About Legal Aid NSW

The Legal Aid Commission of New South Wales (Legal Aid NSW) is an independent statutory body established under the *Legal Aid Commission Act 1979* (NSW) to provide legal assistance, with a particular focus on the needs of people who are economically or socially disadvantaged.

Legal Aid NSW provides information, community legal education, advice, minor assistance and representation, through a large in-house legal practice and private practitioners. Legal Aid NSW also funds a number of services provided by non-government organisations, including 36 community legal centres and 28 Women’s Domestic Violence Court Advocacy Services.

The interaction between people with cognitive and mental health impairments and the criminal justice system is an area of particular significance to Legal Aid NSW. The Legal Aid NSW criminal law practice provides legal assistance and representation in criminal courts at each jurisdictional level throughout the State, including proceedings in Local Court and Children's Court, committals, indictable sentences and trials, and appeals. Our specialist criminal law services include the Children’s Legal Service, Prisoners' Legal Service and the Drug Court.

The Legal Aid NSW Mental Health Advocacy Service provides and coordinates duty representation in metropolitan and regional NSW for people who are subject to involuntary treatment or detention under the *Mental Health Act 2007* and represents forensic patients under the *Mental Health (Forensic Provisions) Act 1990* (MHFPA).

Legal Aid NSW welcomes the opportunity to make a submission to the New South Wales Law Reform Commission’s reference on people with cognitive and mental health impairments in the criminal justice system, Question Paper 2 – Fitness to plead guilty.

Should you require any further information, please contact Annmarie Lumsden, Executive Director, Strategic Policy Planning and Management Reporting at annmarie.lumsden@legalaid.nsw.gov.au.
INTRODUCTION

Legal Aid NSW is of the view that the test for fitness to be tried and fitness to plead guilty should remain uniform. For that reason, this submission will not give a detailed response to each question in the Question Paper. Rather, the submission will provide a response to the high level question of whether there should be a separate test for fitness to plead guilty and will make brief observations relevant to the other high level questions raised.

ISSUES

Should there be a separate test of fitness to plead

Legal Aid NSW is of the view that there should not be separate tests for fitness to be tried and fitness to plead guilty.

The proposal for separate tests assumes a relatively clear division, with a higher level of fitness required to be tried and a lower level of fitness required to plead guilty. It is the view of Legal Aid NSW that this approach is simplistic and does not reflect the issues and concerns of the law of fitness, and the practical reality of a continuum of complexity of both sentence and trial proceedings and relative capacity of individual accused.

The central issue of the law of unfitness is the capacity of the accused to meaningfully participate in criminal proceedings. Capacity should therefore be the focus of reformulation of the test for fitness.

In addition, the core concern of the law of unfitness is fairness to the accused, which underpins all criminal processes, and does not logically permit a division between an individual pleading guilty and an individual facing trial.

The assessment of the capacity of the accused to meaningfully participate in criminal proceedings can take into account the fact that the accused is facing a sentence or trial. Indeed, the capacity of the accused can be assessed relative to the the complexity of the sentence or trial proceedings, for example, whether the accused is facing a long and complex trial or a short and relatively non-complex trial.

Finally, Legal Aid NSW is of the view that the introduction of a separate test would make the law of unfitness unnecessary complicated.

For these reasons Legal Aid NSW is of the view that the test for fitness to be tried and fitness to plead guilty should remain uniform.

What is the appropriate standard of fitness to plead

Legal Aid NSW notes that the proposed test does not address the capacity of the accused to follow the evidence and provide instructions during the sentencing process. As stated above, capacity should be the focus of reformulation of a test for fitness.

When should it be possible to raise the issue of fitness to plead

Fairness to the accused requires that, consistent with section 7 of the Mental Health (Forensic Provisions) Act 1900 (NSW) it should be possible to raise the issue of fitness to plead guilty at any time, including at any time during the sentence hearing.