



MELBOURNE  
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## ADDRESSING THE INDEFINITE DETENTION OF PEOPLE WITH COGNITIVE AND PSYCHIATRIC IMPAIRMENT DUE TO UNFITNESS TO PLEAD LAWS

21 March 2016

The Melbourne Social Equity Institute and the Disability Research Initiative welcomes the opportunity to make this submission to the Senate Community Affairs References Committee inquiry into the indefinite detention of people with cognitive and psychiatric impairment in Australia.

**The Melbourne Social Equity Institute** at the University of Melbourne supports interdisciplinary research on social equity issues across the full spectrum of social life including health, law, education, housing, work and transport. The Institute brings together researchers from across the University of Melbourne to identify unjust or unfair practices that lead to social inequity and work towards finding ways to ameliorate disadvantage. It facilitates researchers working with government and community organisations and helps with the dissemination and translation of research for public benefit.

**The Hallmark Disability Research Initiative** at the University of Melbourne co-ordinates interdisciplinary projects with the involvement of community partners and those with lived experience of disability. Its brief is to develop high-quality applied research, policy and education programs. The aims of the DRI are to:

- enable the development of disability research in collaboration with the wider community;
- bring together people with disabilities and their representative organisations with academic researchers; and,
- foster a rich understanding of how to match research to the needs and desires of the community.

### OVERVIEW

This submission examines the human rights obligations of Australia in relation to the indefinite detention of persons with cognitive disability resulting from Australia's unfitness to plead laws. In particular, it considers the United Nations ('**UN**') Convention on the Rights of Persons with Disabilities ('**CRPD**').

- Section 1 examines Australia's obligations under international human rights law related to the indefinite detention of persons with cognitive disability.

- Section 2 discusses support frameworks for accused persons with cognitive disability in various jurisdictions, both in Australia and internationally, and offers recommendations for establishing procedural accommodations for persons with disabilities in Australian criminal law.
- Section 3 considers the treatment of people *after* they have been found unfit to stand trial in Australian jurisdictions and makes recommendations to prevent the indefinite detention of persons with cognitive disability.
- Section 4 briefly describes the Melbourne Social Equity Institute's and the Hallmark Disability Research Initiative's project on supports for accused persons with cognitive disability who may be found unfit to plead.
- Section 5 summarises our recommendations.

For the purposes of this paper, the term 'cognitive disability' will be used, and is inclusive of those described by the Senate Community Affairs References Committee as persons with 'cognitive and psychiatric disabilities'.<sup>1</sup>

## Section 1 – Human Rights

Unfitness to stand trial laws in Australia breach the rights of people with cognitive disability in the criminal justice system. Unfitness to stand trial laws set out procedures by which courts decide that a person cannot participate in and understand criminal trial proceedings brought against them. Such laws are designed to prevent disadvantage by ensuring that people receive a fair trial. Yet unfitness to stand trial provisions have the potential to create a separate and lesser form of justice for people with cognitive disabilities. At worst, people with cognitive disability found unfit to stand trial are subject to indefinite detention, including being detained for longer than if had they been convicted and sentenced in the first place. Another discriminatory outcome is that those found unfit to stand trial are subjected to supervision orders and coercion in the community on an unequal basis with others.

The following section will highlight the particular articles of the CRPD which are breached across unfitness to plead laws in each state and territory of Australia, and at the Commonwealth level. It will conclude with recommendations based on the most up-to-date international human rights law commentary and scholarship.

### International Human Rights Law

Unfitness to stand trial laws in Australia currently contravene a number of articles of the CRPD; in particular, the prohibition of discrimination on the basis of disability (Article 2 and 5), the right to

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<sup>1</sup> A non-exhaustive definition of disability contained in the *UNCPRD* indicates that persons with disability include 'those who have long-term physical, *mental, intellectual* or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.' *UNCPRD* art 1 (emphasis added). Although the term 'cognitive disability' does not appear in the *UNCPRD*, it is here used to capture disability arising from 'mental and intellectual' impairment. This term is increasingly used elsewhere in the disability and human rights field. See, eg, Anna Arstein-Kerslake, 'An Empowering Dependency: Exploring Support for the Exercise of Legal Capacity' (2014) *Scandinavian Journal of Disability Research* 1; 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 (October 2015) 31. Cognitive disability itself is a contested notion and we acknowledge that labels of cognitive disability can often be based on problematic testing and/or discriminatory labeling.

equal recognition before the law (Article 12 CRPD), the right to access to justice (Article 13 CRPD), and the right to liberty and security of the person (Article 14 CRPD).

### **Article 2 and 5 – Prohibition of Disability-based Discrimination**

The purpose of the CRPD is to ‘...promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity.’ It prohibits all discrimination on the basis of disability (Article 5) and requires that all appropriate steps be taken to ensure reasonable accommodation. Importantly, Article 2 of the CRPD indicates that “Discrimination on the basis of disability” refers to ‘any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.’ The inclusion of indirect discrimination in this way is important to consider given that provisions such as unfitness to plead rules may result in indirect discrimination against people with disabilities, even though criteria for unfitness to plead may not include an explicit reference to disability.

‘Reasonable accommodation’ is defined in Article 2 as ‘necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms’. The ‘accommodation’ should be tailored and adjusted to the individual’s specific requirements, as long as this can be done without placing an undue burden on the body providing the accommodation. ‘Denial of reasonable accommodation’ constitutes discrimination under the CRPD and the prohibition of discrimination is contained in every right in the CRPD.

### **Article 12 – Equal Recognition before the Law**

Article 12 is the most ground-breaking contribution of the CRPD.<sup>2</sup> Article 12(1) reaffirms the right to ‘equal recognition before the law’ for people with disability.<sup>3</sup> This equal recognition right itself is not new; it mirrors ‘parent’ rights in older UN treaties.<sup>4</sup> This restated right to equality before the law is accompanied by innovative features for the application of this right to the disability context.<sup>5</sup>

Article 12(2) obliges States Parties to recognise that people with disability enjoy legal capacity on an equal basis with others.<sup>6</sup> Legal capacity is a distinct concept from mental capacity, which deals with the decision-making skills of a person. Mental capacity may vary from person to person, depending on external factors including social and environmental factors.<sup>7</sup> Legal capacity, on the other hand, is the right to be a legal actor and person before the law. It is the ‘key to accessing meaningful

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<sup>2</sup> G. Quinn and A. Arstein-Kerslake, ‘Restoring the Human in Human Rights: Personhood and Doctrinal Innovation in the UN Disability Convention’ in C. Gearty and C. Douzinas (eds), *The Cambridge Companion to Human Rights Law* (Cambridge: Cambridge University Press, 2012) 36, 40.

<sup>3</sup> CRPD, Art 12(1).

<sup>4</sup> Universal Declaration of Human Rights 1948, GA Res 217A (III), A/810 (1948), Art 6 (UDHR); International Covenant on Civil and Political Rights 1966, 999 UNTS 171, Art 16 (ICCPR).

<sup>5</sup> CRPD Committee, General Comment No 1: Equal recognition before the law (art. 12), 11 April 2014, para 11.

<sup>6</sup> CRPD, Art 12(2).

<sup>7</sup> *ibid* para 13.

participation in society'.<sup>8</sup> The Committee on the Rights of Persons with Disabilities ('**CRPD Committee**') has made it plain that the right to legal capacity has no qualifications or limitations.<sup>9</sup>

Article 12(3) requires States Parties to take 'appropriate measures' to help people with disability exercise their legal capacity. This obligation is the core of Article 12,<sup>10</sup> and has been described as the main source of States Parties' obligation to provide for 'supported decision-making'.<sup>11</sup>

Article 12(4) provides that States Parties must 'ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law'.<sup>12</sup> Significantly, those measures must 'respect the rights, will and preferences of the person'.<sup>13</sup> This language shifts the focus from an individual's objectively determined 'best interests' to his or her will and preference.<sup>14</sup>

Finally, Article 12(5) obliges States Parties to 'ensure the rights of persons with disabilities with respect to financial and economic affairs, on an equal basis with others'.<sup>15</sup>

Read together, the limbs of Article 12 require what has been described as a 'paradigm shift'.<sup>16</sup> They encourage legal systems to abandon the emphasis on identifying the point at which a person is unable to express their will and preferences and therefore unable to exercise legal capacity.<sup>17</sup> The CRPD instead recognises legal capacity as an absolute, inviolable right: impairment 'must never be grounds for denying legal capacity or any of the rights provided for in Article 12'.<sup>18</sup> Article 12 focuses on identifying and implementing the supports necessary to help an individual exercise that absolute right to legal capacity.

### **Article 13 – Access to Justice**

Article 13 of the CRPD addresses the right to access to justice on an equal basis with others. Article 13 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.' Hence, 'access to justice' encompasses formal and substantive access to the

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<sup>8</sup> *ibid* para 13.

<sup>9</sup> *ibid* para 5.

<sup>10</sup> G. Quinn and A. Arstein-Kerslake, 'Restoring the Human in Human Rights: Personhood and Doctrinal Innovation in the UN Disability Convention' in C. Gearty and C. Douzinas (eds), *The Cambridge Companion to Human Rights Law* (Cambridge: Cambridge University Press, 2012) 36, 47.

<sup>11</sup> G. Quinn, 'Personhood and Legal Capacity: Perspectives on the Paradigm Shift of Art 12 CRPD' (Concept paper presented at HPOD Conference on Disability and Legal Capacity under the CRPD, Harvard Law School, Boston, 20 February 2010, 16, at <http://www.inclusionireland.ie/capacity> (last accessed 9 December 2015).

<sup>12</sup> CRPD, Art 12(4).

<sup>13</sup> *Ibid*.

<sup>14</sup> CRPD Committee, above n 5, para 21.

<sup>15</sup> CRPD, Art 12(5).

<sup>16</sup> See generally Quinn, above n 11.

<sup>17</sup> P. Gooding and C. O'Mahony, 'Laws on Unfitness to Stand Trial and the UN Convention on the Rights of Persons with Disabilities: Comparing Reform in England, Wales, Northern Ireland and Australia' (2015) *International Journal of Law, Crime and Justice* 15.

<sup>18</sup> CRPD Committee, above n 5, para 9.

different 'systems, information, procedures, processes and locations involved in the administration of justice'.<sup>19</sup>

Article 13(1) requires States to provide accessibility measures 'including through the provision of procedural and age-appropriate accommodations' and training for those working in the judiciary.<sup>20</sup> A failure to provide such accommodations may therefore amount to a form of discrimination under Article 5, given the definition of disability encompasses failure to provide reasonable accommodation. Article 9, which sets out the right to 'accessibility', also plays a key role in the exercise of the right to access to justice, particularly regarding access to information and communication.<sup>21</sup>

In practical terms, accessibility measures and procedural accommodation in court proceedings are many and varied. They include: multimedia, written and audio materials, including plain language materials;<sup>22</sup> a role for intermediaries and court assistants to advance the communication needs of witnesses, such as those provided for by the 'Registered Intermediaries' schemes in England, Wales and Northern Ireland;<sup>23</sup> and measures to make court proceedings less formal. As Gooding and O'Mahony have noted, the provision of procedural accommodations has the potential to circumvent the need for any assessment of fitness for trial in the first place.<sup>24</sup>

#### **Article 14 – Liberty and Security**

Article 14 contains a right to liberty and security of person, as well as a prohibition on unlawful or arbitrary deprivation of liberty.<sup>25</sup> Like Article 12, Article 14 reflects 'parent' rights to liberty in other UN human rights instruments.<sup>26</sup> However, it contains one very important disability-specific prohibition — 'that the existence of a disability shall in no case justify a deprivation of liberty'.<sup>27</sup>

This limb of Article 14(1)(b) was the subject of considerable debate during the drafting negotiations.<sup>28</sup> Some States Parties, including Australia, advocated strongly for the narrow view that Article 14 forbade detention solely on the basis of disability but not detention on the basis of

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<sup>19</sup> See generally S. Ortoleva, 'Inaccessible Justice: Human Rights, Persons with Disabilities and The Legal System' (2011) 17 *ILSA Journal of International & Comparative Law* 282, 284; E. Flynn, *Disabled Justice? Access to Justice and the UN Convention on the Rights of Persons with Disabilities* (Surrey: Ashgate, 2015) 11–16.

<sup>20</sup> CRPD, Art 13(1).

<sup>21</sup> CRPD, Art 9.

<sup>22</sup> See generally E. Flynn and A. Lawson, 'Disability and Access to Justice in the European Union: Implications of the United Nations Convention on the Rights of Persons with Disabilities' in L. Waddington, G. Quinn, and E. Flynn (eds), *European Yearbook of Disability Law: Volume 4* (Centre for Disability Law and Policy, 2013).

<sup>23</sup> Department of Justice (England and Wales), *Registered Intermediaries: Assisting Vulnerable Witnesses and Defendants with Communication Difficulties in the Criminal Justice System*, Factsheet (September 2013) at <<https://www.dojni.gov.uk/sites/default/files/publications/doj/intermediaries-leaflet.pdf>> (last accessed 16 February 2016).

<sup>24</sup> P. Gooding and C. O'Mahony, 'Laws on Unfitness to Stand Trial and the UN Convention on the Rights of Persons with Disabilities: Comparing Reform in England, Wales, Northern Ireland and Australia' (2015) *International Journal of Law, Crime and Justice* 12.

<sup>25</sup> CRPD, Art 14(1).

<sup>26</sup> For example see ICCPR, Art 9(1) and UDHR, Art 3.

<sup>27</sup> CRPD, Art 14(1)(b).

<sup>28</sup> Daily Summaries of the Fifth Session of the Ad Hoc Committee, 26 January 2005, afternoon session; Daily Summaries of the Fifth Session of the Ad Hoc Committee, 27 January 2005, afternoon session; Daily Summaries of Discussion at the Seventh Session of the Ad Hoc Committee, 18 January 2006, afternoon session; and Daily Summaries of Discussion at the Seventh Session of the Ad Hoc Committee, 19 January 2006, morning session. All available in the negotiation archives at: <http://www.un.org/esa/socdev/enable/rights/adhoccom.htm>.

disability *combined with another justification* (or multiple justifications).<sup>29</sup> On this view, detention because of disability among other factors — for example, community protection — is justifiable. However, the CRPD Committee has adopted a broader interpretation, stating that Article 14 ‘prohibits the deprivation of liberty on the basis of actual or perceived impairment *even if* additional factors or criteria are also used to justify the deprivation of liberty’.<sup>30</sup>

Article 14 is closely intertwined with the legal capacity right in Article 12(2).<sup>31</sup> Violations often go hand-in-hand: impairment is used to justify the denial of legal capacity through the removal of procedural safeguards; this in turn leads to deprivation of liberty. Liberty is deprived because of impairment, not because of any extant criminal proceedings. In these circumstances, custodial and supervision orders are paternalistic declarations that, because of the individual’s impairment, it is no longer in his or her ‘best interests’ to enjoy the autonomy afforded to others. The CRPD Committee 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>32</sup>

### **What does the CRPD mean for unfitness laws?**

All of the articles of the CRPD are interlinked. For the purposes of this submission, the close relationship between Article 12 and 13 is noteworthy.<sup>33</sup> The CRPD Committee has stated that ‘the recognition of the right to legal capacity is essential for access to justice in many respects.’<sup>34</sup> In order to enforce his or her legal rights against another, or to defend himself or herself in legal proceedings – including criminal proceedings – an individual must be recognised as the holder of legal rights.

The connection between Article 12 and 13 does not preclude tension. As noted, a declaration of unfitness to stand trial may inherently compromise the right to equal recognition before the law (and hence a person’s access to justice on an equal basis). Yet without a mechanism to identify and accommodate a person who is unable to understand court proceedings, even with the full provision of reasonable accommodations, the accused may be denied a fair trial.<sup>35</sup> The adversarial system depends on ‘equality of arms’,<sup>36</sup> and assumes the defendant will vigorously test the case against them. Yet the rules and procedures of the criminal law – designed chiefly to protect the rights of defendants – are highly complex and, under present conditions, these rules and procedures are typically inaccessible to persons with disabilities.

### *CRPD on declarations of unfitness*

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<sup>29</sup> Daily Summaries of the Fifth Session of the Ad Hoc Committee, 26 January 2005, afternoon session.

<sup>30</sup> 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’ (2015) para 7, at <http://www.ohchr.org/EN/HRBodies/CRPD/Pages/CRPDIndex.aspx> (last accessed 10 December 2015). (Emphasis added).

<sup>31</sup> *ibid* para 8.

<sup>32</sup> CRPD Committee, above n 5, para 40.

<sup>33</sup> See E. Flynn and A. Lawson, ‘Disability and Access to Justice in the European Union: Implications of the United Nations Convention on the Rights of Persons with Disabilities’ in L. Waddington, G. Quinn, and E. Flynn (eds), *European Yearbook of Disability Law: Volume 4* (Centre for Disability Law and Policy, 2013) 7.

<sup>34</sup> CRPD Committee, above n 5, para 38.

<sup>35</sup> Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws* ALRC Report 124 (August 2014) para 1.21 at <https://www.alrc.gov.au/publications/equality-capacity-disability-report-124> (last accessed 16 December 2015).

<sup>36</sup> The principle of equality of arms is a jurisprudential principle and is used throughout common law codes of criminal law as an essential component of a fair hearing. For example, the principle was issued by the European Court of Human Rights and is a part of the right to a fair trial written in the (European) Convention for human rights and fundamental freedoms.

The CRPD Committee has offered some guidance on the requirements of the CRPD for unfitness to plead laws. In 2015 it released a statement calling on States parties to remove declarations of unfitness to stand trial from their criminal laws.<sup>37</sup> The CRPD Committee has made similar comments in its concluding observations on Ecuador and South Korea.<sup>38</sup> These comments suggest that, irrespective of the mode of detention, declarations of unfitness to plead are inconsistent with the terms of the CRPD. On this interpretation, none of the Australian systems are truly compliant; the CRPD requires States Parties to guarantee all accused persons equal right to a fair trial.

However, the CRPD Committee did not suggest that a person who cannot express wishes during proceedings to the extent of being able to challenge claims made against him or her (even after all efforts at reasonable accommodation to support them to do so have been made) should be forced through a typical trial. In such circumstances, it may be possible to develop an alternative to a declaration of unfitness to stand trial. We propose defining two thresholds. The first, is one at which an individual is identified as needing accessibility measures on the basis that he or she is having difficulty with the criminal justice processes – but not on the basis of the existence of a disability. Those measures should then be activated to ensure that the person enjoys procedural fairness on an equal basis with others, such as enjoying the same standard of proof and probative value of prosecution evidence.

The second threshold may be one at which the individual, after all accessibility measures have been provided, cannot express his or her wishes and participate independently to the extent of being able to instruct counsel or challenge claims made against him or her. At this threshold, the CRPD requires that people with cognitive disability are not denied the legal capacity to stand trial. Instead, a new type of procedural accommodation may be needed when all accessibility measures have been provided but have failed to assist the person to express wishes, instruct counsel and participate independently to the extent of being able to challenge claims made against him or her. This process might be more intensive, and might resemble ‘special hearings’ under current law. However, they must ensure that individuals with cognitive disabilities enjoy procedural fairness on an equal basis with others, including enjoying the same standard of proof and probative value of prosecution evidence.

#### *CRPD on detention*

The CRPD Committee's jurisprudence on unfitness to stand trial laws indicates that the loss of liberty flowing from a determination of unfitness to plead is in violation of the Articles 12, 13 and 14. In relation to Ecuador, the CRPD in its concluding observations expressed concern that declarations of unfitness to stand trial was a ‘pretext for applying security measures involving their indefinite deprivation of liberty and that they are not entitled to the same guarantees as other persons in the criminal justice system’.<sup>39</sup> The Committee recommended that the State Party should now refrain from declaring persons with disabilities unfit for trial in order that they are ‘entitled to due process, on an equal basis with others, and that the general guarantees of criminal law and procedure are

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<sup>37</sup> Committee on the Rights of Persons with Disabilities, *Guidelines on Article 14 of the Convention on the Rights of Persons with Disabilities* < <http://www.ohchr.org/EN/HRBodies/CRPD/Pages/CRPDIndex.aspx> > [16].

<sup>38</sup> Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Initial Report of Ecuador*, CRPD/C/ECU/CO/1 (27 October 2014) [29(b)]; Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Initial Report of Republic of Korea*, CRPD/C/KOR/CO/1 (29 October 2014) [28].

<sup>39</sup> CRPD Committee, 2014. *Concluding Observations on the Initial Report of Ecuador*, 27 October CRPD/C/ECU/CO/1.

observed'.<sup>40</sup> In its concluding observations to New Zealand the Committee similarly expressed concern that a determination of unfitness to stand trial resulted in a deprivation of liberty.<sup>41</sup> The Committee's principal objection was that the 'system does not recognize that a person with disabilities should only be deprived of liberty when found guilty of a crime, after criminal procedure has been followed, with all the safeguards and guarantees applicable to everyone'.<sup>42</sup> In light of its concerns the Committee recommended:

that the State Party review the criminal justice system to ensure that criminal procedure is followed in accordance with all the safeguards and guarantees that are applicable to nondisabled persons, and that deprivation of liberty should be applied as a matter of last resort and when other diversion programmes, including restorative justice, are insufficient to deter future crime. The Committee also recommends that the State Party ensure that reasonable accommodation in prison settings operates in respect of persons with disabilities.<sup>43</sup>

Once again, the CRPD Committee interprets that a determination of unfitness to stand trial that results in a loss of liberty violates Article 14.

Tina Minkowitz, a disability rights scholar, argues that special defences such as the insanity defence and unfitness to plead rules are 'inherently suspect and discriminatory based on disability'.<sup>44</sup> Accordingly, rules on unfitness to plead should be abolished and replaced with an inclusive framework, which would ensure the following:

[t]here would be no declaration of unfitness to plead and no assessment that a person is incompetent to be put on trial. Everyone would have the right to participate in his or her own defence without any discrimination based on actual or perceived disability or decision-making skills. Procedural accommodations and support would be provided for all stages of criminal proceedings, including investigative stages.<sup>45</sup>

The practical reality of such a vision for reforming the criminal law may be challenging, but must be carefully considered by any policymakers seeking to reform Australia's unfitness to plead regimes in order to prevent indefinite detention.

## RECOMMENDATIONS

The CRPD requires a number of changes to Australian law, in relation to the indefinite detention of persons with cognitive disability. We recommend:

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<sup>40</sup> CRPD Committee, 2014. General Comment on Article 9 (CRPD/C/GC/2).

<sup>41</sup> CRPD Committee, 2014. Concluding Observations on the Initial Report of New Zealand, 31 October CRPD/C/NZL/CO/1.

<sup>42</sup> *ibid.*

<sup>43</sup> CRPD Committee, 2014e. Concluding Observations on the Initial Report of New Zealand, 31 October CRPD/C/NZL/CO/1.

<sup>44</sup> Minkowitz, T., 2015. Rethinking criminal responsibility from a critical disability perspective: the abolition of insanity/incapacity acquittals and unfitness to plead, and beyond. *Griffith Law Rev.* 23, 434.

<sup>45</sup> *ibid.*



- **Shifting the focus of laws to facilitating participation by people with disability in criminal proceedings on an equal basis with others, rather than assessing competence to stand trial.**
- **Accessibility and procedural accommodations should be adequately funded and provided as a matter of rights and entitlements.**
- **Law reform efforts should be directed to developing a new threshold to identify when a person cannot participate, even after the provision of all accessibility measures, to the extent of being able to express wishes, instruct counsel and/or challenge claims made against him or her. This threshold would comply with the CRPD and would activate sufficient accessibility measures to ensure procedural fairness for the accused on an equal basis with others, including securing the same standard of proof and probative value of prosecution evidence.**
- **Where criminal sanctions are imposed as a result of such processes, they must occur on an equal basis with others, including setting fixed terms and regular review by an independent body.**

## Section 2 – Support Frameworks

This section discusses support frameworks in place in various jurisdictions, both in Australia and internationally. This section looks at both legislative frameworks and service provision which could be applied in the Australian criminal justice system. Broadly speaking, support frameworks have one or more of the following features:

- Formal or informal intermediary/communication assistant schemes;<sup>46</sup>
- Formal or informal support person schemes;
- A statutory entitlement to an intermediary/communication assistant; and/or
- A statutory entitlement to a support person.

Some jurisdictions have a combination of features. For example, England and Wales has a formal intermediary scheme for witnesses, but only an informal intermediary scheme for defendants. Witnesses enjoy a statutory entitlement to an intermediary, but not defendants.

### Key questions for the Committee

It is assumed that the Committee will explore the possibility of nationally consistent to support frameworks for individuals with cognitive impairments in the criminal justice system. These alternatives present some questions for the Committee to consider.

- Should Australian jurisdictions adopt an intermediary scheme?
- Should it be formalised, with a registration and accreditation process, or informal?
- If so, who should be responsible for managing the scheme: governments or NGOs?
- Should an intermediary's role be limited to helping the accused give oral evidence? Should they play a greater role in the trial process, or become involved pre-trial?

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<sup>46</sup> '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.

- Should the intermediary’s role extend to providing emotional support?
- Should Australian jurisdictions distinguish between the roles of intermediaries and support people? If so, what are the key differences between the two?
- Should Australian jurisdictions recognise a statutory entitlement to an intermediary?
- Should Australian jurisdictions recognise a statutory entitlement to a support person?

The Section will consider these questions and conclude by offering recommendations for the Committee’s consideration.

## **United Kingdom’s registered intermediary scheme**

### Features

England and Wales’ registered intermediary scheme provides court-appointed experts to help facilitate the flow of information to and from the witness during the giving of evidence. Importantly, the registered intermediary is an independent and impartial officer of the court; their paramount duty is owed to the court, not the defendant.<sup>47</sup> The registered intermediary is not a support person, an expert witness or an interpreter.<sup>48</sup>

The registered intermediary scheme currently applies to witnesses and not defendants, aside from a pilot program operating in Northern Ireland (see below). It is also limited to support during the witness’s evidence, although there have been recent proposals for intermediaries to play a broader role (see below).

### Background

In 2004 England and Wales introduced a pilot witness intermediary scheme aimed at ensuring vulnerable witnesses were supported during the trial process.<sup>49</sup> It was rolled out nationally in 2008.<sup>50</sup>

However, this formalised, statutory scheme was only available to witnesses, not defendants.<sup>51</sup> In *C v Sevenoaks Youth Court*, the High Court ruled that courts enjoyed an inherent common law discretion to appoint a defendant intermediary ‘if necessary to ensure a fair trial’.<sup>52</sup> But defendant intermediaries appointed pursuant to this inherent power are not part of the registered intermediary system. As a consequence, defendant intermediaries are sometimes referred to as ‘non-registered intermediaries’.<sup>53</sup>

The informal nature of the defendant intermediary role has several drawbacks. First, there are no minimum standards of training, experience or accreditation.<sup>54</sup> Second, the unregulated nature of the

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<sup>47</sup> Ministry of Justice, *Registered Intermediary Procedural Guidance Manual* (2012) 9 [1.23].

<sup>48</sup> *ibid* 10 [1.23].

<sup>49</sup> Ministry of Justice, *Registered Intermediary Procedural Guidance Manual* (2012) 2.

<sup>50</sup> *ibid* 3.

<sup>51</sup> The witness intermediary scheme has statutory footing: *Youth Justice and Criminal Evidence Act 1999* (England and Wales) s 29. An equivalent provision recognising the role of defendant intermediaries exists at s 104 of the *Coroners and Justice Act 2009* (England and Wales), but has not yet been brought into force.

<sup>52</sup> [2010] 1 All ER 735, 742 [17]-[18] (Openshaw J).

<sup>53</sup> Ministry of Justice, *Registered Intermediary Procedural Guidance Manual* (2012) 5 [1.4].

<sup>54</sup> Law Commission, *Unfitness to Plead Volume 1: Report*, Report No 364 (January 2016) 51 [2.74], [2.75].

service means defendant intermediaries can charge considerably more than witness intermediaries — in many instances at twice the rate.<sup>55</sup>

But it also has one potential advantage: flexibility. Registered witness intermediaries are only permitted to assist clients when giving oral evidence.<sup>56</sup> ‘Non-registered’ defendant intermediaries are not so restricted. For example, in *C v Sevenoaks Youth Court*, Openshaw J recognised the value in a defendant intermediary ‘not just during the proceedings, but beforehand as [the accused] and his lawyers prepare for trial’.<sup>57</sup> The presiding judicial officer will determine the scope of the intermediary’s role.

### The Northern Ireland Pilot Project

In 2013, a pilot registered intermediary scheme was introduced in Northern Ireland.<sup>58</sup> A review of this pilot was largely positive, although the small number of cases reviewed included no examples of the RI being used to help defendants give evidence in court.<sup>59</sup> The review concluded, however, that ‘the pilot was successful in assisting people with significant communication deficits to give their evidence and that the prevailing view is that the RI Schemes should, therefore, continue’.<sup>60</sup>

The Northern Ireland pilot recommended, however, that general support throughout the duration of the trial — for example, emotional support — should be provided by a ‘court defendant supporter’ rather than an intermediary.<sup>61</sup> This position reflected the intermediary’s role as a ‘neutral, independent, impartial and transparent’ officer of the court.<sup>62</sup>

### The Law Commission’s Proposal

In January 2016, the Law Commission (England and Wales) made a series of recommendations about reforming the law on unfitness to plead. In particular, they called for the introduction of a statutory defendant intermediary scheme.<sup>63</sup> Like the witness intermediary scheme, this would be registered and subject to minimum qualification, training and experience standards.<sup>64</sup>

The statutory entitlement to an intermediary would apply in two situations:

- During the giving of evidence, provided the intermediary is ‘necessary in order that the accused receives a fair trial’;<sup>65</sup> and
- Other than the giving of evidence, provided the intermediary (and the nature of assistance proposed) is ‘necessary in order that the defendant can have a fair trial’.<sup>66</sup>

The Law Commission’s proposal accordingly envisages a broad role for the registered intermediary, encompassing support beyond the giving of oral evidence.

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<sup>55</sup> Law Commission, *Unfitness to Plead: Summary*, (January 2016) 9 [1.32].

<sup>56</sup> *Youth Justice and Criminal Evidence Act 1999* (England and Wales) s 29.

<sup>57</sup> [2010] 1 All ER 735, 742 [17].

<sup>58</sup> Department of Justice, *Northern Ireland Intermediaries Schemes Pilot Project: Post-Project Review* (January 2015) 3.

<sup>59</sup> *ibid* 28–9 [84]-[87].

<sup>60</sup> *ibid* 28 [84].

<sup>61</sup> *ibid* 6 [5]-[6].

<sup>62</sup> *ibid* 6 [5].

<sup>63</sup> Law Commission, *Unfitness to Plead Volume 1: Report*, Report No 364 (January 2016) 48–9 [2.66]-[2.69].

<sup>64</sup> *ibid* 54 [2.84].

<sup>65</sup> *ibid* 48 [2.66].

<sup>66</sup> *ibid* 49 [2.69].

## **New Zealand's statutory entitlement to support**

### Features

In New Zealand, a defendant is entitled to 'communication assistance',<sup>67</sup> which includes assistance provided to a person with a 'communication disability'.<sup>68</sup>

When giving evidence, a defendant is also entitled to have at least one support person near him or her.<sup>69</sup> The presiding judge may prohibit reliance on a support person, however, if it is in the interests of justice to do so.<sup>70</sup> The judge may also give directions regulating the conduct of a support person, or the recipient.<sup>71</sup>

However, there does not appear to be any formal intermediary service to provide either support or communication assistance.

## **Canada's vulnerable witness laws and communication intermediary scheme**

### Features

Canadian courts can order that a support person accompany vulnerable witnesses<sup>72</sup> during their testimony. Taken literally, these provisions are broad enough to cover the testimony of an accused. However, this power appears to be largely utilised in respect of victims and prosecution witnesses.<sup>73</sup>

However, the non-profit charity Communication Disabilities Access Canada (**CDAC**) has established its own communication intermediary scheme (see below). It appears that this system was established within the existing legislative framework, with the government support.

### Background

The supporter provisions in the Canadian *Criminal Code* were enacted in January 2006. A 2013 review focused entirely on the views of Crown prosecutors and victim advocates,<sup>74</sup> as a result, there is little information available about their potential use in relation to 'vulnerable defendants'.

There have been calls for a formalised English and Welsh-style intermediary scheme. In 2012, Janine Benedet and Isabel Grant argued 'the development of a program of trained intermediaries in Canada would improve the ability of this group of complainants to have their stories told to a court'.<sup>75</sup>

Also in 2012, CDAC conducted a national feasibility study for Justice Canada on the implementation of an intermediary scheme for people with speech and language disabilities.<sup>76</sup> They determined that

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<sup>67</sup> *Evidence Act 2006* (NZ) s 80(1).

<sup>68</sup> *ibid* s 4(1) (definition of 'communication assistance').

<sup>69</sup> *ibid* s 79(2).

<sup>70</sup> *ibid* s 79(3).

<sup>71</sup> *ibid* s 79(5).

<sup>72</sup> Defined as a witness under the age of 18 or who has a mental or physical disability: *Criminal Code* s 486.

<sup>73</sup> See, eg, Pamela M Hurley, 'Vulnerable Adult Witnesses: The Perceptions and Experiences of Crown Prosecutors and Victim Services Providers in the Use of Testimonial Support Provisions', Department of Justice (2013) <[http://www.justice.gc.ca/eng/rp-pr/cj-jp/victim/rr13\\_15a/rr13\\_15a.pdf](http://www.justice.gc.ca/eng/rp-pr/cj-jp/victim/rr13_15a/rr13_15a.pdf)> [accessed 20 January 2016].

<sup>74</sup> *ibid* 32.

<sup>75</sup> Janine Benedet and Isabel Grant, 'Taking the Stand: Access to Justice for Witnesses with Mental Disabilities in Sexual Assault Cases' (2012) 50(1) *Osgoode Hall Law Journal* 1, 40.

the existing statutory framework could support an intermediary system operating at a regional level.<sup>77</sup> Consequently, CDAC trains and manages a roster of communication intermediaries throughout Canada. Their intermediaries are all speech-language pathologists with at least a Master's degree; they are regulated healthcare professionals with at least two years' experience.<sup>78</sup> According to CDAC's website:

CIs work in a similar way to sign language interpreters or language translators, however, they use different techniques to support people who have communication disabilities due to cerebral palsy, autism, cognitive disabilities, acquired brain injury, learning disability, stroke, dementia, ALS, Parkinson's Disease and other conditions.<sup>79</sup>

The CDAC scheme is particularly interesting because it appears to operate largely independently of government. CDAC created it — albeit with government input — and CDAC continues to oversee training and the online roster (searchable by province). Police, lawyers or courts search the roster, and then request and pay for communication intermediary services.<sup>80</sup> The intermediaries negotiate their own terms, and CDAC is not responsible for their work (beyond maintaining the roster and providing training).<sup>81</sup>

## **Israel's statutory entitlement to support**

### Background

In 2005, Israel enacted the *Investigation and Testimony Procedural Act (Accommodations for Persons with Mental or Cognitive Disabilities) 2005*. This Act, and the accommodations contained within, was inspired by a pilot program by disability rights organisation Bizchut.<sup>82</sup>

### Features

Among other things, the Israeli law permits a court to make the following adjustments to the usual trial procedure:

- The witness may give evidence using alternative augmentative communication, including the assistance of people, computerised aids, communication panels, photos, symbols, letters or words;<sup>83</sup>
- The witness may give evidence while accompanied;<sup>84</sup>
- A special advisor may be appointed to advise the court and lawyers about phrasing, simplifying questions, addressing the individual and avoiding potential harm to the witness.<sup>85</sup>

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<sup>76</sup> Communication Disabilities Access Canada, *Communication Intermediaries in Canada: Key Findings* (2012) <<http://www.access-to-justice.org/mediabin/CDAC-Feasibility-Study-Key-Findings.pdf>>.

<sup>77</sup> *ibid* 3.

<sup>78</sup> Communication Disabilities Access Canada, *Communication Intermediaries*, <http://www.access-to-justice.org/communication-intermediaries/roster/communication-intermediaries/> [accessed 20 January 2016].

<sup>79</sup> *ibid*.

<sup>80</sup> *ibid*.

<sup>81</sup> *ibid*.

<sup>82</sup> Sharon Primor and Na'ama Lerner, *The Right of persons with Intellectual, Psychosocial and communication Disabilities to Access to Justice Accommodations in the Criminal Process*, Bizchut, 13.

<sup>83</sup> *Investigation and Testimony Procedural Act (Accommodations for Persons with Mental or Cognitive Disabilities) 2005* s 22(7).

<sup>84</sup> *ibid* s 22(8).

The Act applies equally to defendants and other witnesses.<sup>86</sup> As a result of these reforms:

[t]estimony by a person with a mental or cognitive disability can be supported, directed, and interpreted by experts from therapeutic disciplines, who are vested with extensive authority ... [and who can] point to the way a witness should be addressed, what questions she may or may not be asked, how to frame the questions, what her responses mean (or do not mean), what her body language insinuates, etc. In general, these experts provide a type of interpretation to the testimony, by casting it against distinctive behavioural patterns of persons with similar disabilities.<sup>87</sup>

However, these statutory provisions are focused on helping the accused (and other witnesses) give evidence. Bizchut has also advocated for the use of personal ‘facilitators’ to assist defendants. Their proposed facilitator model appears to be a hybrid: part-intermediary and part support person. For example, the facilitator can ‘assist by simplifying questions and legal arguments so they can be understood by the person with the disability’.<sup>88</sup> But they can also ‘assist the witness emotionally during the proceedings, reduce his or her anxiety, and inspire confidence and reassurance’.<sup>89</sup>

It is not clear whether this facilitator role has become a reality in the Israeli justice system.<sup>90</sup>

### South Australia’s ‘vulnerable witness’ laws

#### Features

In 2015 the South Australian Parliament passed the *Statutes Amendment (Vulnerable Witnesses) Act 2015* (SA). The Act introduced a number of accommodations for vulnerable witnesses, including witnesses with a ‘mental disability’.<sup>91</sup> Relevantly, the Act:

- created a statutory entitlement to a communication assistant;<sup>92</sup> and
- expanded the classes of support people permitted to provide emotional support.<sup>93</sup>

The ‘communication assistant’ role is significant feature of the new laws. They provide for two different types of ‘communication assistant’. The first is the ‘communication partner’ — an individual approved by the Minister to provide assistance to witnesses.<sup>94</sup> It is anticipated these communication partners will be volunteers operating under a formal specialist scheme.<sup>95</sup> (This volunteer status raises concerns about whether the support role is valued and whether the scheme secures the rights and entitlements owed to accused persons with disabilities). Secondly, a Court can appoint any other suitable person to provide communication assistance.<sup>96</sup>

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<sup>85</sup> *ibid* s 22(9).

<sup>86</sup> Neta Ziv, ‘Witnesses with Mental Disabilities: Accommodations and the Search for Truth — The Israeli Case’ (2007) 27(4) *Disability Studies Quarterly* 23 <<http://dsq-sds.org/article/view/51/51>> [accessed 19 January 2016].

<sup>87</sup> *ibid*.

<sup>88</sup> Sharon Primor and Na’ama Lerner, *The Right of persons with Intellectual, Psychosocial and communication Disabilities to Access to Justice Accommodations in the Criminal Process*, Bizchut, 10.

<sup>89</sup> *ibid*.

<sup>90</sup> Language barriers have made it extremely difficult to determine how the Israeli legal system deals with these issues in practice.

<sup>91</sup> *Evidence Act 1929* (SA) s 4 (definition of ‘vulnerable witness’).

<sup>92</sup> *ibid* s 13A(5A).

<sup>93</sup> *ibid* s 13A(5).

<sup>94</sup> *ibid* s 13A(5A)(a)(i).

<sup>95</sup> South Australia, *Parliamentary Debates*, House of Assembly, 6 May 2015, 1038 (John Rau, Attorney-General).

<sup>96</sup> *Evidence Act 1929* (SA) s 13A(5A)(a)(i).

However, the communication assistant's role is limited to assistance while the defendant is giving evidence. It accordingly has no application to a defendant outside of the witness box.

The role of a support person is said to be 'quite distinct' from that of a communication assistant.<sup>97</sup> The 2015 amendments expanded the list of people who can provide emotional support. Previously, only relatives or friends could provide emotional support.<sup>98</sup> Now, regulations may specify certain classes of individuals expressly permitted to provide emotional support.<sup>99</sup>

### Background

The 2015 Act was a key part of the State Government's \$3.246m Disability Justice Plan. Significantly, the Disability Justice Plan pledged to provide communication assistants for defendants with 'complex communication needs'.<sup>100</sup>

The Government intended to call for tenders in late 2015 for the communication partner scheme outlined previously.<sup>101</sup> As at January 2016 this does not appear to have been put out for tender,<sup>102</sup> and the precise nature of support to be provided remains unclear. However, when introducing the Bill, Attorney-General John Rau explained the rationale as follows:

The communication assistant model in the Bill draws on the familiar and long recognised role of a language interpreter and will be similar to that role. However for people with complex communication needs, communication is broader than spoken language. It is only right that persons, be it witnesses, victims, suspects, or defendants, with complex communication needs have the same entitlement of support to communicate effectively and/or understand the relevant proceedings as someone who is unable to speak or understand English. There are augmented and alternative means of communication that can be legitimately used (such as speak-and-spell communication devices or picture book aids), especially with the contribution of a communication assistant, to facilitate and enable effective communication. There are a broad range of disabilities and complex communication needs, and the term 'complex communication needs' is not confined to intellectual disability. The precise nature and extent of the role of communication assistant will depend on the particular complex communication needs in any case.<sup>103</sup>

### **New South Wales' statutory entitlement to support**

#### Features

In NSW, a vulnerable<sup>104</sup> witness (including a defendant) has the right to request the presence of a 'supportive person' while giving evidence.<sup>105</sup> This may be a parent, guardian, relative, friend or

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<sup>97</sup> South Australia, *Parliamentary Debates*, House of Assembly, 6 May 2015, 1038 (John Rau, Attorney-General).

<sup>98</sup> *Evidence Act 1929* (SA) s 13A(5).

<sup>99</sup> *ibid* s 74H(2)(b).

<sup>100</sup> Attorney-General's Department, *Disability Justice Plan 2014-2017* <<http://www.agd.sa.gov.au/sites/agd.sa.gov.au/files/documents/Initiatives%20Announcements%20and%20News/DJP/Disability%20Justice%20Plan%20WEB.pdf>> [accessed 19 January 2016] 11.

<sup>101</sup> South Australia, *Parliamentary Debates*, House of Assembly, 6 May 2015, 1036 (John Rau, Attorney-General).

<sup>102</sup> Government of South Australia, *SA Tenders and Contracts* <<https://www.tenders.sa.gov.au/tenders/tender/search/tender-search.do?action=advanced-tender-search-open-tender>> [accessed 20 January 2016].

<sup>103</sup> South Australia, *Parliamentary Debates*, House of Assembly, 6 May 2015, 1038 (John Rau, Attorney-General).

<sup>104</sup> A 'vulnerable person' means a child or a cognitively impaired person: *Criminal Procedure Act 1986* (NSW) s 306M.

<sup>105</sup> *ibid* s 306ZK(2).

support person.<sup>106</sup> They may act as an interpreter, or for the purpose of providing the vulnerable person with other support.<sup>107</sup>

However, the scheme is limited to vulnerable *witnesses*, and only while giving evidence. Accordingly, it does not apply to a vulnerable defendant while not in the witness box.

### Background

It is unclear whether this has been used in proceedings to any significant extent.<sup>108</sup> Phoebe Bowden, Terese Henning and David Plater have suggested:

[T]here appears to be a view abroad that this provision relates to a person whose function is to provide nothing more than emotional support to the vulnerable witness, and does not extend to assisting the witnesses' comprehension and communication of evidence. This limited view may mean that the full potential of the relevant provisions is not exploited. *Yet quite clearly their wording allows for much greater assisted communication than mere emotional support* (emphasis added).<sup>109</sup>

Theoretically, the NSW provisions could therefore authorise the involvement of an intermediary or facilitator. Despite this, the NSW Government's view (at least in the *witness* support context) seems to be that the supporter's role is confined to emotional support.<sup>110</sup>

However, in October 2016, the NSW Government announced it would introduce a witness intermediary scheme for child victims of sexual assault.<sup>111</sup> The 'Children's Champions'<sup>112</sup> program is expected to commence in March 2016, and is modelled on the English and Welsh scheme.<sup>113</sup>

## **Queensland's statutory entitlement to support**

### Features

Queensland recognises a limited role for support workers during a trial. A court may order that a 'special witness' — a witness with a mental, intellectual or physical impairment',<sup>114</sup> including the defendant<sup>115</sup> — be supported by a person approved by the court.<sup>116</sup>

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<sup>106</sup> *ibid* s 306ZK(3)(a).

<sup>107</sup> *ibid* s 306ZK(3)(b).

<sup>108</sup> Phoebe Bowden, Terese Henning and David Plater, 'Balancing Fairness to Victims, Society and Defendants in the Cross-Examination of Vulnerable Witnesses: An Impossible Triangulation?' (2014) 37(3) *Melbourne University Law Review* 539, 574.

<sup>109</sup> *ibid* 574.

<sup>110</sup> Victim Services, *Justice Journey Court Preparation Guide*, Department of Justice (October 2012) <[http://www.victimsservices.justice.nsw.gov.au/Documents/fs36\\_workers-guide.pdf](http://www.victimsservices.justice.nsw.gov.au/Documents/fs36_workers-guide.pdf)> [accessed 19 January 2016] 23.

<sup>111</sup> Department of Justice, 'Victims Services Now Seeking Children's Champions' (Media Release, 3 December 2015) <<http://www.justice.nsw.gov.au/Pages/media-news/news/2015/victims-services-seeking-witness-intermediaries.aspx>> [accessed 20 January 2016].

<sup>112</sup> It is interesting to note that, during the consultation process, Legal Aid NSW preferred the term 'witness intermediary' to 'Children's Champion'. They noted that 'as an intermediary is not the child's advocate or support person, they should not be termed 'champion'...this may encourage misconceptions about the role of the intermediary'. They also advocated for the inclusion of defendants in the scheme. These recommendations were not adopted: Legal Aid NSW, Submission to department of Justice, *Consultation Paper: Children's Champions and Pre-recording of Evidence July 2015*, August 2015, 8 <[http://www.legalaid.nsw.gov.au/\\_data/assets/pdf\\_file/0005/22469/Childrens-Champions-and-pre-recording-of-evidence-20150811.pdf](http://www.legalaid.nsw.gov.au/_data/assets/pdf_file/0005/22469/Childrens-Champions-and-pre-recording-of-evidence-20150811.pdf)> [accessed 20 January 2016].

<sup>113</sup> Department of Justice, Role Description: Witness Intermediary (Children's Champion), <[https://www.google.com.au/url?sa=t&rct=j&q=&esrc=s&source=web&cd=3&cad=rja&uact=8&ved=0ahUKEwjkeuCyLfKAhUEJJQKHdvOBaQQFggmMAI&url=http%3A%2F%2Ffiles.jobs.nsw.gov.au%2F66kd4m&usq=AFQjCNFDvobSSEyYyQzC8T6-76KF60NppA&sig2=tgocWo12\\_i6L7O0P2dn-dw](https://www.google.com.au/url?sa=t&rct=j&q=&esrc=s&source=web&cd=3&cad=rja&uact=8&ved=0ahUKEwjkeuCyLfKAhUEJJQKHdvOBaQQFggmMAI&url=http%3A%2F%2Ffiles.jobs.nsw.gov.au%2F66kd4m&usq=AFQjCNFDvobSSEyYyQzC8T6-76KF60NppA&sig2=tgocWo12_i6L7O0P2dn-dw)> [accessed 20 January 2016].



The court may order that the person ‘be present while the special witness is giving evidence *or is required in court for any other purpose*’ (emphasis added).<sup>117</sup> This suggests that the support person’s role may extend the witness’s oral evidence. However, this entitlement to support still only applies to *witnesses*. It follows that, if an accused is not proposing to give evidence, they are not entitled a supporter.

Additionally, the role of a supporter is limited to providing emotional support.<sup>118</sup>

## **RECOMMENDATIONS - Accessibility and Procedural Accommodation Australia**

The diverse support measures for accused persons set out in this section, give greater clarity to Australia’s human rights obligations for providing procedural accommodations. Based on this combination of practice, we recommend:

- **A baseline of *formal, non-voluntary procedural accommodations to be made available to accused persons with cognitive disability.***
- **Formal support persons require the development of minimum standards of training, experience and/or accreditation.**
- **Formal support should not preclude voluntary measures to assist accused persons with disabilities in the criminal justice system insofar as such voluntary measures are not needed to secure the right to a fair trial and to avoid potential indefinite detention under unfitness to plead provisions.**

## **Section 3 – Detention Dispositions throughout Australia**

As noted, ‘special hearing’ procedures used in most Australian jurisdictions are discriminatorily applied to persons with cognitive disability – even before courts get to the stage of making a detention order. Hence, even before the court or tribunal must decide on detention dispositions, would appear to violate the right to equal recognition before the law and access to justice in articles 12 and 13 of the *CRPD*. The *CRPD Committee* has stated that, irrespective of the mode of detention, declarations of unfitness to plead are inconsistent with the terms of the *CRPD*.

However, for the purposes of this senate committee inquiry, this Section considers the treatment of people *after* they have been found unfit to stand trial in Australian jurisdictions and makes recommendations to prevent the indefinite detention of persons with cognitive disability. This Section focuses on detention dispositions, rather than dispositions involving conditional or unconditional release into the community. There are four different models of detention available in state, territory and Commonwealth law:

- Indefinite terms — Western Australia, Queensland and Tasmania
- Nominal terms — Victoria, the Northern Territory and the Australian Capital Territory
- Limiting terms — New South Wales and South Australia

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<sup>114</sup> *Evidence Act 1977* (Qld) s 21(1)(b) (definition of ‘special witness’).

<sup>115</sup> *ibid* s 21(1AB).

<sup>116</sup> *ibid* s 21(2)(d).

<sup>117</sup> *ibid*.

<sup>118</sup> *ibid*.

- Definite terms —Commonwealth

Notwithstanding the broader human rights concerns, within current law, the procedure established under the *Crimes Act 1914* (Cth) for detention arguably goes furthest towards *CRPD* compliance. It does so by the use of fixed terms, akin to a sentence of imprisonment, which appears to be more consistent with the equality requirements of article 14 of the *CRPD*.

#### **ARTICLE 14 CRPD**

Article 14(1) states that:

States Parties shall ensure that persons with disabilities, on an equal basis with others:

- a) Enjoy the right to liberty and security of person;
- b) Are not deprived of their liberty unlawfully or arbitrarily, and that any deprivation of liberty is in conformity with the law, and that the existence of a disability shall in no case justify a deprivation of liberty.

Article 14(2) provides:

States Parties shall ensure that if persons with disabilities are deprived of their liberty through any process, they are, on an equal basis with others, entitled to guarantees in accordance with international human rights law and shall be treated in compliance with the objectives and principles of this Convention, including by provision of reasonable accommodation.

As noted, indefinite detention on the basis of disability is a violation of art 14 of the *CRPD*. In its concluding observations in relation to Australia, the Committee expressed concerns that ‘persons with disabilities who are deemed unfit to stand trial due to an intellectual or psychosocial disability can be detained indefinitely in prisons or psychiatric facilities without being convicted of a crime and for periods that can significantly exceed the maximum period of custodial sentence for the offence’.<sup>119</sup>

#### **DISPOSITIONS**

After a finding of unfitness to plead (and generally a special hearing), courts need to determine how to deal with the unfit defendant. Most Australian jurisdictions have moved away from the traditional ‘Governor’s Pleasure’ detention regime, which saw individuals detained until released by an executive order. This form of indefinite detention was criticised as an ‘antiquated and unjust’ system prone to arbitrariness and political interference.<sup>120</sup>

#### *Indefinite terms*

Despite the widely held view that the Governor’s Pleasure model is an inappropriate disposition, some jurisdictions still retain this system in substance, if not in form. For example:

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<sup>119</sup> Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Initial Report of Australia*, CRPD/C/AUS/CO/1 (21 October 2013) [31]. See also, Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Initial Report of Brazil*, CRPD/C/BRA/CO/1 (29 September 2015) [30]; Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Initial Report of Ecuador*, CRPD/C/ECU/CO/1 (27 October 2014) [28]; Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Initial Report of Germany*, CRPD/C/DEU/CO/1 (27 October 2014) [31].

<sup>120</sup> See, eg, Victoria, *Parliamentary Debates*, Legislative Assembly, 19 September 1997, 185 (Jan Wade, Attorney-General).

- The Western Australian regime still retains a Governor’s Pleasure scheme in both substance *and* form — an accused found unfit to plead is detained ‘until released by order of the Governor’ (albeit on the advice of the Mentally Impaired Accused Review Board).<sup>121</sup>
- In Queensland, the power to release an individual from a custodial order rests with an administrative body — the Mental Health Review Tribunal.<sup>122</sup>

The Tasmanian system is not, strictly speaking, Governor’s Pleasure detention. Release is a matter for the Supreme Court.<sup>123</sup> However, the term of detention remains indefinite and, unlike the remaining five states and territories, the detention is *not* subject to a nominal or limiting term.

#### *Nominal terms*

Victoria, the Northern Territory and the Australian Capital Territory have ‘nominal term’ systems.<sup>124</sup> These systems involve a nominal period of detention, fixed either by a court or by legislation. The nominal term is usually tied to the length of sentence that would have been imposed, if not for the finding of unfitness. For example, in the Australian Capital Territory and the Northern Territory, courts required to fix a nominal term equivalent to the sentence the accused would otherwise have received.<sup>125</sup> In Victoria, statute automatically sets the nominal term.<sup>126</sup>

Unlike a limiting term, or a definite sentence, detention is still indefinite and it does not lapse at the end of a nominal period.

#### *Limiting terms*

In New South Wales and South Australia, the court must set what is called a ‘limiting term’ equivalent to the ‘best estimate of the sentence the Court would have considered appropriate if the special hearing had been a normal trial of criminal proceedings against a person who was fit to be tried’.<sup>127</sup>

A limiting term is definite. An individual ceases to be a forensic patient when the limiting term expires,<sup>128</sup> and is accordingly entitled to leave any forensic facility in which they were detained. Health authorities are entitled to apply for extensions of custodial orders,<sup>129</sup> but barring this prospect, there is an end in sight.

#### *Commonwealth – fixed terms*

The *Crimes Act 1914* (Cth) takes an approach to detention following a finding of unfitness which is unique in Australia. If a court determines that a person is unfit to be tried, and will not become fit to be tried within 12 months, it may order that the person be detained in a hospital (but only if

<sup>121</sup> *Criminal Law (Mentally Impaired Accused) Act 1996* (WA) s 24(1).

<sup>122</sup> *Mental Health Act 2000* (Qld) ss 203(1), 207, 288, 293.

<sup>123</sup> *Criminal Justice (Mental Impairment) Act 1999* (Tas) s 24.

<sup>124</sup> *Crimes Act 1900* (ACT) ss 301(2); *Criminal Code Act 1983* (NT) s 43ZG; *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 28(1).

<sup>125</sup> *Criminal Code Act 1983* (NT) s 43ZG(2); *Criminal Code Act 1983* (NT) s 43ZG(2).

<sup>126</sup> *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 28(1).

<sup>127</sup> *Mental Health (Forensic Provisions) Act 1990* (NSW) s 23(1)(b). See also *Criminal Law Consolidation Act 1935* (SA) s 2690(2).

<sup>128</sup> *Mental Health (Forensic Provisions) Act 1990* (NSW) s 52(2)(a); *Criminal Law Consolidation Act 1935* (SA) s 2690(3).

<sup>129</sup> See generally *Mental Health (Forensic Provisions) Act 1990* (NSW) sch 1.

treatment is available, and the individual agrees to be transferred to a hospital) or other place (including a prison).<sup>130</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>131</sup>

A person detained under these laws may in fact be released before his or her specified period expires. The Act requires that the Attorney-General review the individual's ongoing detention every six months.<sup>132</sup> That review must involve a consideration of medical evidence, as well as any representations made by or on behalf of the detained individual.<sup>133</sup>

Section 20BC is an anomaly because, alone among the Australian jurisdictions, it provides for a truly definite term. Unlike the limiting term systems in New South Wales and South Australia, state authorities cannot apply to have the fixed term extended. Like a sentence of imprisonment, it gives the individual the certainty of a release date. But unlike a term of imprisonment, it also (at least in theory) caters for rehabilitation and reintegration through periodic reviews.

The Commonwealth unfitness laws were introduced in 1989 with the express intent of abolishing indefinite detention. When introducing the Bill, Land Transport Minister Robert Brown said:

...This Bill also provides an innovative and humanitarian regime to deal with the frequently and overlooked problem of mentally ill and intellectually disabled persons who come into contact with the criminal justice system. The existing legislation only provides limited options to deal with a person who has been charged with an indictable Federal offence where there is a finding of unfitness to be tried or not guilty on the grounds of mental illness. One of the most serious criticisms of the existing law is that a person may be kept in custody indefinitely, without any statutory requirement that his or her case be reviewed. Moreover, a person found unfit to be tried is kept in custody indefinitely without even a prima facie case being established that he or she committed the alleged offence.<sup>134</sup>

Section 20BC has received little judicial attention. The Act and its extraneous materials give no guidance as to how a judge is to fix the period of detention, beyond stating that it cannot exceed the maximum penalty available for the offence charged.

However, the statutory language is identical to that in s 20BJ, which concerns detention following acquittal on the grounds of mental impairment. The New South Wales Court of Appeal and the Victorian Supreme Court have interpreted that provision as requiring that 'the length of the period of detention should be fixed by reference to the sentence which would have been imposed if the person had been found guilty'.<sup>135</sup> That is, the Act implicitly requires that the judge treat the process of fixing a period of detention as if it were a sentencing exercise. If the accused had been charged with multiple offences, then the principle of totality applies as it ordinarily would and the judge must

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<sup>130</sup> *Crimes Act 1914* (Cth) s 20BC(2).

<sup>131</sup> *ibid.*

<sup>132</sup> *ibid* s 20BD(1).

<sup>133</sup> *ibid* s 20BD(2).

<sup>134</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 5 October 1999, 1603 (Robert Brown, Minister for Land Transport and Shipping).

<sup>135</sup> *R v Goodfellow* (1994) 33 NSWLR 308; *R v Robinson* (2004) 11 VR 165.

consider questions of cumulation and concurrency.<sup>136</sup> Chief Justice Hunt of the New South Wales Court of Criminal Appeal described this as the ‘only logical approach’.<sup>137</sup>

There is some uncertainty, in the case law considering s 20BJ, as to how (or even whether) the accused’s impairment may be relevant to the term fixed. In *R v Goodfellow*, the New South Wales Court of Criminal Appeal held that the approach outlined above ‘would necessarily exclude any account being taken of that person’s mental illness or any state of mind aggravated by that mental illness’.<sup>138</sup> Taken on its face, this statement suggests that a court fixing a term under s 20BJ (and by extension s 20BC) may not consider the mitigatory impact of a psychosocial or cognitive impairment operating *either* at the time of the offence or at the time of trial.

However, as Kellam J noted in *R v Robinson*, ignoring an impairment which may lie ‘at the root of the [alleged conduct] ... is artificial indeed’.<sup>139</sup> His Honour said:

I have great difficulty in undertaking the notional process of establishing what sentence of imprisonment would have been imposed upon Mr Robinson had he been found guilty of the offences in question without any consideration of the nature of his mental illness or his state of mind at the time of the offence.<sup>140</sup>

Justice Kellam concluded that, when fixing a term, he was obliged to consider the nature of the offence and the culpability of the offender, including any impairment operating *at the time of the offence* which might have a bearing on the offender’s culpability.<sup>141</sup> However, an impairment operating at the time of fixing the notional sentence is not relevant; nor is a prognosis.<sup>142</sup> Those are matters for the Attorney-General to consider when conducting the six-month periodic reviews.<sup>143</sup>

## RECOMMENDATIONS – INDEFINITE DETENTION

The CRPD Committee has repeatedly called for an end to the use of indefinite detention following findings of unfitness to plead. Indefinite detention violates both art 14 and the non-discrimination provision in art 5 of the *CRPD*. Accordingly, and notwithstanding the *CRPD Committee’s* directive that the CRPD requires the abolition of unfitness declarations themselves, the *CRPD* unequivocally requires abolition of indefinite detention following unfitness declarations. Hence,

- **the indefinite and nominal terms used in Western Australia, Queensland, Tasmania, Victoria, the Northern Territory and the Australian Capital Territory are inconsistent with the *CRPD*.**

A question arises over whether the New South Wales and South Australian limiting terms can truly be characterised as ‘definite’. While they do automatically expire, they may also be extended, including by health authorities – potentially indefinitely.<sup>144</sup> Particularly given the role of health

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<sup>136</sup> *R v Goodfellow* (1994) 33 NSWLR 308, 311.

<sup>137</sup> *ibid.*

<sup>138</sup> *ibid.*

<sup>139</sup> (2004) 11 VR 165, 171 [25].

<sup>140</sup> *ibid* 171 [25].

<sup>141</sup> *ibid* 173 [31].

<sup>142</sup> *ibid* 173 [32].

<sup>143</sup> *ibid.*

<sup>144</sup> *Mental Health (Forensic Provisions) Act 1990* (NSW) sch 1.

authorities, it seems inevitable that a decision to extend a custodial order will be made on the basis of impairment, in violation of art 14. Hence,

- **while limiting terms are an improvement on indefinite terms, it appears they do not comply with the *CRPD* and still retain scope for indefinite detention.**

Section 20BC of the *Crimes Act 1914* (Cth) is in a different category, given that it is a definite term which cannot be extended. It may be that, in 1989, the Commonwealth Parliament inadvertently created a model of detention following an unfitness declaration which, at least among Australian jurisdictions, most closely complies with the *CRPD*.

This observation will remain relevant even if Australia embraced the *CRPD Committee* recommendation to abolish declarations of unfitness. After all, some process will likely be required to identify when an accused person cannot express wishes during proceedings and/or cannot independently participate to the extent of being able to challenge claims made against him or her. Hence,

- **dispositions that occur following such a process – assuming procedural accommodations have been consistently provided – could be developed in reference to Section 20BC of the *Crimes Act 1914* (Cth), particularly its provision for fixed terms.**

## **Section 4 – Research into Supports for Accused Persons with Cognitive Disabilities who may be Found Unfit to Plead**

The aim of our research project is to develop practical and legal solutions to the problem of people with cognitive disability, including Indigenous people with cognitive disability, being found “unfit to plead” and subject to indefinite detention in Australia. A secondary aim is to ensure that people with cognitive disability can participate, on an equal basis with others, in criminal proceedings brought against them. This secondary aim responds to the issue of people who may not be able to understand and communicate in order to participate in a trial, but who nevertheless proceed through typical trials due to the inappropriateness or inaccessibility of unfitness rules in their current form.

The researchers conducting the project are Chief Investigator (CI), Professor Bernadette McSherry (Foundation Director, Melbourne Social Equity Institute, University of Melbourne (UoM)); CI, Professor Kerry Arabena (Chair of Indigenous Health, UoM); CI, Professor Eileen Baldry (School of Social Sciences, University of New South Wales (UNSW)); CI, Dr Anna Arstein-Kerslake (Academic Convenor, Hallmark Disability Research Initiative, Melbourne Law School, UoM) and Post-Doctoral Research Fellow, Dr Piers Gooding (Melbourne Law School, UoM), Research Assistant, Louis Andrews (UoM) and Research Assistant, Dr Ruth McCausland (UNSW).

The project is hosted by Melbourne Social Equity Institute and Hallmark Disability Research Initiative at the UoM. It is funded as part of the Australian Government Department of Social Services, National Disability Research and Development Research Scheme.

### **Project Aims:**

- Analyse the social, legal and policy issues leading to unfitness to plead findings and indefinite detention in Australia, with a strong focus on the experiences of Indigenous people
- Provide and evaluate supported decision-making for up to 60 individuals with cognitive impairments who have been charged with a crime and who may be subject to unfitness to plead processes
- Recommend options for the reform of unfitness to plead law and policy

The expected outcomes are the:

- Analysis of the differences and similarities in unfitness to plead laws and policy across the Australian states and territories
- Development and evaluation of a practice model in supported decision-making in the criminal justice context that can be used in Australia and abroad
- Creation of recommendations for law and policy reform in compliance with human rights standards.

For the practical element of the project, the researchers will work with three community legal centres – the North Australian Aboriginal Justice Agency (Northern Territory), the Intellectual Disability Rights Service (New South Wales) and the Victorian Aboriginal Legal Service. The research will be cross-jurisdictional. A ‘supporter’ will be employed at each service to help ensure accused persons understand the case against them, the legal processes and the significance and consequences of decisions such as entering a plea. It is hoped that the supporters will help people participate in the trial process, including avoiding findings of unfitness to plead where possible.

For the purposes of this submission, the Senate Committee Inquiry may be interested in key dates for the project. The Committee may consider undertaking a site visit or further consultation with project participants.

**Key project dates prior to the Senate Committee’s reporting date on July 30:**

- **Mid-May** (precise date to be confirmed): One to two days of training will occur in Melbourne. Trainees will include a supporter and lawyer from each legal organisation. Guest presentations will occur by experts in the field, including persons with cognitive disability who have had experience in the criminal justice system.
- **Late May until October:** ‘Supporters’ will begin providing support at each legal organisation, based in Sydney, Darwin and Melbourne. Support will last six months.

*This project is jointly funded by Commonwealth, state and territory governments under the National Disability Special Account, administered by the Department of Social Services on behalf of the Commonwealth, state and territory Research and Data Working Group.*

## **Section 5 – Summary of recommendations**

In summary, we recommend the following:

1. **Australia's laws on unfitness to plead should shift from assessing competence to stand trial to facilitating participation by people with disability in criminal proceedings on an equal basis with others.**
2. **Accessibility measures for court proceedings should be adequately funded and provided as a matter of rights and entitlements, and formal supporters should be subject to minimum standards of training, experience and/or accreditation.**
3. **Good practice should be identified for providing formal support to accused persons at risk of being unable to participate in criminal proceedings and/or being deemed unfit to stand trial. (Our support model is an example of a practice that seeks to support accused persons with cognitive disability, including Indigenous people with cognitive disability, to prevent Australians being found unfit to plead and detained indefinitely.)**
4. **Unfitness to plead laws that allow for indefinite and nominal terms, which are used in Western Australia, Queensland, Tasmania, Victoria, the Northern Territory and the Australian Capital Territory, should be reformed to prevent indefinite detention of persons with cognitive disability. While limiting terms are an improvement on indefinite terms, they still retain scope for indefinite detention.**
5. **Australian law reformers should develop a new threshold to identify when an accused person cannot participate in criminal proceedings to the extent of being able to express wishes, instruct counsel and/or challenge claims made against him or her – even after the provision of accessibility measures. This threshold could comply with the CRPD and could activate more intensive accessibility measures to ensure procedural fairness for the accused on an equal basis with others, including securing the same standard of proof and probative value of prosecution evidence.**
6. **Where criminal sanctions are imposed as a result of such alternative processes, they should occur on an equal basis with others. This could be achieved by setting fixed terms and regular review of detention by an independent body, similar to Section 20BC of the *Crimes Act 1914* (Cth).**

*This submission was prepared by Dr Piers Gooding, Dr Anna Arstein-Kerslake, Mr Louis Andrews and Prof Bernadette McSherry. For enquiries, please contact Dr Gooding. e: [p.gooding@unimelb.edu.au](mailto:p.gooding@unimelb.edu.au)*