



**The British  
Psychological Society**

Promoting excellence in psychology

## **British Psychological Society response to the Law Commission**

### **Unfitness to Plead**

#### **About the Society**

The British Psychological Society, incorporated by Royal Charter, is the learned and professional body for psychologists in the United Kingdom. We are a registered charity with a total membership of just over 50,000.

Under its Royal Charter, the objective of the British Psychological Society is "to promote the advancement and diffusion of the knowledge of psychology pure and applied and especially to promote the efficiency and usefulness of members by setting up a high standard of professional education and knowledge". We are committed to providing and disseminating evidence-based expertise and advice, engaging with policy and decision makers, and promoting the highest standards in learning and teaching, professional practice and research.

The British Psychological Society is an examining body granting certificates and diplomas in specialist areas of professional applied psychology.

#### **Publication and Queries**

We are content for our response, as well as our name and address, to be made public. We are also content for the Law Commission to contact us in the future in relation to this inquiry. Please direct all queries to:-

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#### **About this Response**

##### **This response was led for the British Psychological Society by:**

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##### **With Contributions from:**

Dr Emily Glorney CPsychol AFBPsS, Division of Forensic Psychology

We hope you find our comments useful.

**David J Murphy CPsychol**  
*Chair, Professional Practice Board*

**British Psychological Society response to the Law Commission**

**Unfitness to Plead**

	<ul style="list-style-type: none"> <li>• <b>How should special measures to enhance the defendant’s ability to participate in trial be fairly incorporated into the test for unfitness?</b></li> </ul>
1.	<p>Comments:</p> <p>Liaison and Diversion services could play a more prominent role in the provision of support for defendants with a view to enhancing engagement in the trial process</p> <p>There is a clear role for Registered Intermediaries for defendants (currently only formally for witnesses). The Registered Intermediary could enhance a defendant’s effective engagement with the trial process but the Registered Intermediary is not a single solution to enhancing a fair trial, i.e. provision of a Registered Intermediary would not address capacity issues. The distinction between enhancing effective engagement and decision-making capacity must be explicit; the role of the Registered Intermediary must be clearly defined and explicit. Defendants could have access to a Registered Intermediary/special measures at the pre-trial stage, where important legal decisions are made. It needs to be made clear whether access to a Registered Intermediary should always be on advice of a recommendation from an expert report.</p> <p>Various assessment instruments are and have been developed to evaluate mental aptitude and fitness to plead. A standard compendium of accepted tests should be agreed upon between those professionals the court approves to assess individuals for capacity to plead. These tools might form one component of a standardised test for fitness to plead. Various assessors of capacity, such as psychologists and psychiatrists (through a working group appointed by the British Psychological Society and Royal College of Psychiatry) should agree upon a standardised battery of assessment tools which can be applied by clinical professionals when assessing capacity at the behest of the legal authorities.</p> <p><i>Through an agreed assessment process clinical professionals can document ‘best practice standards’ as well as compulsory measures to fulfil the requirement to consider special measures. This would enable support to be provided to those defendants who have difficulty engaging with the trial process but who fall short of a lack of sufficient or satisfactory capacity.</i></p> <p><i>Therefore, in response to consultation question 12 relating to a statutory entitlement for defendants to have support of a Registered Intermediary, this special measure would be in line with a focus on functional capacity for trial proceedings and the context of the individual in the court proceedings.</i></p> <p>Qs 13&amp;14:</p> <p><i>In consideration of the relaxing of the evidential requirement, it is clear that Psychology has grown and become more prominent in the legal process since the introduction of the Criminal Procedure (Insanity) Act in 1964, to which the evidential requirements relates. Psychologists are increasingly asked to assess people’s capacity to make legally significant decisions and are well-placed to do so, given their understanding of cognitive and social processes involved and their training in the application of standardised as well as non-standardised assessment measures.</i></p> <p><i>Therefore, in response to consultation questions 13 and 14, clinical practitioners including psychiatrists and psychologists considered by the Court to be adequately qualified and with sufficient experience may provide testimony regarding assessment and fitness to plead.</i></p> <p>Clinical practitioners including psychiatrists and psychologists considered to be adequately qualified by the Court and with sufficient experience may provide testimony regarding</p>

	<p>assessment and fitness to plead.</p> <p>Provisional Proposal 7: A defined psychiatric test to assess decision-making capability should be developed and this should accompany the legal test as to decision-making capability.</p>
	<ul style="list-style-type: none"> <li>• <b>Should the procedure in the magistrates' and youth courts mirror that in the Crown Court?</b></li> </ul>
2.	<p>Comments:</p> <p>Assessment of fitness to plead should extend from Crown Courts to Magistrate and Youth Courts.</p> <p>Magistrates and legal professionals should receive mental health and learning disability awareness training. In the case of Youth Courts, lawyers and judges should receive specific training in working with children and young people.</p> <p>The procedure of assessment of fitness to plead in Youth Courts should be specific to children and young people. A Youth Court differs from a Magistrate's Court. More serious offences are heard in the Youth Court and there are benefits to the judicial process and vulnerable people for trials to be held in a Youth Court rather than being referred to a Crown Court.</p> <p><i>The processes should be consistent throughout all courts. In the youth courts due consideration should be given to the attainment of development milestones in relation to capacity. An agreed group of assessment instruments would include 'youth' versions with confounding and consideration for cognitive age-related normative data. There is no requirement for reference to 'psychiatry' or 'psychology' specifically. A neutral label like 'standardised test of fitness to plead' on the basis that it is implicit within this terminology that it is an assessment of cognitive functioning which is in line with the function of the test for the purposes of the Court. Furthermore, a reference to a 'psychiatric assessment' perhaps discriminates against professional membership and potentially devalues the strong multidisciplinary contributions to the assessment of fitness to plead.</i></p>
	<ul style="list-style-type: none"> <li>• <b>What should the process be for dealing with a defendant when he or she has been found unfit to plead?</b></li> </ul>
3.	<p>Comments:</p> <p>A process or list of conditions should be documented to highlight the clear differences, as well as complements, between an individual's legal capacity and legal rights (specifically, Article 12 of the European Convention on Human Rights). The clinicians' knowledge and sensitivity to human rights with disabilities must be paramount when assessing capacity. This idea draws on the concept of (e.g.) 'in the best legal interests' of a detained patient in Mental Health Review Tribunals.</p>
	<ul style="list-style-type: none"> <li>• <b>At a hearing to deal with a defendant found unfit, what issues should be considered by the court?</b></li> </ul>
4.	<p>Comments:</p>

	<ul style="list-style-type: none"> <li>• <b>What options should the court have in dealing with unfit defendants?</b></li> </ul>
5.	<p>Comments:</p> <p>Discussions held at the Law Commission's Unfitness to Plead Symposium, held at Leeds University on 11th June 2014, regarding adults:</p> <p>Existing options are a hospital order, absolute discharge or a supervision order. There seems to be little in between indefinite hospitalisation and an absolute discharge.</p> <p>An argument presented by Dr Tim Rogers, Consultant Forensic Psychiatrist at the Symposium, that supervision orders are limited in effectiveness because there is not sufficient substance/meaning applied to the orders. Argument to extend community treatment orders. In many cases, the order will be for medication. However, there are implications here for psychologically-informed interventions in the community.</p> <p>Possibility of expanding the use of s35 assessment to a prolonged community assessment for learning disability and autistic spectrum, where longer-term assessment of functional capacity and effective engagement is required.</p> <ul style="list-style-type: none"> <li>• <i>There is potentially an escalation of issues related to consent with community treatment orders.</i></li> <li>• <i>Engagement and motivation. If people are motivated to engage then a benefit of the intervention might be a reduction in recidivism for some people. However, a mandated intervention could be harmful for some people.</i></li> <li>• <i>In line with the Risk, Needs, Responsivity principles (Andrews, 1995), it might be that people who are assessed as a high risk of harm to self/others receive a hospital order and a higher level of intervention than would be warranted by a community treatment order. Where it might be expected that someone were assessed as a lower risk of harm to self/others and, therefore, in receipt of a low level of intervention.</i></li> </ul> <p><b>References</b>  Andrews, D. (1995) The Psychology of Criminal Conduct and Effective Treatment. In J. McGuire (ed.) <i>What works: Reducing reoffending</i>. Chichester: Wiley.</p>

End.