

Northern Ireland Law Commission

Report on Equality Impact Assessment

Unfitness to Plead

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1. INTRODUCTION

1.1 Section 75 of the Northern Ireland Act 1998 requires public authorities, in this instance the Northern Ireland Law Commission (“the Commission”), in carrying out its functions relating to Northern Ireland, to have due regard to the need to promote equality of opportunity between the following nine section 75 groups:

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

1.2 In addition, the Commission is also committed to the promotion of good relations between persons of different religious belief, political opinion or racial group.

1.3 The Commission’s Equality Scheme sets out how the Commission continues to fulfil its obligations under section 75 of the Northern Ireland Act 1998. Part of that obligation is to publish reports on any Equality Impact Assessments carried out by the Commission.

1.4 This report relates to the Equality Impact Assessment on proposed reforms of the law relating to unfitness to plead. A consultation on the proposed reforms, together with the Equality Impact Assessment, was carried out by the Commission during the period from 16th July 2012 until 19th October 2012. The consultation paper, *Unfitness to Plead*, was widely circulated to groups and individuals representative of the interests of section 75 groupings, including those included in the *Guidance on the Distribution of Departmental Publications and Consultation Documents* which is published by the Office of the First and Deputy First Ministers. Alongside specific questions relating to the reform of the law and practice relating to unfitness to plead, the

consultation paper included an initial screening exercise and invited the views of consultees on the preliminary conclusions reached. Consultees are also invited to draw the Commission's attention to any data which may be relevant to any screening. Consultees are also encouraged to provide views in relation to the discussions advanced and the conclusions reached an accompanying EQIA consultation.

- 1.5 The Commission also met with a number of interested parties before, during and after the consultation period. The Commission was also a member of two Steering Groups which had been set up by the Department of Justice as part of its work to determine the implications of the proposed introduction of new mental health and mental capacity legislation by the Department of Health, Social Services and Public Safety. The purpose of these Steering groups was to facilitate stakeholder engagement and the participants in these groups were representative of a significant number of statutory and voluntary sector organisations which have a particular interest in mental health, mental capacity and criminal justice issues. A full list of the participants of these groups, together with a list of respondents to the Commission's consultation can be found in the Commission's Report *Unfitness to Plead*, which is available on the Commission's website www.nilawcommission.gov.uk. Alternatively, the Report can be provided in hard copy. Requests should be sent to:

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- 1.6 This report purports to provide an evaluation of the comments received by consultees in relation to the Equality Impact Assessment. The report also contains the Commission's views on the proposed policy, in the

light of the comments received by consultees. **This document may be made available in an alternative format or language. Please contact the Commission to discuss how a copy of this report that meets your needs may be provided.**

- 1.7 The Commission would like to take the opportunity to thank the consultees who specifically provided responses to the Equality Impact Assessment.

2. BACKGROUND

2.1 As part of the Commission's Second Programme of Law Reform, the Department of Justice made a reference to the Commission which requested that the Commission considered the law relating to the unfitness of an accused person to plead in criminal proceedings in Northern Ireland. The Commission duly accepted the reference. The issues to be addressed by the Commission may be summarised as follows:

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

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

Aims of the policy

2.2 The main objective of the project is for the Commission to make recommendations which aim to:

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

Data relied on for Screening and EQIA

2.3 The Commission considered the sources of data listed in Appendix 4 of the Equality Commission *Practical Guidance on Equality Impact Assessment* (2005). Data was also supplied to the Commission as a result of the consultation exercise conducted on the Equality Impact Assessment. In addition, the Commission also considered material produced by the following agencies with a view to obtaining relevant statistical information on unfitness to plead that facilitated consideration of the potential equality impact of the unfitness to plead proposals:

Northern Ireland Prison Service;
Police Service of Northern Ireland;
Northern Ireland Statistics and Research Agency;
Northern Ireland Courts and Tribunals Service;

Northern Ireland Assembly Research and Library Service;
Department of Justice; and
Department of Health, Social Services and Public Safety.

- 2.4 There is very limited statistical information available in respect of unfitness to plead in criminal proceedings in Northern Ireland. Very few cases involving defendants who are deemed to be unfit to plead occur each year in Northern Ireland. For example, statistics obtained from the Northern Ireland Courts and Tribunals Service (see Equality Screening Exercise which is contained in the consultation paper *Unfitness to Plead*) reveal that in 2010, 9 people were deemed to be unfit to plead, in 2009, 4 cases involving 2 people who were deemed to be unfit to plead occurred and in 2008, 2 people were deemed to be unfit to plead.
- 2.5 The issues raised by unfitness to plead in criminal proceedings are not issues which have attracted a great deal of attention amongst Government departments, the criminal justice system as a whole, statistical agencies or voluntary sector groups. In addition, in this area, the gathering of qualitative data is difficult, perhaps for a number of reasons. These reasons may include inaccessibility to patients in hospital who may have been deemed unfit to plead and the risks involved in disrupting the healthcare treatment of individuals who have been found to be unfit to plead whilst information is sought. In addition, there is no specific representative group for individuals who have been found to be unfit to plead during criminal proceedings, although other groups may represent these individuals as part of their wider remit.
- 2.6 In the absence of more specific qualitative data relating to this policy, the Commission draws upon general population, criminal justice and mental health statistics and publications of relevance to many of the section 75 groupings. Where appropriate and where specific Northern Ireland statistics are unavailable, the Commission has considered relevant research conducted in other jurisdictions, namely the United Kingdom and Republic of Ireland. The following sources have therefore

specifically been of utility to the Commission in carrying out its duties under section 75 of the Northern Ireland Act 1998:

- Census 2001 (www.nisranew.nisra.gov.uk);
- *Population Estimates for the UK, England and Wales, Scotland and Northern Ireland – Mid 2010* (21st December 2011) (www.statistics.gov.uk);
- *Average Percentages of Prisoners by Religion (Jan – June 2011)* Equality and Diversity Reports, Northern Ireland Prison Service;
- *The Review of Northern Ireland Prison Service*, Prison Review Team, Final Report, October 2011 (www.dojni.gov.uk);
- *Bamford Review of Mental Health and Learning Disability: Forensic Services Working Committee Consultation Report* (2008);
- *Northern Ireland Courts and Tribunals Service Customer Exit Survey* (2009) (www.courtsni.gov.uk);
- *The Probation Board for Northern Ireland Restorative Practice Policy: Equality Screening 2011* (www.pbni.org.uk);
- *The Northern Ireland Prison Population in 2009*, Research and Statistical Bulletin 2/2010 (www.dojni.gov.uk);
- *Digest of Information on the Northern Ireland Criminal Justice System* (2012) (www.dojni.gov.uk);
- *Review of the Youth Justice System in Northern Ireland* (September 2011) (www.dojni.gov.uk);
- *The Youth Justice Agency Provisional Workload Statistics* (April - September 2011 Statistical Bulletin 5/2011);
- *Northern Ireland Appropriate Adult Scheme Annual Report 2010-2011*;
- *Demographic information regarding initial admissions to the Juvenile Justice Centre* Youth Justice Agency (2009);
- *Northern Ireland Appropriate Adult Scheme Annual Report 2010-2011* Mindwise (www.mindwisenv.org);
- *The Bradley Review*, April 2009;
- *Statistics of Mentally Disordered Offenders 2007 England and Wales* Ministry of Justice (5 February 2009) (www.moj.gov.uk);

- *Not a Marginal Issue: Mental Health and the criminal justice system in Northern Ireland* Criminal Justice Inspection Northern Ireland (March 2010);
- *No One Knows, Identifying and supporting prisoners with learning difficulties and learning disabilities: the views of prison staff in Northern Ireland* Prison Reform Trust (Loucks and Talbot) (2007);
- *Prisoners and Mental Health* Northern Ireland Assembly Research Paper (9th March 2011) (www.niassembly.gov.uk);
- *Hansard* (www.niassembly.gov.uk/Assembly-Business/Official-Report/);
- *Reducing Re-offending by Ex-prisoners*, Social Exclusion Unit, Office of the Deputy Prime Minister (July 2002);
- *People with a learning disability who offend: forgiven but forgotten?* The Irish College of Psychiatrists/Coláiste Síciatraithe na hÉireann (2007);
- *Northern Ireland Hospital Statistics: Mental Health and Learning Disability (2010/11)* (www.dhsspsni.gov.uk).

Approach adopted to assessment of impacts

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

- Does the quantitative data reveal any differential impact on any of the groups?

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

2.8 Having considered the impact of the policy on each of the section 75 categories and having taken into account the views expressed by consultees in response to the consultation on the Equality Impact Assessment (see www.nilawcommission.gov.uk for a copy of the consultation paper), the Commission has concluded that there are two section 75 groups that are affected by the policy, that is to say, the categories of disability and age. Quantitative data gathered for the purposes of the Equality Screening exercise contained in the Commission's Consultation Paper *Unfitness to Plead* (see www.nilawcommission.gov.uk) indicates that there is evidence that people who are living with a disability or disabilities may have particular needs, experiences and priorities in relation to the policy. Likewise, there is evidence that people of differing ages may have particular needs, experiences and priorities in relation to the policy.

2.9 This report will consider the responses received by the Commission as a result of the consultation exercise carried out on the Equality Impact Assessment. The report will also discuss the evidence gathered by and provided to the Commission and will discuss the impact of the policy on these groups.

3. REPORT ON CONSULTATION AND THE COMMISSION'S CONCLUSIONS

Mental ill-health and learning disability and unfitness to plead

- 3.1 In the equality screening exercise and the Equality Impact Assessment, the Commission identified that people of differing ages may be impacted by the proposed policy on unfitness to plead. Young adults are disproportionately represented in the criminal justice system and age is an issue which may affect whether an individual is fit or unfit to plead in criminal proceedings. The Commission concluded that it was reasonable to conclude that people of differing ages may have different needs, experiences and priorities in relation to the proposed policy.
- 3.2 The Commission has carefully considered the available evidence, together with the views expressed by consultees during the consultation exercise on the Equality Impact Assessment on Unfitness to Plead. The evidence considered by the Commission can be summarised as follows.
- 3.3 The 2001 Census (www.nisranew.nisra.gov.uk) indicates that 20% of the Northern Ireland population and 17% of persons of working age (16-64) had a limiting long-term illness.
- 3.4 The Northern Ireland Courts and Tribunals Service Customer Exit Survey 2009 asked respondents whether they considered themselves as having a disability as defined under the Disability Discrimination Act 1995. The results are outlined in the table below, however, these figures include legal representatives, prosecutors, police personnel, victims and witnesses, as well as defendants:

	Frequency	Percent
Yes	175	7.8
No	2043	91.3
Refusal/missing	19	0.8
Total	2237	100.0

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

Legal category	Unfit to plead	All legal categories
Mental Illness	56	2639
Mental Illness with other disorders	4	306
Psychopathic disorders		493
Mental impairment	9	219
Mental impairment with psychopathic disorders	1	40
Severe mental impairment	4	13
Not known	170	196
All mental disorders	244	3906

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

- 16% of people placed in custody meet one or more of the assessment criteria for mental disorder (Criminal Justice Inspectorate *Not a marginal Issue: Mental health and the criminal justice system in Northern Ireland*, March 2012);

- 64% of sentenced male prisoners and 50% of female prisoners are personality disordered. 78% of male prisoners on remand are personality disordered. This is estimated to be 3 or 4 times greater than the general population (Criminal Justice Inspection Northern Ireland *Not a Marginal Issue* (2010) at page 7);
- 64% of male and 50% of female sentenced prisoners have a personality disorder; 12 and 14 times the level within the general population. Also 7% of male and 14% of female sentenced prisoners have a psychotic disorder, 14 and 23 times the level within the general population respectively (*Reducing Re-offending by Ex-prisoners, Report by the Social Exclusion Unit, Office of the Deputy Prime Minister, July 2002*);
- 95% of young prisoners aged 15 to 21 suffer from a mental disorder. Eighty percent suffer from at least two mental health problems. Nearly 10% of female sentenced young offenders reported already having been admitted to a mental hospital at some point (*Report by the Social Exclusion Unit, Office of the Deputy Prime Minister, July 2002*);
- 20-30% of all offenders have learning disabilities or difficulties that interfere with their ability to cope with the criminal justice system (N Loucks with J Talbot *No One Knows Identifying and supporting prisoners with learning disabilities: the views of prison staff in Northern Ireland* (2007);
- In the UK, 70% of sentenced prisoners have four or five major mental health disorders (Northern Ireland Assembly, *Research and Library Service Paper - Prisoners and Mental Health, Paper 46/11* (9 March 2010). Also *Bromley Briefings Prison Fact-file* December 2010, Prison Reform Trust);
- Research commissioned by the Youth Justice Board in 2006 found that 19% of 13 to 18 year olds in custody had depression, 11% suffered from anxiety, 11% had post-traumatic stress disorder and 5% displayed psychotic symptoms (Chitsabean et al, *Mental Health needs of young offenders in custody and in the community* (2006) Vol. 188 British Journal of Psychiatry 534-540;

- The Prison Reform Trust states that research suggests that the prevalence of mental ill-health for young people in contact with the criminal justice system range from 25% to 81%, being highest for those in custody (*Bromley Briefings Prison Factfile* (December 2010)).

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

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

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

3.8 The Prison Reform Trust undertook a study in 2006 which examined the issues affecting prisoners living with learning difficulties and learning disabilities in Northern Ireland. (*Prison Reform Trust, No One Knows, Identifying and supporting prisoners with learning difficulties and learning disabilities: the views of prison staff in Northern Ireland.*) The study stated that published research on prevalence of learning disabilities amongst prisoners in Northern Ireland is very limited, and referred to research in the Republic of Ireland (*Murphy et al. 2000*) that indicated that 29% of prisoners have an IQ of less than 70, (which is

generally considered the UK and international definition of a learning disability, see pages 1 and 3.) The Prison Reform Trust also identified recent research in England and Wales that indicated the following:

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

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

	Prisoners	General Population
Schizophrenia and delusional disorder	8%	0.5%
Personality disorder	66%	5.3%
Neurotic disorder (e.g. depression)	45%	13.8%
Drug dependency	45%	5.2%
Alcohol dependency	30%	11.5%

(Source: Singleton N et al, 1998, “Psychiatric morbidity among prisoners in England and Wales” Singleton N et al, 2001, “Psychiatric morbidity among adults living in private households, 2000: Technical report”, as cited in the Bradley Report.)

3.10 The Mindwise Northern Ireland Appropriate Adult Scheme Annual Report (2010-2011) (www.mindwisenv.org) reported that in terms of those persons requiring an appropriate adult, 55% were mentally vulnerable. *The Evaluation of the Northern Ireland Appropriate Adult*

Scheme, Mindwise, by University of Ulster and the University of San Diego, found that during 2009/10, Appropriate Adults attended 1382 cases in 23 PSNI stations. Approximately 40% of cases involved mentally vulnerable adults (at page 3).

- 3.11 The Irish College of Psychiatrists/Coláiste Síciatraithe na hÉireann, in their 2007 report *People with a learning disability who offend: forgiven but forgotten?* stated that out of 373 patients identified, the most frequently represented group was males in severe range of learning disability, aged between 25 and 54 years (31%). The second most frequently represented group was males in the moderate range of learning disability, aged between 25 and 54 years (23%) (at page 19).
- 3.12 Hospital statistics in relation to Northern Ireland published by the Department of Health, Social Service and Public Safety, relating to Feb 2011, state that the highest proportion (45.4%) of all learning disability inpatients were aged 45 – 64. A further 41.7% were aged 19 – 44, 8.3% were 65 & over and 4.6% were under 18. (*Age Group - Northern Ireland Hospital Statistics: Mental Health & Learning Disability (2010/11)* at page 18).
- 3.13 In relation to the age of those detained and the length of time for which they were detained, the tables below show the difference between those persons living with learning disability and those living with mental health issues.
- 3.14 The following table provides statistics on inpatients living with learning disability resident at 17 February 2011, including patients on home leave. (*Northern Ireland Hospital Statistics: Mental Health & Learning Disability (2010/11)*):

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

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

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

3.16 In the consultation on the Equality Impact Assessment, the Commission identified two potential issues relating to unfitness to plead that would potentially affect persons living with a disability: a test for determining unfitness to plead which is based on a mental capacity approach and the effect of the Article 49A hearing.

A test based on a Mental Capacity approach

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

3.18 Following the consultation and having taken into account the views of consultees, the Commission is recommending that the *Pritchard* test should be modified to include an assessment of an individual's ability to make certain decisions in relation to his or her trial, based on the test which is contained in the Mental Capacity Act 2005. The Commission considers that a test of this nature is beneficial since enhancement of the *Pritchard* test to take account of a mental capacity test may promote equality of opportunity for individuals, as it looks beyond

intellectual ability as it also considers a person's capacity to make certain decisions in relation to their trial. Therefore, in order to be deemed fit to plead, an accused person would have to be shown to be able to understand the information relevant to certain decisions, to retain that information, to use or weigh that information as part of the decision-making process and to communicate his or her decision.

3.19 Consultees who expressed a view were broadly supportive of modifying the *Pritchard* test so that any test for assessing unfitness to plead is based on a mental capacity approach. However, one consultee stated that individuals who are living with a disability should be able to have equal access to justice and the legal process as those who are not living with a disability.

3.20 The Commission recognises that the law relating to unfitness to plead creates differential treatment for those who are fit to plead, and those who are unfit to plead because they are living with a disability. However, the Commission does not consider that this differential is adverse or unjustified. The law relating to unfitness to plead contributes to ensuring that obligations imposed by Article 6 of the European Convention on Human Rights in respect of an individual's right to a fair trial are met. For example, in *Stanford v United Kingdom* (App No 16757/90) it was clearly stated that Article 6 of the Convention guarantees the right of an accused person to participate effectively in his or her criminal trial. The requirement for ensuring that an individual can effectively participate in his or her trial is explored further in *T v United Kingdom* (App No 24724/94) and *V v United Kingdom* (App No 24888/94). Any reforms that the Commission recommends in this area of law must take account of the obligations imposed by the European Convention on Human Rights and must be compliant with the convention. It is therefore suggested that any differential impact flowing from the adoption of this policy is not adverse nor is it discriminatory: indeed it assists in ensuring that the obligations under Article 6 of the European Convention on Human Rights are met.

Article 49A Hearing

- 3.21 Article 49A of the Mental Health (Northern Ireland) Order 1986 puts in place a process to determine whether an individual, who has been deemed unfit to plead as a result of the application of the *Pritchard* test, has carried out the act or made the omission with which he or she has been charged (the “*actus reus*” of the offence). The purpose of the Article 49A hearing is to solely determine whether the individual has committed the *actus reus* of the offence with which he or she has been charged and no consideration is made in relation to the *mens rea* or mental element of the offence, such as the intention to commit the offence. The Article 49A hearing is a different process to a full criminal trial, and only takes place after a determination of unfitness to plead. The outcomes of the Article 49A hearing are also different to the outcomes of a full criminal trial, as the disposals available to the court are based on care and treatment of the individual.
- 3.22 It could be argued that, as it currently stands, the Article 49A hearing creates a differential impact between the way that people who are fit to stand trial are treated within the criminal justice system, and the way in which people who are unfit to stand trial are treated within that system. It could also be argued that this differential impact is justified (and may indeed be a positive impact) as individuals who are deemed unfit to plead are diverted from the rigours of a full criminal trial and may be able to access appropriate care and treatment disposals which may be beneficial to their health or other needs.
- 3.23 The Article 49A hearing currently does not permit the *mens rea* of the offence to be considered by the court. The effect of this approach is that various defences may not be available to the individual who has been deemed unfit to plead. Although it is possible to raise some defences if the individual is able to give evidence and instruct his or her legal representatives in this regard, it may not be possible to raise

defences without supporting evidence that the defence is available. However, there are practical difficulties with extending the Article 49A hearing to include consideration of the *mens rea* of the offence which are discussed in more detail in chapter 3 of the consultation paper *Unfitness to Plead*. The difficulties being that (a) individuals who are unfit to plead may be unable to give evidence or to instruct counsel in relation to the raising of a defence and (b) that the defence may be able to gain an acquittal by relying on the prosecution being unable to prove that the individual who is unfit to plead lacked the necessary *mens rea* to commit the offence because he or she was experiencing a similar mental state at the time when the offence was committed.

- 3.24 The Commission sought the views of consultees in relation to the operation of Article 49A of the Mental Health (Northern Ireland) Order 1986. Particularly, consultees were asked to consider whether the unfit accused person should be subject to a process in which the *mens rea* of the offence, not just the *actus reus*, should be explored by the court.
- 3.25 The responses of consultees on this point was mixed. A number of voluntary sector organisations were supportive of the inclusion of consideration of the *mens rea* of the offence, whilst a number of statutory organisations and health care professionals expressed a contrary view.
- 3.26 The Commission is recommending no change to the law as it currently stands. A fuller discussion of the reasoning of the Commission is contained in chapter 3 of the *Report on Unfitness to Plead* (www.nilawcommission.gov.uk). As a result of the operation of Article 6 of the European Convention on Human Rights, the Commission considers that 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. However, it is also desirable that a process is in place which recognises that unfit accused persons should be given the opportunity to be acquitted if that is the appropriate

outcome. The Commission considers that the current Article 49A hearing process facilitates both these aims. If the Article 49A hearing process was removed, unfit accused persons would be seriously disadvantaged. They would lose any opportunity for acquittal and instead would be subject to care and treatment disposals. This would place an unfit accused person in the position they would have been in prior to the reforms effected by the Criminal Justice (Northern Ireland) Order 1996. This was a situation which had attracted particular criticism, most notably in 1975 in the *Report of the Committee on Mentally Abnormal Offenders* (Cmnd. 6244 (October 1975)) and the Commission does not consider that removal of the Article 49A hearing process is desirable. Such a reform would not promote equality of opportunity under section 75 of the Northern Ireland Act 1998 as it would create an adverse differential impact which would be impossible to justify or mitigate against.

3.27 The Commission considers that the retention of the Article 49A hearing process provides a tangible benefit to an unfit accused person as it provides an opportunity for the case against the accused to be tested and creates a chance of acquittal. It therefore falls to be considered whether the incorporation of a requirement to consider the *mens rea* of the offence is desirable. The Commission has concluded that any reform of this nature is not recommended. In the Commission's view, a reform of this nature 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 outcome would fail to meet the obligations imposed by Article 6 of the European Convention on Human Rights.

3.28 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 Commission considers that 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.

- 3.29 During the consultation on the Equality Impact Assessment, a number of consultees raised the issue of the importance of ensuring that individuals were supported to make decisions. It was suggested that if supported decision-making was facilitated within the trial process, then individuals may be better able to effectively participate in the proceedings. One consultee suggested that the use of special measures may act as a reasonable adjustment to aid effective participation.

3.30 The Commission has considered the issues raised by consultees very carefully. This is a difficult area, however, the Commission considers that in order to meet the obligations imposed by Article 6 of the European Convention on Human Rights, the law must operate to ensure that individuals can effectively participate in their criminal trial. The Commission considers that the use of special measures for vulnerable accused persons, such as the use of intermediaries, is crucial to ensuring that Article 6 obligations can be met. However, the Commission takes the view that the timing of the use of special measures is crucial. The Commission considers that special measures are designed to improve the accused person's ability to understand and participate in criminal proceedings, however, use of special measures should not operate to alter a determination in relation to the unfitness to plead of an accused person.

3.31 The Commission is, however, recommending that any person who is found to be unfit to plead should have access to a trained supporter, who can assist the unfit accused person to understand the legal processes that he or she is involved in. It is envisaged that a supporter will have benefit, not only to the accused person, but also to the court and the legal representatives. Applications in relation to unfitness to plead and determinations of unfitness are relatively rare: the expertise of a suitably qualified supporter can be of great assistance to all those involved in the proceedings.

Age and unfitness to plead

3.32 In the equality screening exercise and the Equality Impact Assessment, the Commission identified that people of differing ages may be impacted by the proposed policy on unfitness to plead. Young adults are disproportionately represented in the criminal justice system and age is an issue which may affect whether an individual is fit or unfit to plead in criminal proceedings. The Commission concluded that it was

reasonable to conclude that people of differing ages may have different needs, experiences and priorities in relation to the proposed policy.

3.33 The Commission has carefully considered the available evidence, together with the views expressed by consultees during the consultation exercise on the Equality Impact Assessment on Unfitness to Plead. The evidence considered by the Commission can be summarised as follows.

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

3.35 The Northern Ireland Courts and Tribunals Service Exit Survey provides the following data in relation to the age of court users during 2009 and shows that out of 2237 people surveyed, 49.4% of court users during this period were under 35 years old. However, these figures include legal representatives, prosecutors, police personnel, victims and witnesses, as well as defendants. The table below details the breakdown:

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

- 3.36 The Northern Ireland Assembly Research Paper *Prisoners and Mental Health* (9th March 2011) (www.niassembly.gov.uk) reports that there is an ageing population in Northern Ireland prisons. People aged over 60 are the fastest growing age group in the prison population and it was stated that dementia will become an increasing mental health issue (at page 8).
- 3.37 The Mindwise Northern Ireland Appropriate Adult Scheme Annual Report (2010-2011) (www.mindwisenv.org) reported that in terms of those persons requiring an appropriate adult, 45% were juveniles. *The Evaluation of the Northern Ireland Appropriate Adult Scheme, Mindwise*, by University of Ulster and the University of San Diego, found that during 2009/10, Appropriate Adults attended 1382 cases in 23 PSNI stations. Approximately 60% involved in these cases were juveniles (at page 3).
- 3.38 The Department of Justice *Review of the Youth Justice System in Northern Ireland* (September 2011) (www.dojni.gov.uk) states that in any one year, up to 10,000 young people come into contact with the criminal justice system. This represents 5% of the total population of young people in Northern Ireland aged 10-17 (at page 31). The *Review* also states that the number of young people tried in the Crown Court is small – 54 in 2010 – which represents less than 2% of the disposals made by the Crown Court (see page 39).
- 3.39 The Youth Justice Agency *Provisional Workload Statistics* (April - September 2011 Statistical Bulletin 5/2011) at page 1 reports that the total number of statutory orders received by the Youth Justice Agency between April to September 2011 was 814 (Attendance Centre Order, Community Responsibility Order, Reparation Order, Diversionary Youth Conference Plan, Youth Conference Centre and sentenced to Juvenile Justice Centre). This compares to 1746 statutory orders being made in 2010/11, 1639 in 2009/10 and 1565 statutory orders being made in 2008/2009. Between April to September 2011, there was an average daily population of 29 in the Juvenile Justice System,

compared with 26 in both 2010/11 and 2009/10 and 27 in 2008/09. There were 284 admissions to the Juvenile Justice Centre between April and September 2011, 24 aged 10-13, 25 aged 14, 49 aged 15, 106 aged 17 and 80 aged 17+.

- 3.40 The Ministry of Justice publication *Statistics of Mentally Disordered Offenders 2007 England and Wales* (5 February 2009: www.moj.gov.uk) note that most restricted patients detained in hospital were aged between 21 and 59 years (51% were aged between 21-39 and 39% were aged between 40 - 59.)
- 3.41 The data indicates that young adults and young people are significantly represented in the criminal justice system. Although the reference of this project does not include consideration of unfitness to plead in the context of Youth Courts, the Commission is of the view that age is an issue which may impact whether an individual is fit or unfit to plead in criminal proceedings. Age is an issue which may have a bearing on whether an individual is found to be unfit to plead in criminal proceedings, as developmental maturity may affect understanding of the court process and an individual's ability to participate in that process, which is a particularly pertinent consideration when a young person is being tried in the Crown Court.
- 3.42 Also, older persons may be experiencing certain diseases which may affect ability to participate in a trial process, such as Alzheimer's Disease or other forms of dementia. The Commission therefore considers that people of differing ages may have different needs, experiences and priorities in relation to this proposed policy. As a result, the Commission considers that in relation to this issue, there is a differential impact on people of differing ages. It must then be considered whether this impact is an unlawful or a negative one.
- 3.43 Age therefore has the potential to contribute to a finding of unfitness to plead in criminal courts in Northern Ireland. The current test in *R v*

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

- 3.44 The Commission was criticised by one consultee for suggesting that a model that was based on the test contained in the Mental Capacity Act 2005 could be adopted, with modification, for assessing the unfitness of an accused person to plead in the Crown Court or Magistrates' Courts in Northern Ireland. The basis of the criticism appears to lie in an assumption that the new model could not apply to individuals who are under the age of eighteen and who are subject to proceedings in the Crown Court. The Commission can confirm that it was never the intention to remove any protections from individuals involved in Crown Court proceedings: it is unfortunate that this misunderstanding arose, however, the Commission has discussed the issue with the consultee in question and hopes that the policy intention is now understood.

- 3.45 The same consultee also expressed concern that the issue of unfitness to plead within the jurisdiction of Youth Courts had not been addressed by the Commission. On this occasion, the Commission was not able to consider the application of the law within the Youth Courts because that issue did not form part of the remit of the project.
- 3.46 The Commission considers that its recommendations in relation to the law on unfitness to plead has a beneficial impact on children and young people who may be involved in Crown Court proceedings. The Commission believes that a test which is based on assessing both the ability of an accused person to make certain decisions relating to the trial and understanding of certain key elements of the trial process may promote equality of opportunity for children and young people. The Commission considers that if this form of test is adopted, equality of opportunity is promoted, since any test that incorporates consideration of the mental capacity and decision-making ability of individuals will take into account important factors which include not only understanding, but also retention of information, processing of information and communication.
- 3.47 There may also be another benefit to ensuring that children and young people who may be involved in proceedings in the Crown Court can avail of the protections offered by the proposed reforms. The Commission considers that the law relating to unfitness to plead is something of a specialised area. It is hoped that any reform taken forward on the basis of the Commission's recommendations will assist in raising awareness and encouraging further education and training for professionals who play a role in the criminal justice system. Such awareness raising, further education and training may assist in the identification of individuals who are unable to participate effectively in the trial process.
- 3.48 In conclusion, the Commission considers that its recommendations in relation to the law on unfitness to plead does not create an adverse

impact on children and young people. It is considered that the policy is appropriate and that there are no opportunities that exist that may better promote equality of opportunity.

3.49 In relation to older people, the Commission considers that aging may result in individuals developing certain diseases, such as Alzheimer's Disease and other forms of dementia, which may affect ability to participate in a trial process.

3.50 The Commission considers that its recommendations in relation to the law on unfitness to plead has a beneficial impact on older people who may be involved in criminal proceedings. The Commission believes that a test which is based on assessing both the ability of an accused person to make certain decisions relating to the trial and understanding of certain key elements of the trial process may promote equality of opportunity for older people. The Commission considers that if this form of test is adopted, equality of opportunity is promoted, since any test that incorporates consideration of the mental capacity and decision-making ability of individuals will take into account important factors which include not only understanding, but also retention of information, processing of information and communication.

3.51 In conclusion, the Commission considers that its recommendations in relation to the law on unfitness to plead does not create an adverse impact on older people. It is considered that the policy is appropriate and that there are no opportunities that exist that may better promote equality of opportunity.

4. MONITORING FOR ADVERSE IMPACT IN THE FUTURE

The Commission is responsible for making recommendations for law reform to government. However, the Commission is not responsible for implementing any of its proposals: its role is advisory in nature. The Commission considers that the relevant Department with responsibility for the policy area in question is best placed to monitor the effects of any implementation of Commission recommendations in the future. In the case of the unfitness to plead project, the relevant Department is the Department of Justice.