

Institution: London School of Economics and Political Science		
Unit of Assessment: 18 - Law		
Title of case study: Improving justice by establishing a test of “fitness to plead” in criminal courts		
Period when the underpinning research was undertaken: 2009-2018		
Details of staff conducting the underpinning research from the submitting unit:		
Name(s): Jill Peay	Role(s) (e.g. job title): Professor of Law	Period(s) employed by submitting HEI: 2005 to present
Period when the claimed impact occurred: 2013-2020		
Is this case study continued from a case study submitted in 2014? No		
1. Summary of the impact (indicative maximum 100 words)		
<p>Professor Jill Peay’s research addresses the core issue of fairness in the criminal justice system, by providing a legal mechanism for ensuring that those who cannot be tried fairly are not exposed to conviction and punishment. Peay and her collaborators have developed a psychometrically sound method of assessing an accused person’s ability to plead to an indictment, to understand court proceedings, to follow trial evidence, and to participate effectively in their trial. This novel instrument continues to be subject to real-world testing and will require training for its clinical use. The research underpinning the instrument has been endorsed by the Law Commission and has informed its draft legislation on unfitness to plead.</p>		
2. Underpinning research (indicative maximum 500 words)		
<p>The prison population for England and Wales has consistently exceeded 80,000 in recent years. Even setting aside those prisoners whose physical conditions may also have affected the fairness of their trials, some 90% of prisoners notably have one or more of five diagnosable mental health disorders (Singleton et al 1998; Fazel and Danesh 2002; Peay 2014). This can only cast doubt on the fairness of some of their convictions, whilst also questioning the continuing applicability of the leading 19th century case on unfitness, <i>R v Pritchard</i> (1836) 7 C. & P. 303.</p> <p>Government, legal practitioners, civil liberties advocates, and academics have all expressed concern about this state of affairs. In response, the Law Commission initiated a programme of reform to address these issues and the incompatibility of our law with the European Convention on Human Rights (ECHR). Following an initial meeting with Peay, Dr Nigel Blackwood (Institute of Psychiatry), and Dr Michael Watts (UCL), the Law Commission supported the successful grant application to the Nuffield Trust to enable this team to undertake a cross-disciplinary project to develop a psychometrically sound method of assessing an accused person’s ability to plead to an indictment [1]. This project commenced in 2009, with a grant of just under GBP200,000 (see Section 5, [A]).</p> <p>Peay brought to the research project her special expertise in the fields of mental health and crime. Her principal role was that of providing the expertise necessary to design and test a legally appropriate instrument for determining the core cognitive abilities an accused person would need to participate meaningfully in the trial process [2]. In consultation with legal and clinical practitioners, a script was developed for a typical short court case and a testing instrument was devised 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 [1].</p> <p>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 mental health problems. Peay assisted specifically in the task of identifying qualifying normal subjects in the “difficult to locate” more mature age range (64-81yrs). 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 legally informed instrument. As a result of this testing phase amendments were made to the instrument.</p>		

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A second round of testing was held, with a further 160 subjects, leading to a validated test of fitness to plead.

As the legally qualified member of the research team, Peay was influential in refining this instrument. The methodological challenges the team 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 (legal malingerer).

3. References to the research (indicative maximum of six references)

- [1] Brown, P., Stahl, D., Appiah-Kusi, E., Brewer, R., Watts, M., Peay, J., and Blackwood, N. (2018). Fitness to plead: Development and validation of a standardised assessment instrument. *PLoS ONE*, 13(4), e0194332. DOI: 10.1371/journal.pone.0194332.
- [2] Peay, J. (2012). *Fitness to plead and core competencies: problems and possibilities*. Law working papers (WPS 02-2012). Department of Law, London School of Economics and Political Science. Available at: <http://eprints.lse.ac.uk/44734/>
- [3] Peay, J. (2014). *Imprisoning the mentally disordered: a manifest injustice?* LSE Legal Studies Working Paper No. 7/2014, London School of Economics and Political Science. DOI: 10.2139/ssrn.2378445. Available at: <http://eprints.lse.ac.uk/55830/>
- [4] Peay, J. and Player, E. (2018). Pleading Guilty: Why Vulnerability Matters. *Modern Law Review*, 81(6), pp. 929-957. DOI: 10.1111/1468-2230.12374.
- [5] Peay, J. (2016). An awkward fit: offenders with mental disabilities in a system of criminal justice. In Bosworth, M., Hoyle, C., and Zedner, L. (Eds.) *Changing Contours of Criminal Justice: Research, Politics and Policy* (Chapter 10). Oxford University Press. ISBN: 9780198783237.
- [6] Peay, J. (2015). Mental incapacity and criminal liability: redrawing the fault lines? *International Journal of Law and Psychiatry*, 40, pp. 25-35. DOI: 10.1016/j.ijlp.2015.04.007.

4. Details of the impact (indicative maximum 750 words)

The research outlined above has informed legal debate related to establishing an accused person's fitness to plead, and can be shown to have consistently influenced the Law Commission's work on this subject. This influence can be seen in the sequence of Law Commission documents described below, beginning with the initial Consultation Paper in 2010 but most evident throughout the REF 2021 period, in the Commission's 2014 Issues Paper [I] and culminating in its 2016 Final Report and Draft Bill ([B] and [C]).

In 2014, the Law Commission published *Unfitness to Plead: An Issues Paper*, to solicit the views of those with experience of the criminal justice system, ahead of making its final recommendations to government. With respect to developing a defined psychiatric test to assess a defendant's decision-making capacity, the Issues Paper explicitly endorsed this research: "No standardised model was put forward in the [Consultation Paper], but we endorsed research being conducted into such a formulation" [I, para.4.7]. The research referred to here, and cited in a footnote, is that which was later published in [1].

Following consultation ([G] and [H]), the Law Commission published its revised proposals in a final report in January 2016, together with a Draft Bill. Peay's contributions are recognised in the report's acknowledgements [B, para.1.120], alongside those of her collaborators and other academics consulted. The report then goes on to reference Peay's contributions a further 32 times, noting her input to a number of issues under consideration. A fitness to plead psychiatric test based on the project's findings was one of the key planks in these proposals, noting its benefits in terms of increased time and cost efficiencies: "An initial assessment might obviate the need, in some cases, for a full report to be prepared, with all the attendant costs and delays, or at least identify more clearly the appropriate expert to approach. We hope that the work currently being conducted on screening tools might also assist in making screening robust and effective" [B, para.4.72]. Again, the underpinning research is referenced.

The importance of the identification and screening of defendants with unfitness to plead or capacity issues is demonstrated by government funding commitments. As the Law Commission

Report [B, para 1.3 note 7] observes: “On 6 January 2014 the Government announced an additional GBP25 million spending on liaison and diversion services for police stations and magistrates’ courts in ten areas across England, with a view to rolling out the scheme nationwide in 2017. This scheme has the potential to revolutionise the identification and screening of defendants with unfitness to plead or capacity issues”.

The developed instrument has the potential to improve the current practice for assessing fitness to plead under the *Pritchard* criteria. More importantly, it directly addresses a key initial objective of the Law Commission’s programme of reforms insofar as it can be used to reframe assessments in accordance with the ECHR requirements of “effective participation” in trial processes (*SC v UK* (2005) 40 EHRR 10), thus responding directly to a key initial objective of the Law Commission’s programme. As Bevan and Ormerod note with respect to the Law Commission’s proposals: “A critical element of a reformed framework was felt to be the accurate and efficient identification of those few defendants who lack the capacity to participate effectively in trial” [D]. The fitness to plead instrument which arises out of this research explicitly addresses that capacity.

Following the Law Commission’s proposals being issued to government, a response was received in June 2016 from the Rt Hon Mike Penning MP, Minister of State at the Justice Department, which welcomed the “balanced and thorough consideration of how to ensure that defendants who lack the capacity to participate in trial are dealt with appropriately in the criminal courts” [F]. Recommendations remain under consideration, whilst the issues remain prominent for lawyers (see Max Hill QC, DPP [K] and in the Court of Appeal (see *Marcantonio* [2016] EWCA Crim 14 and *Holloway* [2016] EWCA Crim 2175). Clinicians have recommended field trials of the Law Commission’s proposals, augmented by use of test instruments [L].

The instrument has subsequently been put into “real-world” testing in the Magistrates’ Court by Dr Penny Brown at the Institute of Psychiatry. Brown, a clinician, is one of the authors of the 2018 publication [1]. She has been using the instrument in her doctoral research. Peay has been acting as one of three key investigators/collaborators on this PhD (separately supervised at the Institute of Psychiatry, KCL).

Assessment of the wider impacts of this instrument remains under consideration. However, facilitating a fairer and more efficient trial process that balances the rights of vulnerable defendants, whilst protecting the interests of complainants and the public from harm, can only enhance confidence in the criminal justice system. The research has had a direct impact on the Law Commission’s views [E]; evidence of impaired capacity to participate is a key concept in its *Criminal Procedure (Lack of Capacity) Bill* [C]. The Bill’s novel proposals would address many of the problems outlined above.

5. Sources to corroborate the impact (indicative maximum of 10 references)

[A] Nuffield Trust Access to Justice programme grant AJU/35238. The project team were given a grant by the Nuffield Foundation of just under GBP200,000.

[B] Law Commission (2016), [Unfitness to Plead Report - Volume 1: Report](#).

[C] Law Commission (2016), [Unfitness to Plead Report - Volume 2: Draft Legislation](#).

[D] Bevan, M. and Ormerod, D. (2018). Reforming the Law of Unfitness to Plead in England and Wales: A Recent History. In Mackay, R. and Brookbanks, W. (Eds.) *Fitness to Plead: International and Comparative Perspectives*. Oxford University Press.

[E] Supporting statement from Professor Penney Lewis, the current Commissioner for Criminal Law at the Law Commission, in an email 29 October 2020. It confirms the research contributed in a material way to the final form of the Law Commission’s recommendations to government, published in their 2016 Report *Unfitness to Plead*. And it expresses their gratitude.

[F] Letter Rt Hon Mike Penning MP, 30 June 2016, House of Commons Library.

[G] Law Commission (2013), [Unfitness to Plead: Consultation Responses](#).

[H] Law Commission (2013), [Unfitness to Plead: Analysis of Responses](#).

[I] Law Commission (2014), [Unfitness to Plead: An Issues Paper](#).

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[J] Successful integrated research application system proposal for *Fitness to Plead: A conceptual and empirical study* by Dr Penny Brown with Peay as named key investigator/collaborator. See email attachment 25 February 2014 from Brown.

[K] Max Hill QC, Director of Public Prosecutions, [Parmoor Lecture](#), Howard League for Penal Reform 14 October 2019.

[L] Galappathie, N. and Shaw, A. (2019). Reforming fitness to plead and stand trial legislation in England and Wales. *BJPsych Advances*, 26(1), pp. 8-15. DOI: 10.1192/bja.2019.50.