Magistrates Association

Date	**15 April 2015**
Position statement	**Fitness to plead**

Background

The Law Commission is conducting a review of fitness to plead. The legal test currently used to determine fitness to plead (the Pritchard test) dates from 1836. The Law Commission argues that advances in psychiatry and psychology render the test outdated, that the law in this area has evolved piecemeal and that it has also evolved separately from the right to effective participation as guaranteed under the European Convention on Human Rights.

Fitness to plead cannot, at present, be considered in the magistrates' or youth courts. They only have two powers for dealing with defendants who might lack capacity to plead and are charged with imprisonable offences:

- Section 37(3) of the Mental Health Act 1983 allows the court to make a hospital order (or a guardianship order for an accused aged 16 or over) without convicting him or her, if satisfied that the defendant did the act or made the omission charged. Such orders can only be made if the defendant suffers from a mental disorder which makes this appropriate, according to two mental health practitioners, including a psychiatrist.
- Section 11(1) Powers of Criminal Courts (Sentencing) Act 2000 gives the court the ancillary power to adjourn for medical reports to be prepared in relation to a defendant who is being tried for an imprisonable summary offence where the court is satisfied that the defendant did the act or made the omission.

Exceptionally, an application for a stay can be made if a defendant cannot participate effectively in the trial and adjustments cannot be made – but the power to stay is an exceptional one and is rarely used.

This means that fitness to plead is never explicitly considered in magistrates' or youth courts. It also means that the only available powers are narrowly defined. Significant decisions, such as the election of Crown Court trial, would still need to be taken by defendants in this position. The range of disposals available is narrow, and there is no general process for finding that a defendant did the act or made the omission charged. All these problems also apply, to a greater extent if anything, in the youth courts.

What the Law Commission is considering for magistrates' and youth courts

As part of a wider reform of fitness to plead, with a reformed legal test and provision for a special procedure in cases of unfitness to plead, the Law Commission is provisionally recommending that magistrates' and youth courts should be able to deal with cases of fitness to plead on the same basis as the Crown Court.

The revised test would be based on the following criteria, with an additional criterion for decision-making capacity:

- understanding the charge(s)
- deciding whether to plead guilty or not
- exercising his or her right to challenge jurors
- instructing solicitors and/or advocates
- following the course of proceedings
- giving evidence in his or her own defence.

The Law Commission is also recommending that where magistrates decide to retain jurisdiction in either-way cases and fitness to plead is an issue, this should be decided before the accused is asked whether s/he wishes to elect jury trial. If the accused is found unfit to plead, further proceedings would stay in the magistrates' court. As with the Crown Court, it is recommending that a determination of the facts in this situation would be discretionary.

In addition to finding that a defendant did the act or made the omission or acquitting the defendant, a special determination of acquittal because of mental disorder existing at the time of the offence would be available to the court. For non-imprisonable offences, available disposals would only be an unconditional discharge or a supervision order. For others, a hospital order without restriction would also be available.

The Commission is recommending that the summary courts should have the power to commit a case to the Crown Court for the imposition of a restriction order, but not to impose one themselves.

The MA's position

In outline, the MA is supportive of the Law Commission's provisional proposals.

The MA's general position is that fitness to plead proceedings should be treated in the same way in both the Crown Court and the summary courts. It thus agrees that fitness to plead should be able to be considered by magistrates.

The MA also agrees that further proceedings should remain in the magistrates' court if the defendant is found to lack capacity in an either-way case where magistrates choose to keep jurisdiction. This would ensure continuity, so the case is dealt with by those who already have an understanding of the relevant issues, and effective case management, so that justice is not delayed.

The MA agrees that a defendant should be able to request remission for trial when s/he regaining capacity, where recovery is confirmed by the opinion of two experts competent to address the defendant's particular condition.

The MA would suggest an alteration to the Law Commission's proposed test for fitness to plead, adding 'capability to understand the implications of pleading/being found guilty and the likely consequences'.

The MA would also widen the proposed powers available to the youth court in these cases, because it believes that as many cases as possible should be dealt with there, rather than in the Crown Court. The youth court already has the power to impose a detention and training order for up to two years. In view of this, the MA feels that magistrates in the youth court or a judge sitting in the youth court should have the power to impose a restriction order as well as a supervision order and a hospital order without restriction.

Appropriate training will clearly be necessary for magistrates, as for the judiciary as a whole, to ensure that any new framework for fitness to plead is appropriately applied.