



THE LAW SOCIETY  
OF NEW SOUTH WALES

Our Ref: RBG673866

14 December 2012

The Hon James Wood AO QC  
Chairperson  
New South Wales Law Reform Commission  
DX 1227 Sydney

Dear Mr Wood,

**Question Paper 2: Fitness to plead guilty**

Thank you for the opportunity to comment on further issues relating to fitness.

The Law Society's Criminal Law Committee (Committee) has had the opportunity to review the submission by the Senior Public Defender, Mark Ierace SC, and fully endorses his opinion.

The Committee does not support the introduction of a separate test of fitness to plead guilty. Doing so would run the risk of shifting the focus of an inquiry into unfitness and could confuse the central issue. The central issue is one of capacity (to participate meaningfully in the criminal process), and this should be the focus of any reformulation of the provision.

As the Law Commission for England and Wales noted ('Unfitness to Plead', Consultation Paper No. 197, 2010), the tethering of capacity to an individual's plea is one of historical happenstance; the law on unfitness should adopt a wide approach, focusing on criminal processes broadly, so as to provide a genuine protection to accused individuals.

Further, the core concern which lies at the heart of the law of unfitness – fairness to the accused – does not logically permit a division between an individual pleading guilty and facing trial; it underpins all of the criminal process.

The expert assessments of the accused's capacity can take into account that the accused is facing a sentencing hearing or a trial (and, indeed, whether he or she is facing a longer and more complex or a shorter trial).

The development of two tests is overly complex; the test for unfitness should remain uniform.

I trust these comments are of assistance.

Yours sincerely,

Justin Dowd  
President

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