

Prison Reform Trust Response to the Law Commission's Unfitness to Plead: An Issues Paper

The Prison Reform Trust, established in 1981, is a registered charity that works to create a just, humane and effective penal system. The Prison Reform Trust aims to improve prison regimes and conditions, defend and promote prisoners' human rights, address the needs of prisoners' families, and promote alternatives to custody. The Prison Reform Trust's activities include applied research, advice and information, education, parliamentary lobbying and the provision of the secretariat to the all party parliamentary penal affairs group.

The Prison Reform Trust welcomes the Law Commission's Issues Paper on Unfitness to Plead, which builds on their Consultation Paper 197 (2011), which the Prison Reform Trust also responded to. The Further Questions posed in the Issues Paper are important and, where we are able, we are pleased to respond. Our response has been informed by Alison Giraud-Saunders, independent consultant. For a small number of questions we have drawn on responses made by Just For Kids Law and the Law Society, and we have highlighted where this is the case.

Further Questions (FQ)

PART 2: THE LEGAL TEST

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

The Prison Reform Trust (PRT) agrees with FQ1.

Our response to Provisional Proposal 1 (PP1) of Consultation Paper 197 (2011) is unchanged, in particular: 'the need to take into account *all the requirements for meaningful participation in criminal proceedings*, in accordance with Article 6 of the European Convention of Human Rights, and the case law that supports it; and, for children, the United Nations Beijing Rules on juvenile justice.'

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

While PRT favours an effective participation test, with an additional decision-making capacity limb, we are concerned that the John M criteria alone might be too narrow. In considering 'effective participation' we endorse the criteria identified in *SC v UK* (2005) 40 EHRR 10, where effective participation

"...presupposes that the accused has a broad understanding of the nature of the trial process and of what is at stake for him or her, including the significance of any

penalty which may be imposed. It means that he or she, if necessary with the assistance of, for example, an interpreter, lawyer, social worker or friend, should be able to understand the general thrust of what is said in court. The defendant should be able to follow what is said by the prosecution witness and, if represented, to explain to his own lawyers his version of events, point out any statement with which he disagrees and make them aware of any facts which should be put forward in his defence’ (S v UK, 2004).

We add the following points:

- The ‘test’ should be uniformly applied by competent (sufficiently skilled and knowledgeable) person(s)
- There should be an entitlement in law for the accused to receive the necessary support, from competent person(s), when undertaking the ‘test’ and, if deemed fit, throughout subsequent proceedings; including preparation to participate in court proceedings, throughout court proceedings and immediately following court proceedings. See also our response to FQ 12.

FQ3 (2.42): *Do consultees consider that incorporating an exhaustive list of decisions for which the defendant requires capacity into a reformed legal test for unfitness to plead would assist in maintaining the threshold for unfitness at a suitable level?*

An exhaustive list of decisions, as described at 2.36, could provide useful guidance to assist in maintaining uniformity in the application of the test and in maintaining the threshold for unfitness at a suitable level. Practical examples and case studies should also be given.

Assessment of decision-making capacity should be in accordance with the Mental Capacity Act 2005 (MCA 2005), s3; namely, that a person should be able to:

- Understand the information relevant to the decision
- Retain that information
- Use or weigh that information as part of the process of making the decision
- Communicate their decision (whether by talking, using sign language or any other means).

Further, in considering the above, it is important to note that the second principle of the MCA is to take all practical steps to support a person to make a decision themselves. In particular:

“(2) A person is not to be regarded as unable to understand the information relevant to a decision if he is able to understand an explanation of it given to him in a way that is appropriate to his circumstances (using simple language, visual aids, or any other means).

(3) The fact that a person is able to retain the information relevant to a decision for a short period only does not prevent him from being regarded as able to make the decision.

(4) The information relevant to a decision includes information about the reasonably foreseeable consequences of

- (a) deciding one way or another, or*
- (b) failing to make the decision.” (MCA 2005, s3).*

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

Whether an accused is unfit to plead should be determined by a defined ‘test’ and clinical

interview by competent person(s). It shouldn't be necessary to add the words, 'satisfactory' or sufficient'.

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

Yes; the MCA states clearly that assumptions about capacity should not be made on diagnosis. While the emphasis should be on determining the ability of the accused to participate effectively in court proceedings and their decision-making capacity, and necessary support, a diagnosis can help to determine the most appropriate support, and way of providing that support. For example, a diagnosis of learning disability could allow the skills of those assessing capacity and those supporting decision-making to be matched to the needs of the accused.

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

Yes; the assumption of capacity should match the MCA assumption of capacity unless proven otherwise. Unfitness to plead is a finding that should be avoided if at all possible – in the interests of the accused and society at large.

Findings of unfitness to plead should be reviewed and reported upon annually. An independent body, such as the Equality and Human Rights Commission, should be involved in the review, which would help ensure that decisions that declare an individual unfit are appropriate.

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

Capacity can fluctuate. Assessment of capacity is time and decision-specific. The capacity of an individual found unfit to plead should be kept under review, much as the capacity of an individual found fit to plead should be kept under review during court proceedings.

On balance, we agree.

FQ 8 (2.59): *Do consultees agree that disaggregation of capacity to plead and capacity for trial is undesirable?*

Yes, we agree.

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

Notwithstanding the difficulties highlighted in paragraph 2.60, context is relevant. Introducing context supports a case by case, person centred approach to assessment, which, in turn, should determine necessary support that can be tailored to meet individual need. This approach may well have the advantage of fewer defendants being found unfit to plead.

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

NIL RESPONSE

FQ11 (2.88): *Do consultees agree that the difficulties surrounding unrepresented defendants cannot be addressed by amendment to the legal test itself?*

Yes. Any indication that an individual may lack capacity (paragraph 2.84) should trigger proactive assistance, from a specified postholder and in a manner that is understood by the accused (see FQ3), to secure representation. This would reflect the 'appropriate measures' required by article 12(3) UNCRPD (paragraph 2.85) without compromising the 'rights, will and preferences' of the accused, should he or she refuse such assistance.

PART 3: SPECIAL MEASURES

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

Yes; this is long overdue and the current position is discriminatory (see, for example, *Fair Access to Justice?* Talbot, 2012).

The anomaly of registered intermediaries for victims and witnesses and non-registered intermediaries for the accused should be addressed (see, for example, *Fair Access to Justice?* Talbot, 2012; *OP, R (on the application of) v Secretary of State for Justice* [2014] EWHC 1944 (Admin), June 2014).

Where a finding against unfitness to plead is made on the basis of necessary support being made available (or, that an accused is fit to plead with the necessary support), that support should be an entitlement in law, provided and paid for by the court. The same should apply for all support identified as necessary, not only that afforded by a registered intermediary.

Detailed guidance exists on the need to support vulnerable defendants, and how this might be achieved, for example, the *Equal Treatment Bench Book*, summarised in *Fairness in courts and tribunals* and *Criminal Practice Directions*. Case law exists where support has been put in place, for example, *C v Sevenoaks Youth Court* (2009) and *R v Great Yarmouth Youth Court* (2011); there are a small number of 'special measures' that relate to vulnerable defendants; the Equality Act requires that 'reasonable adjustments' are made that anticipate and prevent discrimination against people with disabilities; and members of the judiciary have an inherent discretion within their court, which they can use to ensure the necessary support is put in place.

Yet, despite these measures, evidence suggests that the support needs of vulnerable defendants are frequently neither recognised nor met (Talbot, 2008; 2012). In 2008 the UK Joint Committee on Human Rights said:

We are concerned that the problems highlighted by this evidence could have potentially very serious implications for the rights of people with learning disabilities to a fair hearing, as protected by the common law and by Article 6 ECHR. Some of this evidence also suggests that there are serious failings in the criminal justice system, which gives rise to the discriminatory treatment of people with learning disabilities (A Life Like Any Other? Human Rights of Adults with Learning Disabilities; 212:2008).

More recently, the Criminal Justice Joint Inspection (CJJI) thematic on the treatment of offenders with learning disabilities within the Criminal Justice System found that:

For someone with a learning disability, the court environment and process is confusing and possibly frightening. The court environment could very easily, and with little extra cost, be made less intimidating... We found, however, that little attention had been paid to the needs of those with learning disabilities, for example through the availability of 'easy read' posters and leaflets to explain the court process (CJJI, 2014).

There are, perhaps, two main factors behind these findings, in brief: the courts not recognising that an individual accused has support needs; and/or not knowing how to address support needs should they come to light. To assist with the former (not recognising support needs), it is expected that NHS England Liaison and Diversion services will increasingly assist in identifying individuals with support needs as they enter the criminal justice system, including those who may lack capacity, and these services are welcomed. However, it is important to note that:

- The government commitment for such services applies only in England
- Full roll out, by 2017, rests on the acceptance of a business case in 2015 and subsequent ministerial approval.

Further, in relying on Liaison and Diversion services to provide information that will assist the courts in addressing possible unfitness to plead cases, information sharing protocols will be necessary and common screening and assessment procedures helpful.

There is an identified need for mental health and learning disability awareness training for professionals and practitioners across the criminal justice system, including court staff and members of the judiciary (Bradley Report, 2009). Arguably, there is also the need for information and awareness raising on when and how general support for vulnerable defendants should be provided, and when specialist support, such as that offered by a registered intermediary, might be needed.

Finally, it is important to note that necessary support to ensure effective participation and decision-making capacity should be put in place for all court proceedings, not just for cases that go to trial, in accordance with the MCA second principle (to take all practical steps to support a person to make a decision themselves).

PART 4: ASSESSING THE CAPACITY OF THE ACCUSED

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

We agree, and support the statement contained at 4.21, that 'the important issue is that the training and experience of the individual expert makes them competent for the task.'

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

We agree. This is a grave decision and the implications for the accused, in particular, justifies the involvement of two expert witnesses competent to address the defendant's

particular condition or conditions.

It is important to note that the prevalence of co-morbidity, where people experience more than one condition, is high. For example, an individual may have a learning disability, be on the autistic spectrum and have mental health problems. It is important that those involved in assessments are competent to address a range of conditions and the interplay between complex needs.

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

Members of the judiciary have an inherent discretion within their court, which they can use to ensure the necessary support is put in place.

PART 5: PROCEDURE FOR THE UNFIT ACCUSED

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

Yes; in particular, we agree with paragraph 5.23 that ‘this power should only be exercised where both experts agree that capacity may be recoverable within that period.’

While capacity can fluctuate in people with, for example, mental ill-health, for people with conditions such as learning disability and autistic spectrum disorder, there is likely to be little change in capacity over time. Delays, and consequent incarceration, for individuals unlikely to regain capacity would be an inappropriate use of this power.

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

Other: any decision to increase the time that an individual is held against his or her will should be taken very seriously. We do not feel competent to pass further comment.

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

Yes; on the basis that ‘the accused, or the defence representative, should be entitled to put the Crown to proof of the allegation if they wish... where the allegation itself is likely to be reputationally damaging (for instance an alleged sexual offence)’ (paragraph 5.31).

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

NIL RESPONSE

FQ 20 (5.50): *Do consultees consider that on a determination of the facts, any defence should be left to the jury, after discussion with the advocates, where there is*

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

NIL RESPONSE

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

NIL RESPONSE

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

NIL RESPONSE

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

No. We endorse the response made by the Law Society to this question, which is:

'As a matter of principle the Law Society is firmly of the view that the role of the jury, as the determiner of facts in non-summary criminal cases, is a vital component in the criminal justice system in England and Wales. We are not persuaded that it would be appropriate to create an exception in relation to determining the facts where a defendant lacks capacity.'

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

Such a decision (to act contrary to the defendant's will and preferences) only becomes relevant if the person is assessed not to have capacity to make that decision. If they do have capacity, they are entitled to make an 'unwise' decision.

If the person is assessed as having capacity but the judge remains concerned that their decision is so unwise that it could result in a miscarriage of justice, the first consideration should be to review, and to ensure that the necessary decision-making support is both available and adequate.

If, after such a review, it is thought necessary to act contrary to the defendant's identified will and preferences, then a decision can be made under the MCA in their 'best interests'. In such a case the guidance in the MCA Code of Practice should be followed, including listening to the defendant themselves and others who know and care about them. The role of IMCAs, as currently defined, does not include supporting a defendant, and this should be explored as an integral part of this consultation.

We further suggest that such decisions – acting contrary to the defendant's identified will and preferences, where the court appointed representative considers that to do so is necessary in the defendant's best interests – be reviewed annually by an independent body, such as the Equality and Human Rights Commission, to help ensure that the best interests of the

accused have been served and to learn from decisions taken.

PART 6: DISPOSALS

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

Yes; we agree with the response made by Just For Kids Law (paragraph 29), illuminated by their Case Study 2 on page 9 of their submission.

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

NIL RESPONSE

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

Yes; we agree with the response made by Just For Kids Law that

'supervision orders could be enhanced by a requirement of the supervising officer providing the court with regular reports on the defendant's progress and for the court to have a supervisory function enabling the defendant to attend court to tell the judge about the progress of the supervision order, and providing the court with the power to amend the order, where necessary' (paragraph 30, page 9).

PART 7: REMISSION AND APPEALS (FQs 28-32)

NIL RESPONSE

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

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

We agree. It would, however, be necessary to ensure that training is undertaken by lay benches in advance of such a move and that a legal advisor is routinely available.

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

Yes; we consider that it would be preferable.

FQ 35: (in the alternative to FQ 34)

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

Yes.

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

Yes.

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

Yes.

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

No, the same test should be applied. But see our answer to FQ12.

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

Yes.

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

Yes.

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

NIL RESPONSE

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

Yes.

Further, there should be mandatory disability awareness training, and mental health and learning disability awareness training, in particular, and specific training on effective communication for all legal practitioners and members of the judiciary engaged in cases involving child and adult defendants.

Courts are verbally mediated environments and the ability to communicate effectively, especially as high numbers of child and adult defendants experience communication difficulties, is essential.

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

Yes, but this should be for all defendants under 18 years of age and not just for mental

health issues.

It has long been acknowledged that children who come into contact with criminal justice services are disadvantaged socially, educationally and also because they experience a range of impairments and emotional difficulties (*Punishing Disadvantage: a profile of children in Custody*, Jacobson et al, 2010; *Seen and Heard: supporting vulnerable children in the youth justice system*, Talbot, 2010).

Initial screening and, where necessary, assessment should include mental health issues, low IQ/learning disability, and communication difficulties. NHS England Liaison and Diversion services should increasingly undertake such screening and assessment (see FQ 12).

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

NIL RESPONSE

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

Yes. The consequences of a restriction order are very serious and should therefore be confined to the Crown Court.

FQ 47 (8.135): Do consultees agree that the following disposals should be available to the magistrates' court on a finding that the defendant has "done the act or made the omission," or where a special determination has been arrived at:

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

Yes.

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

Yes.

We agree with the submission made by Just For Kids Law, which 'would encourage supervision outside the criminal justice system'... '(i.e. not overseen by Youth offending Teams) and we would endorse the court exercising a supervisory function over the order.'

Just For Kids Law goes on to say:

'We feel that supervision orders could be enhanced by a requirement of the supervising officer providing the court with regular reports on the defendant's progress and for the court to have a supervisory function enabling the defendant to attend court to tell the judge about the progress of the supervision order, and

providing the court with the power to amend the order, where necessary' (paragraph 30, page 10).

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

Yes.

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

Yes.

Additional points for consideration

In addition to our responses to Further Questions, we would like to make the following points.

1. Finding a person unfit to plead is a grave and complex decision. Any 'test' should have at its heart a set of principles that help to ensure access to justice for the individual concerned and to safeguard his or her best interests. For example, FQ 5, 'the presumption that all defendants are fit to be tried until the contrary is proven' would be one such principle and the right to appeal, (FQ 50), another. Others, for example, might include:
 - a. That the process and outcome for defendants found to be unfit to plead should not be more punitive than for defendants charged with a similar offence where no such finding is made
 - b. That necessary support for effective participation and decision making is determined on a case by case basis, is person centred and tailor-made to suit the particular needs of the individual concerned
 - c. That necessary support, whatever that might look like, should be an entitlement in law, paid for by the court; and that necessary support might change during court proceedings and should be kept under review.
2. There is significant evidence that children's developmental immaturity directly affects their capacity for decision-making. Thus, the age of criminal responsibility is a significant factor in the decision-making capacity of children in youth trials in both youth and crown courts. The age of criminal responsibility in England and Wales should be raised and aligned, at a minimum, with the European norm of 14 years. Meanwhile, the principle of *doli incapax* should be re-established, and the Gillick competence assessment, or similar, used in all youth justice proceedings to regularise the protections afforded to children in the parallel jurisdictions of youth and civil/family courts.

3. Pre-sentence: should it be deemed necessary for a vulnerable defendant to be remanded at any stage of his or her trial, including for a report on his or her mental capacity or while awaiting trial or awaiting sentence, the accused should not be remanded to prison. It is generally acknowledged that prisons are unsuitable environments for vulnerable people, and such incarceration is likely to result in a further deterioration of their mental health.