



UNFITNESS TO PLEAD
A response to Law Commission C.P. 197

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Introduction

Opening remarks

1. The Law Reform Committee of the Bar Council, and the Criminal Bar Association,¹ take this opportunity to pay tribute to the Law Commission on the publication of its detailed and thought-provoking Consultation Paper (the “CP”) concerning a topic of considerable practical importance that has vexed the Courts and the Legislature for over 200 years.² Needless to say that we welcome the opportunity of responding to that Paper.
2. Notwithstanding that the timetable for the submission of responses is short, we have endeavoured to answer as many of the questions³ that have been posed by the Law Commission as possible. Nevertheless, the submissions and representations that we have made herein are provisional only as we acknowledge both the complexity and the breadth of the matters addressed in the CP. We also acknowledge that none of the members of the Working Group have been trained in, or hold a qualification in psychiatric medicine.⁴ Nonetheless, we have endeavoured to pursue a principled and practical approach to the issues raised in the CP, seen from the perspective of experienced in-court criminal law practitioners, having regard to the information and data that we have researched.

Whether the proposals, if accepted, represent an improvement of the existing scheme

3. Although we agree that it is desirable that the law should be “*consistent with modern psychiatric thinking and with the modern trial process*”⁵ and that existing rules of law, practice and procedure, are in need of modification, we have considerable reservations whether the Commission’s Provisional Proposals⁶ would constitute a significant improvement on the existing position. Indeed we suggest that were *all* of the fourteen proposals⁷ to be put into effect (at least as the proposals are currently structured) the Courts would find the revised scheme no less incoherent and arguably a great deal more confusing, as well as unnecessarily

¹ The Criminal Bar Association (“CBA”) represents about 3,600 employed and self-employed members of the Bar who appear to prosecute and defend the most serious criminal cases across the whole of England and Wales. It is the largest specialist bar association. The high international reputation enjoyed by our criminal justice system owes a great deal to the professionalism, commitment and ethical standards of our practitioners. The technical knowledge, skill and quality of advocacy guarantee the delivery of justice in our courts; ensuring on our part that all persons enjoy a fair trial and that the adversarial system, which is at the heart of criminal justice, is maintained.

² Noting the Criminal Lunatics Act 1800, *R v Pritchard* (1836) 7 Carrington & Payne 303; *Rex v Dyson* 7 C&P 305n,

³ Listed at para.1.35 of the CP.

⁴ One member of the Working Group, Valerie Charbit, specialises in mental health issues, particularly concerning defendants. She represents health authorities on restricted cases before the Mental Health Review Tribunal for which she has also been a part-time judge since 2004.

⁵ CP, para.1.15.

⁶ CP, para.1.34.

⁷ Appendix A to this Response.



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demanding on scarce resources. According to the Impact Assessment, appended to the CP, the value of the benefits would exceed costs. The workload of the courts would undoubtedly increase. The Impact Assessment assumes that there will be 500 additional cases, but we believe (for the reasons that we give in this Response) that the figure is likely to be considerably higher:⁸

For the best estimate we assume that there will be 500 additional cases where decisional capacity is raised. In 70% of cases (350) the accused will lack decision-making capacity and be subject to a section 4A hearing. 20% could have a trial assisted by special measures and 10% will have a normal trial. Of the 70% found to lack decision-making capacity, 90% will be subject to a disposal under section 5. 50% of these disposals will be hospital orders and 40% supervision orders. For benefits, the 315 receiving a disposal under section 5 would have had a custodial sentence. 70% of those receiving a hospital order would, if they had gone to prison, have been transferred to hospital.

4. The number of hearings of unfitness to plead has been relatively small (albeit that the number has increased since 1992)⁹ but the combination of proposals 1, 3 and 4, would surely make hearings pertaining to a defendant's "decision making capacity", common place. This is because the test would be whether the accused has "*decision-making capacity for trial*" that would "*take into account all the requirements for meaningful participation in the criminal proceedings*" [CP, paragraph 3.41], in relation to the "*entire spectrum of trial decisions he or she might be required to make*" [CP, para. 3.99]. The Commission states that an accused "*should not stand trial unless he or she has the capacity to participate in all aspects of his or her trial*" [CP, para. 5.42].

5. Trials are becoming increasingly complex to prepare and to conduct. Legislation enacted during the past ten years alone present an accused with many difficult decisions to make from the moment of arrest until proceedings are concluded. These decisions encompass (for example) whether to answer questions posed by persons in authority at the investigative stage, the preparation of Defence Case Statements, bad character and hearsay applications, whether to give evidence, and – if convicted – possible confiscation proceedings, the making of Serious Crime Prevention Orders, and other orders in respect of which the defendant's effective participation is at least desirable if not essential.¹⁰

⁸ Impact assessment (page 2).

⁹ See Mackay, Mitchell, Howe, "*A continued upturn in unfitness to plead: more disability in relation to the trial under the 1991 Act*" [2007] Crim LR 530.

¹⁰ The Commission propose that it would be "incumbent on the judge to take account of the complexity of the particular proceedings and gravity of the outcome. In particular the judge should take account of how important any disability is likely to be in the context of the decision the accused must make in the context of the trial which the accused faces." [CP, para. 3.101]



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6. There are very many defendants whose “decision making capacity” might be questioned by their legal advisers and other professionals (e.g. probation officers, and social workers). Many defendants have personality disorders, or who are problematic drug users or alcoholics. We are concerned that under the Commission’s proposals, legal practitioners would be exposed to unwarranted criticism were they not to routinely invite the Court to determine their clients’ “decision making capacity”.
7. We suggest that the Commission would be well advised to consider whether its proposals might not also be a source of abuse by those who perceive that there would be (or might be) a tactical advantage in pursuing a ‘medical defence’ in the hope that, for example, (a) a full trial might be avoided, (b) the defendant can justify not giving evidence, or (c) the defendant can avoid adverse inference directions.
8. It is submitted that the prospect of routine applications being made is not fanciful having regard to proposal 5 [see CP, para. 4.27], namely, that D’s decision-making capacity “*should be assessed with a view to ascertaining whether an accused could undergo a trial or plead guilty with the assistance of special measures*”. Special measures to assist non-defendants, and (increasingly) defendants, are already well-developed, and improvements in that regard continue to be made. Although rules relating to special measures have developed incrementally, the development has been controlled. We accept that there is no reason why special measures should not be tailored in individual cases having regard to the defendant’s mental and physical condition.
9. Typically a defendant’s application for special measures would be considered pre-trial. But we would eschew a proposal that envisages a defendant’s application for such measures being almost invariably dealt with by way of a hearing that is set down to determine the extent of a defendant’s decision-making capacity.
10. At CP paras. 3.15 to 3.22, the Commission provide six examples that illustrate a defendant’s lack of decision-making capacity (examples 3A to 3F). Such a conclusion in respect of examples 3A,¹¹ 3C¹² and 3F,¹³ is unremarkable, but two examples are illustrative of our concern that the proposed test for a defendant’s decision-making capacity could be applied in many (arguably too many) cases.

¹¹ D has a mental age of a five-year-old and a very low cognitive ability. He does not understand much of what is said to him and finds unfamiliar surroundings frightening.

¹² “A is a 13-year-old male who suffers from severe Attention-Deficit Hyperactivity Disorder (ADHD). This is at its worst when he is anxious. He cannot focus and is impulsive. He finds it almost impossible to remember any new information he is given.”

¹³ “A is autistic and is unable to communicate with others. He can understand information and process lots of it, but does not acknowledge others and tends to “live in his own world”.



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Example 3B

A is suffering from severe depression. He has no interest in interacting with other people and says that he does not care what happens to him. He has a disturbed sleep pattern, poor concentration and is unable to remember things. He has difficulty focusing on specific matters and has a poor ability to express himself verbally.

Example 3E

A suffers from obsessive compulsive disorder which is at its worst whenever he is stressed or anxious. Whenever he is asked a question, he feels compelled to consider the question from all angles and ruminates obsessively about the underlying meaning of the words or phrases in the question. He finds it impossible to come to a clear conclusion and make a decision.

11. The Commission opines that the facts of example 3B illustrate a lack of decision-making capacity because A “*will not be able to retain information or retain sufficient information to be able to focus on a decision or on subsequent decisions which may be related to his initial decision.*”¹⁴ However, persons vary widely in their ability to retain information or to focus on a decision. Persons may genuinely or fraudulently underestimate or exaggerate such ability. Legal practitioners, despite their best endeavours, are frequently given scant/inadequate instructions from their lay clients, but this is not necessarily indicative of a client’s lack of decision-making capacity. We cannot predict the extent to which a psychiatric report might be sought by a legal practitioner in those circumstances, if only as a precautionary measure. The prospect of medical reports being requested as standard practice, or routine applications being made to determine D’s decision-making capacity, is unattractive and, we believe, would constitute an unwarranted demand on scarce resources.
12. Specific difficulties experienced by a defendant (e.g. the need for regular breaks to ease stress) can be addressed – as they frequently are – on a case-by-case basis without the need for a formalised hearing to determine the extent of the defendant’s capacity for decision-making. But, the Law Commission’s proposals appear to envisage a formal determination of a defendant’s capacity for decision-making, applying a unitary test “*that could be sufficiently wide to take into account the range of different decisions and tasks required as part of a trial*”¹⁵ and which

¹⁴ CP, para. 3.17.

¹⁵ CP, para. 3.81.



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“will include consideration of the extent to which special measures will assist the accused”.¹⁶

13. The Commission envisage that the requirements of the trial *“would be broken down fully and the decision-making capacity test would therefore inevitably bear some of the characteristics of a more disaggregated approach”*.¹⁷ With respect, such an approach is disaggregated in all but name. Moreover, different measures might fall to be considered at different stages of the trial process. In cases where the defendant faces more than one indictment, to be tried at different courts, the same medical condition coupled with the same submissions with regards to capacity, could be canvassed before different tribunals with (potentially) different outcomes. How courts should approach the issue of a lack of decision-making capacity, where there are other (or parallel) proceedings, is not canvassed in the CP.
14. Breaking down the trial into parts, and applying a decision-making test in relation to each part, might (conceivably) result in a defendant being held to have capacity to plead “guilty” but yet not have capacity to be tried in the event that he/she pleaded “not guilty”. Our tentative/provisional view is that such an outcome would be undesirable, and that a process that permitted such an outcome *might* be vulnerable to abuse by some defendants who choose to make a tactical decision to plead “not guilty” whilst playing the ‘medical card’ in the hope of avoiding a trial that might result in a conviction.

Legal test alone or combined with a psychiatric test?

15. The Commission proposes that there should be both a “legal test” and a “defined psychiatric test” to assess D’s decision making capacity (proposal 7).¹⁸ Given that the subject matter of the CP is one of mental “capacity” it is unsurprising that the Commission should attach considerable importance and value to the representations made to it by eminent psychiatrists. But it is evidently a central plank of the Commission’s proposals that the psychiatric test (as yet undefined) should be the *“standard means of assessing whether the accused has decision-making capacity in accordance with the legal test”* [CP, para. 5.16].
16. The Commission say that the psychiatric test would not be the only part of the assessment process and that in most cases the test would also be accompanied by a clinical interview. But it seems plain that the Commission envisages the

¹⁶ CP, para. 3.77.

¹⁷ CP, para. 3.81.

¹⁸ See CP, para.5.14 to 5.17/



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psychiatric test being the primary means by which the legal test is found to be satisfied or not.

17. Precisely what role there would be for judicial input into the assessment of a defendant's capacity is unclear. In *Moyle*,¹⁹ the Court of Appeal had regard to M's conduct at trial, which in conjunction with the medical evidence, did not demonstrate that M was unfit to plead. But, at CP, para. 2.86, the Commission suggest that cases such as *Diamond*²⁰ (and presumably *Moyle*) make a "*mockery of what we know to be the concept of participation*" and complain that *the participation...is ultimately a sham in which legal professionals and the courts are forced to collude*. We return to this complaint later in this Response but the thinking of the Commission appears to be that an assessment of capacity should be primarily a medical one.
18. Given the importance that the Commission attaches to the standard psychiatric test, it is therefore surprising to discover that the proposals are made in the absence of what that "defined psychiatric test" should be. Indeed, the seventh proposal is that such a test "should be developed"²¹ The Commission state that psychiatric experts are analysing a test which Dr Blackwood and his colleagues have devised²² but that research is ongoing.²³ It is not clear whether or when such a test would be ready for use in practice. Even if it sees the light of day it will doubtless take time before its value can be accurately assessed. The American experience is not encouraging [CP, para. 5.3];²⁴
- It has been pointed out that between 1965 and 2005, some 19 psychiatric tests have been constructed in North America for the assessment of competence or fitness. The tests have been variously and specifically criticised in terms of their particular limitations. Psychiatrists in England and Wales have not adopted the MacArthur Competence Assessment Tool-Fitness to Plead which was adapted for use in England and Wales.
19. Given the importance that the Commission attaches to the "psychiatric test", and upon which its proposals appear to hang, we believe that the publication of the CP without the inclusion of a proven psychiatric test, was premature. We do not know what the Commission's preferred option is, or would be, in the event that a reliable psychiatric test cannot be defined.

¹⁹ [2008] EWCA Crim 3059.

²⁰ [2008] EWCA Crim 923.

²¹ CP, para. 5.17.

²² CP, para.5.37

²³ CP, para.5.40.

²⁴ And note the study by D.V. James, G.Duffield, R.Blizard, and L.W. Hamilton: "*Fitness to plead. A prospective study of the inter-relationships between expert opinion, legal criteria and specific symptomatology*"; Psychological Medicine, 2001, 31, 139-150. 2001 Cambridge University Press.



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20. The *Pritchard* test is a legal test, albeit that by virtue of s.4(6) of the 1964 Act (as amended),²⁵ the Court shall not make a determination as to fitness to plead under s.4(5) “except on the written or oral evidence of two or more registered medical practitioners at least one of whom is duly approved”. The 1964 Act does not apply to Scotland.
21. As the Commission points out, “*the Scottish model provides an example of a unitary legal test which does not contemplate a particular psychiatric test or that there will even necessarily be any psychiatric input. It is based on the recommendations of the Scottish Law Commission*”.²⁶ Section 53F of the Criminal Procedure (Scotland) Act 1995,²⁷ provides the following criteria for determining fitness to plead in that jurisdiction:
- (1) A person is unfit for trial if it is established on the balance of probabilities that the person is incapable, by reason of a mental or physical condition, of participating effectively in a trial.
 - (2) In determining whether a person is unfit for trial the court is to have regard to—
 - (a) the ability of the person to—
 - (i) understand the nature of the charge,
 - (ii) understand the requirement to tender a plea to the charge and the effect of such a plea,
 - (iii) understand the purpose of, and follow the course of, the trial,
 - (iv) understand the evidence that may be given against the person,
 - (v) instruct and otherwise communicate with the person's legal representative, and
 - (b) any other factor which the court considers relevant.
 - (3) The court is not to find that a person is unfit for trial by reason only of the person being unable to recall whether the event which forms the basis of the charge occurred in the manner described in the charge.²⁸
22. In Scotland there is now no restriction that written or oral evidence of two medical practitioners is required before a Court may find that a defendant is unfit to plead.²⁹ This is to allow the court to receive evidence on the issue from a variety of sources [see CP, para. 5.28].³⁰ The Commission believes that restrictions should remain on the type of evidence that is capable of supporting a finding that

²⁵ Criminal Procedure (Insanity) Act 1964

²⁶ CP, para. 5.22. Footnote 42 to this paragraph points out “The recommendations have been incorporated into the Criminal Justice and Licensing (Scotland) Act 2010, which received Royal Assent on 6 August 2010.”

²⁷ Inserted into the Criminal Procedure (Scotland) Act 1995 by s.170 of the Criminal Justice and Licensing (Scotland) Act 2010.

²⁸ Consider *R v Podola* [1960] 1 QB 325.

²⁹ See s.170(2)(a)(i), Criminal Justice and Licensing (Scotland) Act 2010.

³⁰ But we note and understand the reservations of the Law Commission as stated at CP para. 5.29 to 5.36.



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an accused lacks decision-making capacity³¹ but recognises that an accused may lack capacity as a result of a condition outside the experience of psychiatrists as experts (such as a physical condition).³² We see merit in retaining the requirement for medical evidence pursuant to s.4(6) of the 1964 Act³³ in order to satisfy Article 5 of the ECHR and that the court is able to make a proper determination in the light of expert medical/psychiatric opinion. We recognise that what is to be determined under s.4(5) of the 1964 Act, is “the question” of whether a defendant is fit to plead. But we submit that s.4(6) does not oblige the court to give an answer only if it corresponds to the conclusions and opinions expressed by the medical witnesses. Accordingly, even if a “defined psychiatric test” were to be developed and applied, its function should only be used as a tool that informs both the experts and the court, but the ultimate determination of whether, or to what extent, the defendant lacks decision-making capacity ought to be a matter of judgement for the court. A psychiatric test ought not to be applied prescriptively.

23. In *Attorney General v. O’Driscoll* 2003 JLR 390, the Royal Court in Jersey, declined to apply the *Pritchard* test, and proposed directing Jurats that the correct test is as follows:

“an accused person is so insane as to be unfit to plead to the accusation, or unable to understand the nature of the trial if, as a result of unsoundness of mind or inability to communicate, he or she lacks the capacity to participate effectively in the proceedings.

In determining this issue, the Superior Number shall have regard to the ability of the accused—

- (a) to understand the nature of the proceedings so as to instruct his lawyer and to 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.”³⁴

24. It follows from the above that by the laws of Scotland and Jersey the tests applied to determine the issue of D’s fitness to plead are ‘legal’ rather than psychiatric. In the absence of a workable and dependable psychiatric test, it makes obvious sense to hone criteria that can be applied, *and be explained*, on a principled, reasoned, basis.

³¹ CP, para.5.36.

³² CP, para. 5.36, fn 68.

³³ Section 4(5) of the 1964 Act provides, “The question of fitness to be tried shall be determined by the court without a jury. Section 4(6), 1964 Act provides, ”The court shall not make a determination under subsection (5) above except on the written or oral evidence of two or more registered medical practitioners at least one of whom is duly approved.”

³⁴ Time will tell whether the question of D’s ability to make “rational decisions” is one that will require modification or qualification.



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25. The question arises whether the existing rules of England and Wales, in relation to Unfitness to Plead, are as unsatisfactory and as problematic as the analysis of the English Law Commission suggests in its CP. We are by no means suggesting that the existing rules require no modification or revision. We accept that doing nothing is not an option on the grounds that the law must indeed be “consistent with modern psychiatric thinking and with the modern trial process” (see above). But it is respectfully submitted that the CP does not pay sufficient regard to the practical implications of its proposals were all fourteen to represent the law and practice of England and Wales.
26. Although the Commission has sketched the history of the rules relating to unfitness to plead in England and Wales in the CP, we feel that there is more to say about the history and the context in which the *Pritchard test* has been applied in practice, as well as the extent to which some modification of the test is required. The Commission might wish to consider whether there should be some elaboration of the criteria (consider *John M*³⁵) that might, for example, be incorporated into the ‘Bench Book’.

Fitness to plead, and personal autonomy

27. We stress that personal autonomy is an important freedom. Although there will be circumstances in which it is the duty of practitioners to protect persons from themselves, it is only in exceptional circumstances that the law should permit practitioners to deny personal autonomy and self-determination, and impose on an individual a course of action that is contrary to the latter’s wishes or judgement (whether ill-judged or unwise).³⁶
28. The reasoning of the Law Commission appears to have been significantly influenced by the facts in *Erskine*. E was convicted of murder in 1988.³⁷ The Court of Appeal quashed E’s conviction for murder and substituted a conviction for manslaughter. The Court said (emphasis added, para. 95):

This is a straightforward case. It is overwhelmingly clear that at the time when the appellant appeared at trial, there was unequivocal contemporaneous evidence that his mental responsibility for his actions at

³⁵ [2003] EWCA Crim 3452 – a decision that we discuss later in this Response.

³⁶ It is submitted that the sentiments expressed by Lord Donaldson MR in *In re T. (Adult: Refusal of Treatment)* 3 WLR 782, CA (albeit in the context of the provision of medical treatment) have value in the context of decisions made by defendants during the course of the investigative/trial processes: “*Prima facie every adult has the right and capacity to decide whether or not he will accept medical treatment, even if a refusal may risk permanent injury to his health or even lead to premature death. Furthermore, it matters not whether the reasons for the refusal were rational or irrational, unknown or even non-existent. This is so notwithstanding the very strong public interest in preserving the life and health of all citizens. However, the presumption of capacity to decide, which stems from the fact that the patient is an adult, is rebuttable...*”; see also *Jehovah’s Witnesses of Moscow v. Russia* (10th June 2010, para.138); and *Re MB (Medical Treatment)* [1997] 2 FLR 426, noting Butler-Sloss LJ at 432G.

³⁷ [2009] EWCA Crim 1425, [2010] 1 WLR 183.



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the time of the killing was substantially impaired. In addition, *there was contemporaneous evidence which suggested that as a result of reduced mental acuity, not amounting to unfitness to plead, but part and parcel of his illness, the decision not to advance the defence was irremediably flawed. There was nothing his legal advisers could do about it, and in reality nothing he could do about it himself.*

29. The difficulty that faced E’s legal representatives was that E had denied involvement in the killings. In the Court of Appeal, E contended that his failure to run the partial defence of diminished responsibility at trial was attributable to his mental disorder.

30. The Commission believe that there is “*a strong case for regarding such an accused person as unfit to plead, because the accused’s mental disorder means that he or she lacks the capacity to assess the strengths and weaknesses of his or her legal position, even though his or her understanding of the law and of legal process may be very good*”.³⁸ However, the Court of Appeal declined to hold that Erskine had been unfit to plead (para. 88):

....a defendant is not to be deemed unfit to plead merely because he will not accept what appears to be eminently sensible advice from his legal advisers. It is therefore for him, not his legal advisers or the court, to decide at the time of the trial whether to advance a plea of guilty to manslaughter on the grounds of diminished responsibility.

31. At para. 119 of the judgment, the Court elaborated on the issue of Erskine’s fitness to plead (emphasis added):

Professor Eastman also examined the issue of the appellant’s fitness to plead. He suggested that the appellant was so deluded that he was unable rationally to address the question whether to admit his offences and advance diminished responsibility, or to deny the offences altogether. The evidence would support a suggestion that he was “cognitively” unfit to plead. Professor Eastman addressed some of the difficulties arising from the application of the Pritchard criteria based on a nineteenth century view of mental disorder in the present century. This is not an appropriate case in which to address whether and how and in what circumstances the present law should be updated to take account of developments in psychiatric thinking. However the importance of the appellant’s delusional thinking, as summarised by Professor Eastman, is that his decision to deny responsibility for killing the victims “*was determined not simply by wishing to avoid responsibility per se for the killing, and to avoid the consequences of doing so within the English justice system which was trying him, but to avoid a consequence which*

³⁸ CP, para. 2.78.



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arose in his mind from his psychosis...if a defendant is deluded about matters directly related to his choice of plea, it might reasonably be argued that he is disabled as regards fitness to plead”.

32. We touch upon self-determination later in this Response³⁹ but, for the moment, it is sufficient to identify the cases of *Diamond*,⁴⁰ and *Murray*⁴¹ as further examples that bring into focus the tension that can exist between the right of a defendant to make his own decisions as to plea etc., and his capacity for making decisions in his/her best interests (or which are, at least, rational).
33. Although the Law Commission’s proposals lower the threshold for determining whether a defendant is unfit to plead, the Court would remain bound to decide whether a given defendant’s condition has ‘disabled’ him with regards to his choice of plea or choice of decision. It is not inevitable (as the Commission appears to believe) that the accused’s mental disorder “means that he or she lacks the capacity to assess the strengths and weaknesses of his or her legal position” [emphasis added, CP, para. 2.78]. D’s mental disorder may demonstrate that circumstance, or it may not.
34. We note that in the cases of *Erskine*, *Murray*, and *Diamond*, the partial defence of diminished responsibility was in issue, and involved defendants whose psychiatric disability was profound. Such cases are complex on their facts. Whether the difficulties encountered in each of those cases would have arisen had the sentence of life imprisonment for murder not been mandatory, is debatable. But such cases are thankfully rare. The Commission has not alluded to decided cases where an offence *other than murder* has resulted in injustice by reason of the defendant’s lack of decision-making capacity.

The development of existing rules pertaining to unfitness to plead

Brief history of the current test of unfitness to plead

35. An historical sketch of the law on unfitness to plead is helpfully presented by the Commission at paras. 2.2 to 2.42 of the Consultation Paper. We do not suggest that the historical narrative is inaccurate in any respect but we do seek to give our own interpretation of the cases that have shaped existing rules relating to unfitness to plead.

³⁹ See the discussion under the heading “*Is the Pritchard test unsatisfactory?*”

⁴⁰ [2008] EWCA Crim 923.

⁴¹ [2008] EWCA Crim 1792.



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36. We begin with *Rex v Steel* (1787),⁴²

.... the prisoner was indicted at the Old Bailey for larceny, and upon being arraigned she stood mute. A jury, duly sworn to inquire whether she stood mute of malice or by the visitation of God, found that she stood mute by the visitation of God...the judges....were of opinion....that the finding that the prisoner was mute by the visitation of God was not an absolute bar to her being tried upon the indictment, and that a plea of not guilty should be entered for her. The prisoner was accordingly tried and convicted.

37. By 1736, (the date of publication of Hale’s treatise, *Historia Placitorum Coronæ*, i.e., *The History of the Pleas of the Crown*) it was open to a judge to empanel a jury to determine whether the accused was unfit to stand trial. Where a person became insane after the commission of a capital offence by him, he would not be tried, judged, or executed. But there appears, at that time, to have been various species of insanity [emphasis added]:⁴³

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

And if such person after his plea, and before his trial, becomes of *non-sane memory*, he shall not be tried; or if after his trial he become of *non-sane memory*, he shall not receive judgment; or if after judgment he become of *non-sane memory*, his execution shall be spared; for, were he of sound memory, he might allege somewhat in stay of judgment or execution.

But because there may be great fraud in this matter, yet, if the crime be notorious, as treason or murder, the Judge before such respite of trial or judgment, may do well to impanel a jury to inquire *ex officio* touching such insanity, and whether it be real or counterfeit.

38. In his submissions to the Court in *Padola*,⁴⁴ Lawton QC⁴⁵ usefully traced historically the meaning of the word “insane” at common law,⁴⁶ to demonstrate that “sound memory” (actually the lack of it) was a factor of insanity, and that anyone who was not of sound memory was unfit to plead:

The old phrase used was “in sana memoria”; “memoria” means memory, not mind, while “sana” means sound, and a man could not be tried unless he had a good and “sound memory”: see *Hale's Pleas of the Crown*, vol.

⁴² 1 Leach, 451; the facts are summarised in *Rex v The Governor of his Majesty's Prison at Stafford* [1909] 2 K.B. 81.

⁴³ Hale, *Pleas of the Crown*; Vol. i. p. 34.

⁴⁴ On behalf of the appellant.

⁴⁵ As he then was.

⁴⁶ As well as for the purposes of the Criminal Lunatics Act 1800.



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1, pp. 34-35. That was a factor of insanity, and anyone who did not have it was “insane” and unfit to plead.

The emphasis on a “good and sound” memory runs through the law on this matter: see *Beverley's Case*⁴⁷ [Reference was also made to *Somerville's Case*] Sir John Hawles in his remarks on the trial of Charles Bateman [*Bateman's Case*] said⁴⁸ that the true reason of the law was that

“a person of 'non sana memoria', and a lunatick during his lunacy, is by an act of God...disabled to make his just defence. There may be circumstances lying in his private knowledge, which would prove his innocency, of which he can have no advantage, because not known to the persons who shall take upon them his defence,”

and criticised the “cruel and inhumane law” 33 Hen. 8, c.20, enacting, inter alia, that a man who fell mad after he committed high treason should notwithstanding be tried, but repealed by 1 & 2 Philip and Mary, c.10, so that the law was as it was at common law, and if Bateman was of “non sanae memoriae he ought not to have been tried, much less executed.”

39. However, in *Padola*, the Court of Criminal Appeal declined to treat a mere loss of memory as coming within Hale's statement of the criteria applied at Common Law for determining whether a defendant was unfit to plead. It observed that the expression “sound memory” was to be contrasted with “absolutely mad” and with “frenzy”:⁴⁹

It is to be observed...that the above passages occur in Chapter IV where Sir Matthew Hale is considering “the defect of idiocy, madness and lunacy” in reference to criminal offences. It will also be seen that in the first passage quoted, “sound memory” is contrasted with “absolutely mad” and with “frenzy.” Accordingly, in our judgment, the word “memory” there used does not relate to recollection but to a state of mind. We think that this meaning is to be attached to the word “memory” not only in the passages in Hale but also in the passage in *Coke's Notes on Beverley's Case*,⁵⁰ and in other authorities previous to the Act of 1800 to which we were referred.

40. The Criminal Lunatics Act 1800⁵¹ was passed some thirteen years after *Rex v Steel* was decided. Section 2 of the 1800 Act created a statutory regime for determining

⁴⁷ (1603) 4 Co.Rep. 123b, 124b.

⁴⁸ (1685) 11 State Trials 467, 474, 476.

⁴⁹ [1960] 1 Q.B. 325, at p.353.

⁵⁰ (1603) 4 Co.Rep. 123b

⁵¹ Repealed by the Statute Law (Repeals) Act 1981, Sch 1, Pt III. Note that by s.8(5)(a) of the Criminal Procedure (Insanity) Act 1964: “(a) the Criminal Lunatics Act 1800 and subsections (2) and (4) of section 2 of the Trial of Lunatics Act 1883 shall be repealed except as respects cases where the accused was arraigned before the time mentioned in subsection (3) of this section”.



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whether a defendant was unfit to be tried, but the single qualification was that the defendant was “insane” at the moment of his/her trial. It was left to the common law to construe what “insane” meant for the purpose of s.2 of the Act [emphasis added]:

“ if any person indicted for any offence shall be insane, and shall upon arraignment be found so to be by a jury lawfully impanelled for that purpose, so that such person cannot be tried upon such indictment...it shall be lawful for the Court before whom any such person shall be brought to be arraigned ...as aforesaid to direct such finding to be recorded, and thereupon to order such person to be kept in strict custody until His Majesty's pleasure shall be known.”

41. In order to give a degree of protection to defendants whose medical or physical disability was profound, the Courts gave the word “insane” (as it appears in s.2, CLA 1800) an extended meaning. Thus, in *Padola*, the Court of Criminal Appeal observed that section 2 has “in many cases since 1800 been construed as including persons who are not insane within the *M'Naughten Rules*, but who by reason of some physical or mental condition, cannot follow the proceedings at the trial and so cannot make a proper defence in those proceedings”.
42. *McNauten's case* was decided in 1843,⁵² but cases decided prior to that date (notably *Dyson*,⁵³ and *Pritchard*⁵⁴) show that the common law was prepared to treat a defendant as “non sane” if he or she, by a defect of faculties, “had not intelligence enough to understand the nature of the proceedings” against him or her (see *Rex v Dyson*, per Mr Justice Parke).
43. *Dyson* was indicted for the murder of her bastard child but D was deaf and dumb. The Court made efforts to address D’s disability by calling upon a witness to attempt to communicate with D using the “dumb alphabet”. The witness reported to the Court that D was “not so far advanced as to put words together” and that D was “incapable of understanding the nature of the proceedings against her”. A jury was empanelled to determine whether D was sane or not. The jury found that she was not sane (having been referred to Lord Hale’s commentary in his *Pleas of the Crown*, cited above). D was ordered to be kept in strict custody until His Majesty’s pleasure was known.

⁵² 1 C. and K. 130; 4 St. Tr. N.S. 847 : “...to establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused as labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong”

⁵³ 1831

⁵⁴ 7 C. & P. 303.



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44. It will be seen that even as long ago as 1831, the Court had an eye to what we now call “special measures” to assist the accused by addressing Dyson’s disability, with a view to proceeding to trial if practicable.
45. *Dyson* was followed in *Pritchard* (P was deaf and dumb). In his charge to the jury, Alderson B directed them to the question which they had to decide (emphasis added):

The question is, whether the prisoner has sufficient understanding to comprehend the nature of this trial, so as to make a proper defence to the charge....

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 to whom he may 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 think that there is no certain mode of communicating the details of the trial to the prisoner, so that he can clearly understand them, and be able properly to make his defence to the charge; you ought to find that he is not of sane mind.*

It is not enough, that he may have a general capacity of communicating on ordinary matters.

46. *Pritchard* is a further illustration of an attempt by the Court to look for effective measures that might be taken to assist the defendant to understand the details of the trial and to “be able properly to make his defence to the charge”.
47. The decision of the Kings Bench Division in *Rex v The Governor of HMP at Stafford*,⁵⁵ is a further example of the Courts construing the word “insane”, in s.2 CLA 1800, broadly. The prisoner, who was deaf and could neither read nor write, contended that his disability did not amount to being “insane”. The Court rejected that contention, and it manifestly did so on policy grounds to prevent “a great injustice”:

I should be very sorry if we were compelled to adopt the argument that the finding here does not amount to a finding that the prisoner is not sane. It might work great injustice in many cases to put a prisoner against whom such a finding was recorded upon his trial as if he were perfectly sane, and if he was found guilty to punish him as an ordinary criminal; or it might be the cause of much mischief if he were found not guilty and

⁵⁵ [1909] 2 K.B. 81.



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were allowed to go free. I am glad to say that we are not driven to accept the argument.

48. The Court accepted as “perfectly true” that section 2 of the 1800 Act used the word “insane” and that the words “inability to plead”, “inability to understand the proceedings”, and “inability to communicate with other persons” are not to be found in the Act. But, the Court reasoned that the word “insane” was qualified by the words which followed it:

It seems to me that when one looks at the words which follow the word “insane” in s. 2 of the Act of 1800 - “ so that such person cannot be tried upon such indictment” - we ought to construe the word “insane” with reference to the question whether the prisoner can or cannot be tried upon the indictment; and we ought not to say that Parke J. and Alderson B. and the other judges who considered the matter misdirected the jury as to the test of insanity for the purpose of this Act. I cannot find in any text-book which I have seen that any doubt has ever been thrown upon the view acted upon by those learned judges.

49. The Court found its reasoning to be supported by the decision of the Court for Crown Cases Reserved in *Berry* (1876)⁵⁶ where there was no question of general insanity “but only of insanity from the point of view of not understanding the nature of the proceedings” and yet an order that B be detained under section 2 of the 1800 Act was held to have been correctly made.
50. The Criminal Procedure (Insanity) Act 1964, as originally enacted, made a number of procedural amendments, but it did not modify the test for determining whether the defendant is unfit to plead or not. The 1964 Act has been amended by the Criminal Procedure (Insanity and Unfitness to Plead) Act 1991 and by the Domestic Violence, Crime and Victims Act 2004, but neither of those amending enactments has modified the common law test of unfitness to plead: see *Erskine* [2009] EWCA Crim 1425, para. 85. Unfitness is now determined by a judge rather than by a jury: s.4(5), DVCVA 2004.

Is the Pritchard test unsatisfactory?

51. It is true that the application of the *Pritchard test* has produced some hard cases, but we doubt whether the Commission’s proposals would produce different results or constitute a significant improvement on existing principles. The Consultation Paper provides no examples where the outcome at first instance would have been different or fairer. Accordingly, we look at four cases referred to in the CP, that

⁵⁶ (1876) 1 Q. B. D. 447



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are said to “show the unfairness of the present situation” [CP, para. 2.86], and to consider them in the context of the Commission’s proposals.

52. In *Erskine*, E was not prepared to admit to his involvement in the killings. Even if the appropriate legal test was the one now proposed by the Commission, it is not a ‘given’ that his condition would have resulted in a finding that the defendant lacked decision-making capacity. Even if E had been found to lack such capacity, and a trial of the facts had been conducted in accordance with the Commission’s preferred option (option 5), it is conceivable that the disposal would have been indefinite hospitalisation. But option 5 would require the prosecution “to prove all elements of the offence” [CP, para. 6.138].⁵⁷ It would have been open to E’s appointed representative to raise a partial defence (e.g. diminished responsibility).⁵⁸ Option 5 includes provision for a *qualified acquittal* by reason of mental disorder that “ensures that the public can be protected from an accused who may be dangerous” (see CP, para. 6.129). Thus, whether E was acquitted on a qualified basis, or was found to have done the act, the court would have available to it the same disposals as are currently available under the 1964 Act (CP, para.131). Fair labelling of a defendant’s conduct is important, but a defendant’s decision not to assert that he was unfit to plead would not necessarily be unreasonable if he (or his representatives) reasoned that he might face hospitalisation even if acquitted, but on a qualified basis.
53. The case of *Murray*⁵⁹ is stated by the Commission to be “*a good example of the proposition that the present dichotomy between understanding and capacity can lead to injustice*”.⁶⁰ The question arises whether that is the fault of the *Pritchard* test. M pleaded guilty to murder (as was her wish) in the face of what the sentencing judge described as “*overwhelming medical evidence and overwhelming past facts indicating that, for a very substantial period of time, she has been suffering from a very severe mental illness which has had an almost overwhelming impact upon her actions*” (per Moses J, as he then was). The Court of Appeal subsequently substituted a conviction for manslaughter on the grounds of diminished responsibility. The Court noted that the consensus of opinion among the psychiatrists was that she was not unfit to plead in the legal sense of the term “as they understood it” and that one psychiatrist stated in a recent report that “*Psychiatric understanding and the law in relation to mentally ill defendants do not always sit together comfortably.*” The Court described the case as illustrating “*in*

⁵⁷ The Commission suggest that this “ensures greater fairness to an unfit accused. It also means that the difficulties resulting from the decision in *Antoine* [2000] UKHL 20 are avoided and would mean that an unfit accused would benefit from the protection of article 6 of the European Convention on Human Rights. The provision for a qualified acquittal, however, ensures that the public can be protected from an accused who may be dangerous.”

⁵⁸ See CP, para. 6.129; contrast with the current position (see CP, paras.6.13-14, and *R v Antoine* [2000] UKHL 20.

⁵⁹ [2008] EWCA Crim 1792.

⁶⁰ CP, para. 2.80.



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acute form the problems of the potential mismatch between the legal test and psychiatric understanding in these matters. When the appellant pleaded guilty to murder, her legal team did not feel able to suggest to the judge that she lacked fitness to plead. She was therefore sentenced to life imprisonment”.

54. We doubt that it was (to use the Commission’s words) the “dichotomy between understanding and capacity” that led to the problem in the case of *Murray*. Firstly, M had resolved to plead guilty notwithstanding the legal advice that she had received. That is not a problem which arises from the existence or application of the *Pritchard* test. Secondly, the *Pritchard* criteria needs to be understood and consistently applied by both legal practitioners and psychiatrists. If there was a “mismatch” then the problem does not necessarily rest at the door of the *Pritchard* test. Had M’s legal advisers been able to advance a plea of ‘unfitness’, the plea may (or may not) have succeeded.
55. One question, on the facts in *Murray*, is whether it was (or ought to have been) open to the court at first instance to have declined to accept M’s guilty plea in the light of the information in the reports (and in circumstances where it would seem that a plea of diminished responsibility would not have been contentious). Existing jurisprudence suggests that the powers of the trial judge to intervene is very limited indeed: see *Diamond*,⁶¹ where the court made the following observations:
54. The judge has a very limited duty. In *Kookan*, the Lord Chief Justice observed in answer to a submission by the defence that the judge could raise the issue:
- “We very much doubt whether any such discretion can exist in the judge. However it is always dangerous to forecast that no possible situation could ever arise in which the judge may not have to consider his powers in that respect. But we find it difficult to envisage any situation where a judge could properly call evidence to this effect in the face of the wishes of the defendant, upon whom the choice lies and upon whom alone the choice lies”
55. In *Campbell (Colin)* (1987) 84 Cr App R 255, it was suggested that the judge should have left the issue to the jury. The view was expressed that the most a judge should do was to point the issue out to the defence and it was their decision as to whether to pursue the issue; a similar observation was made in *Straw*.
56. The Commission cite *Moyle*⁶² as a further illustration of an “anomaly” in relation to a defendant who has a serious mental disorder but who remains fit to plead.⁶³

⁶¹ [2008] EWCA Crim 923.

⁶² [2008] EWCA Crim 3059.

⁶³ CP, para.2.82- 84.



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The appellant had given evidence at trial “*and did so in a way which does not create doubts about his ability to understand questions put to him and to give answers he saw fit to give*” and demonstrated “*a tactical awareness*” (para.39). The Court did not find that his conduct at trial, coupled with the medical evidence, demonstrated that he was unfit to plead (para. 40).

57. We suggest that it is doubtful whether the result would have been different in *Moyle* even if the legal test was defined as the Law Commission proposes. At the heart of the Commission’s proposed legal test is the concept of decision-making capacity: “*in our view it is not possible for an accused to have meaningful participation in his or her trial unless he or she can perform certain tasks or make decisions*” (CP, para.3.35). But, on that basis, *Moyle* had been able to perform such tasks.

58. The case of *Diamond*,⁶⁴ cited by the Commission,⁶⁵ was another instance of a defendant who pleaded not guilty to murder rather than plead the partial defence of diminished responsibility. D had made a tactical decision and the Court declined to set aside his conviction. At para.46 of the judgment, the Court made the following observations (among others):

On the established test, a defendant is fit to plead in cases where his mental condition may well enable him to advance successfully the plea of diminished responsibility, yet his mental condition is still such that it may also prevent rational or sensible decision-making as to the conduct of his defence. Once it is concluded that the defendant is fit to plead, although it may be apparent to everyone that 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 (absent an application under s.35 of the 1983 Act). The trial proceeds on the basis of the instructions given not to advance a defence of diminished responsibility, with the risk that at some future stage, a point will be taken on his capacity to give the instructions when the essential contemporaneous medical evidence is lacking.

59. In a hard-hitting passage, the Commission suggest that cases such as *Diamond* make a “mockery of what we know of the concept of participation”. The Commission even alleges “collusion” (CP, para.2.86; emphasis added):

As cases such as *Diamond* show, the unfairness of the present situation is demonstrated by the fact that a defendant may, for example, be delusional and yet fit to plead because he or she has an underlying cognitive understanding. Yet his or her delusional state may well be such as to

⁶⁴ [2008] EWCA Crim 923.

⁶⁵ CP, para. 2.85.



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impair his or her capacity to make decisions. *This makes a mockery of what we know of the concept of participation because although the defendant may appear to be engaging with the trial process, the participation – such as it is – is not on the required level and is ultimately a sham in which legal professionals and the courts are forced to collude.*

60. If the Commission has correctly described the position then it is obviously unacceptable. However, the burden is on the Commission to demonstrate that the cases which it cites (e.g. *Diamond*) are cases where participation was “a sham”. The judgments in cases such as *Erskine*, *Diamond*, and *John M*, are detailed and painstakingly constructed. Indeed, in *John M*, the trial judge’s directions to the jury on the issue of unfitness to plead, were carefully crafted. The suggestion of “collusion” in a sham, between the professionals and the courts, is unwarranted and inappropriate. In *Murray* the Court spoke of the problems “*of the potential mismatch between the legal test and psychiatric understanding in these matters*” (see above). The Commission points to the inconsistent application of the *Pritchard* test, remarking that it is “*probably a reflection upon the inadequate nature of the criteria*”. However, and importantly, the Commission adds that “*it is just as likely to be a reflection of the fact that there is no standard test for psychiatrists to use*” (CP, para. 5.14) – i.e. no standard psychiatric test. This is closer to the truth than “collusion” between legal professionals.
61. We draw the Commission’s attention to a study⁶⁶ that indicates that problems over the application of the *Pritchard* test may be attributable, in part, to weaknesses in the exercise of clinical judgements:

It is this issue of clinical judgement, which has preoccupied some US researchers (Hoge et al. 1997). In effect, clinicians assess symptomatology and then infer unfitness/incompetency in terms of legal criteria. In consequence, judgement as to unfitness may be affected by clinicians failing to detect symptomatology, or conversely by their over-interpreting its significance as regards unfitness/incompetency. An approach explored in the US is the development of instruments to measure incompetency directly. Success in this respect has been limited (Nicholson & Kugler, 1991), leading to the conclusion by some that the incompetency construct cannot be reduced to a finite set of operational indicators. Recently, a more sophisticated approach has been adopted in the MacArthur Adjudicative Competence Study (Hoge et al.1996, 1997). However, given that it takes 2 hours for their test to be administered by a ‘highly trained research assistant’, its value as a clinical, as opposed to a research tool must remain in doubt.

⁶⁶ D.V. James, G.Duffield, R.Blizard, and L.W. Hamilton: “*Fitness to plead. A prospective study of the inter-relationships between expert opinion, legal criteria and specific symptomatology*”; *Psychological Medicine*, 2001, 31, 139-150. 2001 Cambridge University Press.



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62. Given the absence of a dependable and practical psychiatric test that is capable of exposing as a sham D's participation in the trial process (or which is not on the "required level"), practitioners and the Courts have little option but to apply a legal test that requires the exercise of judgement based (in part) on its observation of the defendant's behaviour and responses when, for example, giving instructions to his/her legal representatives, as well as his/her participation in the trial process (e.g. when giving evidence).
63. As stated above, the Commission complains⁶⁷ that a defendant who is held to be fit to plead notwithstanding that his or her delusional state is such as to impair his or her capacity to make decisions, "makes a mockery of what we know of the concept of participation" because, although the defendant may appear to be engaging with the trial process, "it is not on the required level". This statement begs two questions: first, what do we mean by "participation in the trial process", and secondly, what is "the required level"? We agree that the accused has the right to effective participation in his or her criminal trial. In the case of a child, the position appears to be clear (*SC v United Kingdom*; underlining added):⁶⁸

28. The right of an accused to effective participation in his or her criminal trial generally includes, *inter alia*, not only the right to be present, but also to hear and follow the proceedings (*Stanford v. the United Kingdom*, judgment of 23 February 1994, Series A no. 282-A, § 26).

In the case of a child, it is essential that he be dealt with in a manner which takes full account of his age, level of maturity and intellectual and emotional capacities, and that steps are taken to promote his ability to understand and participate in the proceedings (*T. v. the United Kingdom*, §84), including conducting the hearing in such a way as to reduce as far as possible his feelings of intimidation and inhibition.

29. The Court accepts the Government's argument that Article 6§1 does not require that a child on trial for a criminal offence should understand or be capable of understanding every point of law or evidential detail. Given the sophistication of modern legal systems, many adults of normal intelligence are unable fully to comprehend all the intricacies and exchanges which take place in the courtroom: this is why the Convention, in Article 6§3(c), emphasises the importance of the right to legal representation.

However, "effective participation" in this context 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

⁶⁷ At CP, para. 2.86,

⁶⁸ [2004] ECHR 263.



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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 witnesses and, if represented, to explain to his own lawyers his version of events, point out any statements with which he disagrees and make them aware of any facts which should be put forward in his defence (see, for example, the above-mentioned Stanford judgment, §30).

64. We make the following points in relation to the above extract from the judgment. First, that by a parity of reasoning and principle, much of the Court’s description of what constitutes “effective participation” can be said to be of general application. Secondly, the Court was not being over prescriptive about the level of understanding or capacity to be expected of the defendant in question (“broad understanding”, “general thrust”, etc). Thirdly, the Court attached importance to bespoke measures to assist the defendant in question to participate effectively in the trial. Fourthly, that a defendant’s cognitive ability and his/her ability to communicate are important considerations. Although the Court considered that “when the decision is taken to deal with a child, such as [SC] who risks not being able to participate effectively it is essential that he be tried in a specialist tribunal”,⁶⁹ it did not suggest that the proceedings ought not to be criminal proceedings leading to verdict and, if convicted, sentence.
65. We sense that the CP was heavily influenced by the thinking of Professor R.A. Duff in his scholarly work ‘*Trials and Punishment*’ (1986), and indeed there are many references to that work in the CP. Professor Duff’s analysis proceeds on the basis that the accused is typically a rational moral agent capable of being responsible for his/her actions and “one who can be brought to reform and redeem himself” [p.266]. Professor Duff has argued⁷⁰ that where a person is accused of a crime, “*he should be called to answer that charge. This is to say that the defendant should be a participant in his trial. He is not merely someone about whom the court must reach a determination, but someone with whom the court must try to engage in a communicative process of accusation, argument and judgment.*”⁷¹ The argument runs that a defendant’s ability to participate in his trial “depends partly on the nature of the trial, and partly on his own capacities”:

The language and procedures of the trial might be so arcane, so removed from the experience and understanding of ordinary citizens, that we could not expect them to take any real part in the proceedings. We should then say, not that they are unfit for trial, but that the trial is unfit for them: it is

⁶⁹ Para.35 of the judgment.

⁷⁰ Ibid, Crim. L.R. 422

⁷¹ “*Fitness to plead and fair trials: Part 1: A challenge*”, [1994] Crim. L.R. 419.



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not a procedure through which citizens can be called to account for their alleged wrong-doings.

66. As to what these capacities are, Professor Duff has suggested the following [underlining added]:⁷²

What are these capacities? Certain basic cognitive and intellectual capacities are clearly necessary for an ability to understand the trial, but are equally clearly not sufficient for fitness to plead. In particular, since the trial aims to determine whether the defendant is guilty of wrongdoing, she must be able to understand this normative dimension to the trial. She must be able to grasp what it is to be charged with, and condemned for, a crime, and to appreciate the seriousness of the charge and of the proceedings. She must also be able to make a rational response to the charge--which she cannot do if she is, for instance, so pathologically depressed that she can see no point in responding, or so disordered that she insists on pleading guilty to a charge of which she may well be innocent. Thus fitness to plead involves moral and emotional, as well as narrowly defined cognitive or intellectual, capacities.

67. It is in that context that Professor Duff went on to say that a defendant “must be able to grasp what it is to be charged with, and condemned for, a crime, and to appreciate the seriousness of the charge and of the proceedings”.⁷³ However, neither the law of England and Wales, nor the Strasbourg Court has imported a requirement that D must be able to understand the *normative dimension* of a trial that aims to determine issues of ‘guilt’ and ‘wrongdoing’. The Commission accept that part of the reasoning of Professor Duff may be going too far but believe that there remains “a great deal of sense in Professor Duff’s proposition”.⁷⁴ However, we have serious reservations about attempting to formulate proposals for reform on the basis of contentious and complex theoretical constructs in relation to the function of a criminal trial.⁷⁵
68. We regard the *Pritchard* test as organic in its development.⁷⁶ According to Tim Exworthy⁷⁷ (and we agree) practically speaking, the *Pritchard* test has crystallized into four main areas:

⁷² Ibid, Crim. L.R. 422

⁷³ Some have argued that “psychopathic offenders lack even the basis of moral understanding; they cannot meet the conditions of moral agency and so are not the kinds of beings to whom we should attribute moral responsibility.”: *‘Mental impairment, moral understanding and criminal responsibility: Psychopathy and the purposes of punishment’*, Cordelia Fine, Jeanette Kennett, *International Journal of Law and Psychiatry* 27 (2004) 425–443

⁷⁴ CP, para. 1.9. For contrary views (which now need to be considered in the light of ECHR jurisprudence) see the commentary by Professor Don Grubin, “*Fitness to plead and fair trials: Part 2: A reply*”, [1994] Crim. L.R. 423; and Don Grubin, “*What constitutes fitness to plead?*” [1993] Crim LR. 478.

⁷⁵ See also, “*Fitness to plead*”, editorial, Professor Ian Dennis, [2010] Crim LR 887.

⁷⁶ As the Commission point out, the criterion of being unable to instruct legal advisors was added to the *Pritchard* criteria following the decision in *Davies* (1853) C&K 328: see CP, para. 2.46, fn 94.



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- i) an appreciation of the charges and potential consequences (including the significance of the potential pleas),
- ii) an ability to understand the trial process,
- iii) a potential for the defendant to participate in that process, and
- iv) the ability to work collaboratively with his lawyer on his defence.

69. It is at least arguable that the defendant's potential to participate in the trial process (i.e. (iii) above) is broad enough to encompass his/her ability to understand the substantial effect of the evidence that against (or for) the defendant. The judgment of the Court of Appeal in *John M*,⁷⁸ and the circumstances of that case, is instructive. The trial judge directed the jury⁷⁹ that in order to be fit to stand trial a defendant must be capable of doing six things:

...it was sufficient for the defence to persuade them on the balance of probabilities that any one of those six things was beyond the appellant's capabilities. Those six things were as follows:

- (1) understanding the charges;
- (2) deciding whether to plead guilty or not;
- (3) exercising his right to challenge jurors;
- (4) instructing solicitors and counsel;⁸⁰
- (5) following the course of the proceedings;⁸¹
- (6) giving evidence in his own defence.⁸²

⁷⁷ "Commentary: UK Perspective on Competency to Stand Trial", J Am Acad Psychiatry Law 34:466–71, 2006.

⁷⁸ [2003] EWCA Crim 3452 [20].

⁷⁹ The case predates amendments made by the Domestic Violence, Crime and Victims Act 2004.

⁸⁰ The trial judge gave the following direction: "This means that the defendant must be able to convey intelligibly to his lawyers the case which he wishes them to advance on his behalf and the matters which he wishes them to put forward in his defence. It involves being able (a) to understand the lawyers' questions, (b) to apply his mind to answering them, and (c) to convey intelligibly to the lawyers the answers which he wishes to give. It is not necessary that his instructions should be plausible or believable or reliable, nor is it necessary that he should be able to see that they are implausible, or unbelievable or unreliable. Many defendants put forward cases and explanations which are implausible, unbelievable or unreliable. The whole purpose of the trial process is to determine what parts of the evidence are reliable and what parts are not. That is what the jury are there for."

⁸¹ The trial judge directed the jury what this entailed: "This means that the defendant must be able (a) to understand what is said by the witness and by counsel in their speeches to the jury and (b) to communicate intelligibly to his lawyers any comment which he may wish to make on anything that is said by the witnesses or counsel. Few defendants will be able to remember at the end of a court session all the points that may have occurred to them about what has been said during that session. It is, therefore, quite normal for the defendant to be provided with pencil and paper so that he can jot down notes and pass them to his lawyers either as and when he writes them, or at the end of the session. (Lawyers normally prefer not to be bombarded with too many notes while they are trying to concentrate on the evidence). There is also no reason why the defendant's solicitor's representative should not be permitted to sit beside him in court to help with the note taking process." He added, "It is not necessary that the defendant's comments on the evidence and counsels' 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."

⁸² As to this, the judge directed the jury that, "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."



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70. It seems to us that the trial judge – with the approval of the Court of Appeal – applied the *Pritchard* test in a way which meant that the defendant’s ability to participate in the trial is crucial.
71. At a time when commentators are considering (and rightly so) whether the *Pritchard* criteria is too narrow, it is arguably ironic that in 2001 a study suggested that the criteria could actually be pruned [emphasis added]:⁸³

According to this study, the conclusion by psychiatrists as to whether someone is fit to plead is most strongly associated with judgements on two of the legal criteria - ability to follow the proceedings of the trial and ability to instruct a solicitor - which identified 91.25% and 90% of unfit cases respectively. The logistic regression produces a predictive model incorporating the three issues concerned with trial (following trial, instructing solicitor and understanding details of evidence). Addition of the factors relating to plea and charge did not increase the power of the model. This suggests that these factors could be jettisoned without affecting the performance of the remaining criteria in predicting unfitness.

72. There is a further consideration, namely, that the principle of a defendant’s self-determination (personal autonomy) is not to be lightly disregarded. We recognise that a bad/irrational decision made by the defendant at trial may be difficult to put right later.⁸⁴ Indeed some appeals have been historic.
73. As the Commission points out, there is no standardised procedure for the screening of defendants in England and Wales⁸⁵ but we suggest that legal practitioners are able to recognise (and do) mental abnormality and learning difficulties. We have considered whether provision might be made for a defendant’s legal representatives to be protected from complaint if, on reasonable grounds, they initiate (without the consent of their lay client) proceedings for a determination of the defendant’s capacity for decision-making. However, we do not believe that this would be tenable or practical. Apart from ethical considerations, there are practical considerations too. Even if the defendant’s legal representative alerted the Court of his/her concern, it would remain the defendant’s decision whether to

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 are 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.”

⁸³ D.V. James, G.Duffield, R.Blizard, and L.W. Hamilton: “*Fitness to plead. A prospective study of the inter-relationships between expert opinion, legal criteria and specific symptomatology*”; *Psychological Medicine*, 2001, 31, 139-150. 2001 Cambridge University Press.

⁸⁴ Consider *Neaven* [2006] EWCA Crim 955.

⁸⁵ CP, para. 2.62.



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submit to medical/psychiatric assessment or not. A legal practitioner will wish to have the lay client's confidence in him/her rather than leave the client with a sense of grievance that his/her instructions have been disregarded. It is therefore unsurprising that the Court will be unlikely to "pick up on unfitness in respect of a defendant who is represented and in respect of whom no such representations are made" [CP, para. 2.62]. A defendant who feels that his instructions are being ignored may decide to change his representation or to act in person. In the latter situation, who is to protect the mentally disadvantaged defendant from his own disability? We do not believe that the Commission's proposals address and meet these realities.

74. We leave open the question of whether there could be circumstances in which a judge should be empowered to order assessment and psychiatric reports on a defendant in respect of whom the Court has concerns about his/her decision-making capacity. However, in that regard, we note that in *R v McCarthy* Lord Parker CJ observed that it had been held "certainly before this Act"⁸⁶, that the question of unfitness can be raised not merely by the prosecution or by the defence, but by the judge himself.⁸⁷ In support of that proposition, Lord Parker CJ cited *Reg. v. Beynon*,⁸⁸ where Byrne J had said:⁸⁹

As I have always understood the law and seen it administered, if the court is aware of the fact that there is a preliminary issue whether the person who is charged before the court on an indictment is insane so that he is unfit to be tried, it is the duty of the court to see that the issue is tried, even though no application is made by the prosecution or by the defence.

75. It seems that, in *McCarthy*, there would have been no difficulty had the judge merely ordered medical reports and made up his/her mind on reading them whether an issue of unfitness to plead arose that ought to be determined.⁹⁰ What the judge could not do (at least prior to the DVCVA 2004) was, in effect, to decide for himself/herself whether the defendant was fit to plead or not.

⁸⁶ That is to say, the Criminal Procedure (Insanity) Act, 1964.

⁸⁷ [1967] 1 Q.B. 68. What the judge could not do, at least prior to the DVCVA 2004, was (in effect) to determine the issue of fitness to plead himself (rather than a jury) and it is submitted that this proposition is what *McCarthy* is actually authority for.

⁸⁸ [1957] 2 Q.B. 111

⁸⁹ [1957] 2 Q.B. 111, 114.

⁹⁰ The head-note to the QB report of this decision reads: "The defendant, a deaf mute, was indicted for sending offensive material by post. Before arraignment the judge remanded him for medical examination. When the defendant appeared before the court again the judge had three medical reports and, in the defendant's absence, he informally questioned one of the doctors as to the defendant's fitness to plead. Neither the prosecution nor the defence raised the question of the defendant's fitness to plead and he was arraigned, the trial proceeded and the jury convicted him. On appeal, on the ground that a question regarding his fitness to plead had been raised within the meaning of section 4 of the Criminal Procedure (Insanity) Act, 1964, and that the judge should have caused a jury to be empanelled to decide it."



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Potential injustice of indefinite hospitalisation

76. Section 5(1) of the 1964 Act, as originally enacted, provided that where a defendant was found unfit to plead “*the court shall make an order that the accused be admitted to such hospital as may be specified by the Secretary of State*”. As the Commission point out,⁹¹ this was an order for “indefinite hospitalisation”.
77. The approach taken by the Courts in the *Pritchard* line of cases, to prevent a “great injustice”, came to be viewed as itself being capable of causing great injustice. In November 1985, newspapers reported on the case of Mr Glenn Pearson who had been charged with burglary of a dwelling and stole therein a £5 note and three light bulbs. Mr Pearson was found to be profoundly deaf and of limited intelligence and had great difficulty in communicating.⁹² A jury found Mr Pearson unfit to plead and a “Place of Safety” order was made in his case.⁹³ The case was reported as one of lifelong incarceration for the theft of £5.⁹⁴ As Christopher Emmins points out in his article⁹⁵ the actual consequences were not as draconian as might have appeared to be the case.
78. Mr Pearson’s case was taken up in Parliament by Edward Leigh MP who, with others,⁹⁶ was permitted in 1986 to bring a Bill in Parliament to amend the law:

My Bill seeks to amend the law so that a person found unfit to plead will be detained in a prison hospital only if the strict criteria of insanity are met. Otherwise, he will be remanded in custody or on bail with conditions, as appropriate, until such time as he is fit to plead. Remand to prison custody would be appropriate only if the offence were of a serious nature and the defendant's unfitness was outside the scope of the mental health provisions. I must make it clear, therefore, that the Bill in no way lessens the protection available to the public; it simply widens the powers available to the courts.

⁹¹ CP, para. 2.14.

⁹² See Christopher J Emmins “*Unfitness to Plead: thoughts prompted by Glen Pearson’s case*” [1986] Crim LR. 604.

⁹³ Mr. Mellor (Secretary of State for the Home Department): “On 19 November, at Lincoln Crown court, Glenn Pearson was found unfit to plead, under the Criminal Procedure (Insanity) Act 1964, to a charge of burglary. On 26 November the same court directed his admission to Harmston Hall hospital as a place of safety, under schedule 1 to the Act, pending the Home Secretary’s direction under section 5 on his longer term hospital placement.”: HC Deb 27 November 1985 vol 87 c568W.

⁹⁴ Per Edward Leigh MP: “The Bill is prompted by the case of a constituent of mine, Mr. Glen Pearson, a 32-year-old deaf mute with few communication skills, who was alleged to have stolen £5.40 and three light bulbs and ordered to be detained in custody for an indefinite period by Lincoln Crown court. He was released three months later, after a national outcry. No ordinary person would be treated in that way by the courts. Why did it happen to Glen Pearson? He was found, rightly, to be unfit to plead. From that moment he was caught in the grip of an infernal machine, as remorseless in its purpose as anything out of a Greek tragedy....As two psychiatric reports and one psychologist’s report showed later, Glen Pearson was not insane and he was not a serious danger to the public, but he was treated as if he was” [HC Deb 16 April 1986 vol 95 cc873-4].

⁹⁵ Christopher J Emmins “*Unfitness to Plead: thoughts prompted by Glen Pearson’s case*” [1986] Crim LR. 604

⁹⁶ Bill ordered to be brought in by Mr. Edward Leigh, Mr. Austin Mitchell, Mr. Michael Brown, Mr. Simon Hughes, Mr. David Ashby, Mr. Joe Ashton, Mr. Andrew Rowe, Mr. Tom Clarke and Mr. Douglas Hogg [HC Deb 16 April 1986 vol 95 cc873-4].



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The Bill provides for the regular review of unfitness, there is no similar provision in the law as it stands. The Bill provides for the case to be brought to a conclusion within a specified period. ...

[A]nyone, however reviled or lowly or disabled, has a right to be treated fairly and that anyone has the right to be considered innocent before guilt is proved.

79. Thus, the outcry was *not* in relation to the *Pritchard* test, or the determination that Mr Pearson was unfit to plead, or that too many persons were treated as fit to plead when they ought not to be, but rather that the disposal was perceived as being draconian, namely, the prospect of lifelong hospitalisation.
80. The fate of Mr Leigh’s Bill is not known to the authors of this Response (and no reference is made in the CP to the Bill or what became of it) but, six years later, substantial amendments were made to the 1964 Act by the Criminal Procedure (Insanity and Unfitness to Plead) Act 1991.
81. Relevant to this part of the discussion is section 5 of the 1964 Act, as amended by the 1991 Act, and then by the Domestic Violence, Crime and Victims Act 2004, which empowers the Court to make the following orders in respect of an offender who is unfit to plead *and* it is found under s.4A of the 1964 Act that he did the act or made the omission charged against him:⁹⁷
- (a) a hospital order (with or without a restriction order);
 - (b) a supervision order; or
 - (c) an order for his absolute discharge.
82. A significant reform brought about by the amending legislation is that the “Secretary of State no longer has a role in deciding whether or not the defendant is admitted to hospital and that a court can no longer order the defendant’s admission to a psychiatric hospital without any medical evidence”⁹⁸.
83. In cases where a finding of unfitness to plead has been determined, we are not aware of cases in which the options for disposal under s.5(2) are inadequate or unsatisfactory.

⁹⁷ See s.5(1) and s.5(2), 1964 Act, as amended.

⁹⁸ See Mental Healthcare Online:
http://www.mentalhealthlaw.co.uk/Domestic_Violence_Crime_and_Victims_Act_2004



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The section 4A hearing; the dual role of counsel; conflict of interest concerns

84. The Criminal Procedure (Insanity and Unfitness to Plead) Act 1991 inserted s.4A into the 1964 Act⁹⁹ that provides for a mandatory hearing of the facts of the case once an accused has been found to be unfit to plead [see CP, para.2.22].¹⁰⁰
85. As the Commission point out,¹⁰¹ the procedure provided for by section 4A “*was intended to counter the problems which arise when an accused cannot participate effectively in his or her trial by giving appropriate instructions to his or her lawyers, following the proceedings and, if he or she wishes, giving evidence in his or her own defence.*”
86. The Commission reminds us that the 1964 Act enabled the question of unfitness to be postponed until any time up to the opening of the case for the defence.¹⁰² Our researches suggest that this was intended, at least in part, to resolve a conflict of authority.¹⁰³
87. Before turning to the nature and structure of section 4A hearings, we invite the Commission to consider whether a trial of the facts must be mandatory in all cases where a defendant has been found unfit to plead (or to lack decision-making capacity). There may be cases where a defendant’s lack of capacity is likely to be temporary, or susceptible to treatment, so that a trial in the ordinary way would be possible.¹⁰⁴
88. The Commission describe one aspect of the section 4A hearing as a “great advantage”, namely, that the legal representative appointed under s.4A(2)(b) “*is not bound to follow the accused’s instructions about the way in which the case should be run if he or she does not agree that those instructions are in the*

⁹⁹ Section 4A (1) and (2) provides: “(1) This section applies where in accordance with section 4(5) above it is determined by a [court] that the accused is under a disability. (2) The trial shall not proceed or further proceed but it shall be determined by a jury-(a) on the evidence (if any) already given in the trial; and (b) on such evidence as may be adduced or further adduced by the prosecution, or adduced by a person appointed by the court under this section to put the case for the defence, whether they are satisfied, as respects the count or each of the counts on which the accused was to be or was being tried, that he did the act or made the omission charged against him as the offence.”

¹⁰⁰ We have been assisted by the useful article by Tim Exworthy, “*Commentary: UK Perspective on Competency to Stand Trial*” *Journal of the American Academy of Psychiatry and the Law* 34:466-71, 2006.

¹⁰¹ CP, para. 6.4.

¹⁰² See CP, para.2.13. Section 4(2) of the 1964 Act, as originally worded, provided: “The court, if having regard to the nature of the supposed disability the court are of opinion that it is expedient so to do and in the interests of the accused, may postpone consideration of the said question (hereinafter referred to as “the question of fitness to be tried”) until any time up to the opening of the case for the defence, and if before the question of fitness to be tried falls to be determined the jury return a verdict of acquittal on the count or each of the counts on which the accused is being tried that question shall not be determined.”

¹⁰³ See *Roberts* [1954] 2 Q.B. 329 (Devlin J), not followed in *Beynon* [1957] 2 Q.B. 111.

¹⁰⁴ We note that according to Lord Hale, in his *Pleas of the Crown* (vol. i. p. 34), and in *Pritchard*, a finding of unfitness to stand trial might result in a “*respite*” of judgment or trial.



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accused's interests".¹⁰⁵ This may be a "great advantage" in cases where the defendant is unable to communicate effectively with his/her legal representatives, but the statutory entitlement of the appointed representative to override the wishes of the defendant bumps hard against the general freedom to self-determination (personal autonomy). It is conceivable that a few decades ago greater latitude was afforded to an advocate than now seems to be the case, to exercise skill and judgement on behalf of a lay client who could not communicate with him/her, to secure an acquittal if he/she could. Thus in *Roberts*, Devlin J said:¹⁰⁶

....it is a perfectly conceivable situation, although it appears never to have arisen in practice before, that counsel for the defence, although he cannot be instructed by the accused, may say: "I do not think that the prosecution can bring any case against this accused man at all. If they can, then of course I am in no position to defend it with his aid because he cannot instruct me and cannot tell his story. But as the prosecution can make out no case, I am not prepared to let the matter go merely on the issue whether he is fit or unfit to plead."

89. Devlin J indicated the steps that counsel on behalf of the accused might wish to take [emphasis added]:¹⁰⁷

In cases where the defence does not propose to challenge that the prosecution has a prima facie case, and has no evidence which might induce a jury to reject the evidence for the prosecution, then the convenient course is to let the issue of fitness to plead be tried at once. *I can find no authority in these cases which would prevent counsel for the defence, who wishes to test the prosecution's case on the general issue, from having the right to do so and at the same time preserving all those rights which flow to the defence from the fact that the accused is a person, if it be so established, who is incapable of being communicated with or instructing counsel for his own defence.* Were it otherwise, I think that the gravest mischief and injustice might follow. As I said earlier in the argument, *the defence might wish to tender a witness who could prove that the accused was ten miles away at the time of the alleged crime. It cannot, I think, be our law that, by some formality of procedure, the defence should be prevented from laying matters of that sort before the jury, and so achieving, if they can, for their client a verdict of not guilty.*

90. It is obvious that a practitioner, by definition, is engaged in a discipline that results in the attainment of skills and judgement that may be lacking on the part of the person for whom the practitioner acts. But, although in medicine there may well be a recognised procedure for carrying out (e.g.) surgery, the course of a trial is

¹⁰⁵ CP, para.6.3.

¹⁰⁶ [1954] 2 Q.B. 329, 332; and see the commentary to this case (author unknown): "*Question Whether Accused Is Fit To Plead: Not Always Triable As Separate Issue*", 17 J. Crim. L. 318, 1953.

¹⁰⁷ But note that *Roberts* was not followed in *Beynon* [1957] 2 Q.B. 111



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rarely routine. The advocate will face many tactical dilemmas and will often encounter a development in the case that he/she had not expected. The advocate rarely holds all the cards. Not infrequently, the lay client holds back a card or two (notwithstanding the Criminal Procedure Rules). But even if - and despite the emphatic advice of the defendant's legal representative - the defendant is determined to act unwisely, unreasonably or irrationally, at what point is it appropriate for the law to intervene and to require the professional to act contrary to the clear wish of the defendant? There are professional standards (e.g. not to gratuitously besmirch the character of a witness) as well as statutory rules that (e.g.) prohibit a defendant from cross-examining a witness in person in specified circumstances. The problem is (arguably) less acute if unfitness to plead is narrowly circumscribed (e.g. D is wholly unable to communicate with his/her lawyers). But, the wider the basis for determining unfitness, the greater will be the number of cases that require a 'trial of the facts' involving defendants whose disabilities span an increasingly wide spectrum (especially if judges are required to apply, in reality, a disaggregated approach to the question of unfitness to participate effectively in the trial process).

91. It is submitted there is force in the commentary to the Domestic Violence, Crime and Violence Act 2004, in the context of unfitness of plead, that mental health issues (unlike criminal proceedings) are not ordinarily adversarial and that the duality of roles of the criminal trial advocate may give rise to a conflict of interest:¹⁰⁸

.... the issue of fitness to plead is a mental health issue. As such, and as set out in para 213 of the Auld report, the matter is often the subject of agreement between the defence and prosecution. Mental health issues are not ordinarily adversarial, as it is the case that all interested parties have the best interests of the patient or potential patient in mind when conducting proceedings.

Criminal proceedings are by their nature adversarial. The best interests of a defendant qua defendant may not correspond with the best interests of a defendant qua patient or potential patient. The provisions of the old law and the Act may therefore place advocates in a criminal trial, both prosecution and defence, and particularly the defence, in a position where a conflict of interest between those two roles arises or may arise. This may be particularly acute if the judge raises the issue of fitness to plead during the course of a trial in which the defendant does not wish the issue to be raised, for example because he has a good defence on the merits. The new Act does nothing to address the duality of the roles of the trial advocate.

¹⁰⁸ Blackstone's Guide to the Domestic Violence, Crime and Victims Act 2004, paras. 9.33 and 9.34; Elizabeth Lawson QC, Melanie Johnson, Lindsay Adams, John Lamb, and Stephen Field, Oxford University Press, 2005.



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92. Like the DVCVA 2004, the Consultation Paper does little to address the duality of the roles of the trial advocate. Indeed, we go so far as suggesting that the Commission's proposals would have the effect of significantly increasing the number of defendants who meet the Commission's proposed legal test with the consequence that more contested s.4A hearings are likely (with associated costs and delays), coupled with an increased risk in the incidence of a conflict of interest given the advocate's dual role.
93. The Commission has set out its case for reform of s.4A hearings at CP para.6.11 to 6.54. It is an erudite analysis. But even if one assumes that the problems associated with the current section 4A hearing are as many, and as significant, as the Commission believes them to be, this merely reinforces the desirability of ensuring that hearings under s.4A are kept to a minimum and that it is in everyone's interest (particularly the accused's) for the accused to have his/her case tried in the ordinary way, even if that means bespoke special measures being devised and implemented by the Court to address (if possible) the accused's disability(ies).¹⁰⁹

Question 1

94. **Question 1:** *Do consultees agree that we should aim to construct a scheme which allows courts to operate a continuum whereby those accused who do not have decision-making capacity will be subject to the section 4A hearing and those defendants with decision-making capacity should be subject to a trial with or without special measures depending on the level of assistance which they need?*
95. We agree that the term "unfitness to plead" is not apt to describe the issue of whether or not a defendant has the capacity to participate effectively in the trial.
96. We do *not* agree with the Commission that under "the current *Pritchard* test, the role of special measures is not considered".¹¹⁰ It is true that recent cases have not discussed the *Pritchard* test in the context of special measures but the absence of discussion does not mean that a consideration of such measures is irrelevant or excluded. Indeed, as we have pointed out (above) the judges in the cases of *Dyson* and *Pritchard* did consider measures that we would now describe as "special measures". In *Dyson*, the judge appears to have called upon *two* witnesses to

¹⁰⁹ We note that Provisional Proposal 5 is that "Decision-making capacity should be assessed with a view to ascertaining whether an accused could undergo a trial or plead guilty with the assistance of special measures and where any other reasonable adjustments have been made".

¹¹⁰ CP, para.4.25.



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attempt to communicate with the defendant (who was deaf and dumb). In the case of *John M*,¹¹¹ one of the psychiatrists expressed the opinion that JM was fit to stand trial “*provided that measures were taken to cater for his memory difficulties, such as the provision of frequent breaks so that matters could be explained to him.*”

97. The overarching consideration is whether the defendant’s trial is fair and Convention compliant. We are not aware of complaints from the judiciary that the *Pritchard* test has resulted in injustice (the CP provides no such reports/complaints).
98. Once the court is alerted to the existence of a defendant’s physical or mental condition and which, unless addressed, might render the defendant’s trial unfair, it should be open to the Court to consider steps or measures that will enable the defendant to participate effectively in the trial. Some trial judges are permitting vulnerable defendants to give evidence through an intermediary notwithstanding that s.104 of the Coroners and Justice Act 2009 has yet to be brought into force (and note Part 29 of the Criminal Procedure Rules 2010, in relation to special measures, defendant’s evidence directions, and the use of intermediaries).¹¹²
99. There may be merit in adding to the *Pritchard* test a further consideration, namely, “any other relevant factor” (see s.53F(2)(b) of the Criminal Procedure (Scotland) Act 1995¹¹³). However, whether a factor is “relevant” must be judged in the context of the aforementioned overarching requirement that the trial is fair. One test might be that if the defendant’s disability/condition cannot be satisfactorily accommodated by way of special measures (with the consequence that his/her trial would be likely to be unfair) then the defendant lacks the necessary capacity to participate in the trial. We point out that in *John M*,¹¹⁴ the Court of Appeal did not criticise the trial judge who (on one view) expanded the factors to be considered to determine whether D was unfit to plead. The Court of Appeal remarked that “*to include additional tests, even if unnecessary, can scarcely lower the standard of the test to be met when the judge had said that a failure to be able to do any one of the six things would suffice to render the appellant unfit to stand trial*” [27].
100. Although the issue of a defendant’s capacity to stand trial will often arise and be determined pre-trial, there may be circumstances in which the issue arises during

¹¹¹ [2003] EWCA Crim 3452, [14].

¹¹² We point out that contrary to what is said in CP para. 2.62 our experience is that Counsel and solicitors are able to detect psychiatric problems, or at least detect that there may be such a problem that requires investigation.

¹¹³ Inserted into the Criminal Procedure (Scotland) Act 1995 by s.170 of the Criminal Justice and Licensing (Scotland) Act 2010.

¹¹⁴ [2003] EWCA Crim 3452



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the trial, or at the point of sentencing or the making of determinations in confiscation proceedings.

101. We are firmly of the view that the section 4A hearing should continue to be by judge and jury. We were less united on the question of whether the issue of ‘unfitness’ should also be determined by a jury. One member of the Group makes the powerful point that the proposed new test is broader than the *Pritchard* criteria and with the result that there would be more contested hearings, and that the importance of the outcome is a highly material consideration.

Question 2

102. **Question 2: Can consultees think of other changes to evidence or procedure which would render participation in the trial process more effective for defendants who have decision-making capacity but due to a mental disorder or other impairment require additional assistance to participate? (CP. Paragraph 4.31)**
103. Earlier in this Response we posed the question whether there might be circumstances in which a judge should be empowered to initiate an examination of the defendant’s mental or physical condition for the purpose of determining whether he or she has decision-making capacity. We provisionally state that there may be some merit in vesting the Crown Court with powers similar to those available in Magistrates’ Courts, to deal with defendants with a mental or physical condition: see section 37(3) of the Mental Health Act 1983, and section 11(1) of the Powers of Criminal Courts (Sentencing) Act 2000.¹¹⁵
104. We consider that there may be cases where the defendant and the court would be assisted were a psychologist or psychiatrist to attend the hearing(s), perhaps acting as an intermediary, or to alert the court to difficulties that ought to be addressed in order that the proceedings are fair. We note that during the highly publicised trial of Mr Barry George at the Central Criminal Court in August 1998, a psychologist had sat with him in the dock.¹¹⁶

¹¹⁵ See CP, paras. 8.4 to 8.7.

¹¹⁶ <http://news.bbc.co.uk/1/hi/uk/7537797.stm> Mr George was tried and acquitted of the murder of the television presenter, Jill Dando.



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Question 3

105. **Question 3: Do consultees agree that we have correctly identified the options for reform in relation to the section 4A hearing? If not, what other options for reform would consultees propose? (Paragraph 6.153)**
106. We remind ourselves that the s.4A hearing was “*intended to counter the problems which arise when an accused cannot participate effectively in his or her trial by giving appropriate instructions to his or her lawyers, following the proceedings and, if he or she wishes, giving evidence in his or her own defence*” [CP, para.6.4].
107. The Commission state that the statutory procedure “*has more or less consistently succeeded in achieving that objective. Broadly speaking, it does what it was intended to do which is to enable the prosecution’s evidence to be properly tested and to allow any points which can be properly made in the accused’s favour to be put before the jury for their consideration*” [CP, para. 6.5]. We have no reason to doubt the correctness of that statement.
108. The s.4A hearing is a limited enquiry, namely, to determine whether the defendant “did the act or made the omission charged against him as the offence” (s.4A(2), 1964 Act). We recognise that a significant problem with that formulation is whether and in what circumstances it is necessary for the jury to have regard to the fault element of the offence in question.¹¹⁷ It is clear that there are offences in respect of which the conduct element of the offence possesses a mental ingredient of some kind: examples of these are set out in CP, para.6.28 (e.g. failing to disclose knowledge or suspicion of money laundering, s.330, s.331, POCA 2002).
109. The Commission’s preferred option for reform is Option 5 [emphasis added]:
- 6.129 One way would be to *have a procedure where, in so far as is possible, all the elements of the offence are considered. The prosecution would have the burden of proof in relation to this. In determining whether all elements of the offence are proved, it should be possible to consider defences in so far as this is consistent with the fact that decisions about the section 4A hearing are made by the accused’s appointed legal representative. In other words, as long as there is a sufficient evidential basis to raise the defence or partial defence then the representative of the accused can do so if he or she thinks that it is in the accused’s best interests. If the accused is acquitted (because, for example, there is no evidence of fault) then there may (but would not necessarily be) a further hearing to consider whether or not the acquittal is because of mental disorder existing at the time of the offence.*

¹¹⁷ CP, para. 6.7.



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6.130 As envisaged, there would be three possible outcomes to this procedure:

- (1) a finding that the accused has done the act or made the omission and that there are no grounds for acquitting him or her;
- (2) an outright acquittal; or
- (3) an acquittal which is qualified by reason of mental disorder.

110. The Commission’s thinking is summarised at CP para.6.138, namely, *“In our view, option 5 strikes the most appropriate balance between protecting the accused and the public interest. By requiring the prosecution to prove all elements of the offence, it ensures greater fairness to an unfit accused. It also means that the difficulties resulting from the decision in Antoine are avoided and would mean that an unfit accused would benefit from the protection of article 6 of the European Convention on Human Rights. The provision for a qualified acquittal, however, ensures that the public can be protected from an accused who may be dangerous.”*
111. At first sight Option 5, and its underlying reasoning, have much to commend it. However, a hearing along such lines is barely distinguishable from a traditional jury trial. On the one hand the defendant would be advantaged to the extent (a) that the burden of proof would be on the prosecution throughout (and presumably in all cases),¹¹⁸ (b) that his/her legal representative would be free to put forward answers and defences in the accused’s best interest,¹¹⁹ and (c) that the accused may be subject to special measures. The ‘sting in the tail’ is that even if the defendant is acquitted, he might find that a further hearing takes place, the acquittal becomes “qualified”, and he is then made the subject of an order under s.5 of the 1964 Act. In short, he may find that his acquittal is a ‘Pyrrhic Victory’ and that he is in a worse position than if he had held out for a traditional trial or declined to assert that he lacked decision-making capacity. The Commission’s proposals involve up to two hearings, and possibly three (i.e. determination of capacity, trial of the facts, qualified acquittal determination). The impact of such hearings on the public purse and court time is obvious.
112. We provisionally, and tentatively, submit that the problems and issues relating to a ‘trial of the facts’, where D has been found to be unfit to plead, are linked to the severity of the measure that disposes of D’s case, as well as concerns that D and/or the public may need to be protected from D.
113. It could be argued that the unfitness to plead regime has the potential for bringing to the attention of public authorities a vulnerable person who is in need of (or

¹¹⁸ What would be the position in relation to strict liability offences?

¹¹⁹ Whether this is actually an “advantage” to the accused is subject to the submissions we have made regarding the right to self-determination (personal autonomy).



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seeks) assistance or care. On that basis, the focus of attention moves away from whether D did the act or not, to providing the care and assistance that D needs/seeks. Similarly, if it is evident that D poses a risk to the public, then it is arguable that (regardless of whether D did the act alleged) that risk should be addressed. These difficult issues might be easier to address if the procedure for determining ‘fitness to plead’ was confined to a narrow band of cases where D’s disability is profound/evident. But the converse is true if the threshold of ‘unfitness to plead, etc’ is set low.

114. A further concern is whether the section 4A procedure (of whatever form) compounds incoherence that arguably already exists in the trial process. We briefly look at three situations that arguably give rise to that incoherence. In relation to the second situation there is no disposal of the kind specified in section 5 of the 1964 Act if the trial does not proceed.

- i. First, the existing scheme under the 1964 Act for determining unfitness to plead applies to trial on indictment but not to summary trial [see CP, Part 8].
- ii. Secondly, were a court to be persuaded to stay proceedings as an ‘abuse of process’ on the grounds of a defendant’s incapacity, there would be no trial of the facts and no disposal other than the defendant being ‘released’.
- iii. Thirdly, having regard to the decision of cases such as *R v Jones*,¹²⁰ there are circumstances in which a defendant may be tried in his/her absence including where a defendant is ill or incapacitated [per Lord Bingham, emphasis added]:

6. For very many years the law of England and Wales has recognised the right of a defendant to attend his trial and, in trials on indictment, has imposed an obligation on him to do so. ... But for many years problems have arisen in cases where, although the defendant is present at the beginning of the trial, it cannot (or cannot conveniently or respectably) be continued to the end in his presence. This may be because of genuine but intermittent illness of the defendant (as in *R v Abrahams* (1895) 21 VLR 343 and *R v Howson* (1981) 74 CrAppR 172); or [other situations] ... In all these cases the court has been recognised as having a discretion, to be exercised in all the particular circumstances of the case, whether to continue the trial or to order that the jury be discharged with a view to a further trial being held at a later date..... it is of course a discretion to be

¹²⁰ [2002] UKHL 5



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exercised with great caution and with close regard to the overall fairness of the proceedings; *a defendant afflicted by involuntary illness or incapacity will have much stronger grounds for resisting the continuance of the trial than one who has voluntarily chosen to abscond.*

Later in his speech, Lord Bingham added that “*If the absence of the defendant is attributable to involuntary illness or incapacity it would very rarely, if ever, be right to exercise the discretion in favour of commencing the trial, at any rate unless the defendant is represented and asks that the trial should begin.*” (para.13).

Their Lordships noted that “a defendant in a criminal trial should have the opportunity to present his arguments adequately and participate effectively: *Ensslin, Baader and Raspe v Germany* (1978) 14 DR 64, at p.115; *Stanford v United Kingdom* (1994) Series A/282-A” (per Lord Bingham, para.8(3)).

115. A defendant who is absent through illness may nonetheless have provided his legal representatives with sufficient instructions to enable a trial to proceed in his or her absence. But the key feature is that the defendant is able to participate effectively in the trial process, and this issue is context/fact specific.
116. If a defendant is unable to participate effectively by reason of a physical or mental condition then, despite the protections woven into the procedure under Option 5, it is difficult to see how the defendant would truly be able to participate effectively in it. For example, there are many cases where the material facts/answers rest within the mind/knowledge of the accused. If the accused is unable to communicate those facts/answers, fact-finders are left speculating as to what they might be. Expressed rhetorically, would the accused in the cases of *Pritchard* (1831) and/or *Dyson* (1831) fare better under the procedure proposed under Option 5? Unfortunately, the CP is silent on the issue and provides no examples. On the other hand, if an accused is able to participate with the assistance of special measures, then the preferred course is a trial pursued in the ordinary way.
117. It follows from the above that whilst we are content to proceed on the basis that the Commission has correctly identified options that merit consideration, our provisional view is that we are not persuaded that Option 5 is needed or desirable.



Question 4

118. **Question 4: If consultees do not agree that option 5 is the best option for reform, would they agree with any other option? (Paragraph 6.153)**
119. We have acknowledged the complexity of this topic in our response to Question 3. For the moment (pending further consultation and reflection) we confine ourselves to the representations that we have made thus far.

Question 5

120. **Question 5: Should a jury be able to find that an unfit accused has done the act and that there are no grounds for acquittal in relation to an act other than that specifically charged? (Paragraph 6.159)**
121. We find the expression “no grounds for acquittal” potentially confusing. It is submitted that a question answered positively is to be preferred to one that is couched in the negative. We tentatively suggest that the correct course is for the indictment to be carefully drafted, including (if appropriate) alternative charges. Judges are now encouraged to draft ‘routes to verdict’ and we are inclined to the view that a similar approach could/ought to be taken in relation to a section 4A hearing. One member of the Working Group (whose views are likely to be shared by many legal practitioners) suggests that a jury should also determine whether a defendant has decision-making capacity.

Question 6

122. **Question 6: Are there circumstances in which an accused person who is found to have done the act and in respect of whom there are no grounds for an acquittal should be able to request remission for trial? (Paragraph 7.26)**
123. Our provisional view is that there ought to be provision that enables a defendant who has been found to have ‘done the act’ to apply for a remission for trial. Despite the procedure proposed in Option 5, there may be circumstances in which, subsequent to the section 4A hearing, information relevant to the trial of the facts/issue becomes available (e.g. the accused recovers sufficiently to provide it). We leave open (pending further consultation and reflection) whether and in what circumstances such provision should be restricted. There may be a case for imposing a time limit, and/or that the information must be ‘new’ in the sense that it was not available or capable of being adduced at the time of the original hearing. It may be that some consideration would need to be given to the extent of the



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court's powers of case-disposal in the event that the defendant is convicted (e.g. where D has been hospitalised for many months).

Question 7

124. **Question 7: Should an accused who is found to be unfit to plead (or to lack decision-making capacity) be subject to the section 4A hearing in the same proceedings as co-defendants who are being tried? (Paragraph 7.44)**
125. Our provisional view is that this is a matter best determined by the trial judge on a case-by-case basis albeit that there may be merit in a presumption that the hearings are discrete. Such determinations are fact-specific and it would be imprudent to lay down hard-and-fast rules. Option 5 presents particular problems in this regard because of the matters that the prosecution would be required to prove, including all the elements of the offence(s) charged.
126. However, there may be compelling reasons why the hearings should be joined (e.g. each hearing would be lengthy, detail-rich, and where the strands of the evidence involving all the defendants are so heavily interwoven that it would be in the interests of justice for the cases of all defendants to be heard together).
127. There may be other cases (arguably the majority) where discrete hearings are warranted because the cases can be presented separately without prejudice to the parties and that a joint hearing might result in directions to the jury (and routes to verdicts/findings of fact) being unduly complex, confusing, and even contradictory (e.g. as to the burden of proof on a given charge).

Question 8

128. **Question 8: Do consultees think that the capacity based test which we have proposed for trial on indictment should apply equally to proceedings which are triable summarily? (Paragraph 8.37)**
129. We answer this question in the affirmative. There is no logical reason why the tests should be different as the rationale is rooted in effective participation in the proceedings with an understanding of the process.



Question 9

130. **Question 9: Do consultees think that if an accused lacks decision-making capacity there should be a mandatory fact-finding procedure in the magistrates' court? (Paragraph 8.37)**
131. Our provisional view is that the decision should be discretionary (but subject to published guidelines to avoid seemingly inconsistent outcomes and arbitrary decision-making on the part of the Court).

Question 10

132. **Question 10: If consultees think that there should be a mandatory fact-finding procedure, do they think it should be limited to consideration of the external elements of the offence or should it mirror our provisional proposals 8 and 9? (Paragraph 8.37)**
133. Not applicable

Question 11

134. **Question 11: Do the matters raised in questions 8, 9 and 10 merit equal consideration in relation to the procedure in the youth courts? (Paragraph 8.68)**
135. Yes.

Question 12

136. **Question 12: How far if at all, does the age of criminal responsibility factor into the issue of decision-making capacity in youth trials? (Paragraph 8.69)**
137. The age of the defendant is a material consideration especially when it pertains to his/her maturity and/or 'developmental maturity'.

Concluding remarks

138. The Commission's provisional proposals, were they to become law, would have profound consequences. But its preferred option for determining a defendant's lack of decision-making capacity is constructed on the assumption that a psychiatric test can be "defined" and that it would be the standard test for



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assessing capacity. In the event that such a test cannot be defined, or is flawed, no alternative option for reform is advocated by the Commission in the CP. The publication of the CP was therefore arguably premature. However, even if a psychiatric test can be developed, we believe that its value is in the information that it provides, rather than being prescriptive of the determination. Whether a “defined psychiatric test” comes into being or not, the CP has usefully put the *Prichard* test under the microscope and makes a powerful case for the use of special measures, as appropriate, in relation to vulnerable defendants as well as non-defendant witnesses.

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17th January 2011

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APPENDIX A: Law Commission's Provisional Proposals

Provisional Proposal 1: The current *Pritchard* test should be replaced and there should be a new legal test which assesses whether the accused has decision-making capacity for trial. This test should take into account all the requirements for meaningful participation in the criminal proceedings. (Paragraph 3.41)

Provisional Proposal 2: A new decision-making capacity test should not require that any decision the accused makes must be rational or wise. (Paragraph 3.57)

Provisional Proposal 3: The legal test should be a revised single test which assesses the decision-making capacity of the accused by reference to the entire spectrum of trial decisions he or she might be required to make. Under this test an accused would be found to have or to lack decision-making capacity for the criminal proceedings. (Paragraph 3.99)

Provisional Proposal 4: In determining the defendant's decision-making capacity, it would be incumbent on the judge to take account of the complexity of the particular proceedings and gravity of the outcome. In particular the judge should take account of how important any disability is likely to be in the context of the decision the accused must make in the context of the trial which the accused faces. (Paragraph 3.101)

Provisional Proposal 5: Decision-making capacity should be assessed with a view to ascertaining whether an accused could undergo a trial or plead guilty with the assistance of special measures and where any other reasonable adjustments have been made. (Paragraph 4.27)

Provisional Proposal 6: Where a defendant who is subject to a trial has a mental disorder or other impairment and wishes to give evidence then expert evidence on the general effect of that mental disorder or impairment should be admissible. (Paragraph 4.31)

Provisional Proposal 7: A defined psychiatric test to assess decision-making capacity should be developed and this should accompany the legal test as to decision-making capacity. (Paragraph 5.17)

Provisional Proposal 8: The present section 4A hearing should be replaced with a procedure whereby the prosecution is obliged to prove that the accused did the act or made the omission charged and that there are no grounds for an acquittal. (Paragraph 6.140)

Provisional Proposal 9: If the accused is acquitted provision should be made for a judge to hold a further hearing to determine whether or not the acquittal is because of mental disorder existing at the time of the offence. (Paragraph 6.140)

Provisional Proposal 10: The further hearing should be held at the discretion of the judge on the application of any party or the representative of any party to the proceedings. (Paragraph 6.152)

Provisional Proposal 11: The special verdict should be determined by the jury on such evidence as has been heard or on any further evidence as is called. (Paragraph 6.152)

Provisional Proposal 12: Where the Secretary of State has referred a case back to court pursuant to the accused being detained under a hospital order with a section 41 restriction order and it thereafter becomes clear beyond doubt (and medical evidence confirms) that the accused is still unfit to plead, 26 the court should be able to reverse the decision to remit the case. (Paragraph 7.21)

Provisional Proposal 13: In the event of a referral back to court by the Secretary of State and where the accused is found to be unfit to plead, there should not be any need to have a further hearing on the issue of whether the accused did the act. This is subject to the proviso that the court considers it to be in the interests of justice. (Paragraph 7.21)



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Provisional Proposal 14: In circumstances where a finding under section 4A is quashed and there has been no challenge to a finding in relation to section 4 (that the accused is under a disability) there should be a power for the Court of Appeal in appropriate circumstances to order a re-hearing under section 4A. (Paragraph 7.59).

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