of the *Pritchard* test may "become" fit if special measures were made available to them.

[180] [2011] EWCA Crim 443.
[181] As set out in *R(C) v Sevenoaks Youth Court* [2009] EWHC 3088.
[182] At paragraph 37 of the judgment.

5.7 The Commission noted that the use of intermediaries, in particular, may be influential for this group of individuals, as the intermediary's role is to assist an accused person to understand questions and give understandable answers. However, it is important to note that the current definition of "intermediary" which is contained in the Criminal Evidence (Northern Ireland) Order 1999 envisages a narrow role for the intermediary. The intermediary merely assists the accused to understand questions that are put to him or her during the trial and to give understandable answers. The intermediary has no statutory responsibility to explain the trial process to the accused or to assist him or her make decisions about taking certain actions during the trial, for example, deciding whether to plead guilty or not.

5.8 If the current test in *Pritchard* is examined in light of the availability of the use of intermediaries for "vulnerable" accused persons, it is possible that the fitness of an individual could be affected by the use of special measures if that individual had failed to satisfy the *Pritchard* test criterion that requires that he or she must have the ability to give evidence on his or her own behalf. An intermediary could assist the accused person with this task, and in theory at least, someone who would have been deemed to be unfit could be viewed as fit to plead if this special measure was available to him or her. The Commission also considered that the same issue could arise if a test for unfitness to plead which is based on the mental capacity test in the Mental Capacity Act 2005 was adopted. In these circumstances, two aspects of the test could be affected by the use of this special measure: the ability of the accused to understand information and his or her ability to communicate decisions.

5.9 In the consultation paper, the Commission highlighted its concern about the appropriateness of using special measures in such a way that their use may operate to cause an "unfit" person to become "fit". Special measures were designed to protect the accused, increase his or her participation in the trial process and improve the quality of

evidence that he or she could give. Since such a protective function lies behind the rationale for the development of special measures, it seems counterintuitive to allow the use of special measures to influence whether a person is fit or unfit to plead. After all, a person who is fit to plead will be subject to the rigours of the criminal trial process and the disposals available to the court. A person who is unfit to plead may be better served by recognising that the characteristics which have led to a finding of unfitness may be suggestive of a care and treatment disposal, rather than exposure to disposals which are focused on sentencing and rehabilitation.

5.10 The Commission suggested in the consultation paper 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. The Commission sought the views of consultees on this issue and the responses received indicated that the majority of consultees were in agreement with the Commission's initial suggestion. Two consultees commented that the use of special measures could be viewed as being an adjustment which could help and support the accused person to make decisions which were pertinent to the trial and therefore facilitate full and effective participation in the trial process. It was clear that the other consultees who responded saw an inherent unfairness in using special measures when assessing unfitness to plead, if the use of those special measures meant that a person who would otherwise be unfit to plead was found, instead, to be fit to participate in criminal proceedings.

The Commission's view on the use of special measures

5.11 The Commission has carefully considered the views expressed by consultees. It is important to achieve a balance between encouraging the participation of individuals in the trial process and recognising that some individuals are unsuited to the rigours of criminal proceedings. After all, the underpinning rationale of the concept of "unfitness to

plead" is a recognition that there are some individuals, who, because of ill-health or disability should not be subject to the trial process. Although this recognition could be viewed as resulting in unequal treatment between those who are deemed to be unsuited to the trial process and those who are so suited, any disparity in approach can be strongly justified. The law must make adequate provision for individuals who cannot effectively participate in their trial, otherwise it will operate to involve individuals in proceedings which they are unable to understand or effectively participate. The Commission does not consider that this is an acceptable position. Nor does the Commission consider that there is any way of mitigating the risk to the accused person in these circumstances. The use of advocates, substitute decision makers or forms of representation may merely act to mask the difficulties faced by individuals who in fairness should not be involved in a criminal trial. The Commission does not consider that, for these individuals, effective participation in the trial process can be achieved and therefore their rights under Article 6 of the European Convention on Human Rights may be impinged if any attempt was made to involve them in a criminal trial process. The Commission, therefore, does not consider that the use of special measures and their effect upon the accused's ability to participate effectively in criminal proceedings should be a consideration which is taken into account when assessing the fitness to plead of an individual.

MAGISTRATES' COURTS

5.12 The current law in relation to "unfitness to plead" in Magistrates' Courts in Northern Ireland is different to the law which applies in the Crown Court. The Mental Health (Northern Ireland) Order 1986 contains a number of provisions which relate to the powers of the Magistrates' Courts in relation to individuals who may be experiencing mental ill-health or learning disability, whilst the Magistrates' Courts (Northern Ireland) Order 1981 contains provision for remanding an accused

person for the purposes of inquiries into his or her physical or mental health.[183]

5.13 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 a 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.

5.14 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.[184] 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 by the Regulation and Quality Improvement Authority for the purposes of Part II of the Mental Health (Northern Ireland) Order 1986,[185] 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.[186] 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 available in the case.[187]

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[183] See Article 51.
[184] Article 44(1) of the Mental Health (Northern Ireland) Order 1986.
[185] That is to say, the medical practitioner has been approved for the purposes of assessing an individual in order to determine whether a compulsory admittance to hospital is required.
[186] See Article 44(2)(a) of the Mental Health (Northern Ireland) Order 1986.
[187] See Article 44(2)(b) of the Mental Health (Northern Ireland) Order 1986.

5.15 A guardianship order can only be made by the 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 or her 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 court, that the most suitable disposal is a guardianship order.[188]

5.16 There appears to be no statutory mechanism for returning the accused to court if his or her mental state improves.[189]

5.17 In addition to Article 44, Article 42(1) of the Mental Health (Northern Ireland) Order 1986 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. The Commission has already expressed its view regarding the handling of policy development in relation to any reforms concerning Article 42,[190] so it is not intended to further explore this particular power of the Magistrates' court.

[188] See Article 44(3) of the Mental Health (Northern Ireland) Order 1986.
[189] TP Rogers, NJ Blackwood, F Farnham, GJ Pickup and MJ Watts, (see footnote 89) at page 579.
[190] See paragraph 4.21 above.

5.18 There have been a number of cases which have examined the statutory provisions outlined above, or the equivalent provisions which are in force in England and Wales. These cases are discussed in more detail in the consultation paper,[191] but it is useful to review the case law again for the purposes of this report. In *Singh v Stratford Magistrates Court*,[192] the meaning of section 37(3) of the Mental Health Act 1983 was examined. This provision is the equivalent of Article 44(4) of the Mental Health (Northern Ireland) Order 1986, the effect of which is discussed above.

5.19 In his judgment in *Singh*, 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 which gives the court power to remand the accused to hospital for reports on his or her mental condition in certain conditions[193]) should be read in conjunction with section 37(3) of the Mental Health Act 1983. If the provisions were read together, if there was a possibility that a hospital or guardianship order was being contemplated by the court, an adjournment for medical examination and reports could be allowed.[194] Furthermore, although Lord Justice Hughes considered that section 37(3) did not provide for a trial of the issue of unfitness to plead, section 37(3) was sufficiently flexible to allow consideration of the mental state of the accused. Lord Justice Hughes referred to the judgment in *R(P) v Barking Youth Court*[195] in which the Court of Appeal had held that a Magistrates' court ought not to have embarked on a trial of the issue of unfitness to plead, as the Crown Court is obliged to undertake under the provisions of the Criminal Procedure (Insanity) Act 1964. Instead, the factual question of whether the accused had done the act or made the omission with which he or she had been charged should have been determined. The

[191] See consultation paper at paragraphs 5.6 – 5.8.
[192] [2007] EWHC 1582 (Admin).
[193] See consultation paper at paragraph 5.5.
[194] See paragraph 11 of the judgment.
[195] [2002] 2 Cr App Rep 294.

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 the section 37(3) procedure was flexible, as it did not have to be preceded by a determination of the unfitness of the accused to plead, but could be based more broadly on the mental state of the accused, providing that the acts or omissions which constituted the offence which had been alleged against the accused were proved.[196] The approach taken in this judgment was endorsed in *Blouet v Bath & Wansdyke Magistrates Court*.[197]

5.20 In the consultation paper, the Commission asked consultees to consider whether a test for unfitness and associated procedures would be beneficial in the Magistrates' Courts. The Commission noted that the current statutory provision placed a focus, not on the unfitness of the accused to plead, but on the fact of ill health or impairment. The Commission suggested that an approach which is based on the abilities of the accused to participate and understand the trial process may offer more protection to the accused.

5.21 Four consultees who responded to the consultation paper provided comments on the Commission's suggestions. The issue was also raised in a number of face-to-face meetings with the Commission. Of the consultees who expressed a view, all but one held the opinion that there would be benefit in having a test for unfitness, together with a process similar to Article 49A of the Mental Health (Northern Ireland) Order 1986 extended to the Magistrates' Courts. One consultee commented that the criticisms of the current process in the Magistrates' Courts which were contained in the consultation paper[198] were "apparent to us in our practice".

[196] See paragraph 33 of the judgment.
[197] [2009] EWHC 759 (Admin). See also the decision of Conner RM in *DPP v McN* (April 2003).
[198] See consultation paper at paragraphs 5.9 to 5.12.

The case for extension of the unfitness to plead test to the Magistrates' Courts

5.22 It appears to the Commission, that there is a strong case for consistency of approach across the courts in the matter of unfitness to plead. We have discussed the issues with the key stakeholders and considered the comments made by consultees who responded to the consultation paper. The Commission, therefore, recommends that any test in relation to unfitness to plead and the corresponding procedures should be available in the Magistrates' Courts.

5.23 The Commission acknowledges that many offences which are tried in the Magistrates' Courts are less serious offences; however, it is still considered that there is benefit in having a clear, statutory scheme for addressing the issue of unfitness to plead in Magistrates' Courts. Having such a scheme will promote fairness to accused persons, who would be assessed according to their ability to participate effectively in the proceedings, rather than being subject to disposals based on their ill-health or learning disability. The Commission does not consider that the current system that is in place in the Magistrates' Court is the optimal approach for correctly identifying difficulties that an accused person may be having with participating effectively in the trial process. A statutory scheme, such as the one suggested, is also beneficial as it will also offer guidance and clarity to members of the judiciary, prosecutors, legal representatives and experts who have been asked to provide opinions in relation to the accused person's health or learning disability.

5.24 Of course, such a change in the law would have implications for practice in the Magistrates' Courts, as well as resourcing issues. Extending any unfitness to plead test and associated processes from the Crown Court to the Magistrates' Courts would necessitate an increased need for appropriate training for members of the judiciary and legal representatives who operate within the jurisdiction of the Magistrates' Courts. There is also the potential for additional resources

to take account of the time needed to hear any unfitness cases, however, the Commission anticipates that the numbers would be, in all likelihood, relatively small and manageable. After all, the numbers of unfit accused in the Crown Court are very small: if numbers of potentially unfit accused in the Magistrates' Courts were the same, or even twice or three times the number, the total would still be very modest. Of course, it is impossible to predict with any real accuracy how many unfitness cases would result from proceedings in the Magistrates' Court, but the Commission considers that it would be very surprising if the numbers were significantly large. It must also be acknowledged that, if an increased number of individuals are found to be unfit to plead in the Magistrates' Court, then they will, no doubt, be subject to disposals which require the making of hospital orders or other orders which have resource implications.[199] The Commission considers that the benefits of a clear and principled court process, together with improved fairness to the accused and raised awareness of mental ill-health and learning disability within the Magistrates' Courts are very important factors for the Department of Justice to consider when deciding whether or not to implement the Commission's recommendation in relation to this matter.

5.25 Having decided to recommend that any test of unfitness to plead and associated procedures should be available in the Magistrates' Courts, the Commission recognises that some modification is required to take account of the differences between the Crown court and Magistrates' court. The main difference, of course, is that juries are not a regular feature of Magistrates' Courts proceedings.

5.26 Since jurors are not a feature of proceedings in Magistrates' Courts, it is therefore necessary to revise the criteria within the test for unfitness to plead which the Commission is recommending.[200] Any test of

[199] Though, of course, it should be noted that disposals such as hospital orders and guardianship orders are currently available in the Magistrates' Court.
[200] See chapter 2 of this report.

unfitness to plead which the Commission is recommending should be applied in the Magistrates' Court will therefore differ from the one which is recommended for the Crown Court. The recommended test will omit the element which requires the accused person to have the ability to make decisions to challenge jurors.

5.27 The Commission also considers that any process in the Magistrates' Court that relates to the finding of unfitness to plead and the determination of whether the accused has carried out the act or made the omission which is the subject of the criminal proceedings must necessarily take account of the absence of a jury in Magistrates' Courts. With no jury, there cannot be a division of roles between the judge and jury and therefore, the District Judge will be required to make both the finding of unfitness and the determination in relation to whether the *actus reus* of the offence has been adequately demonstrated.

5.28 The Commission sees no difficulty with this dual role for the District Judge. The nature of Magistrates' Courts in Northern Ireland requires the District Judge to carry out the fact-finding functions which are undertaken by the jury in the Crown Court. It is not anticipated, therefore, that any difficulties would arise as a result of a duality of function for the District Judge.

RECOMMENDATION

5.29 **The Commission recommends that the proposed new test for unfitness to plead, together with processes similar to the ones contained in Articles 49 and 49A of the Mental Health (Northern Ireland) Order 1986, should be available in the Magistrates' Courts in Northern Ireland.**

EXPERT EVIDENCE AVAILABLE TO THE COURT FOR THE PURPOSES OF DETERMINATION OF UNFITNESS TO PLEAD

5.30 Currently, in Northern Ireland, Article 49(4A) of the Mental Health (Northern Ireland) Order 1986 provides that the court cannot make a determination in relation to the unfitness to plead of an accused person, except on the oral evidence of a medical practitioner who has been appointed by the Regulation and Quality Improvement Authority 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. The position in Northern Ireland is slightly different to the one which currently applies in England and Wales. In England and Wales, section 4(6) of the Criminal Procedure (Insanity) Act 1964 requires 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".

5.31 In the consultation paper, the Commission commented that in England and Wales, there has been criticism of the existing expert evidence that has been available to courts when a determination of unfitness to plead falls to be made. It has been suggested that legal criteria for assessing unfitness to plead have been applied inconsistently by different psychiatrists on different occasions,[201] that assessments are made by psychiatrists without consulting the legal team, and also that the nature of unfitness itself may lead to fluctuations in an accused's condition over time with the danger existing that the accused person may be feigning illness or malingering.[202]In the consultation paper, the Commission commented that it was unaware of any evidence which suggests that these difficulties may be occurring in Northern Ireland and no further evidence of any problems was indicated by consultees

[201] See DH Grubin, 'Unfit to Plead in England and Wales, 1976 – 1988: a survey' *British Journal of Psychiatry* 158, 540 – 548 and 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.
[202] TP Rodgers, 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.

who responded to the consultation paper. The size of the jurisdiction and relatively small number of experts who specialise in matters of this nature no doubt assists in avoiding problems which may be evident in other, larger, jurisdictions.

5.32 The Commission has examined a number of cases which are of relevance to the use of expert evidence in cases where unfitness to plead was an issue to be determined by the court. These cases were discussed in the consultation paper and it is helpful to review them in this report.

5.33 In *R v Walls*,[203] the timeliness of seeking expert advice was considered. In this case, the accused had been charged with two counts of sexual assault on a child and false imprisonment. The accused was found guilty of the offences and the court ordered pre-sentence reports to be prepared. The court was duly provided with 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 had struggled with independent living skills, such as cooking, cleaning and care. He had been given an IQ test which found him to have 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.

5.34 Subsequent to the conviction, Walls was assessed by a forensic psychiatrist who concluded that he was presently unfit to stand trial and was probably have been unfit at the time of the trial. On the basis of this evidence, Walls appealed his conviction.

[203] [2011] EWCA Crim 443.

5.35 Lord Justice Thomas, in considering the appeal, drew attention to the case of *R v Erskine*[204] in which Lord Judge had emphasised the importance of a timely assessment of unfitness to plead and the duty on the trial judge to ensure such timeliness:

> 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 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 the 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.[205]

5.36 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

[204] [2009] EWCA Crim 1425.
[205] At paragraph 22 of the judgment, quoting paragraph 89 of the judgment in *R v Erskine*.

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 accused person if it did not rigorously examine the evidence and reach its own conclusion.[206]

5.37 The Commission considers that *R v Walls* contains important messages: not only that it is important to seek timely expert advice in relation to an accused person's unfitness to plead, but also that it is imperative that legal representatives and the judiciary are mindful of the possibility that unfitness to plead may be an issue which is relevant to any accused person. Unfitness to plead is a matter which is not raised particularly often in criminal courts in Northern Ireland. Statistics which the Commission obtained and reported in the consultation paper[207] revealed that numbers of accused persons found to be unfit to plead in the Crown Court in Northern Ireland varied: for the years that statistics were made available to the Commission, the lowest reported number of unfitness determinations was 1 (in 2001) and the highest was 9 (in 2004). Despite these small numbers, the Commission considers that it is imperative that there is awareness of unfitness to plead within the legal fraternity and it is hoped that, as part of the wider work of the Department of Justice and the Department of Health, Social Security and Public Safety, issues arising as a result of mental ill-health and learning disability in the justice system will be the subject of both awareness raising and continuing education for professionals who operate within the justice system. It is important for key players in the justice system to enhance their existing knowledge and understanding of the particular difficulties faced by individuals who are living with mental ill-health and learning disability, in order for the system to respond appropriately to the needs of those individuals.

[206] At paragraph 38 of the judgment.
[207] See consultation paper at paragraph 1.12.

5.38 Another case which has relevance to the use of expert evidence in assessing unfitness to plead is *R v Ghulam*.[208] This case involved an appeal against a conviction for burglary. On the first day of the trial, a letter was produced to the court by the defence from a trainee psychiatrist. The letter stated that the accused would not be able to stand trial as the process would result in a deterioration of his physical and mental health. The trainee psychiatrist held the view that the accused suffered from an anxiety and depressive disorder which was complicated by a high level of misuse of alcohol.

5.39 The trial judge refused to postpone the trial, as he considered that the letter from the trainee psychiatrist did not indicate that the accused was unfit to plead, but rather that the stress of the trial would exacerbate existing health problems. The trial went ahead, but after the judge had begun his summing up to the jury, the defence made an application asking for the fitness of the accused to be determined. The defence produced another letter from the trainee psychiatrist which, this time, addressed the *Pritchard* test criteria and indicated that the trainee psychiatrist had concluded that, in his opinion, the accused was unfit to plead. The trial judge heard the application in relation to the fitness to plead of the accused, but refused to make a determination of unfitness. The accused was duly convicted of burglary and proceeded to appeal his conviction on the basis that when the application in relation to unfitness to plead was made, the judge should have discharged the jury and then directed that the issue of unfitness to plead should be examined.

5.40 The Court of Appeal stated that in the normal course of events, the issue of unfitness to plead should arise before or at the very beginning of 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

[208] [2009] EWCA Crim 2285.

unfitness when it was raised at the end of the trial.[209] 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 the meaning of section 6 as requiring that a determination of unfitness cannot be made unless the evidence of two or more medical experts is in accordance on the issue of whether the accused was unfit to plead, since the Court considered that it would be anomalous if the accused was found to be fit to plead where a consultant psychiatrist considered that he or she was fit, but a general practitioner considered that the accused was unfit to plead.[210] 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 for the purposes of the Mental Health Act 1983, the Court of Appeal considered that the trial 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 trainee psychiatrist.[211]

5.41 Therefore, the Court of Appeal 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 trainee psychiatrist. The trial judge's refusal to discharge the jury was a matter for his own discretion and accordingly, the appeal was dismissed.[212]

5.42 The decisions in *Ghulam* and *Walls* highlight three important principles: first, that it is desirable that the issue of unfitness is dealt with in a timely matter, but having said that, it must be dealt with as soon as the issue becomes apparent. Second, the statutory provisions in relation to the expert evidence which is to be made available to the court must be

[209] At paragraph 14 of the judgment.
[210] At paragraph 16 of the judgment.
[211] At paragraph 21 of the judgment.
[212] See paragraph 22 of the judgment.

satisfied. Finally, it is clear from both cases that the test of unfitness to plead is one for the court to apply and determine, based on the expert evidence of medical professionals. The Commission considers that these elements of the present test for unfitness to plead are sound, offer protection for the accused person and add much to the integrity of the court process. The Commission therefore does not intend its proposals for reform of the law on unfitness to plead to disturb these principles.

5.43 In the consultation paper, the Commission discussed the case of *R v McCullough*[213] which highlighted a potential difficulty with the interpretation of the drafting of Article 49(4) and (4A) of the Mental Health (Northern Ireland) Order 1986. In his judgment in *McCullough*, 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 medical evidence. The provision, as currently drafted, 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 oral evidence of a medical practitioner appointed for the purposes of Part II[214] by the Commission[215] and on the written or oral evidence of one other medical practitioner.

5.44 Smyth J considered that if the opinion of the second doctor mentioned in the statutory provision 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*[216] such evidence. He held the view that the

[213] [2011] NICC 42.
[214] Of the Mental Health (Northern Ireland) Order 1986.
[215] Formerly the Mental Health Commission, now the Regulatory and Quality Improvement Authority.
[216] See italics in the paragraph above.

evidence of the two doctors must be consistent with each other and must support the determination of unfitness.[217]

The Commission's view on a more flexible approach to the use of expert evidence

5.45 In the consultation paper, the Commission commented that it was open to interpretation whether it was the intent of the legislature to give Article 49(4A) the meaning which has been afforded to it in *R v McCullough*.[218] It is potentially problematic that the current statutory provision only allows for two medical opinions, both of which should be in agreement. There may well be situations in the future where the issue of unfitness is finely balanced and it may well be possible that the two expert witnesses may have reached different conclusions having assessed the accused person. In a situation like this, the court may analyse the evidence before it and draw its own conclusions on the accused person's fitness (see *Ghulam* and *Walls*) but it may be prudent to address what the Commission sees as a deficiency in the legislation. In the consultation paper, the Commission suggested that the approach in England and Wales is adopted, which requires that the evidence of two or more experts is required, at least one of whom is duly approved.

5.46 Only three consultees specifically commented on the Commission's suggestion. All supported the adoption of the wording used in England and Wales, no doubt recognising that the approach offers the court more flexibility.

RECOMMENDATION

5.47 **The Commission therefore recommends, in order to provide flexibility to the court and to avoid the difficulties that may arise**

[217] At paragraph 17 of the judgment.
[218] See paragraph 5.51 of the consultation paper.

as a result of the interpretation of Article 49(4A) in *R v McCullough*, that evidence is sought from two or more experts in order to allow the court to make a determination in relation to the unfitness of the accused.

Expert opinion from professionals other than within the medical profession

5.48 In the consultation paper, the Commission also asked consultees to offer their views on whether it should be possible for the court to consider the expert opinion of professionals other than those within the medical profession when determining the issue of whether an accused person is unfit to plead.

5.49 The Commission suggested that an argument for taking such an approach was that it may be helpful to extend the current statutory provision to allow the court to hear evidence, not only from the medical experts already identified in statute, but also from other professionals who may have expertise which is relevant to assisting the court to make an assessment of the unfitness to plead of the accused person. The Commission suggested that there may be merit in allowing clinical psychologists, educational psychologists and social workers, for example, to provide expert opinions, as members of these professions may have knowledge of the accused over a period of time and may have valuable insights into the question of fitness.

5.50 The Commission advanced an argument against allowing the expansion of the existing legislative provisions in relation to expert evidence. This argument contended that, since there is a possibility that a finding of unfitness could lead to an accused person being subject to a disposal which results in the loss of liberty, then 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.[219]

5.51 The Commission considered that there were two distinct phases to be undergone in which expert evidence plays a crucial role during the process of determining unfitness to plead. First, the determination of whether an individual is unfit to plead requires the court to consider the evidence of experts in order to reach a conclusion on the fitness or unfitness of the accused person. Second, the court must also consider the views of experts when making a disposal. In the consultation paper, the Commission suggested that experts other than those currently prescribed in the relevant provisions of the Mental Health (Northern Ireland) Order could assist the court in its determination of the question of whether the accused person was unfit to plead. However, the Commission did not consider that it was appropriate that the views of experts other than medical experts were taken into account when the court was considering disposals in relation to the accused person. The consultation paper asked consultees to provide the Commission with their views on the suggested changes to the current legislative provision for expert evidence.

5.52 Over half of the consultees who responded to the consultation paper provided the Commission with their view in relation to the issue of extending the current legislative provision for expert evidence. All the consultees were in favour of such an approach. The majority of the consultees specifically commented that such an extension should be "in addition to" or "to assist and supplement" the requirement of evidence from two or more medical professionals, one of whom is to be duly appointed.[220] One consultee commented that it is "essential that the court be allowed to consider expert evidence that is pertinent to the case, regardless of professional background". This consultee, however,

[219] See *Winterwerp v Netherlands* App No. 6301/73 and *Varbanov v Bulgaria* App No. 31365/96.
[220] See paragraph 5.30 above for explanation of "duly appointed".

cautioned that such an approach "does carry an onus of the court to establish the expertise of those presenting any such evidence". Another consultee commented that "other supporting evidence from suitably qualified practitioners to help get a fuller picture of a defendant's mental state at the relevant time" would be helpful to the court. Another consultee suggested that "individuals who know the person well" could assist the court to determine whether the accused person could participate in the trial. One consultee suggested that, as a supplement to existing requirements for medical evidence, a number of other professionals could provide the court with expert evidence, including psychologists, nurses, occupational therapists, social workers and members of the allied health professions, such as speech and language therapists, physiotherapists, art therapists and dieticians.

RECOMMENDATION

5.53 Having reflected on the issue and considered the views expressed by consultees, **the Commission recommends that the court should be able to take account of evidence from experts other than medical professionals when determining whether an accused person is unfit to plead. However, the Commission considers that such evidence should be in addition to the evidence of medical professionals and should be sought only if it is appropriate to do so in the circumstances of the case.** For example, the accused person may have had a long history of an interface with social services or clinical or educational psychologists. The Commission would intend that any widening of the scope of the legislation in this way would allow the court to gain a fuller perspective on the question of the unfitness of the individual who is the subject of the proceedings. It is not intended as a measure to allow a confusing amount of possibly contradictory evidence to be brought before the court. By retaining a requirement that the core evidence which the court must consider must be from medical professionals, but facilitating the procurement of evidence from other professionals in appropriate circumstances, the Commission

suggests that the best outcome may be achieved for any accused person whose unfitness to plead is an issue for the court to determine.

5.54 The Commission is mindful that a number of consultees commented that it is important for the court to ensure that the expert is suitably qualified. There are a number of issues here: first, that the expert in question is a member of a professional representative body; second, that the person has the requisite level of experience and expertise; and third, that the expert's evidence is actually of relevance to the court when it is tasked with determining the issue of whether the accused is unfit to plead or not. The Commission does not consider that any overly prescriptive legislative intervention is necessary in this regard: the court is well placed to ascertain the credentials of the expert in question, though it may be useful for the legislation to require that the expert is suitably qualified to make an assessment of the accused's fitness to plead.

CHAPTER 6. REGULATORY IMPACT ASSESSMENT

1. Title of Proposal

Reforms in relation to the unfitness of an accused person to plead in criminal proceedings in Northern Ireland.

2. Purpose and intended effect of measure

Objectives:

To present recommendations to government regarding amendments to the law relating to unfitness to plead in the Crown Court and Magistrates' Courts in Northern Ireland.

The background:

This policy is one of the projects contained within the Northern Ireland Law Commission's Second Programme of law reform (2012 – 2015). The Project was adopted as a result of a referral made to the Commission by the Department of Justice. The terms of the reference were as follows:

- to review the current law in the Crown Court and Magistrates' 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 Jersey or Scotland 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 accused person has carried out the act or made the omission with which he or she has been charged.

Risk assessment:

Current statistics which have been obtained from the Northern Ireland Courts and Tribunals Service show that fewer than ten people per year are found to be unfit to plead in the Crown Court in Northern Ireland. Unfortunately, statistics in relation to the numbers of people who invoke the protections available in the Magistrates' Courts by virtue of the provisions of the Mental Health (Northern Ireland) Order 1986 are unavailable. The reforms recommended by the Commission are modest: it is not envisaged that a change to the current *Pritchard* test within the Crown Court jurisdiction will

result in any real increase in numbers of individuals who are found to be unfit to plead. In relation to the recommendation to apply a new test for unfitness to plead in the Magistrates' Courts, it is possible that more people will be found to be unfit to plead than currently avail of the protections offered by the current law. However, it is not envisaged that these numbers will be particularly large or unmanageable.

3. Options

Option 1: Do nothing

The Commission considers that retaining the *Pritchard* test as it currently stands is not the preferred option. The collective evidence suggests that it would be beneficial to modify the existing law, albeit in a modest way. The Commission does not consider that there is value in retaining the current law which applies in the Magistrates' Courts. The present law appears to the Commission to be unsatisfactory. However, the Commission considers that the current law in relation to Article 49A hearings should remain unaltered.

Option 2: Modify the current statutory framework concerning unfitness to plead

The Commission considers that modifying the current operation of the *Pritchard* criteria and introducing a test more analogous to one based on mental capacity, is the preferred option. In addition, the Commission considers that its recommendations in relation to a new unfitness to plead test should be extended to the Magistrates' Courts. Additionally, the Commission considers that there should be a relaxation of the restrictions in relation to the types of medical evidence that is currently sought to assist with any determination of unfitness, allowing for a greater range of experts to provide opinions to enable the court to determine whether an accused person is unfit to plead.

4. Benefits

Option 2:

The creation of a new test for unfitness to plead which is based on the mental capacity test that is contained in the Mental Capacity Act 2005 may be beneficial in the following ways. Such a test may assist those who are tasked with providing professional assessments for the purposes of determining unfitness to plead; the court in its role in determining the fitness of an accused person to plead; and provide some clarity to accused persons, their representatives and advisers. The Commission considers that such a reform may also offer the beneficial side-effect of raising awareness of the important issues surrounding unfitness to plead amongst those who play key roles in the criminal justice system.

Business sectors affected

This measure has no impact on business sectors in Northern Ireland.

Other Impact Assessments

An equality impact screening exercise and an equality impact assessment has been carried out in relation to this policy. Details can be obtained on the Commission's website: www.nilawcommission.gov.uk.

5. Costs

(i) Compliance costs

Where costs are concerned, the Commission is not best placed to assess the cost of implementing its proposals. However, the Commission is able to identify the areas where some costs may be incurred. A modification to the *Pritchard* test is unlikely to result in an increase in the number of persons being deemed as unfit to plead in the Crown Court. However, the extension of a new test of unfitness to plead to the Magistrates' Court, together with the extension of an Article 49A hearing process may increase the numbers of individuals in the Magistrates' Courts who seek to avail of the protections offered by the proposed new law as compared with those who seek the protection of the current law. There will therefore potentially be an increase in the court time required to deal with these individuals. A change in the law in the Magistrates' Courts may have the effect of seeing more people transferred from the criminal justice system to health-care system. There may also be costs incurred in providing training and guidance in relation to any new law to legal professionals, the judiciary and medical and non-medical experts. If supporters are appointed by the court to assist unfit accused persons during an Article 49A hearing process, there is the possibility that there will be a cost impact from the adoption of this recommendation.

(ii) Other costs

It is not anticipated that there would be any other costs associated with this measure.

(iii) Costs for a typical business

It is not envisioned that this policy will have any effect on businesses in Northern Ireland.

6. Consultation with small business: the Small Business Impact Test

There is no impact on small business, however, representative groups were included in the consultation exercise.

7. Enforcement and sanctions

This measure offers protections to certain individuals within the criminal justice system. Since it is a facilitative measure, no enforcement powers or sanctions are required.

8. Monitoring and Review

If the recommendations made by the Commission are accepted by government and duly implemented, it will be the duty of the relevant Department to monitor and review any final policy.

9. Consultation

(i) Within Government

The consultation paper was widely circulated to government departments, MLAs, Northern Ireland Assembly Committees and local authorities.

(ii) Public consultation

The consultation paper was widely circulated to an extensive range of consultees by hard copy or email. The consultation period ran from 16th July until 19th October 2012. The consultation paper was also placed on the Commission website. Throughout the course of the project the Commission arranged consultation meetings with various stakeholders and interested parties.

10. Summary and recommendation

The Commission has concluded that an amendment to the current test for unfitness to plead based on a mental capacity approach is the preferred approach. The Commission also considers that this test should be extended to the Magistrates' Courts in Northern Ireland. Additionally, the Commission considers that amendments to the law which allow a greater range of experts to provide opinions to the court in relation to the unfitness of an accused person to plead are desirable. Although there will undoubtedly be costs attached to these recommendations, the Commission is of the view that the benefits to the criminal justice system and the protection of vulnerable individuals within that system outweigh any financial costs.

11. Contact point

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LIST OF CONSULTEES AND STAKEHOLDERS

LIST OF CONSULTEES WHO PROVIDED RESPONSES TO THE CONSULTATION PAPER

Children's Law Centre

College of Occupational Therapists

Disability Action

Mencap

Niamh

Probation Board for Northern Ireland

Public Prosecution Service for Northern Ireland

Royal College of Psychiatrists in Northern Ireland

South Eastern Health and Social Care Trust

Mr Barry Valentine BL

MEETINGS WITH STAKEHOLDERS

Criminal Bar Association

Mencap

Northern Ireland Courts and Tribunals Service

Public Prosecution Service for Northern Ireland

Royal College of Psychiatrists in Northern Ireland

MEMBERSHIP OF THE MENTAL CAPACITY AND THE CRIMINAL JUSTICE SYSTEM REFERENCE GROUP

Department of Justice officials

Department of Health, Social Services and Public Safety officials

Northern Ireland Law Commission

Northern Ireland Prison Service

Police Service of Northern Ireland

General Council of the Bar of Northern Ireland

Law Society of Northern Ireland

Royal College of Psychiatrists in Northern Ireland

Belfast Health and Social Care Trust

Western Health and Social Care Trust

South Eastern Health and Social Care Trust

Regulation and Quality Improvement Authority

Victim Support Northern Ireland

Northern Ireland Human Rights Commission

VOYPIC

NIACRO

EXTERN

Niamh

Praxis Care

Mencap

Disability Action

Law Centre (NI)

British Association of Social Workers

Children's Law Centre

MindWise

NSPCC

MENTAL CAPACITY LEGISLATION AND THE CRIMINAL JUSTICE SYSTEM PROJECT STEERING GROUP

Department of Justice officials

Department of Health, Social Services and Public Safety officials

Northern Ireland Law Commission

Southern Health and Social Care Trust

South Eastern Health and Social Care Trust

Probation Board for Northern Ireland

Police Service of Northern Ireland

Public Prosecution Service for Northern Ireland

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