Regulatory Impact Statement – Order of inquiries to determine fitness to stand trial under the Criminal Procedure (Mentally Impaired Persons) Act 2003

Agency Disclosure Statement

This Regulatory Impact Statement (RIS) has been prepared by the Ministry of Justice (the Ministry). It provides an analysis of options to improve the procedure for assessing a defendant's fitness to stand trial under the Criminal Procedure (Mentally Impaired Persons) Act 2003 (the act).

The analysis of problems and nature of impacts has been informed largely by anecdotal information and views of stakeholders, including judges, lawyers, operational court staff and academics.

The gaps in information and assumptions contained in this analysis largely arise from the limited nature of the data available. Key gaps and assumptions include:

- a lack of conclusive evidence as to the scope of the issue. The data able to be extracted is not detailed enough to precisely identify the scope of the problems analysed in this RIS. This is partially due to the small number of people dealt with under the Act. In particular, the data does not distinguish between the number of defendants entering the 'fitness to stand trial' process and the total number of people assessed under the Act. The proportion of those defendants who are ultimately found fit to stand trial is also unavailable;
- the conclusion that only the status quo and one alternative are feasible options. Based on the significant academic and judicial commentary on the issue and broad rights-based considerations, we have not fully assessed the impact of other alternatives.

The policy options are unlikely to:

- impose additional costs on businesses;
- impair private property rights, market competition, or the incentives on businesses to innovate and invest,
- override fundamental common law principles.

A RIS is necessary because an alternative to the status quo would require Cabinet approval and legislative amendment. Further, any reforms in this area of law would affect how potentially vulnerable people are dealt with in criminal proceedings. The provisions and proposals considered may affect the length of time defendants are subject to criminal justice processes. They also have the potential to engage rights affirmed under the New Zealand Bill of Rights Act 1990 (namely, freedom from discrimination under section 19 and rights to minimum standards of criminal procedure under section 25).

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Status quo

1. The act governs, among other things, the procedure for assessing a defendant's fitness to stand trial.

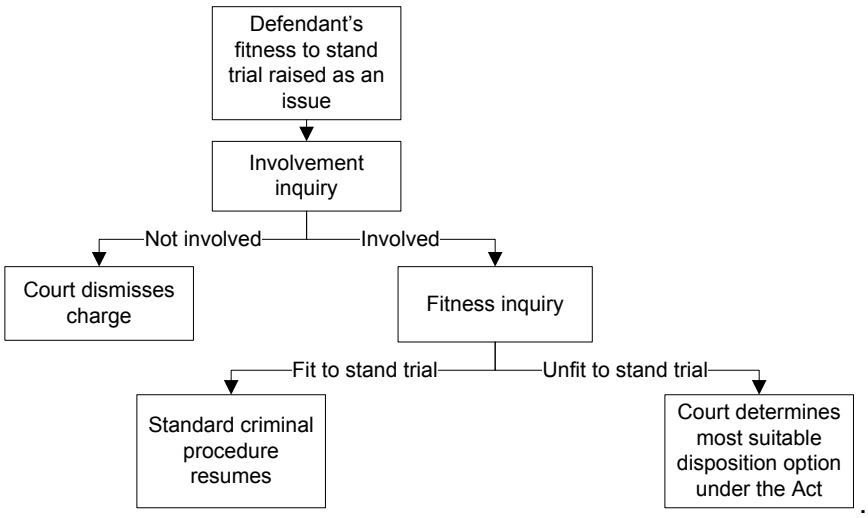
2. Currently, the Act provides that a court can only decide whether a defendant is unfit to stand trial once it is satisfied, on the balance of probabilities, that the defendant caused the Act or omission that forms the basis of the offence charged. This determination is referred to as an 'involvement' inquiry.

3. If the court is satisfied the defendant caused the offence, the court must hear evidence from two health assessors as to whether the defendant is mentally impaired. If the court determines the defendant is mentally impaired, it must then hear evidence and determine, on the balance of probabilities, whether the defendant is unfit to stand trial. This is referred to as a 'fitness' inquiry.

4. If the defendant is found fit to stand trial, the defendant returns to the standard criminal trial process. If unfit, the court must consider the most suitable method of dealing with the defendant. The possible outcomes for the defendant under the Act are detention in a hospital or secure facility, compulsory care or treatment, or immediate release.

5. Any participant in the case (including the judge or the prosecutor) can raise the issue of fitness to stand trial. In practice, it is most likely to be raised by the defendant or their lawyer. Once the issue is raised, the Act requires the process of determining fitness to be completed. Diagram 1 illustrates the process described in paragraphs 2 to 5.

   Diagram 1: Current process under the Act



6. Data shows that 533 assessments were made under the Act in 2013 (including for purposes other than fitness inquiries, such as the insanity defence or for sentencing). Of those assessments, 101 resulted in an outcome of 'unfit to stand trial' (that is, at the fitness inquiry stage). These figures have been consistent since 2011. The data able to be extracted does not illustrate how often defendants are found fit at the

fitness inquiry stage, but anecdotal evidence suggests that it is a considerably more frequent outcome than a finding of unfitness.

7. Prior to the Act, the process of determining fitness to stand trial and dealing with unfit defendants did not (formally) require proof that the defendant was involved in the offence. The Act instituted the involvement inquiry to minimise the risk that innocent defendants would be detained and/or subject to compulsory treatment. Requiring the involvement inquiry to precede the fitness inquiry was intended to reduce the risk of subjecting innocent defendants to the criminal justice process unnecessarily.

Problem definition

8. The prescribed order of the involvement and fitness inquiries can result in extra inconvenience and stress for witnesses, unnecessary delays in case resolution and inefficient use of resources. It may also preclude appropriate support for mentally impaired defendants during the involvement inquiry.

Witnesses have to give evidence twice

9. Anecdotally, it appears that more defendants are found fit to stand trial in the fitness inquiry and return to the normal criminal process than are found unfit.[1] Where the normal process requires a trial, witnesses may have to give evidence both at the involvement inquiry and the trial.[2] This can add considerably to the stress, time and expense involved in giving evidence, and can be particularly difficult for victims of violent or sexual crimes.

Defendants are subject to delays in resolving their cases

10. Defendants found fit to stand trial must go through the involvement inquiry as well as the normal criminal process, which will involve a trial if they plead not guilty. Anecdotal evidence suggests the procedure for determining unfitness (that is, both the involvement and fitness inquiries) can add up to 200 days to the time taken to resolve a criminal case. The involvement inquiry, which may be effectively duplicated when the defendant is found fit and returns to the normal criminal process,[3] adds significantly to the time defendants may have their liberties restricted and be under the stress of prosecution.

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[1] While available data appears to support this statement, it cannot be used to verify anecdotal accounts because a report requested by the court may include a finding of fitness even if the report was requested for a different purpose. This may have resulted in disproportionately high numbers of 'fitness' findings in the data.

[2] As defendants admit their responsibility for the criminal act or omission relatively frequently at the involvement stage, witnesses will not have to give evidence in every case.

[3] The defendant's guilt in a criminal trial must be proven to a higher standard than in an involvement inquiry. This means that much of the evidence proved to the balance of probabilities in an involvement inquiry will have to be presented and proved again, beyond reasonable doubt, in the criminal trial.

The process is inefficient and a waste of court resources

11. As mentioned above, involvement inquiries concerning defendants subsequently found fit to stand trial are ultimately unnecessary. These inquiries can tie up court time and resources to determine matters that may have to be determined again in a full trial, albeit to the higher criminal standard of proof.

The process may be open to exploitation by lawyers

12. The judiciary has identified that the process is open to abuse, because it enables the defence to test evidence and information about the prosecution's case that they would not otherwise be able to obtain. There should be no incentive to improperly, or tactically, raise the issue of the defendant's fitness.

The process may prevent or delay appropriate support for impaired defendants

13. Because the involvement inquiry is held before any formal court examination of the defendant's mental capacity, defendants may not be supported as well or as much as they could be when their involvement in the offence is being assessed. For instance, defendants with certain types of intellectual disability may benefit from having a specialist care worker present during court hearings, or particular assistance while in custody. This is particularly so in cases where the issue of fitness is nuanced or unclear, and there may be little observable evidence on which to determine the support needed.[4]

Objectives

14. The Act aims to protect the rights of defendants suspected of being mentally impaired while maintaining public safety. Consistent with these objectives, the process for determining fitness to stand trial should:
    - be procedurally fair and consistent with access to justice (clear, consistent, impartial, supported processes);
    - be efficient (the process and use of resources);
    - minimise harm to complainants.

15. These objectives are also consistent with the Ministry's mission to deliver modern, accessible, people-centred justice services.

Options and impact analysis

16. The range of options that could address the problems and objectives identified above include:
    - retaining the status quo (that is, no legislative change);
    - reversing the order of inquiries, so the fitness inquiry precedes the involvement inquiry;

[4] While targeted support may not be available from a resourcing perspective, determining the nature of a defendant's mental impairment earlier would enable that support to be given if and when possible.

- returning to the pre-Act position, where no involvement inquiry was prescribed;
- removing legislative prescription regarding the order of the two inquiries.

Options considered infeasible

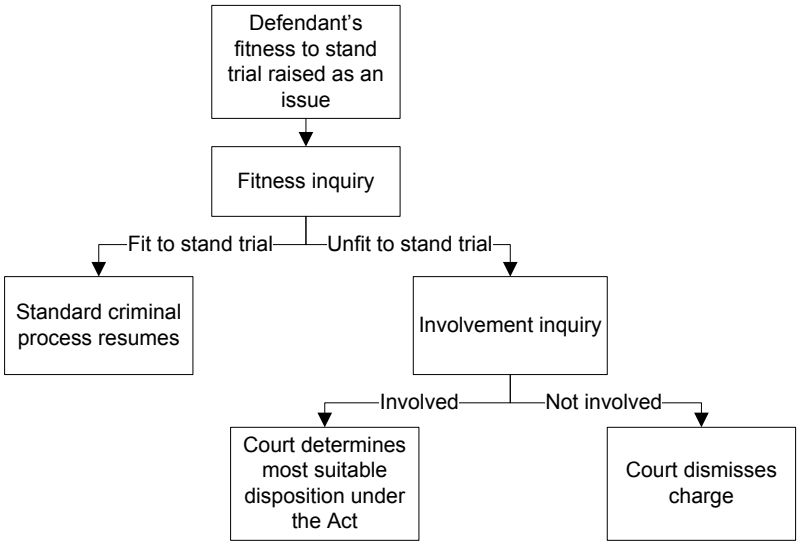
17. We have not assessed the situation preceding the Act as a feasible option. Under the Criminal Justice Act 1985, no involvement inquiry was required in the process of determining fitness to stand trial and subsequently dealing with unfit defendants. This meant that a person could be found unfit to stand trial and placed into secure care, even though that person had not committed the alleged offence. We consider this possible outcome to unacceptably limit human rights, natural justice and procedural fairness.

18. Not prescribing the order of the two inquiries was also considered infeasible. A variable approach would undermine procedural fairness and the certainty and consistency of the law affecting already vulnerable people.

Analysis of feasible options

19. The only feasible reform option identified was to reverse the status quo, so that the fitness inquiry precedes the involvement inquiry. This would mean that involvement inquiries only occur when a court has determined a defendant is mentally impaired to the extent that they are unfit to stand trial. Diagram 2 illustrates the process under this option.

Diagram 2 – Reversing the status quo



20. The table below compares how the status quo and alternative option measure against the objectives identified.

Objective	Status quo (involvement inquiry then fitness inquiry)	Alternative (fitness inquiry then involvement inquiry or normal trial)
Procedural fairness and access to justice	× Defendants who are eventually found fit to stand trial face delays in the resolution of their case because they have to go through both an involvement inquiry and a normal trial. × Delays caused by ultimately unnecessary involvement inquiries reduce access to justice for all court users. × The process may be misused for tactical reasons, to allow the defence to gain access to information they would not otherwise obtain. × Cases without merit are disposed of more quickly, minimising the time defendants (against whom there is insufficient evidence) are subject to the uncertainty and stress of prosecution.	✓ All defendants' involvement in the offence assessed in court only once, making the procedure fairer and speeding up access to justice. ✓ Involvement inquiries are less frequent, in turn reducing case resolution times and delays for other court users (improving access to justice). ✓ Involvement inquiries could be conducted with knowledge of the defendant's particular mental impairment, which may enable more appropriate support and more comprehensive assessment of their involvement in the offence. ✓ The tactical benefit of triggering the unfitness process is reduced, as any extra information or evidence available to the defence during an involvement inquiry will only be available once the defendant has been found unfit. × Charges brought without sufficient evidence stay in the system for longer, because the defendant's involvement is assessed later in proceedings. In a very small number of cases this may affect access to justice for both the defendant and other court users, and procedural fairness for the defendant.

Objective	Status quo (involvement inquiry then fitness inquiry)	Alternative (fitness inquiry then involvement inquiry or normal trial)
Efficiency (of process and use of resources)	× If a defendant's involvement in the offence has been determined by the court and they are then found fit to stand trial, the defendant's commission of the offence may have to be re-established in a standard criminal trial. Anecdotal evidence indicates defendants are found fit in the majority of fitness inquiries. × People giving evidence may have to attend court twice to present the same evidence.	✓ The court only has to establish the defendant's involvement in, or commission of, the offence once – either in an involvement inquiry or in the standard criminal process. × As identified in the cell above, charges with insufficient evidence may stay in the system for longer, which would reduce efficiency.
Minimising harm to victims of crime	× Victims giving evidence in cases where the defendant is found fit to stand trial may have to attend court and give the evidence twice. This can exacerbate the trauma of the original incident and create further upheaval for the victim.	✓ Victims giving evidence only have to do so once – at an involvement inquiry or at a normal trial.

21. We note that the only benefit of the status quo identified in the table (quicker disposals of unmeritorious cases) is likely to occur very occasionally, as prosecutors will rarely bring cases they cannot establish to the balance of probabilities. This also means that the two negative impacts identified for the alternative option will occur equally occasionally.

Other factors

22. We also note that reversing the order of the inquiries will align New Zealand practice with most comparable jurisdictions, including Australia and England. This may provide a greater and more applicable pool of resources and judgments for judges to draw on. This has the potential to enhance the consistency, quality and robustness of decisions in this area, especially in the early period following a change to the order of inquiries.

23. A further consideration is that the Ministries of Justice and Health plan to undertake a wider procedural review of the Act. We consider it is appropriate to address the order of inquiries issue before the wider review, as it is one of the more acute issues with the Act. There also appears to be broad legal, judicial and academic consensus

as to the appropriateness of reversing the order of the inquiries.[5] As the order of inquiries issue has minimal bearing on other procedural issues with the Act, no adverse effects are anticipated in addressing it independently of other changes that may be made following the review.

Recommended option

24. As the table above highlights, reversing the order of inquiries better meets the objectives in paragraph 14. We consider the benefits of the reform (for defendants, witnesses and other court users) outweigh the slight risk that some innocent defendants may stay in the system for longer.

25. There are risks in reforming the process without hard data on the scope of the problem. However, judicial and academic support for the reform provides some assurance that reversing the order of inquiries will result in a more efficient fitness process that is fairer to witnesses without compromising defendants' trial rights.

26. While the impact on the criminal justice sector cannot be readily quantified, the removal of one hearing will reduce the amount of court time, legal aid and other sector resources required by these cases.

Consultation

27. Stakeholder and judicial views were taken into consideration in this analysis.

28. Officials have met and corresponded with members of the judiciary on the issue and options for amendment, and on progressing the proposed reform independently of any other changes to the Act. It was agreed that reversing the order of inquiries was most appropriate, and doing so without addressing other issues in the Act would not cause any new problems. Professional legal bodies have also been consulted on the proposal.

29. The following agencies have been consulted on this RIS: Crown Law, NZ Police, Department of Corrections and Ministry of Health.

Conclusions and recommendations

30. The Ministry's preferred option is to reverse the order of involvement and fitness inquiries, rather than retaining the status quo.

31. The status quo involves re-litigation of many defendants' involvement in the offences charged. This can result in unnecessary delays for case resolution, inefficient use of court time and resources, and further inconvenience and trauma to victims and witnesses.

32. Reversing the order of inquiries would mean that courts only ever have to establish defendants' involvement in the offence once. This would improve efficiency and procedural fairness, and limit further harm to victims. It may also allow appropriate

[5] See in particular *R v Te Moni* [2009] NZCA 560 at [96].

support for mentally impaired defendants earlier in the process, and judicial decision-making that can take advantage of a more comprehensive understanding of defendants' impairments.

33. There is a risk that the reform will mean charges without merit are dismissed later, and defendants of those charges will remain in the criminal justice system longer. However, as unsubstantiated charges are likely to be brought very infrequently, this risk is minimal.

Implementation plan

34. Implementing the preferred option would require amendment to the Act. The proposed vehicle for this amendment is the Courts and Tribunals Enhanced Services Bill.

35. The Ministry will amend relevant guidance (including training materials for court staff, forms and web content) to reflect any amendments to the Act. The legislation could also establish transitional arrangements for parties who had entered the fitness process before the legislation changed, to ensure the law is clear and parties are not disadvantaged by the procedural amendments.

36. Ministry officials will help to familiarise court staff and the judiciary with the change before it is in effect, and will also keep lawyers informed.

Monitoring, evaluation and review

37. The Ministry will monitor the effectiveness of the amendment through engagement with stakeholders, including the judiciary and the legal profession. The Ministry will also analyse any changes in data trends, including case lengths when provisions of the Act are engaged and the number of dispositions under the Act. This will help determine whether the amendment is meeting objectives. The Ministry is also working to improve the collection of data in this area.

38. As mentioned in the options analysis section, a wider review of the Act is planned. The review may provide an opportunity to address any issues that appear following the amendment's implementation.