



THE UNIVERSITY OF  
MELBOURNE

# Unfitness to Plead and Indefinite Detention of Persons with Cognitive Disabilities

Addressing the Legal Barriers and  
Creating Appropriate Alternative  
Supports in the Community



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Cover Artwork: Flinders Street Railway Station, 32.50 x 50cm, Rebecca Scibilia, 2015. Courtesy of the artist and Arts Project Australia. Arts Project Australia is a Melbourne-based studio and gallery supporting artists with an intellectual disability as they develop their art practice.

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# Table of Contents

<b>Unfitness to Plead Project Personnel</b>	<b>6</b>
<b>Acknowledgements</b>	<b>8</b>
<b>Executive Summary</b>	<b>9</b>
Language and Terminology	10
Main Findings	10
<b>Introduction</b>	<b>12</b>
Disability and Disadvantage in the Criminal Justice System	13
Indigenous People with Disabilities	14
<b>The Legal Issues</b>	<b>15</b>
The Need for Reform	16
How Unfitness to Plead Laws Work	16
Law Reform Recommendations for Special Hearings	21
What Happens in Other Countries?	22
Human Rights Concerns	22
Are Unfitness to Plead Laws Fundamentally Flawed on Human Rights Grounds?	25
Supports for Persons with Cognitive Disabilities	26
<b>The Disability Justice Support Program</b>	<b>29</b>
Overview	29
Community Legal Centres	29
Disability Justice Support Persons	30
Evaluation	32
Findings	32
Issues facing Indigenous Participants	47
Other Issues	51
Challenges and Potential Drawbacks to the Program	53
Cost-Benefit Analysis	56
<b>Conclusion</b>	<b>58</b>
<b>Appendix One: List of Project Publications</b>	<b>60</b>
<b>Appendix Two: Support Person Protocol</b>	<b>62</b>
<b>Endnotes</b>	<b>66</b>



# Unfitness to Plead Project Personnel

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# Executive Summary

Access to justice is a cornerstone of modern legal systems. Yet, for many persons with disabilities, systems of justice are largely inaccessible. Human rights law requires equal access to justice for all, including persons with disabilities. In the criminal justice system, laws regarding 'fitness to plead' or 'fitness to stand trial' raise serious concerns about accused persons with cognitive disabilities potentially being denied equal access to justice. Such laws call into play the rights to a fair trial, liberty, legal capacity and equal recognition before the law.

Fitness to plead laws are based on the idea that accused persons should not be put on trial if they are unable to understand the legal process and the charges against them. The main aim is to avoid unfair trials. However, declarations of unfitness may lead to indefinite detention of unconvicted persons in prison or special facilities based on community protection. Such declarations may also lead to state intervention for a period of time which exceeds the length and/or gravity of the potential sentence for the original charge.

This report summarises the findings of a two-year research project which was designed to develop practical and legal solutions to the problem of persons with cognitive disabilities – and particularly Indigenous people with cognitive disabilities – being found unfit to plead and detained indefinitely in Australia.

The research team conducted a human rights analysis of current unfitness to plead laws. It also developed, implemented and evaluated a Disability Justice Support Program for accused persons at risk of being deemed unfit to plead and subject to indefinite detention. Three community legal centres across Australia participated in the program. Four non-legal 'disability support persons' were trained to provide support to persons with cognitive disabilities charged with a crime. The research team then evaluated the program to develop an evidence-base for implementing similar support models across Australia and elsewhere. The project findings have informed recommendations for improvements to enable better access to the criminal justice system and support for accused persons with cognitive disabilities.

## Language and Terminology

In writing this report, the authors acknowledge that there are different opinions about the respectful use of language in the context of persons with disabilities. The term 'cognitive disabilities' is a broad term that encompasses all impairments that may affect cognition. The term 'persons with cognitive disabilities' is used in this report to refer to persons with a range of disabilities, including intellectual disabilities, Alzheimer's disease, autism, multiple sclerosis, acquired brain injuries, mental health challenges and so on, who experience difficulties regarding:

- the ability to learn, process, remember, or communicate information;
- awareness; and/or
- decision-making.

The researchers acknowledge that people with these impairments do not always experience an effect on cognition, and that the support needs of people with intellectual disability and mental health (or 'psychosocial') disability may vary greatly.

The term 'Indigenous people' is generally used to refer to both Aboriginal and Torres Strait Islander Australians collectively, and Indigenous people more generally. When referring to specific groups of Indigenous people around Australia, the local self-identifying term is used where appropriate.

## Main Findings

Persons with cognitive disabilities face barriers at almost every step of the criminal justice system, whether as accused persons, witnesses, prisoners, or those under supervision. Indigenous people with cognitive disabilities are particularly disadvantaged. Unfitness to plead laws leading to indefinite detention are an extreme example of this disadvantage. Many other interconnected forms of disadvantage were identified in this project, including:

- inaccessible court proceedings that rely on complex language;
- the inconsistent availability of support through proceedings;
- legal services that are under-resourced and not necessarily prepared to respond to the access needs of persons with disabilities;
- long delays in proceedings involving accused persons with cognitive disabilities; and
- the 'criminalisation of disabilities', in which the environmental causes of difficult behaviour are ignored or played down, and/or disability is misinterpreted as deliberately difficult or defiant behaviour.

To comply with obligations under international human rights law, persons with cognitive disabilities must be able to access criminal proceedings on an equal basis with others. This equal access requires implementation of the recommendations of a federal Senate committee inquiry which noted that 'indefinite detention is unacceptable and that state and territory legislation be amended in line with this principle'.<sup>1</sup>

Various forms of support can improve the accessibility of proceedings. The Disability Justice Support Program appears to reduce the need for unfitness to plead determinations by assisting accused persons to participate in proceedings and exercise their legal capacity. Such formal support is increasingly shown to be effective for many persons with disabilities and appears to provide a cost-effective and rights-affirming practice for securing access to justice.

# Introduction

Multiple law reform initiatives, media reports and international human rights agencies have raised concerns about unfitness to plead laws that lead to the indefinite detention of persons with cognitive disabilities, and particularly Indigenous people with cognitive disabilities, in Australia.<sup>2</sup> Unfitness to plead laws raise serious concerns about persons with cognitive disabilities potentially being denied equal access to justice. While such laws are meant to protect accused persons from unfair trials, if an accused person is found unfit to plead or stand trial, he or she may be subject to indefinite detention or state intervention for a longer period than would have been possible if the individual was permitted to proceed through a trial.

This project is concerned with two major research gaps in relation to unfitness to plead laws. The first relates to the United Nations Convention on the Rights of Persons with Disabilities (CRPD), which entered into force in 2008 and which Australia has ratified. The range of human rights implicated by unfitness to plead laws include the general right to equality and non-discrimination, and specific rights of equal recognition before the law, legal capacity, liberty, and freedom from cruel, inhuman and degrading treatment.<sup>3</sup> However, relatively little has been written about the implications of the CRPD for unfitness to plead laws.

The second major research gap concerns what makes for effective support for accused persons with cognitive disabilities to participate in criminal proceedings. One common recommendation to emerge from law reform inquiries into unfitness to plead laws is the need for formal support for accused persons at risk of being deemed unfit to plead.<sup>4</sup> However, prior to this project, there was very little evidence of effective support practices for assisting an individual with a cognitive disability who is accused of a crime.

The Victorian Law Reform Commission noted that '[t]he importance of support measures in the unfitness to plead process was one of the strongest themes to come out of the Commission's review'.<sup>5</sup> It suggested that support measures can 'optimis[e] an accused's fitness where they might otherwise be unfit'.<sup>6</sup> Yet, according to the Commission, such supports are 'not necessarily considered, provided or available'.<sup>7</sup> Indeed, there remain few evaluations of formal supports for accused persons with disabilities to participate in criminal justice proceedings, and none concerning supports to optimise fitness to plead under current law.

The research team therefore:

- conducted a human rights analysis of current unfitness to plead laws; and
- developed, implemented and evaluated a Disability Justice Support Program for accused persons at risk of being deemed unfit to plead and subject to indefinite detention.

The legal issues arising from the human rights analysis are presented in the next main section of this report, and an overview of the Disability Justice Support Program is presented in the following section.

Excerpts from interviews with lawyers and disability justice support persons conducted as part of the Disability Justice Support Program evaluation are used throughout this report to illustrate key points. Stories of some of the challenges facing accused persons with cognitive disabilities – as well as success stories – are used to highlight major issues.

## Disability and Disadvantage in the Criminal Justice System

Specific concerns with unfitness to plead laws should be considered with broader concerns about disability and disadvantage in the criminal justice system.

By and large within this criminal justice system there was a mass of people who just presented as having disabilities and having fallen through these widening cracks, to navigate everything.  
[Support Person]

A growing body of research indicates that persons with cognitive disabilities are significantly over-represented throughout criminal justice systems of high-income countries,<sup>8</sup> including Australia<sup>9</sup>:

- The New South Wales Law Reform Commission reported that there is 'clear evidence of over-representation of persons with **cognitive and mental health impairments** at all stages of the criminal justice system'.<sup>10</sup>
- The Victorian Department of Justice reported that 42 per cent of male prisoners and 33 per cent of female prisoners had an **acquired brain injury**, compared to just 2.2 per cent of the general population.<sup>11</sup>
- A 2013 Victorian parliamentary inquiry reported that individuals with an **intellectual disability** were 'anywhere between 40 and 300 per cent more likely' to be jailed than those without an intellectual disability.<sup>12</sup>

- The Australian Institute of Health and Welfare reported in 2012 that 38 per cent of prison entrants and 46 per cent of 'prison dischargees' disclosed that they had been told at some point in their life by a doctor, psychiatrist, psychologist or nurse that they had a mental health diagnosis, including drug and alcohol abuse.<sup>13</sup>

## Indigenous People with Disabilities

Indigenous people with disabilities face particular disadvantage in the criminal justice system, including under unfitness to plead laws.<sup>14</sup> Mindy Sotiri and colleagues reported in 2012 that all nine individuals on indefinite supervision orders as a result of findings of unfitness to plead in Western Australia were Indigenous, as were 11 of 33 individuals found unfit to plead or 'unsound of mind' under the jurisdiction of the Western Australian Mentally Impaired Accused Review Board.<sup>15</sup> Mick Gooda, the former Aboriginal and Torres Strait Islander Social Justice Commissioner stated of Indigenous people that '[w]e have high rates of unresolved intergenerational trauma, which has led to disability, alcohol-related disability, brain injury and mental health issues'.<sup>16</sup> A lawyer interviewed as part of the Project commented on the importance of culturally appropriate services:

I think it's just an understanding of all the layering of disadvantage and where somebody comes from and also - yeah, I think just that deeper level of understanding of a culture and appreciation of where somebody ... and being able to bridge that gap of understanding in relation to what the criminal justice system is and making that understandable because I think lawyers - I know I try really hard, even with interpreters, and I still have trouble explaining concepts in the criminal justice system and that's even with interpreters.  
[Lawyer]

Understanding the reasons for the general disadvantage facing Indigenous people with disabilities in the criminal justice system would require examining the complex interplay of colonialism, disability and disadvantage.

[W]hen I sat there waiting [in court] for my case to come up, all I saw was - brought up and it was just one [Indigenous person] after the other, after the other, after the other. Even astounded me.  
[Indigenous Client]

While law reform efforts alone will not redress the deep inequality experienced by Indigenous people with cognitive disabilities in Australia, they do present an opportunity to improve procedural due process rights and formal equality in the criminal justice system – including the human rights to equality before the law, legal capacity, liberty, and a fair trial.



# The Legal Issues

The law on unfitness to plead is based on the premise that individuals should not be put on trial if they are unable to understand the legal process and the charges against them.<sup>17</sup> It is designed to insulate accused persons from both criminal procedure and criminal sanctions.<sup>18</sup> The professed aim is to avoid unfair trials.<sup>19</sup>

However, declarations of unfitness also potentially deny accused persons the right to a fair trial in several ways. For example, they may be precluded from the opportunity to scrutinise allegations in a court of law.<sup>20</sup> They also may be precluded from the opportunity to be found not guilty or to be exonerated from the charges against them. They may also be subject to detention and state intervention for a period of time which exceeds the length and/or gravity of the potential sentence if the finding of unfitness had not been made.

In 2015, a young Western Australian man, 'Jason', was reported to have been detained for over 11 years following a finding that he was unfit to stand trial for a charge of manslaughter.<sup>21</sup> The young man, who cannot be identified because he was 14 years old when he was charged, had allegedly crashed a stolen car that resulted in the death of his 12-year-old cousin. Jason entered juvenile detention in 2003 and later moved to adult prison, where he remains at the time of writing. An opposition legal affairs spokesman in Western Australia reported that if Jason had been convicted and sentenced for his original charge, he could have expected to face a jail term of between four and eight years.<sup>22</sup>

Unfitness to plead laws are typically applied in higher courts, often relating to very serious allegations. Yet, law reform inquiries, in Australia and elsewhere, have generally been premised on the belief that 'the normal criminal trial is the optimum process where a defendant faces an allegation', to use the terms of the Law Commission of England and Wales.<sup>23</sup> The Commission stated:

We consider that full trial is best not just for the defendant, but also for those affected by an offence and society more generally. This is because the full criminal process engages fair trial guarantees for all those involved, under article 6 of the European Convention on Human Rights, and allows robust and transparent analysis of all the elements of the offence and any defence advanced. It also offers the broadest range of outcomes in terms of sentence and other ancillary orders.<sup>24</sup>

The Law Commission concluded that unfitness to plead proceedings which removed the accused person from a typical trial should happen as a last resort and emphasised facilitating full trial through trial adjustments.<sup>25</sup> This view appears to be broadly shared by Australian law reform bodies, which have almost uniformly called for formal supports to assist accused persons with cognitive disabilities to take part in typical proceedings.<sup>26</sup>

## The Need for Reform

Several law reform initiatives at the federal, state and territory-levels have examined indefinite detention following findings of unfitness to plead. In 2016, for example, a federal Senate committee inquiry stated 'that indefinite detention is unacceptable and that state and territory legislation be amended in line with this principle'.<sup>27</sup>

Although there are points of disagreement between major inquiries, they have all recommended that formalised support should be available for accused persons with cognitive disabilities where they might otherwise be found unfit to plead.<sup>28</sup>

The inconsistent availability of such support across Australia means there are few evaluations of support to participate in criminal justice proceedings generally.<sup>29</sup> There have been no evaluations of support designed to optimise fitness to plead. Therefore, the Unfitness to Plead Project built in an evaluation of its support program with the aim of providing an evidence base for the implementation of support measures to assist accused persons at risk of being deemed unfit to plead. This is discussed in the next main section.

## How Unfitness to Plead Laws Work

In Australia, the legal test of an accused's ability to participate in the criminal trial process is derived from the 1836 English case of *R v Pritchard*.<sup>30</sup> The '*Pritchard* test', as it is known, requires that the accused must be 'of sufficient intellect to comprehend the course of proceedings in the trial so as to make a proper defence, to know that he [or she] may challenge any of you to whom he may object and to comprehend the details of the evidence'.<sup>31</sup>

The test has been developed further in subsequent cases. In Australia, the influential case is that of *R v Presser*.<sup>32</sup> To be fit to plead the accused must be capable of:

- Understanding the charges;
- Deciding whether to plead guilty or not;
- Exercising the right to challenge jurors;
- Instructing solicitors and counsel;
- Following the course of proceedings; and
- Giving evidence in his or her own defence.<sup>33</sup>

In many state and territory jurisdictions, the Australian '*Presser* test' has been incorporated into legislation.<sup>34</sup>

In most jurisdictions, the prosecution case may be tested (albeit in a limited fashion, focusing on the physical elements of the alleged offence) through a 'trial of the facts' or a 'special hearing', which tend to be conducted 'as nearly as possible' to a criminal trial.<sup>35</sup> There are exceptions to the use of special hearings which are considered below.

One of the most publicised cases involving indefinite detention is that of Marlon Noble.

Marlon Noble is an Indigenous man with an intellectual disability who was found unfit to plead to alleged sexual assaults. He was imprisoned for over 10 years without conviction, despite the alleged victims of his original charge subsequently informing prosecutors that Mr Noble had never assaulted them.<sup>36</sup> The UN Committee on the Rights of Persons with Disabilities found that Mr Noble had a number of his rights violated, including rights to equality before the law, access to justice, freedom from deprivation of liberty, and freedom from cruel, inhuman and degrading treatment.<sup>37</sup>

## How Many Accused Persons are Found Unfit to Plead?

Declarations of unfitness to plead occur infrequently in Australia and elsewhere.<sup>38</sup> In Victoria, for example, the Victorian Law Reform Commission (VLRC) found that:

Over a 12-year period from 2000–01 to 2011–12, there were 159 cases determined under the [*Crimes (Mental Impairment and Unfitness to Stand Trial) Act 1997* (Vic) ('CMIA')] in the higher courts (the Supreme Court and County Court). That is, cases where there was an issue of unfitness to stand trial and/or mental impairment that resulted in a finding and an order being made (either an unconditional release or a custodial or non-custodial supervision order).<sup>39</sup> ... CMIA cases therefore made up

only approximately one per cent of the total cases that resulted in a sentence or a CMIA order in the higher courts.<sup>40</sup>

These figures are likely to be similar across Australia. However, the VLRC added the caveat that 'due to gaps in available data, this may not reflect a complete picture of the [law's] operation'.<sup>41</sup> The data reported only dealt with cases in the higher courts. It is not clear how many charges for summary offences occur, in which the issue of unfitness to plead is raised and charges are subsequently withdrawn by Victoria Police.<sup>42</sup>

This case from the Disability Justice Support Program highlights the problem with estimating how many times the issue of unfitness to plead is raised:

'Edward' was a 19 year-old man with cognitive and communication disabilities who lived in a group home. He had been charged with gross indecency. The court considered whether it should pursue unfitness to plead proceedings. The defence team considered Edward making a guilty plea with a claim of mitigating circumstances to resolve the matter quickly. However, the defence lawyer considered he could receive some instructions from Edward. The support person and defence lawyer developed a support package involving a male-only group home and sexuality and relationship classes for Edward and presented this to the prosecution. The defence lawyer said the prosecution team 'were able to then come back to us and say, "well, in the circumstances we're satisfied that he's no longer at risk of committing further offences so we'll withdraw this matter" – as opposed to going to a fitness trial, because the fitness report that we had for him stated that he was unlikely to ever be fit in the future'.

There are several possible explanations for the apparent infrequency of findings of unfitness to plead in Australia. One explanation may be that lawyers are aware of the potential negative repercussions, and they avoid such findings wherever possible. Another explanation may be that courts themselves are aware of the negative repercussions. Regardless of the reason, the individuals that are subject to unfitness to plead findings are at risk of rights violations – as are those who may be going through typical trials without appropriate supports to guarantee their participation. The fact that the laws are used so infrequently, and yet there are high numbers of individuals with cognitive disabilities in the criminal justice system suggests that the current unfitness to plead laws are insufficient in addressing the needs of persons with cognitive disabilities charged with a crime.

### *Special Hearings in Australia and other Alternative Proceedings*

After a finding of unfitness, all Australian jurisdictions except Western Australia provide some means of challenging the prosecution's case. As noted, in most of these jurisdictions, legislation states that a special hearing, sometimes called a 'trial of the facts', is a process by which the case against an unfit accused is tested. However, a special hearing invariably deviates from the usual trial process in some way. For example:

- Under Commonwealth law, a court must only determine whether the prosecution has established a 'prima facie case' against the accused;<sup>43</sup>
- In the Australian Capital Territory and South Australia, the court only examines whether the prosecution has proved the physical elements of the charge, not the mental elements;<sup>44</sup>
- In South Australia, the court cannot consider whether the accused has any defences available to them.<sup>45</sup>

If a person is detained following unfitness to plead proceedings, the focus typically becomes 'therapeutic', meaning that new evidence relating to the case may not be able to be tested. The United Nations Committee on the Rights of Persons with Disabilities stated in relation to Marlon Noble:<sup>46</sup>

[T]hroughout [Marlon Noble]'s detention in prison, the whole judicial procedure focused on his mental capacity to stand trial without giving him any possibility to plead not guilty and to test the evidence against him. The Committee also notes that [Australia] did not provide [Mr Noble] with the support or accommodation he required to exercise his legal capacity, and did not analyse which measures could be adopted to do so. As a result of the application of the Act, [Mr Noble's] right to a fair trial was instead fully suspended, depriving him of the protection and equal benefit of the law.

### *What Happens Following a Special Hearing or Declaration of Unfitness?*

After finding an accused unfit to plead, criminal proceedings may be discontinued and the accused released.<sup>47</sup> If a court decides an accused person who has been found unfit to plead should not be released, there are two possible dispositions: custodial or non-custodial orders.

While this report focuses on custodial orders where the accused person is detained in prison or a special facility, there are also concerns about the limitations on human rights for individuals placed on non-custodial orders.<sup>48</sup> Non-Custodial Supervision Orders are made by courts and impose conditions with which a person must comply. Conditions might include: regular reporting to corrections services, complying with compulsory psychiatric interventions and residing in a particular place.

Judith Cockram tracked 843 offenders with intellectual disabilities in Western Australia over 10 years, and concluded that such orders often provide 'little prospect of rehabilitation for the offender, with the focus generally being on the care and supervision of the resident, and an absence of specialist habilitative programs'.<sup>49</sup> The few studies that do exist on supervision orders have raised concerns that the schemes may perpetuate unfounded notions of risk and community safety in relation to intellectual disabilities,<sup>50</sup> and may not give sufficient weight to the environmental causes of difficult behaviour,<sup>51</sup> leading to the application or maintenance of indefinite supervision orders. Further, there remains the risk of orders being varied from non-custodial to custodial.<sup>52</sup>

He'd collect all the cigarette butts [during his community supervision in a government run cottage]. Then when he's tried to smoke them he's not allowed to smoke on government grounds so they told him no. But the cottages are very easy to escape so he's just gone. He's taken off up the road and the police have tried to arrest him and he's ... put rocks through the police cars and all the rest. It's like snakes and ladders. He's back now, back in custody.  
[Support Person]

There are essentially four unfitness custodial models in Australia: traditional 'Governor's pleasure' detention; nominal terms; limiting terms and the fixed term approach.

- **The traditional 'Governor's pleasure' detention.** This model is effectively retained in Western Australia, while Tasmania uses a modified version of Governor's pleasure detention.<sup>53</sup> Disposition is discretionary, in the sense that courts can decide whether to make a custodial order or release the accused person.<sup>54</sup> If the court proceeds with a custodial order,<sup>55</sup> that order is indefinite. The term of detention effectively rests with administrative decision-makers.
- **Nominal terms.** At the end of a 'nominal term' of custody, a court is asked to decide whether the order should be continued.<sup>56</sup> The effect of a nominal term is simply to bring the matter back before a court for what is known as a 'major review'.<sup>57</sup> Major reviews apply a presumption that the accused must be released at the end of



the nominal term, unless they pose a serious risk to the public.<sup>58</sup> Importantly, these dispositions still amount to indefinite detention, as is the case in legislation in the Northern Territory and Victoria.<sup>59</sup>

- **Limiting terms.** The third Australian model of custodial disposition is the 'limiting term' used in New South Wales and South Australia. This approach most closely resembles a criminal sentence imposed following conviction. The limiting term should be the best estimate of the sentence the Court would have considered appropriate if the special hearing had been a full trial of criminal proceedings.<sup>60</sup> Significantly, under a limiting term, an individual ceases to be a forensic patient when the term expires,<sup>61</sup> and is accordingly entitled to leave any forensic facility in which they were detained. Health authorities may apply for extensions of custodial orders<sup>62</sup> – which raises concerns about indefinite detention under civil law – but barring this prospect there is an end in sight.
- **Fixed terms.** The Commonwealth, and the Australian Capital Territory (ACT) appear to go a step further toward equality rights than is the case with limiting terms (notwithstanding concerns outlined in the previous section of this report, about procedural due process rights). For example, the *Crimes Act 1914* (Cth) provides that, if a court determines that a person is unfit to be tried and will not become fit to be tried within 12 months, the court may order that the person be detained in a hospital (but only if treatment is available, and the individual agrees to be transferred to a hospital) or other place (including a prison).<sup>63</sup> However, the individual can only be detained for a specified period 'not exceeding the maximum period of imprisonment that could have been imposed if the person had been convicted of the offence charged'.<sup>64</sup>

## Law Reform Recommendations for Special Hearings

The Victorian Law Reform Commission's 2014 report on the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) made the following recommendations about that state's special hearing regime:

- Courts should have the power to excuse an accused from attending their special hearing where they are legally represented and would be distressed or confused by proceedings;<sup>65</sup> and
- Victoria should introduce a formal support person scheme, modelled on the UK's registered intermediary scheme, broad enough to provide support to accused persons at special hearings.<sup>66</sup>

A 2016 report on unfitness to plead by the Law Commission of England and Wales made the following recommendations:

- Courts should have the discretion to decline to proceed with a special hearing – referred to in England and Wales as a ‘Section 4A hearing’ – if it is not in the interests of justice to do so;<sup>67</sup>
- The prosecution should be required to prove all elements of the offence, including the mental elements;<sup>68</sup> and
- The special hearing jury/judge should be required to consider any full defences raised by the accused (excluding partial defences to murder – ie. diminished responsibility and provocation).<sup>69</sup>

## What Happens in Other Countries?

The doctrine of unfitness to plead is largely found in common law jurisdictions, such as Australia, England, Wales, Ireland and the United States. Jurisdictions that follow a civil law tradition, such as the majority of continental Europe, do not have a strong need for the unfitness to plead doctrine because they do not have the same adversarial model in the criminal justice system that can be found in common law traditions.

In common law systems, the adversarial model notionally involves contests between ‘equals’ and it is, therefore, viewed as essential that the accused person plays an active role in his or her defence. In contrast, civil law systems hold inquisitorial proceedings in which a judicial inquiry is ‘directed at establishing the true facts’.<sup>70</sup> As a result, the accused person does not play a significant role in his or her defence.<sup>71</sup> However, the position differs from jurisdiction to jurisdiction in civil law systems:

- In the Netherlands, prosecutions can be suspended if an accused cannot understand the charges against him or her;<sup>72</sup>
- German criminal law recognises that some accused are unfit to plead, and the law provides for the making of preventative detention orders if the prosecution decides to drop charges;<sup>73</sup>
- In Sweden and Denmark, all accused persons are put on trial and lawyers are charged with protecting their clients’ interests;<sup>74</sup>
- In Japan, it is assumed that prosecutors will not proceed against accused persons who are unfit to plead.<sup>75</sup>

## Human Rights Concerns

Human rights are considered rights inherent to all human beings, regardless of status. The Preamble to the Universal Declaration of Human Rights recognises the ‘inherent dignity and inalienable rights of all members of the human family’.<sup>76</sup> Human rights are:

the basic rights that belong to everyone, regardless of age, race, sex, or disability, income or education. They are about treating people fairly and with dignity, and ensuring individual rights are respected.<sup>77</sup>

The Australian Law Reform Commission (ALRC), in its major review on 'Equality, Capacity and Disability in Commonwealth Laws', recommended that unfitness to plead laws be reformed in line with the human rights set out in the United Nations Convention on the Rights of Persons with Disabilities (CRPD) which Australia has ratified.<sup>78</sup>

The CRPD is underpinned by a view of disability which looks to external barriers — whether physical or attitudinal — to a person's participation on an equal basis with others.<sup>79</sup> This '**social model**' or '**human rights model of disability**' can be contrasted with the 'medical model', which locates disability within the individual, in terms of pathology.<sup>80</sup> The task then turns to dismantling barriers to equality, and one important barrier to equality noted in the CRPD, is a failure to provide *accessibility* measures and 'reasonable accommodation'. This latter term is typically referred to in Australian law as 'reasonable adjustment'.

There are tensions between the demand of the CRPD for equal access for persons with disabilities to legal processes, and unfitness to plead laws that effectively create separate processes that operate in a 'protective' manner.<sup>81</sup> The following sections outline three important CRPD rights that might be affected by unfitness to plead laws.

### *Legal Capacity*

Article 12 of the CRPD refers to equal recognition before the law. It requires States Parties to 'recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life' and to 'take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity'.<sup>82</sup>

**Legal capacity** refers to the capacity to be a holder of rights under the law as well as the capacity 'to engage in transactions and create, modify or end legal relationships'.<sup>83</sup>

Legal capacity differs from **mental capacity**. The United Nations Committee on the Rights of Persons with Disabilities, which assists governments to interpret the CRPD, defines mental capacity as 'the decision-making skills of a person, which naturally vary from one person to another and may be different for a given person depending on many factors, including environmental and social factors'.<sup>84</sup> The Committee on the Rights of Persons with Disabilities has stated that:

Under article 12 of the Convention, perceived or actual deficits in mental capacity must not be used as justification for denying legal capacity.<sup>85</sup>

A major concern raised by the ALRC was that individuals found unfit to plead 'will often find themselves in a situation where they are not able to exercise legal capacity'.<sup>86</sup> Unfitness to plead laws do not accord with the Committee's interpretation of Article 12 because they rely on mental capacity assessments to deny legal capacity.

The Committee would require that where accused persons have difficulty understanding trial processes, they should be provided with comprehensive and meaningful support options that could allow them to understand and participate in the trial process. If this were not sufficient for accused persons to participate in the trial, then it seems that under the Committee's interpretation of Article 12, an adjudication of the criminal charges should proceed with the defence lawyer operating on what he or she believes is the best interpretation of the individual's will and preference.

### *Access to Justice*

Article 13 of the CRPD directs States Parties to 'ensure effective access to justice for persons with disabilities on an equal basis with others ... in order to facilitate their effective role as direct and indirect participants ... in all legal proceedings. This again implicates unfitness to plead laws, where they discriminate against persons with cognitive disabilities' ability to take an equal role in criminal trials.

### *The Right to Liberty*

Article 14 of the CRPD sets out the right to liberty and security of person, as well as a prohibition on unlawful or arbitrary deprivation of liberty. Article 14 includes an important disability-specific prohibition – 'that the existence of a disability shall in no case justify a deprivation of liberty'.<sup>87</sup> Article 14 is closely intertwined with the legal capacity right in Article 12.<sup>88</sup>

The Committee on the Rights of Persons with Disabilities has stated that:

declarations of unfitness to plead or incapacity to be found criminally responsible in criminal justice systems and the detention of persons based on those declarations, are contrary to article 14 of the Convention since it deprives the person of his or her right to due process and safeguards that are applicable to every defendant.<sup>89</sup>

From this view, custodial and supervision orders may be viewed as paternalistic declarations in which, because of the individual's impairment, it is no longer in their 'best interests' to enjoy the autonomy afforded to others. The Committee on the Rights of Persons with Disabilities has stated that 'the denial of legal capacity of persons with disabilities and their detention in institutions against their will' is a violation of both articles.<sup>90</sup>

## Are Unfitness to Plead Laws Fundamentally Flawed on Human Rights Grounds?

Unfitness to plead laws create a differential process of justice for accused persons with cognitive disabilities.<sup>91</sup> That differential process is leading to disproportionately long state intervention into the lives of persons with cognitive disabilities.

Unfitness to plead laws could be interpreted as being fundamentally flawed because they deny legal capacity based on an arguably unreliable test of 'mental capacity'.<sup>92</sup> Once legal capacity is denied, alternative procedures of justice apply – which are often unfavourable for persons with cognitive disabilities. From this view, much of the existing legislation that governs unfitness to plead should be discarded, and the justice system should be redesigned to be 'universally accessible' to *all* persons – those with and without cognitive disabilities.<sup>93</sup>

On the other hand, unfitness to plead laws serve as a flexible type of *accessibility measure*, whereby modified proceedings attempt to help secure equality for persons with cognitive disabilities.<sup>94</sup> The question then arises: can unfitness to plead legislation that creates distinct criminal justice procedures for persons with cognitive disabilities be *separate but equal* to the mainstream justice system?

Debates about the implications of the CRPD for unfitness to plead laws are likely to continue. However, it seems clear that modified proceedings that only apply to persons with cognitive disabilities most likely do not comply with the CRPD.<sup>95</sup> Such laws, in Australia and elsewhere, can result in longer sentences and tend not to ensure the due process safeguards of typical trials, such as offering the same evidentiary standards and available defences.<sup>96</sup>

In practical terms, the best way forward appears to be to provide sufficient supports to accused persons with cognitive disabilities to avoid a finding of unfitness to plead. The next section explores existing schemes.

There's so much room for work to be done, and to continue. Just the needs that have been identified through all regions, just having that support and making that difference. I don't know, encouraging the courts to really consider a person with a disability, and don't just rule them out as you can't participate because you have a disability, you're not going to understand. To have a think about that, and think about a way that they could understand, and they could participate. Like slowing it down, explaining the language. I just see the courts as somewhere that is really unfriendly to that, and it's got such a long way to go. [Support Person]

## Supports for Persons with Cognitive Disabilities

Broadly speaking, support frameworks have one or more of the following features:

- Formal or informal intermediary/communication assistant schemes;<sup>97</sup>
- Formal or informal support person schemes;
- A statutory entitlement to an intermediary/communication assistant; and/or
- A statutory entitlement to a support person.

### *Communication Assistants*

The role of a 'communication assistant' or 'communication partner' is to facilitate communication between the individual and the court. This typically occurs when the person is giving evidence.

The following are examples of communication assistant schemes in place in various jurisdictions:

- England and Wales' registered witness intermediary scheme;
- Northern Ireland's pilot registered defendant intermediary scheme;
- Canada's informal communication intermediary;
- South Australia's communication partner scheme (in development); and
- New South Wales's 'Children's champions' witness intermediary scheme for child victims of sexual assault (in development).

### *Support Persons*

Many jurisdictions have formal or informal schemes for the provision of a support person, whose role is generally limited to providing emotional support and information about the legal process, rather than facilitating communication. See, for example, the Court Network volunteer program in Victorian and Queensland courts.



Some jurisdictions have legislated for a statutory entitlement to either a support person or a communication assistant/intermediary. For example:

- England and Wales' registered witness intermediary scheme is statutory;<sup>98</sup>
- New Zealand has a statutory entitlement to 'communication assistance';<sup>99</sup>
- New Zealand also has a statutory entitlement to a support person;<sup>100</sup>
- Canadian legislation allows a court to order that a support person accompany a vulnerable witness;<sup>101</sup>
- Israeli legislation allows the court to appoint a special advisor to assist the court and lawyers about phrasing, simplifying questions and addressing the individual;<sup>102</sup>
- In 2015 South Australia created a statutory entitlement to a communication assistant;<sup>103</sup>
- In New South Wales, a vulnerable<sup>104</sup> witness (including an accused person) has the right to request the presence of a 'supportive person' while giving evidence;<sup>105</sup> and
- In Queensland, a court may order that a 'special witness' — a witness with a mental, intellectual or physical impairment',<sup>106</sup> including the accused person<sup>107</sup> — be supported by a person approved by the court.<sup>108</sup>

### *Court-based Support*

Courts in Australia have demonstrated a willingness to assist accused persons with disabilities in the past.<sup>109</sup> This support has included:

- additional breaks in court proceedings to accommodate fatigue;<sup>110</sup>
- counsel given time to act as a supporter by carefully explaining court processes to the accused person in an accessible way;<sup>111</sup>
- providing a formal role for an informal support person (such as a family member);<sup>112</sup>
- 'special witness declarations' which activate support measures, such as the appointment of a court-based supporter for witnesses;<sup>113</sup>
- adapting adversarial process so that the Court can ensure counsel does not mislead or confuse the accused or otherwise take advantage of their impairment;<sup>114</sup>
- ensuring language is accessible or slowed to allow interpretation and/or explanation;

- 'easy English' summaries of trial proceedings including provision of a dot-point summary at the end of each court day;<sup>115</sup>
- video testimony for those who may find the courtroom environment distressing or confusing;<sup>116</sup>
- educational sessions/programs for accused who are 'borderline unfit' and may be considered fit to plead following education;<sup>117</sup> and
- environmental changes, including the person's position in the court room<sup>118</sup> or modifying court rooms to make them more accessible.

Although these measures have been considered by courts, they appear to be applied inconsistently around Australia.

[The support person] was saying, for example, [that] she'd had some judges who were really open to them providing that level of support and actually let them sit next to the person in the witness box, all these good things, but then other judges didn't want a bar of it was the way she described it, and that, I suppose, from a lawyer's perspective, is something - we can't leave that to chance. So I think that the fact that that level of support is applied in an ad hoc way at the moment is really a huge gap, because whilst it might be there, it means it's of little use if we can't guarantee it's always going to be there and the quality of it, because I think the fall-back position is always going to be that lawyers just go back to the fitness system and raising fitness and then a special hearing, when maybe there could be a better way of dealing with it. [Executive Officer, Community Legal Centre]

The consistent application of such support measures could help move Australia towards a criminal justice system more compliant with its human rights obligations.

# The Disability Justice Support Program

## Overview

The research team wanted to test the hypothesis that:

Non-legal Disability Justice Support Persons could assist accused persons with cognitive disabilities, by working alongside legal counsel and helping clients participate in criminal proceedings. Such support would reduce the need for unfitness to plead determinations, improve the accessibility of typical proceedings, and help prevent indefinite detention.

A Disability Justice Support Program was trialled in the Northern Territory, Victoria and New South Wales. The Program occurred over a six-month period in 2016. Research ethics approval for the project was sought and approved through the University of Melbourne.<sup>119</sup>

## Community Legal Centres

'Disability Justice Support Persons' were co-located at three community legal services:

- **The North Australian Aboriginal Justice Agency (NAAJA)** is contracted by the Commonwealth Attorney-General's Department to provide criminal and civil law services to Aboriginal people and their families in the Top End of the Northern Territory.
- **The Victorian Aboriginal Legal Services (VALS)** was established as a community controlled Co-operative Society in 1973. VALS provides referrals, advice/information, duty work and case work assistance to Aboriginal and Torres Strait Islander peoples in the State of Victoria.
- **The Intellectual Disability Rights Service (IDRS)** is a specialist legal agency that provides individual and systemic advocacy for people with intellectual disabilities in New South Wales, and provides assistance to legal and other professionals supporting people with intellectual disabilities.<sup>120</sup> Within IDRS is the **Criminal Justice Support Network**.<sup>121</sup> The Criminal Justice Support Network coordinates volunteer support persons for people with intellectual disabilities who are in contact with the criminal justice system. IDRS was able to co-fund a second Disability Justice Support Person – one in Sydney and the other in Wollongong.

## Disability Justice Support Persons

The desired skills and qualifications when hiring candidates for the role were:

- a Bachelor of Arts in a related field (or equivalent experience);
- experience supporting individuals in the criminal justice system;
- experience working with persons with cognitive disabilities; and
- knowledge of supported decision-making.

Each support person was employed to work three days a week over a six-month period.

Aboriginal and Torres Strait Islander people were strongly encouraged to apply to be support persons. However, the researchers were unable to attract Indigenous candidates to the roles. As noted, IDRS placed two of its Criminal Justice Support Network staff on secondment into the Disability Justice Support Person role, both of whom had specific expertise in assisting persons with intellectual disabilities in the New South Wales criminal justice system. NAAJA and VALS employed one candidate each, with backgrounds in law, disability education, and brain injury support services. The next section will outline the training given to support persons.

The aim of the formal support was to optimise the participation of accused persons with cognitive disabilities in proceedings against them by focusing on the supports they may require to exercise legal capacity and access to justice on an equal basis with others.

The lawyer is there to basically get you – handle your charge, whereas [the Disability Justice Support Person] is basically there to help – or my understanding was he is basically there to make you strong enough for your side, not the lawyer’s side.  
[Client]



I’ve seen myself as an interpreter between the lawyer and the client. I’ve seen myself as a facilitator of the justice system ... with the client because I’m not making decisions on their behalf. But I also saw it as an educational role for both lawyers and clients as well, so that everybody’s being informed.  
[Support Person]

## Training

Training took place over two days. The Disability Justice Support Persons were trained as a group and were joined by a small number of lawyers from each community legal centre. The training was based on 'experiential learning' with guest speakers, discussion, scenarios, activities, knowledge sharing, rather than using a lecture/assessment format. The training was developed with reference to:

- the CRPD;
- existing support materials and programs focused on access to justice and support to exercise legal capacity in Australia;
- the input of the National Advisory Panel; and
- the support options set out in statute and case law in Australia.<sup>122</sup>

Another touchstone for the training was the South Australian 'supported decision-making' program.<sup>123</sup> Materials were also drawn from existing legal advocacy programs for persons with disabilities in Australia, particularly those used by the Criminal Justice Support Network and other organisations, such as Villamanta Disability Rights Legal Service.<sup>124</sup>



Support persons, lawyers and researchers during training for the Disability Justice Support Program

More than half of the paid trainers were persons with disabilities, including those with intellectual disabilities, acquired brain injury, hearing impairment, and those with personal experience of the criminal justice system. For example, Jody Barney, a deaf Indigenous community consultant, provided advice based on her experience working with Indigenous people with various disabilities in criminal justice systems around Australia.<sup>125</sup>

## Evaluation

The postdoctoral researcher, Dr Piers Gooding, visited each jurisdiction and conducted semi-structured interviews with support persons, lawyers and clients. Twenty-two interviews were conducted throughout the program. Eleven lawyers were interviewed (four from NT, four from New South Wales and three from Victoria). Two clients were interviewed. All four support persons were interviewed twice, at both the middle and end of the program. Finally, an executive officer of one of the community legal centres was interviewed. The findings have been grouped into prominent themes in the following sections of the report. Some quotations have been edited to improve clarity while preserving the intended meaning.<sup>126</sup>

In addition, two members of the research team undertook a cost-benefit analysis of the program. A de-identified case study of a client of the program was developed. The intervention of the support person was costed, alongside the two pathways which the court was considering (but did not pursue) prior to the support person engaging with the accused person. This is set out on page 56.

### *Support Protocol and Ongoing Assistance*

The researchers developed a protocol to clearly define the Disability Justice Support Person's role (see Appendix Two). The protocol set out guiding principles for the program, as well as ethical and professional obligations expected of the Disability Justice Support Person.

As the program proceeded, the postdoctoral researcher provided ongoing assistance by regularly contacting Disability Justice Support Persons and arranging teleconferences to give support persons the chance to share experiences, exchange knowledge, and identify any additional assistance they may require.

## Findings

On average, each support person assisted 15-20 individuals. This makes a total of approximately 60-80 individuals who were supported through the program. This section summarises the views of clients, lawyers and support persons. While differences in views were expressed, clear themes emerged.

### *Clients' Views of Support*

Of the two clients interviewed, one Indigenous client described the program in the following terms:



Put it this way. When I first met [the support person] I was hidden underneath a table ... I was actually in a foetal position under the table and they got me out. That's how bad my anxiety was. When [the support person] came on the scene I've never gone back under a table ... [the support person] was just really good. He basically let me know that he was there for me and that he'd give me a hand with whatever basically I needed. He was very helpful, because I don't have anyone at all. All my family has passed and I have extreme strong anxiety. Him just being there with me at court and talking to me kept my anxiety very down and good. ... I think it's a great idea. I really do and for people that don't really understand as much as I do, it would be even more helpful for them ... because a lot of Indigenous just don't understand the whole process of what happens to them and this is just – [the support person] would be very good at it, just putting their mind at ease. [Client]

There was no concern raised by the court that this client was unfit to plead. However, she, her lawyer and her support person described several 'disabling' barriers to participation. According to the lawyer:

[This client has] complex trauma issues and suffers from severe anxiety. So [the Disability Justice Support Person] was coming to court and providing emotional support to her which was really invaluable because it's really difficult for me to provide that sort of support to a person throughout the day because often I've got a lot of clients ... I need to see. [Lawyer]

The second client described the program in the following terms:

She helped me a lot.

During this interview, a family member of the client was present. The following exchange between the client, his family member, and the interviewer took place:

Family member: The support that he's got from this company, it's been fantastic and they've tried helping him in every way possible. Rang people and I looked for support.

Client: [Unclear] shopping.

Interviewer: What's that?

Client: Doing my own shopping, pay bills.

Interviewer: Okay, great.

Client: Just got the telephone yesterday, I haven't paid it yet. Pay it tomorrow.

Interviewer: Right.

Family member: Just the support's been great from them.

Interviewer: Okay.

Family member: Help-wise, you know? We didn't even know it existed.

This client was extremely isolated and did not appear to have any community services helping him. Much of the work of the support person consisted of referrals to appropriate services. The lawyer involved in the case made the following comment:

[W]e had a report prepared whereby some of the psychologists said he was in the lowest one per cent of intellect in the population. The question then is how do you ensure he doesn't come back before the system? And there was a list of treatment options available and [the support person] was going to look at that and help the client engage with those options. So, that's something again we just don't have time to do. [Lawyer]

Although unfitness concerns were raised, the client ended up receiving a diversionary order, which did not require that he enter a plea.

### *Lawyers' Views of the Program*

Lawyers broadly endorsed the program. The following comment was typical.

[The support person] helped me really practically with a lot of matters. He's established a relationship with the clients so that they know who to contact for their court ... appointments. He's able to get things done in relation to their files. ... He obtains the medical material. He generates correspondence himself to request records and set up appointments, make referrals. [He is] just there focusing on that issue of if they have any mental health or cognitive, or [other] disabilities, and working on that aspect. So you have that assistance, you can focus on the criminal side of things, and in that sense that client's able to access what would be - what should be their more basic right of representation and service from the organisation. [Lawyer]

All lawyers interviewed spoke positively of the program.

It's invaluable really. [Lawyer]



Putting someone like [the support worker] in all community legal centres would be a great idea. I think that sort of position, having social workers embed themselves within the provision of community legal services would be really beneficial for our clients. [Lawyer]



[W]e face these questions on a daily basis ... there is an inherent need for this service to be provided and how critical it is that the support person role continue. ... It would just be a shame to not roll this out further. I can say categorically that there's a need for this role and that it provides - I suppose when I think of lawyering, community lawyering, I think of a support role that's side by side with practitioners so that we're addressing needs of the community. Solicitors, the workload that we have is phenomenal in here compared to other let's say criminal law practices. Lawyers are required in part to be social workers whilst and in part to be psychologists at times, to be able to identify these issues.

To have the support role I think that's the future of community lawyering is that we have these people that are with us so that the lawyer can focus on the legal elements and to have this support personnel to be able to then provide the broader issues. I'm not saying this as in to make the lawyer's life easier, but to make sure that the client is getting just

outcomes and that we're addressing issues at the first time it's presenting.  
[Lawyer]

### **Ethical Dilemmas: To Pursue Unfitness to Plead or Not**

Lawyers generally indicated that they were reluctant to pursue unfitness to plead proceedings, particularly for those clients who were, in the words of one lawyer, at the 'borderline' between being fit and unfit to plead.

I had one client who had significant cognitive difficulties, and the prosecution started raising that the matter should possibly be committed [to establish unfitness to plead]. Under instructions I resisted that and finalised matters in the youth court. So I guess my experience has been clients have been borderline coming under that [unfitness to plead] legislation, and we've tried to, after providing advice and receiving instructions, steer it away from that course and finalise their matters with them entering pleas of guilty if that is – was the appropriate course.  
[Lawyer]

One lawyer wanted to draw attention to the ethical challenges that lead lawyers to pursue unfitness to plead proceedings.

If I could just say something generally about the project and the way it's kind of framed. I guess - I know a lot of the intention behind it is to stop people going down the unfitness or fitness to [plead track], but as lawyers we come across a real ethical problem. When we have someone who's clearly unfit to give us instructions and we have to just put them through that situation. So it's a ... challenge. [Lawyer]

An executive officer of one community legal centre elaborated on this ethical challenge, but with consideration to what she saw as the inconsistent availability of support in unfitness to plead proceedings.

I think one of the biggest gaps at the moment is that once you get to the stage of the special hearing or the court hearing of the matter in a more substantive sense, there's no legislated or guaranteed level of support. This kind of came up with me ... where the expert report was saying that the accused person didn't have the ability, probably, to take part in a fair way in the trial because they couldn't ensure that he would have the comprehension skills and everything required to be, say, cross-examined and provide consistent instructions.

[The Disability Justice Support Person's] own view, having worked in her sector for a long, long time, was that she thought that with appropriate support, he probably could - this particular person probably could participate, and the concern I had from the lawyer's perspective was well, 'how do I, as the lawyer, guarantee that if we get up to the [court] and we don't raise fitness and we try and bat on that he's going to get the support required to mean that he can take part in a way that we would consider him fit?' Without that being a more guaranteed thing, as a lawyer I wouldn't be prepared to not raise fitness in circumstances where there's quite clearly issues of fitness. [Executive Officer, Community Legal Centre]

A support person expressed similar concerns:

I have this one matter where I think that probably potentially, with the right support, the person may be able to participate, but I'm not confident he's going to get that. In the absence of having an expert that would agree with me, I'm not really prepared to be the one to stand up and say 'yeah, he should just stand trial like anyone else'. I feel like basically the accused person is still on their own once it goes to [a higher] court. They might have a support worker with them, which is great in conference, but are they going to [be allowed to help them] stand trial? Is any arrangement going to be made so that the trial process is different for that person? At this point, I think the fall-back position is no, they're going to be tried like anyone else and expected to keep up, and I think that's the danger. [Support Person]

### *Support Persons' Views*

The following comments capture a sense of the way support persons described their role.

I help the client with communication issues. Supported decision-making. Liaise between services, solicitors, the client, the police. So a communication person. ... I'm not a solicitor so I don't [deal] with the law, I support the client to communicate. Solicitors don't really support the client to communicate. Some of them are really good and try but they are interested in the processes of the law. We're there to make sure that our client understands what that means and how that affects them and the consequences of any actions they do. [Support Person]



I've seen myself as an interpreter between the lawyer and the client. I've seen myself as a facilitator of the justice system for the client - sorry, I should reword that, with the client. [Support Person]

The two support persons in New South Wales commented on the similarities and differences between their role in the Criminal Justice Support Network, from which they were seconded, and the Disability Justice Support Program.

I would have to say look it works well. It is about supported decision-making. Not leading the client down this road or that road but giving them this is what was said, this is what it means, now can you tell me in your own words how that all matters to you.  
[Support Person]



With all the clients, I've felt that I've been a case worker with a lot of them ... I find that really enjoyable. I find that made a massive difference in the whole proceedings. The client having somebody working really closely with them, and to be able to make some changes, adjustments, and be really helpful to their lives. ... I guess when I'm thinking of case work, I mean I'm very involved with the client, and very involved with their families, or their services. It was getting people linked into services, facilitating meetings between people. All for the purpose of the courts, but not so much, obviously I was involved in the legal stuff but this was more outside work, or attending a psychologist, psychiatrist, being there holding someone's hand through processes. Making suggestions.  
[Support Person]

Having summarised the views of clients, lawyers and support persons about the program, the following section will group the types of support provided through the program into key themes.

### *Different Types of Support*

Disability Justice Support Persons provided various types of support. Support may have related to decision-making (for example, a person having to decide about the plea they wished to enter, or being asked about the types of community-based supports they might value). However, much of the assistance took the form of advocacy and communication support (for example, referrals, following up with services, advising lawyers, emotional support or pursuing reports from different government agencies). These different types of support can be grouped into the following themes.

## Communication

Interviewees commonly identified barriers to communication between the client and lawyer, the client and the court, and other sites for the administration of justice. All interviewees emphasised the importance of communication assistance, such as learning clients' individual communication-styles, and providing accessible written or visual material.

The way I do that is not to tell them and say, 'do you understand?', [instead] it's like, 'so, here are the notes, this is what she said, what do you make of all this? What does that mean to you? Well I don't know, what does it mean to you? But I'm not in court mate; it doesn't matter what it means to me, it's what it means to you'. Then we'll go through that. Sometimes that can take 15 minutes, sometimes that might take an hour. But that's my involvement. It's reminding, meeting, discussing and then being there for court on the next time. That's low involvement.  
[Support Person]



First thing I did I just went out introduced myself. Described myself as just a friend, working for [the community legal centre]. I'm going to try to help you tell your story. Then we just chatted about things. Then the following week - like I documented the conversations. Then the following week went back with 'yes' and 'no' - like - PECS cards ... - it's a picture, laminated picture of symbols. For non-verbal people if they want a drink they'll pick up the drink card and give it to you. It's an alternative and augmentative communication system. ... Then I went back and looked up the *Presser* [test] questions. I made a series of resources to give him an opportunity to answer them using PECS which would enable [the lawyer] to make a determination on his fitness to plead. So [in this particular case, the client] was able to understand the charge.  
[Support Person]



[The support person] has actually been better at explaining it to the clients than I am ... what it means to be found fit or be found unfit, but just being able to explain that to a client in language that they understand. It's hard for us to explain what it means without getting wrapped up in the legal ramifications of it. Very difficult.  
[Lawyer]



Providing emotional support and reassurance was a constant theme throughout.

I can imagine someone without their assistance would be confused, probably scared by the system, but that instant feedback where they can ask questions and give an answer, even at a very basic level, is I think important. Just that basic human interaction with a face I think is just important at that level.  
[Lawyer]



So I would say the client feedback is very positive. They do find a great deal of benefit and I think comfort. They're not so anxious if they know what's going on which makes sense.  
[Support Person]

### *Contacting Family and Other Informal Supports*

Support persons often contacted relevant family or other trusted persons for advice and assistance. This helped with communicating the person's history, and their past and present wishes.

I've got another bloke at the moment who's interesting too. He's a chronic alcoholic and we've been trying to organise somewhere for him to live. ... The trustee, his guardian had made some decisions without consulting his son who was a joint guardian. So we were able to re-engage the son in the decision-making process which was good.  
[Support Person]



I really like seeing clients with [their] families because they really need that. So you can end up being quite a support for them as well. They want to talk to you and ask, you know, reassurance and that.  
[Support Person]

### *Extra Time*

Lawyers, clients and support persons in each jurisdiction noted the capacity of support persons to spend more time with clients than lawyers had the capacity to. This time was often spent explaining criminal proceedings and responding to concerns or queries.

Look the lawyers here are just flat out. I got allocated a lot of roles from them simply because they don't have the time to provide the support. They are here until six every night. They hit the ground running at 7:30 or so. They spend their weekends at prison. I've come in a few weekends myself. Half the lawyers are here. [Support Person]



It's also helped the people we're supporting, having that time to sit down and explain what's happening. Getting solicitors to maybe explain it differently, and all the paperwork they're getting, going through that. We're talking about paragraph by paragraph, what that might mean. How much of that is seeping in for everyone I'm not sure, but at least somebody is taking time to try and make sure they understand. [Lawyer]



I can get a little bit of history from the client of why things may have changed, or why things have come to the point that they're coming to where they have to go to court. Lawyers don't look at that kind of stuff and my role is to alleviate some of that pressure as well from lawyers in doing referrals, because they've got quite a large caseload. So part of my job has been to alleviate some of those referral processes, but also to speed some processes up. [Support Person]

### *Identifying Disability-based Support Needs*

Interviewees reported the support persons could better identify and respond to disabilities than lawyers. In some cases, support persons organised formal assessments to identify disability support-needs which had not been recognised in the past.

I think by having the involvement of support [persons it] has opened a lot of doors for a lot of people, and particularly if they've had no access to services, that kind of stuff. So I've seen that being a big success. [Lawyer]



One case was a man [who allegedly] inappropriately touched a child [at a shopping centre]. So we managed to secure a behaviour support team that met with the family the other day to work with ways of appropriateness in the community and stuff. So that will be really helpful for when it goes back to court. [Lawyer]

### *Organisational Support and Improving Lawyers Understanding of Disability*

Support persons could be seen to have improved the understanding of disability among the lawyers with whom they worked, and in the community legal centres more broadly.

Examples in which the broad accessibility of community legal services was improved, included advising lawyers on good practice in identifying and addressing disability support needs, collating government and non-government materials about improving accessibility, creating plain language materials, pictograms, and referral lists for relevant disability support services.

[The support person] has been able to help me better manage that client, in the sense of how to get instructions. Taking time, recognising moments when it might be good just to take a break, or even framing the advice or how I get the advice without using too much jargon. Even just teasing out the client's history that might give me some insight into other issues that - as opposed to just getting background instructions ... It has been of great benefit. [Lawyer]



My approach probably to lawyers changed a little bit because they started becoming more aware. So they were able to say to me ... 'from what your assessments and questions you ask, we've probably got some suspicions that there's some sort of impairment'. But working with the lawyers was definitely - it has changed me over the six-month period. I suppose I'm hoping that the lawyers have changed the way that they see clients. [Support Person]



Some solicitors don't engage with the clients at all. They see them in court, that's pretty much it. I've got one solicitor who knows full well that the clients cannot read and write and insists on sending really important documents through the post. [Support Person]

### *Improving Courts' Understanding of Access and other Disability-based Matters*

Where possible, support persons provided advice to courts more generally about avenues for making criminal proceedings more accessible.

A couple of these clients, the magistrate was refusing to give bail unless [the Criminal Justice Support Network] were involved ... if they're familiar with the [Criminal Justice Support Network] ... they may say, 'have [the Network] been involved? If not, I'm holding until we can maybe get me to come to court and say what's been done'. Whereas if there's not that connection, the chances are, two of these clients in particular were heading to prison, because their services aren't just going to pop up to court and say X, Y, Z. So once that happens, I can go in, talk to the magistrate, let them know this referral is in place, that's in place. Being able to provide a report to the court, which I've never done before, but I have in this project. Which has been really helpful for the magistrate. [Support Person]



I just see the courts as somewhere that is really unfriendly ... I think in particular for one of these clients, if they'd just slow down, and took that time. It will take time. It will take a lot longer, so if something could be changed to let that happen I think people with disabilities could actually be part of their own proceedings, and give instructions, with support, with help, with the aids. [Support Person]

### *Referrals and Connecting Disability Services to Community Legal Services*

Support persons were able to make referrals and build relationships between community legal centres and local disability support services, and other relevant support services in each jurisdiction.

[I focus on] introducing the [client] to the idea of supports and then hooking them up with ones. Which means that I have to know what's in the area and yeah, it is a little bit more than just referring them. Because I want to not set them up to fail, so I want to refer them to something that I think might be a good match.  
[Support Person]

Support persons often connected multiple government or community support agencies involved in a client's life. Agencies included Aboriginal health services, as well as broader disability, mental health, housing, and drug and alcohol services.

Talking with services, because you become ... the middle person. So I'm facilitating everyone else, and lawyers and Legal Aid in particular will not respond. I had a lot of services coming back and saying the lawyer is not getting back to us. We've left messages, we've now written to them and there's nothing. I said, 'just leave it with me and I'll do it'. So I was able to get an immediate response, which was really good for the client, and get an outcome.  
[Support Person]

### *Speeding Up Processes that Can Cause Lengthy Delays*

As well as making direct referrals for the client to connect to disability and other community services, the support person tended to play a strong role in gathering relevant documentation relating to the person's disability. Often, such reports were held in multiple government and non-government agencies. New reports were sometimes needed for the benefit of the case (as for example, with disability assessments).



The bonus of having [the support person] on board was I managed to get an assessment for - an [acquired brain injury] assessment much quicker because he has all these contacts that we don't have and he was able to pull some strings and get an assessment a bit quicker.  
[Lawyer]



There's so many additional tasks that have to be done including obtaining medical records, reading those records and doing timelines of events, organising assessments, referring to specialist foundations or organisations in relation to mental health or other issues, assisting those clients practically in terms of meeting those extra appointments or coordinating appointments for assessments. So having that assistance means that that client is accessing a better service, and

their matter probably is being dealt with in a more time-efficient manner and it's more expedited, rather than taking a lot longer. [Lawyer]

The time taken to respond to the needs of clients with cognitive disabilities – including making phone calls, accompanying clients, arranging travel, writing emails, attending meetings, and so on – was a constant theme among interviewees.

### *Ensuring Accountability of and Navigating through Community Services*

Support persons had a role in ensuring government agencies and service providers were accountable in their obligation to assist individuals, including with housing, disability support, and healthcare.

The other thing that I think's a really significant thing, is that often people in a disability job, think [that] the courts and justice system look after justice. So they're not an assertive or an active participant, they think they can just - it'll look after itself because that's the justice system. That just is so far from the truth. So everybody stands back and then in the end they're thinking 'oh my gosh, what's happened now?' But then they don't even think 'well we better go chase somebody to make sure the guy can get out of there'. So I think that understanding of the justice system and how to use it, is really important and the disability sector doesn't understand that in our experience. [Executive Officer, Community Legal Centre]

Monitoring accountability extended to services that were capable of lodging a 'breach' of a person's bail or supervision conditions, which could lead to a person being placed in custody.

The young fellow's spoken to the [Centrelink<sup>127</sup> representative] for 25 minutes. It all seemed good and then he passed the phone back and she was pretty resentful. All I said was, 'can you just outline the next steps that we have to do to ensure that there isn't another breach?' She said, 'no worries. Tomorrow he has to report at 9.00am to the workplace at Groote Island. If he's not there he'll breach'. I said to her, 'so you're not in Darwin are you?' She said, 'no I'm in a southern city'. I said, 'that's all right because Groote's three hours away'. ... Had I not been able to support him in that way and just clarify things he's breached the next day. He was inadvertently, just through the complexities of government systems, put into a place where he just could not

have navigated the system and not breached without the support.  
[Support Person]

Several cases arose in which clients who may well have faced unfitness to plead proceedings had their charges withdrawn following strategic intervention by the support worker. In these cases, the support person's knowledge of the disability support sector tended to benefit the accused.

[I]t was a case in a regional area [and the client] had a - it was a report saying he had the intellectual capacity of an 11 year old. He ... was in care at the time and he had been charged with hitting or assaulting another worker at that place. As soon as I got it I just thought - it's something that the police do here routinely even if it's someone who's under care for any mental condition or some disability they will still charge. Then when [the support person] and I went through all the documentation it became apparent that ... the issue was [a] management issue ... there was certain procedures and guidelines that they were supposed to follow in the way they're supposed to communicate with him that weren't followed ... [The support person] directed me to speak to the DHS [Department of Human Services] worker and request certain documents that they always have on file particularly after such an incident happens. I was able to request them, forward them on to prosecution and then was able to withdraw charges. That's information about the department that I wouldn't have had otherwise. ... It just led to a very swift resolution of the matter.  
[Lawyer]

In this instance, it appeared that the service context potentially increased the person's likelihood of coming into contact with police. This is a well-identified pitfall facing persons with cognitive disabilities in the criminal justice system.<sup>128</sup>

We've got [one case] where the issue was [a resident with an intellectual disability] hitting a staff member in a group home. That particular [service provider] ... should get active and say, 'maybe she's got a thing about that particular staff member', 'how can we avoid this happening'? That doesn't happen. In a way [the group home staff] were very happy to get rid of her. So that particular person was in a country area. She couldn't go back to the home after breaching an assault charge. So she ended up in prison for two months. She was an Aboriginal woman, grew up in out of home care, she was in jail for two months, back to court, still no option for her, back to prison for another two months in between hearings. Eventually they got her [into another residential facility], but by this time she had spent four months in prison. So somebody's got to be watching.



... I think if you're there beside the person and you see yourself as their support, then that's the sort of thing you'll do. People in other roles, you know in their little silos, and they don't really take up on what's actually happening to the person and how wrong it is. [Executive Officer, Community Legal Centre]

## Issues facing Indigenous Participants

Indigenous people with cognitive disabilities who took part in the program faced unique issues. Asked whether there were any specific kinds of supports that were important to Indigenous people, all interviewees agreed that some distinct needs emerged. The following response captures the general response of lawyers who were interviewed.

Culturally appropriate organisations, so Aboriginal organisations for example are particularly important. The reason is because there is a distrust towards mainstream support services and mainstream ... Now that said, specific mental health or in this particular category fitness and mental impairment for example, there aren't too many organisations that are out there that are specific to Aboriginal people ... Having a support person here who is also cognisant of the issues that the Aboriginal or Indigenous people face is also great in so far as if we are then referring them on to a mainstream organisation to make sure that there is a culturally appropriate referral. [Lawyer]

Similarly, gender-specific support was highlighted by one of the clients interviewed, herself Indigenous, though she was also careful to highlight different needs among various Indigenous people.

Mainly with the more traditional guys. It would be more like the women would only talk to a woman and the man would only talk to - because some is women's business, some is man's business. That's only with the very, very traditional guys. [Client]

Some interviewees indicated that Indigenous people would be ideally placed to deliver the support role to Indigenous accused persons.

I think generally having an Aboriginal client base ... having Aboriginal people [as a support person would be beneficial] just because of all the cultural issues but I think [the non-Indigenous support person] did a fantastic job. I think it's just an understanding of all the layering of disadvantage and where somebody comes from and also - yeah, I think just that deeper level of understanding of

a culture and appreciation of where somebody comes from and being able to bridge that gap of understanding in relation to what the criminal justice system is and making that understandable.  
[Lawyer]

Aboriginal legal services typically have client support officers who are mostly Indigenous themselves who provide non-legal forms of support.

In the absence of [the support person], we have [client service officers] here who can do welfare checks and I think it's just someone who's able to spend that time and talk with them in sort of everyday language and kind of explain what's going on in a human way.

Interviewer: What would you say is the difference between a [cultural service officer] and [the support person's] role?

Look [cultural service officers] are culturally trained. So they're aware of all the cultural sensitivities. [The support person] is trained directly with the disability and he knows how to deal with people with a disability. So they're complementary I think.  
[Lawyer]

Interviewees tended to suggest that some clients – and particularly Indigenous clients – were wary of services, including disability services, because they had had negative experiences in the past.

I mean there's lots of non-Aboriginal clients of ours that don't want anything to do with services either. But I think if you're of an Aboriginal culture, then you've got even more good reason to think that. So I guess just not assuming anything is the danger, and really being able to understand and have someone who can interpret the cultural needs of the person and the connection to family and community and land, that for us [as non-Indigenous people] it's just very hard to understand the implications of. Though we are all learning.  
[Support Person]

The role of social welfare services in the historic removal of Indigenous children, and other abuses, is generally agreed to have created wariness among Indigenous communities about engaging with government and non-government welfare services more generally.<sup>129</sup>

Because some of the distrust with institutions, particularly white government institutions, I think is quite apparent still, and I think that it would be good to have special training for those people if they were going to be sitting in on conferences on an ongoing

basis. There's often lots of family members involved in Aboriginal matters because they normally have a strong family presence at court, in the sense of support, so I think someone who is able to interact in a culturally appropriate way would be good. [Executive Officer, Community Legal Centre]

### *Remote Communities*

One interviewee in the Northern Territory remarked on the challenges of providing inter-cultural assistance in remote Aboriginal communities in the Top End, highlighting the types of intersectional disadvantage facing Indigenous people with cognitive disabilities.

I've had a client who had to arrange flights, accommodation, appointments with a psychologist, an interpreter at that appointment. That report still came back quite lacking, because [the assessors] only have a couple of hours to spend with that person and couldn't really properly diagnose them, but after receiving the report, using that report to link them in with disability services in their community provided enough reassurance to the court that those issues were being managed and they probably wouldn't reoffend in the same way, and that was a collaborative approach by getting that report, linking in with his GP, linking in with disability support services, getting medication dropped off every day by the services, getting meals provided because not eating was contributing to those issues. So a whole, cross-organisation approach, and a lot of work to stop someone who is subject to mandatory sentencing from going to jail, and they shouldn't go to jail because they've got a cognitive disability ... Their actions should be seen in light of that. [Lawyer]

### *Koori Court and Restorative Justice Practices*

One Victorian lawyer spoke about the benefits of the Koori Court for clients with cognitive disabilities. The Koori Court is a division of the Magistrates' Court of Victoria that sentences Indigenous people who plead guilty to certain crimes.<sup>130</sup> Community elders and members of the accused's family can attend and participate in the proceedings, and the prosecutors have personal conversations with accused persons about their circumstances to arrive at a culturally appropriate sentence. All Victorian participants noted that the Koori Court can provide greater accessibility for Indigenous people with cognitive disabilities. Similar comments were made about the Assessment and Referral Court List

in the Magistrates' Court of Victoria. This is a specialist court list which was developed to meet the needs of accused persons who have been diagnosed with a mental illness and/or a cognitive disability:

This particular client [has] been lucky enough, as I said, to be in the Koori Court and in [the Assessment and Referral Court List], which is a much better environment in the sense that everyone sits around the table. The magistrate is at the table, the support workers are at the table, they sit next to, not behind the lawyer. Their support people sit next to them. It's much more of a conversation. All the formality of the court is left outside, so it is much more of a conversation.

We can pace it to the client, so there's not a rush. We're not trying to get through 100 other matters. The magistrate generally has an experience - or does have experience working with people with cognitive issues, so they tend to avoid jargon. They tend to speak directly to the client. They understand when a client doesn't show up or if the client is taking two steps forward, three steps back ... The client is encouraged to speak and have autonomy really in the proceeding, as opposed to mainstream where they're just voyeurs through the whole process and it's really quite alien.

By the same token, I wouldn't recommend [the Assessment and Referral Court List] or Koori Court for some of my clients if it is a very simple, straight-forward matter that could be - that I could go in, resolve in a day, and that client never has to come back to court again and the whole problem goes away, and I've clearly got instructions to plead. There would be situations where I would just go into mainstream and just deal with it because I know that coming back to court month after month after month isn't ideal for my client.  
[Lawyer]

The above, Indigenous-specific issues are just some of the issues that emerged from this project in relation to Indigenous people with disabilities. Other issues concern rates of hearing impairment and deafness among Indigenous clients, issues related to a lack of resources, particularly related to housing, health and disability-related services.

## Other Issues

### *Assessments*

Several participants discussed the assessment process, in which psychologists or psychiatrists assess mental impairment, including fitness to plead. Of particular issue to interviewees was the integration of support into the assessment process.

[O]ne of the things I've learnt is that you can't really assist a client to become fit. You're not allowed - the psych assessments, so whether it's done by a psychologist ... [w]e can't - we really can't influence a client's fitness to plead. It's not that - like so I have one client who on the first assessment he could do so maybe four out of six of the *Presser* criteria. On the second one he was lucky to do two. Okay? That's not for - like we reminded him of everything. It was his recall at the time and I think the way the questions are asked. Also during the testing whilst we can be in the room mostly they don't - they being the psychs - don't want us to interfere at all. [Support Person]



So some of my clients - two that have come to see me out of the three, the other one I go to them - but two out of three, they can't travel independently. They can't hang around Sydney independently, so that requires arranging a support person, arranging transport, accommodation we now realise is better because two of them had more than a 14-hour journey with a one- to two-hour break and then three to four hours of a psychological assessment where no breaks were allowed.

We asked for breaks, because I can - having met the people on more than one occasion, you start to notice the body signals of getting frustrated, agitated, just sheer boredom and tiredness. None of the psychologists allowed a break. It was like, we can reschedule it, you can come back in a month. These are people with intellectual disability, their concentration - always from uni, and as a trainer, we've learned 20 minutes of information, 10-minute break so people can digest the information. Three to four hours of an assessment with no breaks at all is way too intense for anybody, let alone someone with an intellectual disability. [Support Person]



I think sometimes some of our undoing is the person doing the assessment will say to the client so you'll be getting support in court, how is that going, it's really, really good, what do they do, they tell them, could you do it without them, no. Automatically they're unfit to plead the minute they say no I couldn't do it without that support person.  
[Support Person]



These issues echo concerns raised by law reform agencies about the *Presser* test; namely, that it does not sufficiently take into account the 'possible role of assistance and support for defendants',<sup>131</sup> and fails to consider the capacity of courts to be accessible to accused persons with disabilities.<sup>132</sup> Thus, the ALRC recommended a reformulation of the test 'to focus on whether, and to what extent, a person can be supported to play their role in the justice system, rather than on whether they have capacity to play such a role at all'.<sup>133</sup>

### *Resources*

A number of clients raised the issue of lacking sufficient resources, whether in terms of funding for community legal centres, for the role of the support person, or the lack of available disability, medical and housing services in a particular place.

One of the difficulties is this, that I think - and this is not being critical of politicians, because let's face it, they work in a difficult world, [but they will ask] 'how do we afford it?'  
[Lawyer]

In addition to the cost implications of having a support person, issues were raised about insufficient resources in certain government and non-government services. Participants in the Northern Territory, for example, consistently raised the issue of a lack of services.

Trying to find appropriate people to assess what the issues are is an obstacle. There aren't any local psychiatrists in Darwin. We only have psychologists. We don't have any neuropsychological assessments that are able to be taken place. I've had clients who have had really significant acquired brain injuries from car accidents. The appropriate assessment that we need to take place can't be done over Skype. It's something that takes days, and the services that are offered are all inter-state, so often-times you just cannot get an assessment done.  
[Lawyer]



[I]n remote communities if you're not ordering a ... mental health assessment, so if someone doesn't have a mental health issue, but possibly [a] cognitive issue, there's absolutely no option except for to pay for them to go to Darwin and have an assessment or someone to fly to that remote place and do the assessment. So there's just so many limitations with trying to identify what issues a client has, and it's so important to know in relation to sentence. You can't make submissions that someone's not quite right and their family know it, and it's known in the community, but you have to have that evidence before the court. All of those things take time and effort and resources. [Lawyer]

Two interviewees wanted to emphasise that despite the lack of funding in key areas, the current arrangements were not necessarily cost-effective.

I might say as well that I think what we need to do, we don't need financial resources, we need redeployment of resources ... In other words, there's enough money being spent in the criminal justice systems - more effectively redeployed we could do better. [Lawyer]



We've got [a client with a cognitive disability who has been revolving through the criminal justice system for 30 years]. [It costs] them half a million a year. I think you multiply that over time ... you could spend a hell of a lot of - he costs so much. He's in the system. Can't get him out of the system. He'll be there for life. I said to the lawyer the other day, 'he's created more bloody work in the Territory than Impex [a largescale mining employer]'. [Support Person]

## **Challenges and Potential Drawbacks to the Program**

Several challenges and potential drawbacks were identified through the research, although none of the interviewees suggested that the drawbacks outweighed the benefits of the program.

### *Support Persons and Legal Training*

Some interviewees indicated that support persons' lack of legal training might pose challenges. Several support persons and lawyers referred to the challenge of the support person having sufficient legal knowledge.



Interviewer: Were there any kinds of support that you or your clients didn't receive that might have helped?

I think - look I don't know. I suspect maybe some basic legal training probably wouldn't - more about in the sense of being a little bit careful about what the client tells them, what they tell the client, but also so perhaps if they are better placed - if someone like [the support person] is better placed to explain what's going to happen in court, the formal legal processes, that just takes a little bit of training. That would be - I can't see how that wouldn't be helpful. [Lawyer]



Interviewer: What would you say have been the most challenging aspects of your role so far?

Definitely the interpretation of the law and the legal side of things. The law can have many meanings or it can be very black and white at times, depending on the case, depending on the charge, depending on the client ... trying to understand that, and learning that legal jargon. [Support Person]

Not all support persons experienced this challenge. Support persons in New South Wales – because of the unique nature of the community legal centre – had almost three decades of experience between them, working with persons with intellectual disabilities in the criminal justice system. An example of the knowledge of these support persons, and the procedures of the community legal centre, was captured in the following case:

I don't go through the facts and stuff because that's a bit risky. Our service just sees that as really risky being a legal centre, I guess. I'm just thinking on those lines. If you get involved and if something is said or admissions are made, you know, they're just really kind of strict on that. So I kind of avoid that a little bit. It's about that process, the legal process. [Support Person]

Again, the Support Person Protocol (Appendix Two) articulates the support person's ethical and professional obligations, including the directive to avoid anything that could be construed as legal advice and to defer to the legal practitioner as to the client's legal interests. Any extension or adaptation of the program would require utmost care to maintain this emphasis.

## *Support Persons as Compellable Witnesses*

Support persons are not legal representatives of an accused person, meaning their discussions with the accused are not privileged.<sup>134</sup> A support person may be called to give evidence, which could work to the detriment of the client.<sup>135</sup>

I think the thing is you're sitting so long with somebody, that you do hear a lot. Sitting in the waiting room, we try not to talk to them about the charge, or about what happened. If they said to us, what does this mean on my charge sheet, we'd feel like we could explain that. But we tried not to have them telling us all the ins and outs of what happened. Because of that worry that we might be called as a witness. So we try not to do that.  
[Executive Officer, Community Legal Centre]

A support person who is compelled to give evidence on allegations of impropriety in a third-party (for example, a police) interview or on how it was conducted will not likely raise significant issues.<sup>136</sup> However, significant issues will be raised if he or she is compelled to give evidence on what was communicated privately, without police present.

The New South Wales Law Reform Commission suggested that a solution to this issue would be to have support persons as *competent* but not *compellable* witnesses.<sup>137</sup> This would enable the defence to call them when necessary but not abuse the trust relationship established by the system to protect the interests of accused persons with disabilities.<sup>138</sup> Moreover, clearer guidelines would be needed on the duties and obligations of the support person, including training to ensure they are aware of police processes and the rights of suspects. These steps would further ensure fairness and promote admissibility of evidence gained in the police interview.

## *Supports May Imbalance Equality of Arms*

Providing support might have the unintended consequence of increasing bias either for or against the accused person.

The presence of [a support person] indicates to a magistrate there's something wrong.  
[Lawyer]

Research concerning the law of evidence on the provision of specialist support to child witnesses and accused persons or witnesses in sexual offences trials might provide a starting point for considering to what extent changing trial procedure can alter outcomes.

## Cost-Benefit Analysis

Two members of the research team, Professor Eileen Baldry and Dr Ruth McCausland, analysed a Victorian case study related to 'David', a 38 year-old man with an intellectual disability, who was supported in the program. They compared the outcome of his case (Pathway 3, below) with typical pathways for accused persons whose fitness to plead is in question (Pathways 1 and 2).

The analysis calculated the criminal justice-related costs to government of the three pathway scenarios for the 12 months following court proceedings. Costs and benefits anticipated over the longer term were also considered.

### **Pathway 1: David faces unfitness to plead proceedings under the Crimes (Mental Impairment and Unfitness to Stand Trial) Act 1997 (Vic)**

*Outcomes and costs:*

- *Forensic unit: \$393,755.88*
- *Supervision order: \$95,874.95*
- *Acquittal: \$74,341.38*

### **Pathway 2: David's solicitor enters a guilty plea to avoid unfitness to plead proceedings, including option of pleading mitigating circumstances due to disability**

*Outcomes and costs:*

- *Incarceration: \$132,426.53*
- *Community order: \$46,195.88*
- *Community order with Disability Justice Plan: \$12,290.38 (further costs to come)*
- *Conviction but no penalty: \$9,252.76*

**Pathway 3 (actual outcome):** With the assistance of the support worker, David's solicitor invites police prosecution to withdraw the charge after creating a support package which is presented to the court as an alternative to prosecution

*Outcome and cost:*

- *Charge withdrawn with support: \$5,033.88*

The findings indicate significant short-term savings associated with the intervention by the Disability Justice Support Worker which cost \$5,033.88 per client on average, compared to the maximum cost associated with full unfitness to plead proceedings totaling upwards of \$390,000.

The longer-term savings are likely to be even more pronounced. While criminal proceedings and pathways and associated costs may vary between jurisdictions, this cost-benefit ratio is likely to still apply or provide even greater savings in circumstances where clients may face indefinite detention.

The research team will publish a detailed account of these findings with a full explication of the costings methodology.

# Conclusion

*I think it's all important for the person's dignity – for me it's about justice and it's about avoiding terrible things happening that wouldn't happen to you or me. But happen to some people because they don't understand what's going on. I just think that is - that's excruciatingly unjust. These are people who can't extricate themselves from the situation either, so they don't even have the feeling of 'that wasn't fair' or they've got so used to things being unfair that they would never complain or do anything about it. I just think it's really essential.*

[Executive Officer, Community Legal Centre]

While unfitness to plead laws are aimed at avoiding unfair trials for persons with cognitive disabilities, declarations of unfitness can lead to detention and/or supervision for periods which exceed the length of a sentence had such persons been convicted. This investigation into the *operation* of unfitness to plead laws reveals the interconnected barriers to accessing justice facing persons with cognitive disabilities more generally.

The researchers identified the following policy implications:

- the CRPD, and the increasing attention to cases like that of Marlon Noble, bring awareness to the inadequacy of current unfitness to plead laws and the treatment of persons with cognitive disabilities in the criminal justice system;
- human rights law – including the CRPD – demand equal rights to a fair trial, liberty, legal capacity, and recognition before the law for persons with cognitive disabilities;
- a criminal justice system that is universally accessible – to persons with and without disabilities – and does not create separate justice procedures for persons with disabilities, is the most comprehensive way to comply with human rights law;
- until a universally accessible criminal justice system can be achieved, there is a need to maximise rights protections for persons with cognitive disabilities in existing criminal justice processes, such as unfitness to plead law;

- despite the differences in unfitness to plead rules across Australia, each jurisdiction appears to have some gap in ensuring procedural due process and substantive equality for persons with cognitive disabilities compared to typical criminal trials experienced by persons without a cognitive disability;
- there is a consensus that the criminal justice system could be modified to be more accessible to persons with cognitive disabilities, and that formal supports for accused persons with disabilities (whether they are victims, accused persons or in correctional services) would help them access the justice system on an equal basis with others; and
- support can be provided to persons with cognitive disabilities in the criminal justice system and tends to improve outcomes, including being more cost-effective for government and reducing rates of offending.

Overall, the project articulated the human rights issues raised by unfitness to plead laws and the application of those laws across Australia. The project highlights some of the steps that can be taken to provide formal supports to accused persons with disabilities to secure equal standing before the law for all.

# Appendix One: List of Project Publications

- Arstein-Kerslake, Anna, Piers Gooding, Louis Andrews, Bernadette McSherry, 'Human Rights and Unfitness to Plead: The Demands of the Convention on the Rights of Persons with Disabilities' (2017) *Human Rights Law Review* (Published Online: 19 July 2017).
- Gooding, Piers, Anna Arstein-Kerslake, Louis Andrews and Bernadette McSherry, 'Unfitness to Stand Trial and the Indefinite Detention of People with Cognitive Disabilities in Australia: Human Rights Challenges and Proposals for Change' (2017) 40(3) *Melbourne University Law Review* 816.
- Gooding, Piers, Bernadette McSherry, Anna Arstein-Kerslake and Sarah Mercer, 'Supporting Accused Persons with Cognitive Disabilities to Participate in Criminal Proceedings In Australia – Case Law Concerning Court-based Support during Unfitness to Plead Processes' (2017, forthcoming) *Law in Context*.
- Gooding, Piers, Sarah Mercer, Eileen Baldry and Anna Arstein-Kerslake, 'Unfitness to Stand Trial: The Indefinite Detention of Persons with Cognitive Disabilities in Australia and the United Nations Convention on the Rights of Persons with Disabilities' (2016) 10 *Courts of Conscience* 6.
- McCausland, Ruth, and Eileen Baldry, "'I Feel Like I failed Him by Ringing the Police": Criminalising disability in Australia' (2017) 19(3) *Punishment and Society* 290.

## Forthcoming

- 'Pathways to Unfitness to Plead: The Social Determinants of Justice for People with Cognitive Disabilities in the Criminal Justice System in Australia'.
- 'Participatory Research in Disability Law and Policy – A Human Rights Requirement'.
- 'A Model for Supporting Accused Persons with Cognitive Disabilities to Participate in Criminal Proceedings – Findings from an Empirical Study'.

Information about publications will be updated on the Melbourne Social Equity Institute website.



## Previous

Readers are also invited to consider complementary research by members of the research team such as:

- Baldry, Eileen, Ruth McCausland, Leanne Dowse and Elizabeth McEntyre, *A Predictable and Preventable Path: Aboriginal People with Mental and Cognitive Disabilities in the Criminal Justice System* (University of New South Wales, 2015).

# Appendix Two: Support Person Protocol

## 1. Guiding principles

- 1.1. The supporter's primary role is to support the client to participate effectively throughout the criminal justice process by facilitating accurate communication between client and the court, and between the client and their legal representatives.
- 1.2. The supporter must remain impartial and neutral.
- 1.3. Throughout the process the client must consent to the supporter's involvement.
- 1.4. The supporter should exercise discretion and judgement in accepting any case and should not accept cases which are outside or beyond their professional scope or expertise.
- 1.5. The supporter must work closely with the defence lawyer to determine appropriateness in accepting cases.
- 1.6. The supporter's role must be transparent throughout.
- 1.7. The supporter must have a clear and comprehensive understanding of their responsibilities and duties.
- 1.8. The supporter must conduct themselves in a professional and courteous manner at all times.
- 1.9. The supporter must conduct themselves in court in a manner that facilitates accurate and coherent communication between the client and the court.
- 1.10. The supporter must keep appropriate parties (particularly the legal practitioner) informed of any difficulties that may arise in the course of the assignment, including difficulties communicating with the client and any issues regarding consent.

## 2. When does the support role begin and end?

- 2.1. Legal practitioners will identify appropriate cases for supporter involvement.
- 2.2. The supporter will not become involved unless the client can give instruction to the legal practitioner.
- 2.3. At the suggestion of the client's legal practitioner, a supporter may offer assistance. The support relationship commences when the client gives (written or verbal) consent to accept such support.
- 2.4. Written consent from the client to accept support should be sought in the first instance.

- 2.5. Where written consent is not practicable to obtain (for example, where literacy issues arise) verbal consent may be obtained. Verbal consent may be obtained only when the purpose of the support and the research project have been discussed with the client, and the supporter and the client's legal practitioner are satisfied that the client has provided informed consent to receive support.
- 2.6. If, at any stage, the client withdraws consent to receive support, the support relationship ceases.
- 2.7. If, at any stage, the legal practitioner or the supporter believes the client can no longer consent to receive support, the support relationship ceases. In the event that the client can no longer consent to receive support, this does not preclude the supporter providing assistance to the legal practitioner, as to how communication and accessibility may be enhanced. However, the legal practitioner is under no obligation to accept or have regard to such assistance.
- 2.8. If the client ceases to be a client of the legal organisation or an affiliated legal organisation, the support relationship ceases.
- 2.9. If the criminal proceedings against the client are resolved, the support relationship ceases.

### 3. Ethical and professional obligations

- 3.1. The supporter will conduct themselves responsibly and professionally, using reasonable skill and care in the performance of their duties.
- 3.2. The supporter must consider at all times the potential for conflicts of interest to arise, and the need to act in the public interest.
- 3.3. The supporter must promptly notify the [COMMUNITY LEGAL CENTRE] of any matters, including conflicts of interest or lack of suitable qualifications or experience, that may disqualify or make it undesirable for them to continue involvement with the client.
- 3.4. The supporter must disclose any vested or material interests she or he may have in a client's case as soon as they arise, whether or not they may justify disqualification or make it undesirable for them to continue involvement with the client.
- 3.5. The supporter must treat any information coming to them in the support role as confidential, including the fact of having acted in a support role for a particular client.
- 3.6. The supporter's duty of confidentiality does not preclude disclosure when legally required to do so, or when failure to disclose information could render the supporter liable to prosecution.
- 3.7. The supporter must not use any information or knowledge gained during the course of their work to benefit themselves or anyone else improperly.

- 3.8. The supporter must make appropriate efforts to facilitate communication between people who have differing communication and cultural characteristics.
- 3.9. The supporter must respect the professional and ethical obligations of other professionals, particularly legal practitioners working for the partner organisations.

#### 4. *Supporters and legal practitioners: working together*

- 4.1. The supporter will work actively with legal practitioners to develop and provide support that is appropriate to the legal services provided.
- 4.2. The supporter will offer assistance only in accordance with the legal practitioner's legal obligation to follow the accused's instructions and promote her or his interests. It is up to the legal practitioner to determine how this obligation is met.
- 4.3. The supporter will receive training, developed in consultation with legal practitioners, so as to avoid undermining this professional obligation.

#### 5. *Tasks within the supporter role*

- 5.1. The supporter must assess the client's communication needs.
- 5.2. The supporter may spend time with the client to develop and identify effective ways to communicate.
- 5.3. The supporter may recommend special measures to enable effective communication with the client.
- 5.4. The supporter may sit with the client in the lead up to the trial to answer questions and provide reassurance.
- 5.5. The supporter may suggest ways to create a comfortable and safe environment for the client in order to facilitate ease in decision-making and communication.
- 5.6. The supporter may ask case workers, family members or others who know the client well (within the bounds of privacy and confidentiality constraints) whether there are any prior assessments or knowledge available about the client's communication needs.
- 5.7. The supporter may facilitate communication:
  - during experts' assessment of a client on behalf of both prosecution and defence (insofar as assisting with communication);
  - during familiarisation/preparation of the client for court;
  - during pre-trial court appearances;

- with clients during the trial or when the client is informed about the trial outcome (subject to approval by the court);
  - and in other settings as the need arises.
- 5.8. The supporter can work with the client and the legal practitioner to suggest ways of simplifying questions, which may also be communicated to the judge. Depending on the client, this might include requests to:
- avoid putting questions in the negative ('you were at this place at this time, weren't you');
  - avoid tagged questions ('when you saw this happening, it was night time wasn't it?');
  - avoid leading questions, or to consider prior to court proceedings whether the use of leading questions is likely to produce unreliable responses from the client;
  - avoid leading questions combined with gestures from the questioner ('you were in the house, yes?' asked by a prosecutor who was nodding).

## 6. Tasks outside the supporter role

- 6.1. The supporter must not give legal advice.
- 6.2. The supporter must not offer an opinion about the truthfulness of the information provided by the client.
- 6.3. The supporter must not offer an opinion about the client's ability to understand truth and lies.
- 6.4. The supporter must not offer an opinion about the accuracy of the client's recollection of events.
- 6.5. The supporter must not assess, offer an opinion or contribute directly to the assessment of a client's fitness to stand trial (even though she or he may provide assistance toward communication between the person and the court).
- 6.6. The supporter is not an expert witness.
- 6.7. The supporter's role is not to provide the court with evidence, oral or written, about a client's unfitness to plead or the supports likely to be needed at any trial.
- 6.8. The supporter is not an interpreter.

The supporter must not enter discussions, give advice or express opinions about any aspect of the case that could contaminate the evidence or lead to an allegation of rehearsing or coaching any witness (including the client).

# Endnotes

1 Senate Community Affairs References Committee, Parliament of Australia, *Indefinite detention of people with cognitive and psychiatric impairment in Australia* (2016) Rec 8 [9.24].

2 See, eg, Expert Mechanism on the Rights of Indigenous Peoples, Human Rights Council, 'Access to justice in the promotion and protection of the rights of indigenous peoples: restorative justice, indigenous juridical systems and access to justice for indigenous women, children and youth, and persons with disabilities', 27<sup>th</sup> sess, UN Doc A/HRC/27/65, paras. 47 and 58; Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Initial Report of Australia*, 10<sup>th</sup> sess, UN Doc CRPD/C/AUS/CO/1 (24 October 2013), 4-5 [31-32].

3 Committee on the Rights of Persons with Disabilities, *Views adopted by the Committee under article 5 of the Optional Protocol, concerning communication No. 7/2012*, 16<sup>th</sup> sess, UN Doc CRPD/C/16/D/7/2012 (2 September 2016).

4 Australian Law Reform Commission ('ALRC'), *Equality, Capacity and Disability in Commonwealth Laws*, Report No 124 (2014) 194-209; Victorian Law Reform Commission ('VLRC'), *Review of the Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 (Vic)*, Report No 28 (2014); New South Wales Law Reform Commission ('NSWLRC'), *People with cognitive and mental health impairments in the criminal justice system: Criminal responsibility and consequences*, Report No 138 (2013). See also Law Reform Committee, Parliament of Victoria, *Inquiry into Access to and interaction with the Justice System by People with an Intellectual Disability and their Families and Carers* (2013); Department of the Attorney General (WA), *Review of the Criminal Law (Mentally Impaired Accused) Act 1998*, Final Report (April 2016); Australian Human Rights Commission, *Equal Before the Law: Towards Disability Justice Strategies* (February 2014).

5 VLRC, *Ibid* 89 [3.124]-[3.125].

6 *Ibid*.

7 *Ibid*.

8 See, eg, Jill Peay, 'Imprisoning the Mentally Disordered: A Manifest Injustice?' (Working Paper No 7/2014, London School of Economics and Political Science, 2014) 6-9; Stephanie Ortoleva, 'Inaccessible Justice: Human Rights, Persons with Disabilities and the Legal System' (2011) 17 *ILSA Journal of International and Comparative Law* 281, 307-8.

9 See, eg, Law Reform Committee, Parliament of Victoria, above n 4, 11; Office of the Public Advocate (Queensland), Submission No 45 to Senate Legal and Constitutional Affairs References Committee, *Value of a Justice Reinvestment Approach to Criminal Justice in Australia*, March 2013, 3.

- 10 NSWLRC, *People with cognitive and mental health impairments in the criminal justice system: Diversion*, Report No 135 (2012) 11 [2.5].
- 11 Martin Jackson et al, 'Acquired Brain Injury in the Victorian Prison System' (Corrections Research Paper No 4, Department of Justice, 2011) 22. See also Peter W Schofield et al, 'Traumatic Brain Injury among Australian Prisoners: Rates, Recurrence and Sequelae' (2006) 20 *Brain Injury* 499.
- 12 Law Reform Committee, Parliament of Victoria, above n 4, 14.
- 13 Ingrid Johnston and Jenna Pickles, *The Health of Australia's Prisoners 2012* (Australian Institute of Health and Welfare, 2013) 35.
- 14 See, eg, Eileen Baldry et al, *A Predictable and Preventable Path: Aboriginal People with Mental and Cognitive Disabilities in the Criminal Justice System* (University of New South Wales, 2015) 164, 167; Harry Blagg, Tamara Tulich and Zoe Bush, 'Diversionary Pathways for Indigenous Youth with FASD in Western Australia: Decolonising Alternatives' (2015) 40 *Alternative Law Journal* 257; First Peoples Disability Justice Consortium, Submission No 39 to Senate Community Affairs References Committee, *Indefinite Detention of People with Cognitive Disabilities in Australia*, April 2016, 40–51.
- 15 Mindy Sotiri, Patrick McGee and Eileen Baldry, 'No End in Sight: The Imprisonment, and Indefinite Detention of Indigenous Australians with a Cognitive Impairment' (Report, Aboriginal Disability Justice Campaign, September 2012) 24. The Mentally Impaired Accused Review Board is responsible for periodic reviews of ongoing detention under the *Criminal Law (Mentally Impaired Accused) Act 1996* (WA) s 33. It is the Board that ultimately recommends the release of a person from a custodial order following a finding of unfitness to plead.
- 16 'Fact Check: Amnesty International Claim on "Shocking" Indigenous Child Incarceration Rates Checks Out', *ABC News* (online), 19 June 2015 <<http://www.abc.net.au/news/2015-06-17/fact-check-indigenous-children-incarceration-rates/6511162>>.
- 17 Don Grubin, *Fitness to Plead in England and Wales* (Psychology Press, 1996) 17.
- 18 Arlie Loughnan, *Manifest Madness: Mental Incapacity in Criminal Law* (Oxford University Press, 2012) 66.
- 19 Grubin, above n 17, 15.
- 20 Law Commission (England and Wales), *Unfitness to Plead: An Issues Paper* (May 2014) 3, [1.8] <[http://www.lawcom.gov.uk/wp-content/uploads/2015/03/unfitness\\_issues.pdf](http://www.lawcom.gov.uk/wp-content/uploads/2015/03/unfitness_issues.pdf)>.
- 21 "'Urgent Need" for Law Change as Mentally-Impaired Accused Detained Indefinitely, WA Chief Justice Wayne Martin Says', *ABC News* (online), 10 July 2015 <<http://www.abc.net.au/news/2015-07-10/push-for-mentally-impaired-accused-law-change-in-wa/6611010>>.

- 22 Nicolas Perpetch, 'Indefinite Jailing: Call for Review as Indigenous Driver Involved in Fatal Crash Remains in Prison', *ABC News* (online), 17 September 2014 <<http://www.abc.net.au/news/2014-09-16/call-for-review-of-incarceration-of-former-teen-fatal-driver/5748090>>.
- 23 Law Commission (England and Wales), *Unfitness to Plead Volume 1: Report*, Report No 364, January 2016, 3 [1.11].
- 24 Ibid.
- 25 Ibid, 29-56.
- 26 See NSWLRC, above n 4, 35 (recommendation 2.2); VLRC, above n 4, 89 (recommendation 18); ALRC, above n 4, 200–1 (recommendation 7–1).
- 27 Senate Community Affairs References Committee, Parliament of Australia, *Indefinite detention of people with cognitive and psychiatric impairment in Australia* (2016) Recommendation 8 [9.24].
- 28 See above n 26.
- 29 Piers Gooding et al, 'Supporting Accused Persons with Cognitive Disabilities to Participate in Criminal Proceedings In Australia – Case Law Concerning Court-based Support during Unfitness to Plead Processes' (2017, forthcoming) *Law in Context*.
- 30 (1836) 7 C & P 303.
- 31 Ibid 304.
- 32 [1958] VR 45.
- 33 Ibid 48 (Smith J).
- 34 *Crimes Act 1900* (ACT) s 311; *Criminal Code 1983* (NT) s 43J; *Criminal Law Consolidation Act 1935* (SA) s 269H; *Criminal Justice (Mental Impairment) Act 1999* (Tas) s 8; *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 6; *Criminal Law (Mentally Impaired Accused) Act 1996* (WA) s 9.
- 35 *Crimes Act 1900* (ACT) s 315C(a)(ii); *Mental Health (Forensic Provisions) Act 1900* (NSW) s 21(1); *Criminal Code 1983* (NT) s 43W(1); *Criminal Justice (Mental Impairment) Act 1999* (Tas) s 16(1); *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 16(1).
- 36 Colleen Egan, 'Marlon Noble "Victims" Don't Recall Sex Crimes', *The West Australian* (online), 18 April 2011 <<https://au.news.yahoo.com/thewest/wa/a/9212661/marlon-noble-victims-dont-recall-sex-crimes/>>.
- 37 See Committee on the Rights of Persons with Disabilities, above n 3.
- 38 See, e.g. Law Commission, above n 23, 170 [5.113].
- 39 VLRC, above n 4 [2.25].
- 40 Ibid [2.27].
- 41 Ibid, Executive Summary.
- 42 Ibid [2.50] fn 32.
- 43 *Crimes Act 1914* (Cth) s 20B(3).



- 44 *Crimes Act 1900* (ACT) s 317; *Criminal Law Consolidation Act 1935* (SA) s 269M(B).
- 45 *Criminal Law Consolidation Act 1935* (SA) s 269M(B)(3).
- 46 Committee on the Rights of Persons with Disabilities, above n 3, 15 [8.4].
- 47 *Criminal Law (Mentally Impaired Accused) Act 1996* (WA) s 24(1); *Mental Health Act 2016* (Qld) s 490.
- 48 See, eg, VLRC, above n 4, ch 11; Judith Cockram, 'Justice or Differential Treatment? Sentencing of Offenders with an Intellectual Disability' (2005) 30 *Journal of Intellectual and Developmental Disability* 3, 9–10.
- 49 Cockram, above n 48, 10.
- 50 Kelley Johnson and Sue Tait, 'Throwing Away the Key: People with Intellectual Disability and Involuntary Detention' in Kate Diesfeld and Ian Freckelton (eds), *Involuntary Detention and Therapeutic Jurisprudence: International Perspectives on Civil Commitment* (Ashgate, 2003) 505, 517, 524.
- 51 Paul Ramcharan et al, 'Experiences of Restrictive Practices: A View from People with Disabilities and Family Carers' (Final Research Report, Office of the Senior Practitioner, May 2009) 11 <<http://www.dhs.vic.gov.au/about-the-department/documents-and-resources/reports-publications/experiences-of-restrictive-practices-report>>.
- 52 ALRC, above n 4, [7.22].
- 53 See Piers Gooding et al, 'Unfitness to Stand Trial and the Indefinite Detention of People with Cognitive Disabilities in Australia: Human Rights Challenges and Proposals for Change' (2017) 40(3) *Melbourne University Law Review* 816, 853-854.
- 54 *Criminal Justice (Mental Impairment) Act 1999* (Tas) s 18(2); *Criminal Law (Mentally Impaired Accused) Act 1996* (WA) ss 16(5), 19(4). Courts in Tasmania also have other options: *Criminal Justice (Mental Impairment) Act 1999* (Tas) s 18(2)(b)–(e).
- 55 Jurisdictions use different terminology to label broadly similar orders. Western Australia has 'custody orders' and Tasmania has 'restriction orders'. Queensland has two separate subspecies of custodial order, 'forensic orders' and 'disability forensic orders', recognising the different needs of people with intellectual impairments and people with severe mental health issues: Queensland Health, *Mental Health Act 2000 Resource Guide* (2016) iii.
- 56 *Criminal Code* (NT) s 43ZG(1)–(4B); *Crimes (Mental Impairment and Unfitness to Be Tried) Act 1997* (Vic) s 28(1).
- 57 *Criminal Code* (NT) s 43ZG(5)–(7); *Crimes (Mental Impairment and Unfitness to Be Tried) Act 1997* (Vic) s 35.
- 58 *Criminal Code* (NT) s 43ZG(6); *Crimes (Mental Impairment and Unfitness to Be Tried) Act 1997* (Vic) s 35(3)(a)(i). In Victoria, the presumption is that a custodial order must be varied to a non-custodial order; while in the Northern Territory, the presumption favours unconditional release for all types of order.

- 59 *Criminal Code* (NT) s 43ZC; *Crimes (Mental Impairment and Unfitness to Be Tried) Act 1997* (Vic) s 27(1). See Gooding et al, above n 53, 853. The strength of the rebuttable presumption differs between these jurisdictions.
- 60 *Mental Health (Forensic Provisions) Act 1990* (NSW) s 23(1)(b). This is also the procedure in South Australia: *Criminal Law Consolidation Act 1935* (SA) s 269O(2).
- 61 *Mental Health (Forensic Provisions) Act 1990* (NSW) s 52(2)(a); *Criminal Law Consolidation Act 1935* (SA) s 269O(3).
- 62 For New South Wales, see generally *Mental Health (Forensic Provisions) Act 1990* (NSW) sch 1.
- 63 *Crimes Act 1914* (Cth) s 20BC(2).
- 64 *Ibid.*
- 65 VLRC, above n 4, 307.
- 66 *Ibid* 308 [9.32].
- 67 Law Commission, above n 23, 156–7 [5.61].
- 68 *Ibid* 163 [5.85].
- 69 *Ibid* 174 [5.127].
- 70 Michaël van der Wolf et al, 'Understanding and Evaluating Contrasting Unfitness to Stand Trial Practices: A Comparison between Canada and the Netherlands' (2010) 9 *International Journal of Forensic Mental Health* 245, 248.
- 71 *Ibid*; Liselotte van den Anker, Lydia Dalhuisen and Marije Stokkel, 'Fitness to Stand Trial: A General Principle of European Criminal Law' (2011) 7(3) *Utrecht Law Review* 120, 124.
- 72 *Code of Criminal Procedure* (Netherlands) art 16.
- 73 *Code of Criminal Procedure* (Germany) s 413. See also Marcus Alexander Rothschild, Erland Erdmann and Markus Parzeller, 'Fitness for Interrogation and Fitness to Stand Trial' (2007) 104(44) *Deutsches Arzteblatt International* 3029.
- 74 Dunn et al, 'Forensic Psychiatry and its Interfaces outside the UK and Ireland' in John Gunn and Pamela J Taylor (eds), *Forensic Psychiatry: Clinical, Legal and Ethical Issues*, (CRC Press, 2<sup>nd</sup> ed, 2014) 111, 125.
- 75 *Ibid* 128.
- 76 *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3<sup>rd</sup> sess, 183<sup>rd</sup> plen mtg, UN Doc A/810 (10 December 1978) 71.
- 77 Michael Brett Young, 'From Commitment to Culture: The 2015 Review of the Charter of Human Rights and Responsibilities Act 2006' (Victorian Government Printer, September 2015) 3.
- 78 ALRC, above n 4; *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008) ('CRPD').

- 79 See Rosemary Kayess and Phillip French, 'Out of Darkness into Light? Introducing the *Convention on the Rights of Persons with Disabilities*' (2008) 8 *Human Rights Law Review* 1, 24.
- 80 Ibid 5.
- 81 Thomson Reuters, *The Laws of Australia* (at 1 November 2013) 9 Criminal Law Principles, '3 Defences and Responsibility' [9.3.1950].
- 82 *CRPD* art 12 (3).
- 83 Committee on the Rights of Persons with Disabilities, *General Comment No 1 (2014), Article 12: Equal Recognition Before the Law*, 11<sup>th</sup> sess, UN Doc CRPD/C/GC/1 (19 May 2014) [12].
- 84 Ibid [13].
- 85 Ibid.
- 86 ALRC, above n 4, 196 [7.16].
- 87 *CRPD* art 14(1)(b).
- 88 Committee on the Rights of Persons with Disabilities, *Guidelines on Article 14 of the Convention on the Rights of Persons with Disabilities: The Right to Liberty and Security of Persons with Disabilities* (September 2015) [16].
- 89 Ibid.
- 90 Committee on the Rights of Persons with Disabilities, above n 83, [40].
- 91 Gooding et al, above n 53.
- 92 The Committee on the Rights of Persons with Disabilities defines 'mental capacity' as 'the decision-making skills of a person, which naturally vary from one person to another and may be different for a given person depending on many factors, including environmental and social factors'. Committee on the Rights of Persons with Disabilities, above n 83, [13].
- 93 Tina Minkowitz, 'Rethinking Criminal Responsibility from a Critical Perspective: The Abolition of Insanity/Incapacity Acquittals and Unfitness to Plead, and Beyond' (2014) 23 *Griffith Law Review* 434; Committee on the Rights of Persons with Disabilities, above n 83, 2 [13-15], [29(i)].
- 94 Law Commission, above n 23, 100 [3.171].
- 95 Anna Arstein-Kerslake et al, 'Human Rights and Unfitness to Plead: The Demands of the Convention on the Rights of Persons with Disabilities' (2017) *Human Rights Law Review* (Published Online: 19 July 2017); Gooding et al, above n 53.
- 96 Ibid.
- 97 'Registered intermediary' and 'communication assistant' are not necessarily synonymous. However, they essentially share a common purpose: facilitating communication between the individual and the court. This is a different role to a support person, whose primary task is to provide (usually emotional) support.

- 98 *Youth Justice and Criminal Evidence Act 1999* (UK) s 29. An equivalent provision recognising the role of defendant intermediaries exists at s 104 of the *Coroners and Justice Act 2009* (UK), but has not yet been brought into force.
- 99 *Evidence Act 2006* (NZ) s 80(1).
- 100 *Ibid* s 79(2).
- 101 *Criminal Code, RSC 1985, c C-46, s 486*.
- 102 *Investigation and Testimony Procedural Act (Accommodations for Persons with Mental or Cognitive Disabilities) 2005* (Israel) s 22(9).
- 103 *Evidence Act 1929* (SA) s 13A(5A).
- 104 A 'vulnerable person' means a child or a cognitively impaired person: *Criminal Procedure Act 1986* (NSW) s 306M.
- 105 *Ibid* s 306ZK(2).
- 106 *Evidence Act 1977* (Qld) s 21(1)(b) (definition of 'special witness').
- 107 *Ibid* s 21(1AB).
- 108 *Ibid* s 21(2)(d).
- 109 *Ibid*.
- 110 *R v Mathews* [2013] QCA 20.
- 111 *R v JG* [2014] ACTSC 120; *R v Taylor* [2014] SASCF 112.
- 112 *GAE v Western Australia* [2015] WADC 5 [42].
- 113 *GAE v Western Australia* [2015] WADC 5 [30].
- 114 *GAE v Western Australia* [2015] WADC 5 [32].
- 115 *R v Fairest* [2016] VSC 329 [25, 36]
- 116 *GAE v Western Australia* [2015] WADC 5 [42].
- 117 *R v Jake Fairest* [2016] VSC 329 [27].
- 118 *GAE v Western Australia* [2015] WADC 5 [42].
- 119 Ethics IDs: 1646167; 1545653.1.
- 120 See Intellectual Disability Rights Service <[www.idrs.org.au](http://www.idrs.org.au)>.
- 121 Criminal Justice Support Network is funded by NSW Department of Family and Community Services, Ageing Disability and Home Care.
- 122 See Gooding et al, above n 29.
- 123 This program was first developed at the South Australian Office of the Public Advocate. Office of the Public Advocate (South Australia), *Supported Decision Making* (n.d.) <[www.opa.sa.gov.au/resources/supported\\_decision\\_making](http://www.opa.sa.gov.au/resources/supported_decision_making)>. The current iteration of the program is being run by ASSET (SA) <[www.assetsa.wordpress.com](http://www.assetsa.wordpress.com)>.

124 See especially, Intellectual Disability Rights Service, *Education and Training* (2017) <[www.idrs.org.au/education/education.php](http://www.idrs.org.au/education/education.php)>; Villamanta Disability Rights Legal Service, *Resources* <[www.villamanta.org.au/resources.html](http://www.villamanta.org.au/resources.html)>; Aboriginal Resource and Development Services (ARDS) North Australian Aboriginal Justice Agency (NAAJA) Aboriginal Interpreter Service, Northern Territory Government (AIS), *The Plain English Legal Dictionary Northern Territory Criminal Law* (2015) <[www.supremecourt.nt.gov.au](http://www.supremecourt.nt.gov.au)>.

125 See Deaf Indigenous Community Consultancy (2015) <[www.deaficc.com.au](http://www.deaficc.com.au)>.

126 A forthcoming article emerging from the project titled 'A Model for Supporting Accused Persons with Cognitive Disabilities to Participate in Criminal Proceedings – Findings from an Empirical Study', will detail the evaluation methodology.

127 Centrelink is the primary federal welfare agency in Australia, tasked with delivering welfare payments and services.

128 See generally, Ramcharan et al, above n 51.

129 See generally, E Baldry and SM Green (eds), *Our Voices: Aboriginal and Torres Strait Islander Social Work* (Palgrave MacMillan, South Yarra, 2012)

130 The Koori Court was created in 2002 to allow participation of the Aboriginal community and culture in the Victorian legal system.

131 ALRC, above n 4, 199 [7.35].

132 VLRC, Review of the Crimes (Mental Impairment and Unfitness to Be Tried) Act 1997, Consultation Paper No 17 (2013) 66–8 [4.60]–[4.73].

133 ALRC, above n 4, 192 [7.4].

134 This issue was raised by the NSWLRC. See NSWLRC, *Report 80: People with an Intellectual Disability and the Criminal Justice System* (1996) 91 [4.85].

135 Ibid 96 [4.103].

136 Ibid [4.105].

137 Ibid 92 [4.103].

138 Ibid 92 [4.103].







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