

# RESPONSE TO QUESTIONAIRE ON SUPPORTS FOR PERSONS WITH DISABILITIES

**21 October**

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| **About us**  **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.   *This submission was prepared by Dr Piers Gooding and Ms Sarah Mercer. For enquiries, please contact Dr Gooding. e:*[*p.gooding@unimelb.edu.au*](mailto:p.gooding@unimelb.edu.au) |

# Summary

The University of Melbourne’s Melbourne Social Equity Institute and the Disability Research Initiative welcome the opportunity to respond to the call for information on supports provided to persons with disabilities. This submission is concerned with questions 1(c)(d), 2 and 6 of the Questionnaire.

In responding to these questions we will focus on a specific project related to unfitness to plead laws and access to justice for persons with disabilities in the criminal justice system. We believe this project is innovative and helps to realise a key objective of the *UNCRPD* to uphold the equal standing of persons with disabilities before the law.

**The Unfitness to Stand Trial project**

The *Unfitness to Plead and Indefinite Detention of Persons with Cognitive Impairments: Addressing the Legal Barriers and Creating Appropriate Alternative Supports*[[1]](#footnote-1) (‘Unfitness to Stand Trial Project’) is aimed at developing a supported decision-making model for persons with disabilities charged with a crime who are at risk of being found unfit to stand trial and who then would face the risk of indefinite detention. The project seeks to address the equality demands of the *CRPD* to determine how Australian criminal law may be reformed to respect the human rights of persons with cognitive disabilities.[[2]](#footnote-2) Particular focus is paid to Indigenous people with cognitive disabilities who are at a heightened risk of being subject to legal capacity deprivations following a finding of unfitness to stand trial.

The practical component of the project has seen the development of a program of formalised support for accused persons with cognitive disabilities in three jurisdictions. Evaluation of the support – which is underway at the time of writing – includes testing the following hypothesis:

*‘Support persons’, specifically trained to assist accused persons with disabilities, when working alongside legal counsel, can assist accused persons with cognitive disabilities to participate meaningfully in criminal proceedings. Such support will reduce the need for unfitness to stand trial determinations. Support will also promote the participation of those at risk of being found unfit to stand trial or being unable to participate in criminal proceedings, and will help prevent the indefinite detention that may result from current unfitness to stand trial laws.*

Overall, the program has the potential to offer practical materials for achieving access to justice for people with cognitive disabilities on an equal basis with others. This contribution may be significant, and is likely to be relevant internationally, given the dearth of similar mechanisms worldwide.

We have written a number of research papers on the topic of the *UNCRPD* and unfitness to stand trial laws that have been published or are forthcoming which go into further depth on the human rights requirements and our approach to supported decision-making to promote participation in criminal justice processes.[[3]](#footnote-3) Please see attached for an article that explains at length the gaps and best practices in supporting persons with cognitive disabilities in the criminal justice system with particular regard to unfitness to stand trial and our project.

# Questionnaire on the provision of support to persons with disabilities

1. **Please provide information on the following services that are available for persons with disabilities in your country, including data on their coverage, geographic distribution and delivery arrangements, funding and sustainability, challenges and shortcoming in their implementation:**
2. **Support in decision-making, including peer support; and**
3. **Communication support, including support for augmentative and alternative communication.**

As part of the Unfitness Project, the supporters are undertaking a number of tasks to assist accused persons with cognitive disabilities, including by:

* Providing communication assistance, including by learning individual communication-style, contacting relevant family or other trusted persons for advice and assistance, and providing accessible written or visual material.
* Developing materials for community legal centres to assist lawyers and other staff to represent persons with cognitive disabilities, including drawing together existing government and non-government resources, creating plain language materials, pictograms, and lists of relevant support services.
* Developing relationships between community legal centres and disability support services, and other relevant support services.
* Spending additional time with accused persons with disabilities (as compared to the time lawyers can spend with clients) in order to explain criminal proceedings.
* Connecting multiple government or community support agencies that may be involved in a person’s life, including disability, mental health, drug and alcohol services, in order to gain information or propose solutions to prosecution.
* Providing advice to lawyers and, where possible, courts, about possible avenues for making criminal proceedings more accessible; for example, through pre-recorded video testimonials, frequent breaks, education tools for improving understanding of proceedings, and the presence of a trusted person.

In the courtroom context, the precise definition of terms such as ‘reasonable accommodation’, ‘support to exercise legal capacity’ and ‘procedural and age-appropriate accommodations’ have been subject to detailed examination and are likely to remain contested.[[4]](#footnote-4) However, it does not seem controversial to suggest that such supports when assisting accused persons with disabilities might include:

* ‘special witness declarations’ which activate support measures, such as the appointment of a court-based supporter for witnesses;
* additional breaks in court proceedings;
* counsel acting as a supporter by carefully explaining court processes to the accused person in an accessible way;
* providing a role for a support person (such as a family member or a more formal support person);
* adapting adversarial process so that the Court can ensure counsel does not mislead or confuse the accused;
* ensuring language is accessible or slowed to allow interpretation and/or explanation;
* ‘easy English’ summaries of trial proceedings including provision of dot-point summary at the end of each court day;
* video testimony for those who may find the courtroom environment distressing or confusing;
* educational sessions/programmes for accused who are ‘borderline unfit’ and may be considered fit to stand trial following an education programme; and
* modifying court rooms to make them more accessible.

This list of support measures has been drawn from measures that are already being implemented or recommended in Australian courts. The supports are listed here to give practical grounding to calls in international human rights law for positive measures to assist persons with disabilities to take part in criminal proceedings.

Consider the following case study from existing law:

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| **Case study from existing law highlighting good practice:**  In *GAE v Western Australia*[[5]](#footnote-5) the court allowed for the use of regular breaks, a closed-circuit television room so the person could provide a statement, and the assistance of a family member to assist in communication following a ‘special witness declaration’. These supports were considered appropriate safeguards that enabled the defendant, who may have had cognitive disabilities in addition to a hearing impairment, to participate in proceedings. As a result, the accused was found to be fit to stand trial.[[6]](#footnote-6) It is noteworthy that the court declaration that the accused should be considered a ‘special witness’ helped specifically to overcome the challenges faced in the adversarial court context, which, in other courts, has led to a finding of unfitness to stand trial.[[7]](#footnote-7) |

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| **Case study from the Unfitness to Plead Project Support Program:**  The following case was relayed in an interview with a community legal centre lawyer:  *We’ve got other [cases] where the issue was somebody hitting a staff member in a group home. That particular person should – you know they 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 they 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 somewhere, but by this time she had spent four months in prison. So somebody’s got to be watching.*  *And, I don’t know whether the solicitors feel powerless as well but… we find we can achieve a lot just because we’re persistent. 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.*  In contrast, consider the following case of a client support worker assisting a person in a very similar situation:  A man with a cognitive disability was charged with assaulting a staff member of a group home that he lived in. Lawyers were seeking ways to challenge the case. The client support worker suggested that they should read staff protocol for that particular service provider. The supporter identified that the staff member had not followed staff protocol, which the supporter was easily able to locate and compare against the charge sheet. This was something the CLC lawyer admitted never having thought to do. As a result, the charges were dropped, and no hearing was required. The group home reportedly re-trained staff on the service’s staff protocol. |

1. **Please explain how persons with disabilities can access information about the existing services referred to in question one, including referral procedures, eligibility criteria and application requirements.**

At present, the support program is ending, after its six month trial period. While our support program was only available in three community legal centres for a sixth month period in 2016, we see potential for this program to be rolled out throughout Australia and to be formally implemented so that those with who are at risk of being found unfit to stand trial, or those who require supports in order to participate, can access the program.

Several law reform inquiries on unfitness to stand trial laws have occurred in Australia since it signed and ratified the *UNCRPD*.[[8]](#footnote-8) All recommended the introduction of formal supports for those with cognitive disabilities in the criminal justice system,[[9]](#footnote-9) including formal support schemes related to unfitness to stand trial laws.[[10]](#footnote-10)

1. **Please describe to what extent and how are persons with disabilities and their representative organizations involved in the design, planning, implementation and evaluation of support services.**

The support program brings together community legal centres, disabled peoples organisations, academics, legal professionals and other stakeholders, to explore solutions which take into account international human rights law, and domestic law and policy. An important component of the project is the National Advisory Panel, which includes Indigenous people and people with disabilities and their representative organisations (including mental health consumer advocates and self-advocates with intellectual disabilities), and representatives from a number of professions, including legal practitioners, clinicians and researchers. The National Advisory Panel informed the development of training for supporters, which included the employment of self-advocates, including persons with intellectual disability, acquired brain injury, and those with experience of the criminal justice system, as well as experts in a range of fields, including communication, Indigenous cultural knowledge and legal representation of persons with disabilities.[[11]](#footnote-11)

As such, the support program was developed and will be evaluated using elements of participatory and emancipatory research. These elements include:

1. ‘Co-production’, wherein research material was generated in partnership with people with disabilities and their representative organisations, for example, through national advisory panel including Indigenous experts and those with disabilities;
2. Research was targeted at altering the inaccessible legal system toward *CRPD* compliance;
3. Participatory action research was undertaken, wherein Aboriginal-controlled and disability-specific community legal centres were resourced to provide additional support to accused persons with disabilities and to feedback findings to researchers;
4. The research was aimed at a practical outcome for persons with disabilities;
5. The views of support recipients themselves were sought in the evaluation of the program, and the national advisory panel will assist in analyzing this material;
6. Continuous dissemination of research findings, including through articles and reports to promote impact, including in accessible formats.

***Should you need further information, want to request copies of our articles that explore these issues in greater depth or have questions concerning this submission, please contact Dr Piers Gooding, Post-Doctoral Research Fellow on*** [***p.gooding@unimelb.edu.au***](mailto:p.gooding@unimelb.edu.au)

1. 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. Research ethics approval for the project has been approved through the University of Melbourne management and review of human ethics. Ethics IDs: 1646167; 1545653.1. [↑](#footnote-ref-1)
2. Note: We are using the term ‘cognitive impairments’ and ‘cognitive disabilities’ refer to a range of disabilities affecting cognition, including intellectual, psychosocial and other disabilities. [↑](#footnote-ref-2)
3. See Piers Gooding, Anna Arstein-Kerslake, Louis Andrews and Bernadette McSherry, ‘Unfitness to Stand Trial and the Indefinite Detention of Persons with Cognitive Disabilities in Australia: Human Rights Challenges and Proposals for Change’ (2017) 40(3) Melbourne University Law Review; Piers Gooding, Sarah Mercer, Bernadette McSherry and Anna Arstein-Kerslake, ‘Supporting Accused Persons with Cognitive Disabilities to Participate in Criminal Proceedings in Australia – Avoiding the Pitfalls of Unfitness to Stand Trial Laws’ (forthcoming); Anna Arstein-Kerslake, Piers Gooding, Louis Andrews and Bernadette McSherry, ‘Human Rights and Unfitness to Plead: The Demands of the Convention on the Rights of Persons with Disabilities’ (forthcoming); Melbourne Social Equity Institute and Disability Research Initiative, *Submission to Senate Community Affairs References Committee inquiry on the indefinite detention of people with cognitive and psychiatric impairment in Australia* (21 March 2016) University of Melbourne <http://www.socialequity.unimelb.edu.au/>. [↑](#footnote-ref-3)
4. For a canvassing of the key debates, see P Gooding, ‘Navigating the Flashing Amber Lights of the Right to Legal Capacity in the United Nations Convention on the Rights of Persons with Disabilities: Responding to Major Concerns’ (2015) 15 *Human Rights Law Review* 45. See also Eilionóir Flynn and Anna Arstein-Kerslake, ‘Legislating Personhood: Realising the Right to Support in Exercising Legal Capacity’ (2014) 10(1) *International Journal of Law in Context* 81; P Weller, ‘Reconsidering legal capacity: radical critiques, governmentality and dividing practice’ (2015) 23(3) *Griffith Law Review* 498. [↑](#footnote-ref-4)
5. [2015] WADC 5. [↑](#footnote-ref-5)
6. Ibid. [↑](#footnote-ref-6)
7. [2013] ACTSC 154. [↑](#footnote-ref-7)
8. Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Report No 124 (2014) 196, 30; New South Wales Law Reform Commission, People with cognitive and mental health impairments in the criminal justice system: Diversion, Report 135 (June 2012) 34; Department of the Attorney General, *Review of the Criminal law (Mentally Impaired Accused) Act 1998: Final Report*, Government of Western Australia (April 2016) 73, 74. [↑](#footnote-ref-8)
9. See New South Wales Law Reform Commission, *People with cognitive and mental health impairments in the criminal justice system: Criminal Responsibility and consequences*, Report No 138 (2013); Victorian Law Reform Commission, *Review of the Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic), Report No 28 (2014), 1. [↑](#footnote-ref-9)
10. See New South Wales Law Reform Commission, above n 9, Rec 2.2; Victorian Law Reform Commission, above n 9, 89 [3.124]-[3.125]; Australian Law Reform Commission, above n 8, 199-200 [7.35]-[7.40], Rec 7—1. [↑](#footnote-ref-10)
11. For more information, please see an upcoming paper: Piers Gooding, Sarah Mercer and Bernadette McSherry, ‘Participatory Research in Disability Law and Policy – A Human Rights Requirement’ (upcoming). [↑](#footnote-ref-11)