

# Research impact: making a difference

## Establishing a test of 'fitness to plead' in criminal court

Professor of Law Jill Peay collaborated on the development of a psychiatric test to ensure that defendants receive a fair trial in England and Wales

### What was the problem?

A defendant's meaningful engagement with criminal court proceedings is central to the fair administration of justice. Determining who can be tried fairly – and who is 'unfit to plead' because of their physical or mental condition – is therefore a pressing legal issue.

In England and Wales the case law establishing an accused person's fitness to plead dates back to 1836. Since that case was decided legal and clinical thinking has evolved, but the legal grounds for establishing unfitness to plead have not kept pace with developments and no standardised test designed to guarantee a fair trial has been introduced.

Government, legal practitioners, civil liberties groups and academics have all expressed concern about the number of mentally disordered people in prisons and about prisoners whose chronic or acute mental states bring into question the fairness of their convictions.

These numbers are significant. Out of a prison population of some 86,200 people (June 2012), epidemiological surveys suggest that over 6,000 (7%) prisoners may have functional psychotic disorders and over 4,000 (5%) may have severe learning disabilities, broadly defined as people whose IQ falls below 65.

### What did we do?

LSE Professor of Law Jill Peay collaborated with Dr Nigel Blackwood of the Institute of Psychiatry and Dr Michael Watts of University College London on a cross-disciplinary project to develop a psychometrically sound method of assessing an accused person's cognitive ability to understand criminal court proceedings and to follow trial evidence.

Peay facilitated the involvement of the Law Commission for England and Wales in the project. An independent statutory body charged with keeping the law fair, modern, simple and effective, the Law Commission was already working on proposals to make the justice system compliant with the right to 'effective participation' in a fair trial as guaranteed under the European Convention on Human Rights. After the research team initiated discussions in April 2008, the Law Commission endorsed their ultimately successful application for funding to the Nuffield Foundation Trust. The research team continued to work closely with the Law Commission throughout the study.

Peay brought to the project her special expertise in the fields of mental health and crime and in civil aspects of mental health law. Her principal role was providing the detailed expertise

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necessary to design a legally appropriate test for determining the core cognitive abilities an accused person would need to participate meaningfully in the trial process.

In consultation with legal practitioners a script was developed for a typical short court case and a testing instrument designed to probe an accused person's understanding of the trial and the court process. The script was cross-checked for authenticity with senior judges and filmed with professional actors. The point of view adopted was that of the defendant.

The resulting film was then shown to some 200 'normal' participants and to groups representing people who might experience difficulties with trial proceedings, such as those with learning disabilities and paranoid schizophrenia. Participants in the exercise were required to put themselves in the position of the defendant. As the film progressed, they were asked a series of questions set out in the accompanying legal instrument.

Researchers then refined the instrument to produce a validated test of fitness to plead. The methodological challenges they addressed included taking into account participants' previous experiences of the criminal justice system, making the instrument gender-neutral, and considering the role of the instrument among participants faking cognitive impairment.

## What happened?

In 2009 the Law Commission held a conference for invited participants to debate the issues around fitness to plead, at which Blackwood presented a paper on the research project and its emergent findings and Peay chaired a question-and-answer session.

The following year the Law Commission published a consultation paper, *Unfitness to Plead*, in which it made a proposal for comprehensive reform of the law and invited comments from experts and the general public. In a section on the development of a suitable psychiatric test for assessing fitness to plead, the paper explicitly endorsed the project's research and gave an overview of the video scenario developed by the team.

The Law Commission received over 50 comments on its proposed reform and published two documents, 'Consultation Responses' and 'Analysis of Responses', in April 2013. Comments that made specific reference to the research and its proposed approach to psychiatric testing were received from the Law Reform Committee of the Bar Council and the Criminal Bar Association of England and Wales, Kids Company, Nottingham Healthcare NHS Trust, Prison Reform Trust,

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Royal College of Psychiatrists, and the Centre of Medical Law & Ethics, School of Law, King's College London.

Based on the responses and recent changes in the criminal justice system, the Law Commission identified additional questions and invited further feedback in a publication called 'An Issues Paper', published in May 2014. This paper made multiple references to the project research. The following month the Commission held an Unfitness to Plead Symposium at Leeds University School of Law, to which over 100 leading experts were invited and at which Blackwood presented the project's research findings.

The Law Commission expected to publish its revised proposals in a final report to be released in autumn 2015. A fitness to plead psychiatric test based on the project's findings was expected to be one of the key planks in these proposals.

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