

Dr Eileen Vizard's Response to the Law Commission's

Unfitness to Plead Consultation Paper

27.1.11

Preliminary Comments

I am a Consultant Child & Adolescent Psychiatrist with a special interest in children who are defendants. For over 30 years I have worked with children and young people who appear before the criminal courts facing very serious charges such as rape, abduction and murder. I have taught, published and researched widely in this field (See the selection of some relevant publications).

I am making this response to the CP as an expert in child & adolescent forensic psychiatry, as an academic at UCL and also as a Trustee of the Michael Sieff Foundation, a child care charity.

As part of my work, I prepare reports for the criminal courts on the Fitness to Plead of children and adolescents facing serious charges and I give expert evidence in these cases. I gave evidence in the Bulger case, on the issue of Doli Incapax, having assessed Robert Thompson. Some of my psychiatric findings in relation to Thompson were referred to in the ECHR judgment on that case. Recently I assessed one of the two boys who abducted and seriously injured two other children, the Doncaster/Edlington case and I gave evidence in that case.

I am also asked to prepare reports on youths facing criminal charges where there are doubts about their fitness to plead. However, given the known significant prevalence of learning disability in juvenile delinquent populations (Bladon et al 2005; Vizard et al 2007,) I am surprised at how few of these requests are made compared with the significant number of pre-sentence requests I receive to assess the level of risk the same youths pose. At a Law Commission Conference on Fitness to Plead in 2009, it was noted that relatively few findings of Unfitness to Plead are made in UK courts in relation to adults. At that Conference little information was available about the prevalence of Unfitness to Plead findings for juveniles but they were thought to be uncommon.

In fact, when my colleagues and I do the pre-sentence reports on the same delinquent youths (already been convicted for the index offence), it is very likely that our cognitive testing and psychiatric evaluation will find that they are within the learning disability range and also that they have a range of psychiatric disorders (Bladon et al 2005; Vizard et al 2007). In such cases, none of these matters have been previously noted or queries raised during the earlier court proceedings and therefore none of these youths were seen for a

fitness to plead assessment. This raises the question of how many potentially unfit to plead juvenile delinquents are already slipping through the net.

A key issue arising in my forensic child psychiatry practice is the lack of any proper, scientifically validated test of juvenile adjudicative competence or fitness to plead which is accepted for use in the UK.

Rather, experts assessing children for fitness to plead are instructed to address the elements of the updated Pritchard criteria. However, the relevance of the Pritchard criteria to modern legal and psychiatric practice has been raised by the present Law Commission consultation document (Law Commission, 2010, 2.106). The Pritchard criteria have also been widely criticised by clinicians and academics on various grounds including inconsistent application of the criteria (Grubin 1991; Mackay & Kearns 2000), the application of varying standards of competence required depending on the seriousness of the charge being faced (Rosenfeld & Ritchie 1998; Buchanan 2006) and the need for both conceptual and procedural changes (Rogers et al 2008).

In the review I undertook for the Royal College of Psychiatrists in 2006 on Child Defendants the dilemmas posed for the assessing clinician dealing with a developmentally immature child defendant are discussed and alternative assessment frameworks are proposed (Vizard 2006, pps 43-48 and elsewhere). At the time of writing this response to the Law Commission's consultation paper, there is still no agreed assessment framework for fitness to plead which can be used by clinicians dealing with child defendants although there are assessment models in use in the USA and elsewhere which could easily be adapted for use in the UK courts with juveniles (Grisso 2000).

The law in relation to Unfitness to Plead is extremely complex (at least to a non lawyer such as me) and it is clear that there has been dissatisfaction with the Pritchard criteria almost from their inception in 1836. However, in relation to Unfitness to Plead and juvenile defendants, in my view, the law as it stands is completely 'Unfit to Plead' on the whole issue of juvenile adjudicative competence. In that sense, I agree entirely with the main thrust of the Law Commission's present Consultation Paper that '*.....the (Pritchard) test is outdated and inconsistent with modern psychiatry.*' (p. 1, note 3.).

However, if the Law Commission's proposals in relation to a new decision making capacity test for fitness to plead in juveniles are accepted and put into practice in years to come, there will be further ramifications, many of which are discussed in the Consultation Paper in relation to the age of criminal responsibility (8.58 – 8.69, pps 175-179).

Central to much of this discussion about childrens' decisional competence is the concept of 'developmental immaturity' which is a key concept in the field of child mental and physical health but one which is almost unknown within the UK legislation. However, it is important to note that, in their review of murder in 2006, the Law Commission did recommend that

'developmental immaturity' could be a separate defence to a charge of murder but this was not adopted by the government (8.61-8.66, pps 176-178). The Royal College of Psychiatrists and I (in separate submissions) pressed for this change to be incorporated citing the overwhelming scientific evidence in relation to childrens' developmental immaturity.

Developmental immaturity is a linking concept (from a legal perspective) between fitness to plead and the age of criminal responsibility. This is why the present CP quite correctly discusses the issue of developmental immaturity within the section on the age of criminal responsibility. It is my view and the view of the majority of professionals working with children that the age of criminal responsibility is too low by a significant amount and that it should be raised in line with other jurisdictions in Europe and elsewhere.

There are also a number of outstanding legal and welfare matters in relation to child defendants who are also subjects of Care proceedings (see my appended presentation to the Criminal Bar Association 2010). These problems are more than just procedural issues.

The failure to envisage the offending child as a whole person who may be both dangerous but also vulnerable and a 'child in need' in terms of the Children Act 1989 has never been addressed by the UK legal system and may constitute a breach of that child's human rights on a number of levels. This situation has meant that the child as an offender is dealt with quite separately from the very same child as a subject of care proceedings. There are many duplications of assessments running alongside a complete lack of any agreed method for communication between lawyers and experts in the criminal and family courts (see my appended presentation to the Criminal Bar Association 2010).

In July 2010 I published a letter in the Times with 33 other senior signatories calling for a review of the age of criminal responsibility (letter appended). Our letter cited some of the more recent neuroscientific evidence on childrens' brain development as definitive proof that all children are 'developmentally immature' at age 10 years old. Furthermore, research shows that juveniles appearing before the criminal courts at a young age suffer from significantly higher levels of neurocognitive difficulties including learning disability and psychiatric disorders than ordinary children (Vizard et al 2007). Taking all this into account, the argument proposed by neuroscientists and clinicians working with young delinquents is that child defendants should not be expected to have the decisional competence to make reliable judgments about their pleas to charges, about instructing their solicitors or about the conduct of their own defences.

In conclusion, it is my view that a new test is for decisional competence in relation to fitness to plead in juveniles is essential. However, if or when such a test is put into practice in the criminal courts (and assuming that this new test is applied consistently according to agreed guidelines) it will become apparent very quickly that all ten year olds are not fit to plead to the charges by dint of their perfectly natural developmental immaturity at that age. If this

supposition is correct, it will again raise the question of the current very low age of criminal responsibility in the UK and will add to the evidence that it needs to be raised significantly.

I have expanded on this and related points in my recent response to the Law Commission's Eleventh Programme of Law Reform Consultation Paper. In that response I am suggesting that the Law Commission should consider a full review of the age of criminal responsibility, in line with recommendations from many organisations including the Royal College of Psychiatrists (Vizard 2006), the Prison Reform Trust (2010) and the All Party Parliamentary Group for Children(APPG)(2010). I append my response to the Law Commissions Eleventh Programme of Law Reform, to which I will allude in some of my answers to the current CP.

I am very willing to attend the Law Commission in person to give evidence on all of these issues if that would assist the Consultation process. I have also appended various papers and presentations which I hope will be helpful to supplement my response to this CP.

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PART 9

LIST OF PROVISIONAL PROPOSALS AND QUESTIONS

PROVISIONAL PROPOSALS

9.1 We provisionally propose that:

(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]

I agree with this proposal. However, in relation to children and young people facing a criminal trial, the new legal test must be based on developmental principles and it must be firmly research evidence based. The implementation of the test should be monitored to ensure that only appropriately trained child mental health practitioners apply the test and that they do not deviate from the recommended procedures.

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

[Paragraph 3.57]

I agree with this in relation to adults. However, in relation to children and young people, it should be remembered that young children may often make unwise or irrational decisions from which they learn as part of growing up – i.e. ‘learning from experience’. That is partly why the Children Act 1989 stipulates that Parental responsibility (PR) should rest with the child’s parents until age 18 years old so that an adult person who can make rational decisions can protect the child from the adverse consequences of his often impulsive choices. With adults who have capacity and who still make foolish or irrational decisions, it is fair to say that they knew what they were doing when they made that decision and they must then take the consequences.

However, with children their natural developmental immaturity means that their brains are not yet fully developed. Those regions, such as the frontal lobes, which are thought to be implicated in evaluating future consequences are not mature enough to help the young child to make balanced and farsighted judgments about his own best interests.

In our letter to the Times (appended) we summarised the neuroscience in relation to this issue as follows:

‘First scientific research has demonstrated that significant psychological and neurobiological development takes place throughout adolescence. Crucially, at age 10, children show marked immaturity in a network of frontal brain regions implicated in social cognition, planning, perspective taking and evaluating future consequences. This psychological and neurodevelopmental immaturity is such that the capacities of a child of ten are not comparable to an older adolescent or adult.’ (The Times 7th July 2010).

(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]

I agree.

(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]

I agree. However, I do not think that this should include placing the burden upon the Judge alone to decide if the adult defendant is disabled to the extent that he requires a formal fitness to plead assessment. That decision should presumably be made by the defence lawyers with the court's agreement. The extent of any relevant disability should then be evident from the assessment the results of which should be made available to the Judge.

(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]

I agree.

(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]

I agree. In fact, in my view, it is wholly unacceptable that any defendant with a known or suspected mental disorder or impairment should be allowed to give evidence without such an expert assessment since his disorder or impairment might lead him to incriminate himself or to give misleading evidence unwittingly.

(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]

I strongly agree with this suggestion. However, see my previous comments about the need for a new test for juvenile decisional competence which is rooted in the scientific evidence on child development including brain development in the context of the general developmental immaturity which naturally characterises every child.

(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]

I agree.

(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]

I agree.

(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]

I agree.

(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]

I agree.

(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, the court should be able to reverse the decision to remit the case.

[Paragraph 7.21]

I agree.

(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]

I agree.

(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]

I agree.

QUESTIONS

9.2 In addition to the above proposals, we also ask the following questions:

(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?

[Paragraph 4.27]

I agree.

(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?

[Paragraph 4.31]

Perhaps the presence of an Intermediary trained in mental health would be useful for those defendants suffering from a mental disorder or from an impairment. In relation to children who are defendants, it is my view that an Intermediary trained in child development and in mental health should always be present, even if the child or young person has been found fit to plead.

(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]

No comment

(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]

No comment.

(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]

Yes, I agree.

(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]

No, because (if I have understood this correctly) if they are fit to plead and found guilty I assume that they can always appeal the finding at a later date.

(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]

Yes, I believe that this could save time and might avoid the cost of an extra hearing.

(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]

Yes. I believe that it should be the same test in both sets of proceedings.

(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]

Yes.

(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]

It should mirror provisional proposals 8 & 9.

(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]

Yes, definitely.

(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]

A great deal. Please see my earlier comments. Also please refer to the publications appended which address this issue in much more detail.

Dr Eileen Vizard Selection of Relevant Publications

Vizard, E. (2001). The Needs of Offending Children. E. Vizard (Conference Organiser) Report on the Conference Hosted by the Michael Sieff Foundation at Cumberland Lodge, Windsor Great Park. 5-7.9.01. Available from: www.michaelsieff-foundation.org.uk

Vizard, E. (2002). Child Defendants. Is the Law Failing Them? E. Vizard (Conference organiser). Report on the Conference Hosted by the Chambers of Michael Lawson QC, 22 Essex Street, London WC2R 3AA. Available from: www.michaelsieff-foundation.org.uk

Vizard, E., French, L. Hickey, N. & Bladon, E. (2004). Severe Personality Disorder Emerging in Childhood. A Proposal for a New Developmental Disorder. Criminal Behaviour and Mental Health. 14 17-28. January.

Bladon, E. Vizard, E., French, L. & Tranah, T. (2005). Young Sexual Abusers: A Descriptive Study of a UK Sample of Children Showing Sexually Harmful Behaviours. The Journal of Forensic Psychiatry & Psychology. 16 (1).

Hickey, N., Vizard, E., McCrory, E., French, L. (2006). Links between juvenile sexually abusive behaviour and emerging severe personality disorder traits in childhood. www.dh.gov.uk/publications

Vizard, E. (2006). Child Defendants. Occasional Paper OP 56. Royal College of Psychiatrists. Gaskell Publications. Available from www.rcpsych.org

Vizard, E. & Cooper, P. (2007). The Expert Witness Pack. For use in Children Act Cases. 2nd Edition. (DVD Format appended to: Lord Justice Wall (Ed), 'A Handbook for Expert Witnesses in Children Act Cases'). Jordan Publishing Limited. www.familylaw.co.uk

Vizard, E., Hickey, N., French, L. & McCrory, E. (2007). Children and Adolescents who present with Sexually Abusive Behaviour: A U.K. Descriptive Study. *Journal Of Forensic Psychology and Psychiatry*. 17. 3. March

Vizard, E., Hickey, N. & McCrory, E. (2007). Developmental Trajectories towards Sexually Abusive Behaviour and Emerging Severe Personality Disorder in Childhood: The results of a three year U.K. study. *British Journal of Psychiatry Special Supplement on Personality Disorder*. Peter Tyrer & Savas Hadjipavlou (Eds). May.

Vizard, E. (2008). Emerging Severe Personality Disorder in Childhood. *Psychiatry*. Part 4. *Child Psychiatry*. 7:9. 389-394.

McCrory, E., Hickey, N., Farmer, E. & Vizard, E. (2008). Early-onset sexually harmful behavior in childhood: a marker for life course persistent antisocial behavior? *The Journal of Forensic Psychiatry and Psychology*. 19.3. September. 382-395.

Vizard, E. & Esam, B. (2009). 1908 – 2008: The Children Act 100 years on. Young Defendants Today. Report on the Conference Hosted by the Michael Sieff Foundation at Church House, London on 28th April 2009. Available from: www.michaelsieff-foundation.org.uk

Other References

All Party Parliamentary Group for Children (APPG) (2010). Report of seminars Organised by the All party Parliamentary Group for Children 2009/2010. Available from National Children's Bureau, 8 Wakely Street, London, EC1V 7QE.

Buchanan A. (2006). Competency to stand trial and the seriousness of the charge. *Journal of the American Academy of Science and the Law*. 34, 458-465

Grisso, T. (2000). What we know about youths' capacities as trial defendants. In *Youth on Trial* (Eds T. Grisso & R. G. Schwartz), pp. 139–171. Chicago: University of Chicago Press.

Grubin, D.H. (1991). Unfit to plead, unfit for discharge: Patients who are found unfit to plead who are still in hospital. *Criminal Behaviour and Mental Health*. 1., 282-294.

Mackay, R.D. & Kearns, G. (2000). An upturn in Fitness to Plead? Disability in relation to trial under the 1991 Act. *Criminal Law Review*. 532-546.

Rogers, T.P., Blackwood, N.J., Farnham, F., Pickup, G.J. & Watts, M.J. (2008). Fitness to plead and competence to stand trial: A systematic review of the constructs and their application. *The Journal of Forensic Psychiatry and Psychology*. 19, 576-596.

Rosenfeld, B. & Ritchie, K. (1998). Competence to stand trial: Clinician reliability and the role of offense severity. *Journal of Forensic Science*. 43, 151-157.

Prison Reform Trust (2010). Jessica Jacobson, Bina Bhardwa, Tracey Gyateng, Gillian Hunter Mike Hough (Eds). Punishing Disadvantage. A Profile of Children in Custody. www.prisonreformtrust.org.uk