The Access to Justice Knowledge Hub

 August 15, 2019

 By electronic submission to sr.disability@ohchr.org

Hon. Catalina Devandas-Aguilar

Special Rapporteur on the Rights of Persons with Disabilities

Palais des Nations

1211 Geneva 10

Switzerland

RE: **Research on Good Practices to Ensure Effective Access to Justice for Persons with Disabilities**

Dear Special Rapporteur:

 The Access to Justice Knowledge Hub is very pleased to submit this response to your request for information on good practices to ensure effective access to justice for persons with disabilities. We have no objection to our contribution being posted on the OHCHR website.

**Introduction**

The Access to Justice Knowledge Hub (the “Hub”) aggregates approaches, expertise, practice, and tools from around the world, to advance the evolution of justice systems so that they enable full and fair participation of persons with disabilities in the justice system. The Hub builds on the knowledge of its participants from a variety of countries (Israel, Kenya, Mexico, South Africa, Spain, United Kingdom, United States, Zimbabwe) to disseminate tools and support for solutions, closely linked with people’s experience of discrimination and with the overarching goal of full participation. We seek to help create an enabling environment where all participants, regardless of their role in the process, can participate and be equally and fairly heard in justice procedures.

The justice system, of course, mediates much of our lives. Article 13 of the Convention on the Rights of Persons with Disabilities (CRPD) recognized that fairness in the criminal justice system is essential to the accused, the victim and, ultimately, to society at large. Countless other areas of life, including interpersonal disputes, entitlements to benefits, family related matters, and enforcement of civil and human rights, are all adjudicated by judicial or administrative justice systems. Unfortunately, persons with disabilities receive unfair and unequal treatment in virtually every aspect of the systems. The consequences are profound. For instance:

* “International literature recognises that people with disabilities are at greater risk of crime than [those without disabilities], but that crime against people with disabilities is significantly under-reported and often fails to proceed to prosecution.” [[1]](#footnote-1) Persons with disabilities are easy targets for abuse and violence far beyond their representation in the population.[[2]](#footnote-2)
* Suspects and defendants with disabilities are at an increased risk of giving (including being coerced to give) false confessions, including to serious and even capital crimes.[[3]](#footnote-3)
* Victims, defendants, and witnesses alike have their testimony excluded or discredited and are denied a fair trial.[[4]](#footnote-4)
* Those who are sentenced find themselves in prisons and jails that lack accommodations, leading to mistreatment and abuse and unequal access to reentry and reintegration services.[[5]](#footnote-5)

Suspects and defendants with disabilities, particularly intellectual and psychosocial disabilities, are at higher risk than those without disabilities of being deprived of their liberty due to arguments of medical necessity.

 We appreciate your attention to these serious issues. We have drawn on the experiences and expertise of Hub members and hope that the international examples of legislation, policies, practices, and institutional measures will be of assistance to you in your important work. Rather than provide you with an annex of documents, we have included links to information about each of the services we highlight in our contribution. The links appear in the footnotes. We will be pleased to provide more information, including documents, at your request.

In preparing our response, we have also drawn on the findings and recommendations of several reports and recommendations of other UN committees and officials. In particular, we have benefitted from reports of the Special Rapporteur on Violence against Women.[[6]](#footnote-6) Among other areas of investigation, those reports address the serious barriers faced by women with disabilities in the justice system. In addition, we have benefitted from the reports and General Comments of the Committee on the Rights of Persons with Disabilities.[[7]](#footnote-7)

Our contribution will focus on challenges in participating in justice system procedures relating in particular to the use of language and communication. We recognize that how a person communicates may depend on one or more factors that are physical, intellectual, pychosocial, or be related to other disabilities. In a rule-ridden justice system, based on communicating in a linear highly verbose way, persons who do not communicate traditionally are adversely affected on account of their disability. It is this challenge, and responses to it, that our contribution addresses. We believe and hope that your report will take prior international guidance important steps *further* and provide much needed guidance on enabling people who are marginalized and left out to participate equally and effectively.

**I. Barriers to fair and equal access for persons with disabilities in the justice systems.**

 It is widely acknowledged that persons with disabilities, regardless of their roles, are at a disadvantage in both criminal and civil justice systems. The fact that you are investigating these issues is proof enough. Despite some exciting and innovative efforts to accommodate persons with disabilities by eliminating discriminatory aspects of the systems, several of which we describe below, powerful barriers and strong resistance remain. We think that a description of the barriers will inform any review of innovative and necessary programs.

 Many of these barriers are manufactured, often procedural in nature, and can, therefore, be dismantled by changes in laws, policies, and practices. Others arise from the non-inclusive systems that do not know how to understand someone who communicates in other than the typical way. The second kind of barrier may be more difficult, but hardly impossible, to break down. Nearly every one of these barriers we describe is founded in stigma and is the result of a lack of knowledge and experience.[[8]](#footnote-8)

 Public systems are non-inclusive in part because of the long history of isolating and segregating people with disabilities from society. Historically, they have been placed outside the mainstream of life, being marginalized in housing, work, education, and recreation. Despite significant progress in integration and notwithstanding the CRPD, many people with disabilities still live in segregated settings.

 No matter what the etiology of the barrier, the result is the same -- an uneven, and consequently, an unfair and unequal, playing field.

 Article 19 of the CRPD, of course, recognizes the need for societies to achieve full inclusion. The programs we describe facilitate inclusion.

 In this contribution we do not address physical access barriers. The architectural solutions are reasonably straight forward, albeit not always applied. We also do not focus on training programs, although we recognize their importance and some Hub members have designed particularly effective ones.[[9]](#footnote-9) Rather, we focus on barriers that arise in relation to disabilities that affect cognition and/or communication. Some of the barriers to equal access for persons with disabilities to the justice system which Hub members frequently witness include:

* That the person with a disability, for example, physical, sensory, intellectual or psychosocial, communicates differently (e.g., has limited use of vocabulary, makes idiosyncratic use of words, uses facial and body gestures differently) or uses non-traditional means of communication that are not understood by many others. Such differences in communication and alternative communication measures are likely to be perceived as a problem with the person rather than the system and translate to a perception that the person, or of the testimony by the person, is not credible.
* Medicalized concepts of disability are ingrained in many justice systems.[[10]](#footnote-10) Consequently, the systems often rely too heavily on a medical model to the exclusion of more social and developmental theories or, more importantly, the experience of the person with disability.
* Concepts of capacity discriminate against persons with disabilities either inherently or in their application.[[11]](#footnote-11) The so called “insanity defense,” rules about competence to stand trial, and judgments about a witness’s capacity to testify all have serious consequences for persons with disabilities. For instance, in a civil case, a person with a disability may not have the right to pursue or defend litigation except through a guardian or other surrogate. Persons who are found incompetent to stand trial may spend years in institutions to have capacity “restored” -- denied both their freedom and the right to defend themselves. Witnesses who are not allowed to testify are denied any participation in the process. Civil litigants who can act only through a surrogate are denied the right to enforce or defend their rights.
* Like others in our societies, court officials, clerks, judges, juries, lawyers, probation and parole officers, are influenced by irrational but widely accepted stigma and other misconceptions about persons with disabilities and their abilities to communicate thereby erecting barriers to full and equal access.
* Justice systems, particularly courts, are bound by traditions and customs, some of which are archaic. Many are incomprehensible and confusing enough to the general population, and, therefore, all the more so to persons with cognitive and communication disabilities.
* Court systems are often resistant to change and adaptation. Some rules and customs are so woven into the fabric of the system that they are very difficult to modify, even in the face of strong evidence that they deny access to certain groups of people.
* Processes and rules are often complex and inflexible. Strict timelines, mandated written forms, required legal language, complex notice rules and the like may be difficult and inaccessible to some persons with disabilities, particularly those without lawyers or other advocates. Indeed, persons with disabilities who cannot read can be at a serious disadvantage.
* Some accommodations necessary to ensure access for persons with disabilities may appear to be (but need not be if properly designed) contrary to the rights of others. For instance, many criminal justice systems have struggled with (and resolved) issues that arise when a victim witness for understandable emotional reasons cannot testify in the presence of the defendant.

In what follows we will (1) show how, in practice, accommodations are a tool that enable participation and there is no need to resort to “capacity” determinations; (2) describe the kinds of accommodations that experience shows are effective; and (3) provide guidance on systemic-level changes (the kinds of laws and policies that need to be in place) for full participation to be possible. We note here, as we will throughout this contribution, that accommodations apply across the board whichever role the person with the disability is in and at whatever stage of the process.

**II. Principles for fair and equal access.**

In recognition of these barriers, the Hub was created on the idea that a fair and equal system of justice must operate pursuant to certain principles. Rather than respond serially to each of the five categories in your request, we have listed specific principles which are among those we have chosen to guide the work of the Hub and best inform how to enable those with disabilities affecting cognition and/or communication equal access to justice. After each principle we have a brief explanation and then describe good or promising efforts undertaken in our members’ nations (and others we are aware of) that we believe are consistent with the stated principle.

Although we describe what we believe to be very creative responses to the access barriers facing persons with disabilities, we recognize that many of the things we describe are not yet fully conceptualized or always fully or faithfully implemented and evaluated. We will point this out whenever it is appropriate to do so.

**A. Where we begin.**

We start with underlying teachings of the CRPD, which although they may seem self-evident, are worthy of repetition in this context. That is, first, persons with disabilities have the right to fair and equal access to and full participation in the justice system. This includes respect for inherent dignity, individual autonomy, including the freedom to make one’s own choices, and personal independence and non-discrimination.

Second, States Parties have the obligation to ensure fairness and equality through the effective provision of programs and services necessary to accommodate a person’s disability and through the modification of policies and practices to ensure a playing field that is to that for persons without disabilities; moreover, accommodations should be firmly integrated into the justice system, through formal policies, rules, and domestic legislation.

Modifications and accommodations, individually designed to be appropriate to the person, must be available at every stage of the person’s interaction with the justice system, from, for instance, first encounter, to testimony, through verdict, sentencing, incarceration, and reentry into society. Moreover, the government has a responsibility to adequately fund the accommodations and to make them available.

 Of course, modification and accommodations cannot be considered or adopted in a vacuum. Our principles call for consideration and adoption of changes that are deep, effective, meaningful, and lasting.

 Accordingly, we suggest certain principles that we believe may help to guide and inform your study. (There certainly are others, but we have chosen to begin the Hub’s efforts by focusing on these.) Each is listed below and after a statement and an explanation of the principle, you will find one or more brief examples of how nations are responding.

**B. Principles**

***Principle 1*: Because many persons with disabilities experience justice systems as confusing, rigid, rule-bound, and intimidating, systems must make available services and program and design and modify policies, rules, and practices to create an enabling environment where all parties – regardless of disability -- can have equal access and fair participation.**

This principle, and those that follow and flow from it, is not about relaxing the rules to create special rights for and an advantage to persons with disabilities. Rather, it seeks to equalize the process in ways that remain firmly within the justice system context and do not compromise the due process rights of others.

Accommodations, which are at least as we interpret them, do not “belong” to the victims only, or to defendants only. Access and accommodations apply across the board whichever role the person with the disability is in, in whatever forum, and at whatever stage of the process. They impact the relationship among the parties and between the parties and the tribunal. Since the accommodations serve to provide everyone an equal opportunity to fully participate, all the parties, the court, and society benefit.

*Examples of programs, services, policies and legislation to address Principle 1.*

a. Israel: Accommodations apply to all parties. Unfortunately, persons with psychosocial disabilities are not entitled to accommodations during police investigations under current legislation, although in practice the police often reach out to “intermediaries”[[12]](#footnote-12) in such cases, mostly through a disability rights organization.[[13]](#footnote-13) The better practice would be to make the use of this accommodation mandatory regardless of the nature of the person’s disability.

b. Mexico: Mexico’s disability rights statute recognizes, although in only general terms, the right to equal access to courts.[[14]](#footnote-14) The Mexican Criminal Proceedings Law recognizes the right to procedural accommodations of persons with disabilities, either victims or defendants.[[15]](#footnote-15) Although this constitutes a very significant step for guaranteeing access to justice for persons with disabilities, this provision has not been implemented in practice in the country. Since March 2017, advocates have developed a program in Mexico City to implement procedural accommodations for persons with intellectual and psychosocial disabilities who faced the criminal justice system as witnesses, victims or offenders.[[16]](#footnote-16) This program, the first of its type in Latin America, entails recruiting and training a team of justice facilitators, who can identify the barriers faced by each individual, and propose modifications to the proceeding in order to guarantee effective communication and participation. Therefore, even though the law only generally references accommodations, without creating process around them, pilots involving civil society and the court system have sprouted, to introduce the practice of intermediaries. This is an important pathway to support subsequent legislative change.

c. U.S: Two examples from the U.S. are instructive, though neither is perfect in design or implementation.

i. Americans with Disabilities Act: The Americans with Disabilities Act (ADA) was enacted to “provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.”[[17]](#footnote-17) Title II of the ADA provides that “no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.”[[18]](#footnote-18) The U.S. Supreme Court has held that Title II’s requirement of program accessibility includes the right of access to courts.[[19]](#footnote-19) The Department of Justice has provided practical guidance to criminal justice systems and courts on the implementation of Title II.[[20]](#footnote-20) Although the ADA has been federal law since 1990, adherence is remains incomplete at best.

ii. Court rule in Washington State (U.S.): Washington State has a court rule that requires accommodation for litigants with disabilities.[[21]](#footnote-21) The rule is fairly unique in the U.S. because it includes appointment of counsel at state expense as an accommodation in cases where such appointment is otherwise not mandated. This is an example of very meaningful accommodation that is well within the accepted procedures of the system. Apparently, Rule 33, which has proved to be less expensive than anticipated, has been very well received by judges and advocates. Advocates we talked with suggested that implementation is uneven across the state. This model is being considered in other states.

d. Kenya: Accommodations are more fully developed in the statutes with regard to victims of sexual abuse. However, even these laws are uneven and less than ideal. For instance, although they reference competency criteria for witnesses, there are procedures for accommodations for “vulnerable witnesses,” including the use of an intermediary. Like in Mexico, through a project initiated by Kenyan civil society to train intermediaries and to apply to the police, prosecution and defense attorneys, and directly to court, in some cases intermediaries are appointed, in those cases enabling people who would otherwise be deemed not “fit” to give testimony to have their full day in court.

e. Spain: Spain’s law applies only to victims.[[22]](#footnote-22) The statute says that notification of dates for hearings must be done in a manner that effectively informs the person and make sure that the absence at hearings is voluntary. The Constitutional Court has relied on the CRPD in several cases. In one important case, the Court said that the right to a fair trial and to defend oneself (art. 24 Spanish Constitution - *tutela judicial efectiva*) required that a court judging a defendant with intellectual disability who did not attend his oral hearing should have checked whether the person had actually chosen not to attend his oral hearing or whether he had not been made aware of the consequences.[[23]](#footnote-23) It is also states that the duty to make additional inquires is based on the right to equality recognized in the Spanish Constitution, and that public services must ensure equality by removing barriers that hinder participation and prevent effective equality.

f. Europe: The Council of Europe has produced a recommendation and a resolution regarding detainees with disabilities that call for actions to prevent imprisonment of persons “whose [disability] is incompatible with detention and to ensure that the fundamental principles of equality of treatment, non-discrimination, reasonable accommodation and accessibility are respected.” The Council also calls for the collection of data necessary to put in place support and accessibility measures.[[24]](#footnote-24) While the recommendations, which are predicated on the CRPD among other international laws, address detainees, they are relevant to broader issues of access to justice for persons with disabilities.

***Principle 2*: Outdated and ambiguous concepts of “competency” and “capacity” can create insurmountable barriers to access to and participation in justice systems. Accordingly, the concepts should be eliminated to the fullest extent possible. Justice systems, therefore, should create programs, services, and policies that empower persons with disabilities to participate by exercising their will and preferences and to relate their own narratives.**

Article 12 of the CRPD is an essential guide for considering issues of capacity and competence. The Article recognizes the right of “legal capacity” on an equal basis with others and without discrimination on the basis of disability. Article 12(3) requires State Parties to ensure access to supports required to enjoy and exercise legal capacity. The CRPD recognizes that every person has will and preferences. Governments have an obligation to provide supports necessary for the persons to exercise their will and preferences – that is, their human agency. Rules which limit access to the justice system based on (mostly medical) concepts of “mental competency” are discriminatory and inconsistent with the exercise of legal capacity.[[25]](#footnote-25)

Competency issues arise in at least three areas in the context of criminal cases – competence to testify, competence to stand trial and in the use “insanity defense,” which, in a significant sense, is a question whether the defendant was competent to commit the crime. In a civil case, competence to litigate the case (and make decisions about the course of the case) and competence to testify may be issues. Our comments below concentrate on competence to testify and competence to stand trial.

*“Competence” to testify*. Everyone has a narrative, and if they want to tell it, they should not be barred from doing so in advance on the basis of disability. Laws in many jurisdictions do that in one form or another, by determining that having a certain kind of disability disqualifies one from being a witness.

There should be no capacity threshold of any sort to be a witness. Accordingly, it is not a matter of who is “competent” to testify (or be investigated, or be a plaintiff or a defendant, or sit on a jury or otherwise participate) but how to enable everyone to participate fairly; how to enable every person the best chance to communicate their own version of events and be understood; and how to ensure that accommodations pave the way to equal and effective participation. A range of accommodations that touch on procedure and relate to language and communication specifically, can pave the way for persons with disabilities that affect cognition and communication to equally participate in justice procedures.

Once the way is paved for a person to communicate and be understood, like any witness, the weight and credibility of testimony is a matter for the fact finder.

Rather than barring participation, the justice system should modify practices and procedures and provide individualized accommodations to enable persons with disabilities, particularly those who use non-traditional communication, to fully participate. The purpose of the accommodations is to enable participants to understand the processes in which they are involved and maximize their ability to present their version of events, without directing or influencing the content of that version.

Drawing as well from the principle of legal capacity and choice, accommodations should be provided only with the person’s consent.

*“Competent” to stand trial.* Likewise, complex jurisprudence has developed in many jurisdictions about a person’s competence to stand trial. In those countries, when a tribunal determines that a person (usually a criminal defendant) cannot understand the proceedings, the trial cannot go forward and the case cannot be adjudicated. This denies the individual the right to speedy and fair trial and can, and often does, result in long institutionalization until the person becomes competent. Experience shows, however, that many individuals who are treated as incompetent, in fact, are not.

In most jurisdictions the test for competence to stand trial is largely subjective and often is based almost exclusively on the opinion of a physician. Often other professionals, non-professionals and the persons themselves are better able to assess what a person needs to enable full participation. Experience shows that with appropriate individualized accommodations many individuals (even those with high support needs) can fully participate. This is particularly true for people who communicate differently. There are several innovative programs that have been successful in assisting persons who would otherwise be determined to be incapable of taking part in the justice system, to fully participate. These programs, which help to level the playing field, are described below.

Successful programs are those which tailor accommodations to the individuals. Medical diagnosis or type of disability is not the determiner of the accommodation – rather it is the individual’s needs and strengths in relation to understanding the proceedings and maximizing their ability to communicate their version of events as well as communicate their choices with regard to their defense.

Finally, in jurisdictions where a person who is deemed not competent to stand trial must be “restored” to competency (sometimes by way of forced treatment and services[[26]](#footnote-26)) before being afforded a trial, there have been successful efforts to replace institutionalization with community based programs, to substantially reduce the time a person waits for and receives voluntary restoration services, and to improve restoration services to include identifying individualized accommodations that would facilitate full participation. Examples of successful efforts in this regard are described below.

*Examples of programs, services, policies and legislation to address Principle 2.*

a. Testimonial capacity

 i. Israel: The Investigation and Testimony Procedures Law (Accommodations to Persons with Psychological and Intellectual Disabilities) of 2005[[27]](#footnote-27) applies to police investigations and court testimony of persons with mental, intellectual or developmental disabilities, if they are suspected of committing a “severe”[[28]](#footnote-28) crime, witness such a crime, or are victims of one. The law requires comprehensive accommodations to persons with mental and cognitive disabilities. Professionals provide opinions about necessary accommodations and mediate between the disabled person and the law enforcement and justice agencies. The law allows for the alteration of procedural and evidentiary rules and practices, in order to enable individuals to give the full version of events as perceived by them during investigations and court testimony. Accordingly, medical opinions of a person’s competence are irrelevant.

 The Israeli criminal system explicitly declares all persons are fit to give testimony before the court. There are no fitness tests for testifying in court. Testimony by persons with disability is not observed as admissible or non-admissible, but rather observed through estimating its evidential value (weight), as all evidence are examined within the discretion of the judge.

 ii. Massachusetts (U.S.): After a judge refused to allow a sexual abuse victim with aphasia to testify, the state’s highest court established a rule, based on state law,[[29]](#footnote-29) that a trial court must inquire what individualized accommodations would make it possible for a witness with a communication disability to testify. [[30]](#footnote-30) Drawing from a friend of the court brief of the National Aphasia Association, the Court surveyed cases that described accommodations that have been allowed by American courts to assist persons with communication disabilities to testify. [[31]](#footnote-31)

 iii. Lesotho: The High Court of Lesotho (Constitutional Division) recently declared unconstitutional a statute that deemed individuals with certain grossly outdated pejorative diagnostic labels to be incompetent to give evidence.[[32]](#footnote-32) The Court found that the statute violated Sections 18 (freedom from discrimination) and 19 (right to participate in government) of the country’s constitution. The Court’s opinion, which issued in August 2019 recognizes that it is the Court’s “sacred and fundamental duty to guarantee that all persons appearing before courts of law as suspects, accused, victims or witness all have a fair hearing – otherwise justice stands imperiled and jeopardized.”[[33]](#footnote-33)

 iv. Massachusetts (U.S.) has a statute which requires courts to make accommodations to witnesses with intellectual and/or developmental disabilities (I/DD). The statute lists useful examples of possible accommodations which the judge should consider, including videotaped testimony and allowing a friend or family member to sit with the witness during the testimony.[[34]](#footnote-34) While the statute is useful, it is less than ideal, as it requires the judge to determine that there is some risk of emotional harm to the witness if the accommodations are not provided. This misses the point that accommodations are designed not only to make testifying less frightening, but to facilitate testimony from anyone with a communication or other disability, regardless of the potential impact on the witness.

b. Competence to stand trial

 As will be described more fully below, several countries use “intermediaries” to assist the court and individuals with disabilities to participate in the justice system. Although Intermediaries are often thought of as assisting witnesses, they also have an impact on a person’s competency to stand trial.

i. Spain: The Victim Statute[[35]](#footnote-35) recognises the right to understand and to be understood even before legal proceedings begin, thus including any conversation before reporting the crime with police or judiciary. This right includes communication style support and such aid the victim may require (for instance, sign language or other form of communication the person may use). It also allows the victim to be accompanied by a person of her choice at all times. This law also recognises the right to participate actively in criminal proceedings, giving all evidence and information the person deems appropriate to the authorities.

The National Hate Crime Plan[[36]](#footnote-36) will create accessible formats of reporting crime, including easy-to-read materials to be implemented nation-wide.

 ii. Israel: Although, as noted above, there are no capacity tests in Israel for victims or witnesses with a disability and everyone is considered to have the capacity to give testimony regardless of the nature or severity of the disability, in the case of suspects, individuals with intellectual disability, with mental disability, or with Autism Spectrum Disorder (ASD) need to be found fit to stand trial by the agency appointed with this authority. In the case of persons with intellectual disabilities, the agency is a committee under the auspices of the Ministry of Social Affairs responsible for assessing an individual’s capacity in a range of areas. In the case of persons with mental illness assessments are carried out by District Psychiatrists who also have responsibility for deciding if someone with ASD is fit to stand trial, even though they have no expertise regarding autism. This is an example of the potential dangers of over medicalization of disability issues.

 Criteria examined in the assessments include whether the individual understands they have are suspected of having committed a crime, whether they understand they have done something wrong and if they have an understanding of criminal procedures. As in other jurisdictions, these criterial are very subjective and may reflect the biases of the examiner more than the abilities of the person with the disability.

c. “Restoration” to competence

 i. In Washington State (U.S.), as throughout the U.S., all individuals charged with a crime have the constitutional right to understand the nature of the charges against them and assist in their own defense; that is, be legally competent to stand trial. If a court believes the defendant may not be competent, the court stays the case while an evaluation is completed to determine that individual’s legal competency.  If the individual is found not competent, the state may be required to provide competency restoration services. The majority of competency restoration services are provided in locked mental health or similar institutions.

 A class action lawsuit challenged unconstitutional delays in competency evaluation and restoration services.[[37]](#footnote-37) In Washington State, individuals believed to have serious mental illness and other disorders languished in jail for weeks or months while awaiting these court-ordered services.  In 2015, a U.S. court found the state was taking too long to provide competency evaluation and restoration services and ordered that they take place within 14 and 7 days, respectively. After the court’s order, the parties entered into several consent agreements which included the development of alternatives to institutionalization and diversion programs.[[38]](#footnote-38) The alternative included the Law Enforcement Assisted Diversion (LEAD) arrest diversion program which provides law enforcement with community-based alternatives to arresting persons whose behavior stems from unmet behavioral health needs or poverty. Since this is a pre-arrest program, a guilty plea is not a criterion for participation. Indeed, since the defendants are likely to be found incompetent to stand trial, they could not plead guilty.

 Likewise, the Legal Intervention and Network of Care (LINC) program provides treatment in lieu of prosecution for individuals with mental health and substance use conditions who have been booked into jail for misdemeanors and low level felonies. The program serves adults with psychosocial conditions who have been referred by a prosecutor willing to dismiss a charge or refrain from filing one.[[39]](#footnote-39) Again, since this is a prosecution initiated process, there is no requirement of a guilty plea as charges are dismissed or not filed.

 Like most diversion protocols, these programs have the risk of coerced treatment – that is, the person will agree to participate (and accept services and treatment) in exchange for the promise they will not be arrested, or charged, or incarcerated. Although keeping a person out of the criminal justice system also keeps them out of the competency evaluation process, there is a risk that they can become a vehicle for involuntary services and treatment.

 ii. In England and Wales, Liaison and Diversion services operate at the initial point of contact with the criminal justice systems, with the police and courts. Medical personnel from Liaison and Diversion services help to identify when an accused person has specific disabilities, including psychosocial and intellectual disabilities, autism, and communication needs. Information from Liaison and Diversion services informs criminal justice decision making including, for example, the need for accommodations, sentencing options and, where appropriate, diversion away from custody in favour of a community sentence or away from the criminal justice system into treatment and care.[[40]](#footnote-40)

***Principle 3*: Persons with disabilities are often denied the right to speak for themselves. When others assume or are assigned the right to speak for them, they are denied their own voice and the dignity that attends the opportunity to tell their own stories. Accordingly, justice systems must provide programs and services and design policies and practices that promote dignity and autonomy and ensure the expression of their own will and preferences.**

Article 12 of the CRPD requires governments to recognize that everyone has legal capacity and to take whatever actions are needed to ensure the exercise of legal capacity. The core belief underlying this requirement is that all people, regardless of disability or the extent of disability, have will and preferences and that they have a right to make their own choice consistent with their preferences. Governments, in turn, have the obligation to assist persons with disabilities in the exercise of their own choices, when assistance is needed. One impact of Article 12 has been a significant global movement away from substituted decision-making, particularly from guardianship.

We believe that it is fundamentally important, and cannot be overemphasized, that persons with disabilities be allowed and provided the opportunity to speak for themselves when they choose to do so. Accordingly, in the justice system, states must provide the accommodations that are necessary to afford this opportunity. This principle, therefore, recognizes that in the justice system, as in the rest of life, the controlling approach to advocacy should be to advance what the individual chooses, not what someone else decides is in the person’s “best interest.” Likewise, tribunals should afford individuals every opportunity to present their own accounts and, where applicable, their own preferences. In reaching decisions in matters in which the individual’s wishes are a factor (for example, whether to testify or determination of need for guardianship) fact finders should afford the individual’s preference the strongest, even controlling, weight.

One of the most important ways to ensure that an individual is heard is to provide counsel whose sole ethical responsibility is to the client and who is required to treat the client in the same manner as any client without a disability.

Tribunals should also avoid appointing surrogates to make decisions for litigants who may appear to the magistrate to be incompetent.

*Examples of programs, services, policies and legislation to address Principle 3.*

a. U.S.: Legal ethics rules

Most states in the U.S. base their ethical rules for lawyers on the American Bar Association’s Model Rules of Professional Conduct. Model Rule 1.14 sets of the attorney’s responsibilities to a client “with diminished capacity.”[[41]](#footnote-41) Although the rule requires that “[w]hen a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client,” it, nevertheless, sets out certain limited circumstances in which the attorney may deviate from that rule.[[42]](#footnote-42)

b. U.S.: Despite the Model Rule discussed above, it is not uncommon for attorneys for persons with disabilities to make their own judgment about what is in the clients’ “best interest,” and if the clients do not agree, to ignore what the clients choose. The Massachusetts public defender agency, which appoints and regulates court appointed lawyers requires that they always advocate for their clients expressed choices and not resort to a “best interest” mode of representation.[[43]](#footnote-43)

c. Spain: Spain: A new law requires that the court hear from the person and provides for as legal representation during legal capacity proceedings. [[44]](#footnote-44)

***Principle 4*: A person’s nontraditional manner of communication is frequently a pretext to deny the person the same rights of access and participation that are afforded those with typical types of communication. Accordingly, justice systems should fund and provide services and programs and design and modify policies, procedures, and rules, to accommodate individuals’ communication styles.**

Some persons with disabilities are limited in their use of spoken language or communicate in other than traditional ways. This may be because of a physical, sensory, intellectual or psychosocial disability or because they have not received the necessary services. Individuals’ using non-traditional methods of communication may find their attempts to testify thwarted by lack of understanding, unavailability of anyone to assist, institutional concerns about alterations to the court procedures and the like.

Accommodations to such individuals may sometimes be seen as infringing on the rights of other parties. This may be due to not understanding the essence of these accommodations, or in their misapplication. In essence, such accommodations derive from the notion of equality and non-discrimination, levelling the playing field for the person with the disability so that the disability, against the background of an inaccessible system, does not adversely affect the person compared to a nondisabled person.

In practice this means applying such accommodations with attention to the boundaries of over-intervention. This can occur, for example, if an intermediary or facilitator speaks instead of the witness, fills in what the witness did not say, or unnecessarily leads the witness—all of which diminish the personal integrity and independence of the witness and may create an imbalanced for another party. This accentuates the importance of understanding the nature of accommodations and of adequate guidance and training to all justice system stakeholders and importantly the intermediaries themselves in understanding the nature of the accommodations at hand and learning how to provide them in ways that level the playing field without crossing boundaries.

Relatedly, accommodations are relevant to all persons with disability no matter their “side”—the need for them and obligation to provide them is equally applicable to a person with disability whether victim, complainant, witness, suspect, defendant, or prisoner, or any other side or role one might have. It’s not an accommodation for victims only, or defendants only.

There are several innovative services that help to break down those barriers.

*Examples of programs, services, policies and legislation to address Principle 4.*

a. Intermediaries and similar services

We believe that intermediaries are one of the most practical and effective accommodations that are available to persons with disabilities in the justice system. Intermediaries are trained to be neutral, objective and independent throughout the inquiry and hearing of a case. Intermediaries have no interest in the legal outcome of the deliberations, and they will never act in favor of acquittal, conviction or any other conclusion. The sole purpose and role of this new profession is ensuring fullest communication between court and persons with disability. This special intervention aims for disability not to be the reason for any legal outcome, misunderstandings in court or police, all while guarding every person with disability’s dignity and human rights.

i. England and Wales: In England and Wales, the law provides for the examination of “vulnerable” witnesses through an Intermediary whose function is to assist the witness to communicate.[[45]](#footnote-45) Intermediaries are available at any stage of or event in the proceedings.

 The law provides that individuals who could benefit from an Intermediary include those who could not otherwise participate in the proceedings.[[46]](#footnote-46) Unfortunately, “Registered Intermediaries” certified by the Ministry of Justice are only available to victims and witnesses; defendants can use non-registered intermediaries available from available from a range of public, private and voluntary sector providers.

Intermediaries are foremost communication specialists whose primary responsibility is to enable complete, coherent and accurate communication. Their role is to prevent miscommunication and they may intervene when miscommunication may or is likely to have occurred or be occurring. The Appeals Court of England and Wales has noted “the valuable contribution made to the administration of justice by the use of the intermediaries in appropriate cases.”[[47]](#footnote-47)

Intermediaries assist the judiciary to monitor the questioning of “vulnerable” or at risk witnesses and defendants but responsibility to control questioning rests with the judge. Intermediaries are, therefore, impartial, neutral officers of the court. Although they may file an assessment report and recommendations about testimony, they are not expert witnesses except about accommodations. The report is intended to be a guide to how questioning can best be adapted to the individual’s needs.

ii. Northern Ireland and New South Wales, Australia: Northern Ireland and New South Wales have intermediary programs based on the English model. Criminal Evidence (Northern Ireland) Order 1999 has the same range of special measures found in the England and Wales law. In May 2013, the Department of Justice in Northern Ireland launched intermediary pilot program – one for “vulnerable” witnesses and one for “vulnerable” accused persons. Unlike England and Wales, Northern Ireland, however, has implemented provisions ensuring defendants have access to certified intermediaries.[[48]](#footnote-48) New South Wales initiated a three year pilot program in April 2016.[[49]](#footnote-49)

iii. Vermont (U.S.): The Vermont Communication Support Project (VCSP) recruits, trains and certifies Communication Support Specialists (CSS) who can assist persons with disabilities in Court, administrative hearings and related meetings. The accommodations that are offered by a specialist support communication, and overcome barriers to effective communication. The Communication Specialist is not an advocate, and does not offer legal advice. A large percentage of persons who qualify for VCSP services are represented by legal counsel. The Vermont Communication Support Project is the first program of its kind in the United States.[[50]](#footnote-50)

iv. Israel: The concept of active participation of persons with disabilities in justice procedures to which they are party, is embedded within the intention of the Israeli law. Provision for intermediaries and accommodations exist in order to make this possible.

Israeli law provides for intermediaries both during police investigations and the giving of testimony in court. In the case of individuals who require Augmentative and Alternative Communication, these accommodations are provided by a specialist trained in this area. The use a communication board is fully recognized under The Accessibility Chapter of the Equal Rights for People with Disabilities Law (2005)[[51]](#footnote-51) as part of the duty to make all public spaces and services provided to the public must be accessible to persons with all disabilities. The use of pictures of anatomical dolls is at the discretion of the judge. The authenticity and reliability of evidence gathered by police using these tools is often challenged within the court room and the role of the intermediary is often initially to demonstrate the credibility of the testimony. Moreover, since at the investigation stage at least, the use of these accommodations is limited to certain circumstances and is at the discretion of the investigator, there may be missed opportunities.

 Also, the first-ever course for “Access to Justice Facilitators,” specially trained professionals who help make legal proceedings accessible to persons with disabilities was held at Tel Aviv University between 2017 and 2018. Twenty-seven graduates of the course completed 70 hours of lectures and workshops and 30 hours of practicum in which they practiced supporting and accompanying individual cases. The participants included lawyers, social workers, licensed and authorized persons in the field of accessibility for persons with disabilities, and occupational therapists from all over the country.

v. Tasmania: The Tasmania Law Reform Institute in 2018 recommended establishment of an intermediary scheme based on the England and Wales model. [[52]](#footnote-52)

***Principle 5*: Systems should ensure that when expert assistance to a court or other part of the justice system is needed, that the assistance is provided by individuals who by education, training, or experience have expertise in the issue under consideration. Designing systems and accommodation using the medical model of disability should be avoided.**

 Many systems rely far too heavily on medical doctors to provide opinions about almost anything that relates to a person with a disability. This over-reliance almost certainly stems from the still pervasive but very outdated medical model of disability. Courts are one of the last, but hardly the only, outposts of extreme deference to physicians in addressing disability. The medical model of disability says persons are disabled by their impairments or differences. The social model of disability says that disability is caused by the way society is organized and relationships among people and society.

 Many persons with disabilities and their advocates have experienced that a diagnoses can be the fundamental determinant of outcomes. So, doctors, working from a belief that the diagnosis defines the person (and, indeed, every person with a similar diagnosis), too often assume that persons with a particular label cannot be competent, or cannot testify, or cannot raise their children, or cannot act on their own behalf. Courts should be skeptical, at least, of such formulations. Rather, they should rely on individuals who have life experience with persons with disabilities, who are trained and able to communicate, and who can assess the need for and suggestions of accommodations.

*Examples of programs, services, policies and legislation to address Principle 5:*

Intermediaries and facilitators used in several countries, and described above, play and important role is providing non-medically designed accommodations to persons with disabilities in the justice system.

 Spain: Spanish legislation allows for the use of expert witnesses for any type of trial. While this is controversial in jurisprudence, it allows parties to bring forward other experts on the person with disabilities other than family members. This has allowed lawyers to call upon social workers or people who know the person with disabilities to testify or present a report in support of the person with a disability. [[53]](#footnote-53) It is not ideal but it does provide a way to break down the medical paradigm. The new reform on legal capacity requires multidisciplinary teams instead of sole reliance on a physician.

**SUMMARY AND CONCLUSION**

 In summary, we suggest that you adopt the following as recommendations.

* Because accommodations are essential to guaranteeing that persons with disabilities have equal access to the justice system, States should firmly embed accommodation concepts and programs for ensuring accessibility in legislation. Moreover, governments should accept responsibility for funding.
* States should reduce reliance on the medical model of disability and the consequent over-reliance on medical professionals. For example, the practice currently used by most countries, that a medical doctor deduces “unfitness” to participate in one’s defense from a medical diagnosis should be eliminated.
* All threshold criteria (especially medical criteria) for competence to testify should be eliminated.
* Justice systems should have processes are in place to insure that persons with disabilities are able to participate fully in their cases and, when they so choose, are able, with whatever accommodations are needed, to communicate their own version of events.
* The valuable and positive experiences in the several nations using intermediaries should be widely replicated. Intermediaries are a practical and workable way to accommodate those persons (in particular those with disabilities that have an impact on cognition or communication) who are now largely excluded from participation in the justice system. This accommodation levels the playing field for the person without infringing on the rights of others. Intermediaries should be introduced through law whenever possible. Pilot projects should be encouraged. The service design should include role clarification to insure that proper boundaries are maintained. Training should be provided to all relevant participants in the justice system. There should be quality control measures and processes.
* Persons with disabilities who cannot afford a lawyer should be provided counsel at the government’s expense, at least when that is a necessary accommodation. Attorneys should be required to follow their client’s wishes and not what the attorney believes is in the person’s “best interest.”

We hope you find these suggestions useful. Thank you for the opportunity to participate in this important undertaking. We would welcome the opportunity to discuss our experiences with you. You may contact Tirza Leibowitz at the Open Society Foundations (tirza.leibowitz@opensocietyfoundations.org), Bob Fleischner (Bob.Fleischner@gmail.com), or any member of the Hub if you have any questions.

Respectfully submitted,

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1. Claire Edwards, Gillian Hard, Shane Kilcommins, Access to Justice for People with Disabilities as Victims of Crime in Ireland, p. 1 (2012) available at <https://www.ucc.ie/en/media/academic/law/ccjhr/publicationsseptember2018/AccesstoJusticeforPeoplewithDisabilitiesasVictimsofCrimeinIreland2012.pdf> (last accessed July 24, 2019). [↑](#footnote-ref-1)
2. The U.S. Department of Justice has found that persons with disabilities older than 12 are victims of crimes 2.5 times their percentage in the population, and that persons with cognitive disabilities are at the greatest risk of becoming the target of a violent crime. Erika Harrell, Crime Against Persons with Disabilities, 2001-2015 – Statistical Tables (2017) available at <https://www.bjs.gov/index.cfm?ty=pbdetail&iid=5986> (last accessed August 7, 2019). [↑](#footnote-ref-2)
3. Saul M. Kassin, et al., Police Induced Confessions: Risk Factors and Recommendations (2009) available at <https://web.williams.edu/Psychology/Faculty/Kassin/files/White%20Paper%20online%20%2809%29.pdf> (last accessed July 24, 2019)(listing disability as a risk factor for false confessions; comparing and contrasting interrogation techniques in the U.K. and the U.S.). [↑](#footnote-ref-3)
4. See, e.g., United Nations, Div. for Social Policy Development & Dep’t of Economic and Social Affairs, Toolkit on Disability in Africa: Access to Justice for Persons with Disabilities, (n.d.), pp. 6-8, available at <https://www.un.org/esa/socdev/documents/disability/Toolkit/Access-to-justice.pdf> (last accessed August 1, 2019). [↑](#footnote-ref-4)
5. See, e.g., Human Rights Watch, “I Needed Help, Instead I was Punished”: Abuse and Neglect of Prisoners with Disabilities in Australia,” (2018) available at <https://www.hrw.org/report/2018/02/06/i-needed-help-instead-i-was-punished/abuse-and-neglect-prisoners-disabilities> (last accessed July 24, 2019). Discussion of the conditions in prisons and jails is beyond the scope of our contribution. [↑](#footnote-ref-5)
6. For instance, we relied on the Report of the Special Rapporteur on Violence against Women, its Causes and Consequences presented by the Secretary-General to the General Assembly on 3 August 2012.The report is available at <https://www.ohchr.org/Documents/Issues/Women/A.67.227.pdf> (last accessed August 2, 2019). Also, we found the Committee on the Elimination of Discrimination against Women’s General Recommendations on Women’s Access to Justice, to be very informative. That report is available at <https://www.ohchr.org/Documents/Issues/Women/A.67.227.pdf> (last accessed July 27, 2019). [↑](#footnote-ref-6)
7. There are seven General Comments to the CRPD. We found General Comment 3 on Women and Girls with Disabilities, and General Comment 6 on Equality and Non-discrimination to be particularly instructive in preparing this contribution. The comments can be retrieved at <https://www.ohchr.org/en/hrbodies/crpd/pages/gc.aspx> (last accessed July 27, 2019). [↑](#footnote-ref-7)
8. We recognize that it will not be easy to overcome stigma. However, too often, elements of the justice system have done little or nothing to eliminate disability discrimination in their programs and services. Justice systems must be proactive and must act affirmatively, with conviction and commitment, to systematically eliminate the unfairness that creates an unequal playing filed. Facing down stigma is essential to meaningful system reform. [↑](#footnote-ref-8)
9. For example, The Arc of the United States’ National Center on Criminal Justice and Disability (NCCJD) has created Pathways to Justice, a comprehensive training program for criminal justice professionals on intellectual and developmental disabilities. The program involves creating a team of criminal justice and disability professionals and advocates, called a “Disability Response Team.” Each team has a law enforcement officer, an attorney, a victim service advocate, a person with a disability, and a disability advocate. The team works together to provide the training to three primary professional groups in the system, including law enforcement, legal professionals, and victim service providers. The goal of Pathways to Justice is build collaborative relationships between the disability and criminal justice communities. See [www.NCCJDPathwaystoJustice.org](http://www.NCCJDPathwaystoJustice.org) (last accessed July 18, 2019)

In Israel, all law enforcement agencies, that is, judges, state prosecutors, public defenders, legal aid, and the police, engage in training on a range of issues addressing scope and depth on access to justice for people with disabilities.

Just recently in Mexico, a 120 hours college diploma was developed by a Mexican NGO with the support of the National University of Mexico (UNAM) to train professionals who could implement procedural accommodations for persons with disabilities in the justice system. [↑](#footnote-ref-9)
10. Garcia Iriarte, E., Models of Disability, . In Edure Garcia Iriarte, et al. (Eds.), Disability and Human Rights: Global Perspectives (2015) cited in Catherine O’Leary & Michael Feeley, Alignment of the Irish Legal System and Article 13.1 of the CRPD for Witnesses with Communication Difficulties, available at <http://dsq-sds.org/article/view/5587/4887> (last accessed August 7, 2019). [↑](#footnote-ref-10)
11. The Arc of the United States has a very useful white paper with articles about capacity in the criminal justice system, **Competency of Individuals with Intellectual and Developmental Disabilities in the Criminal Justice System: A Call to Action for the Criminal Justice Community (2016) available at** <https://www.thearc.org/what-we-do/programs-and-services/national-initiatives/nccjd/NCCJD-White-Paper-Competency-of-Individuals-with-IDD-in-the-Criminal-Justice-System> **(last accessed August 7, 2019).**  [↑](#footnote-ref-11)
12. Intermediaries are referenced throughout this contribution. The role and purpose of intermediaries is more full explained beginning at p. 28, below. [↑](#footnote-ref-12)
13. That organization is Bizchut. Its website is available at <https://www.bizchut.org.il/>. For a description of Bizchut’s activities (and those of similar organizations in other countries) relevant to the matters discussed in this contribution, particularly the implementation of the CRPD Article 12, see Arlene S. Kanter & Yotam Tolub, The Fight for Personhood, Legal Capacity, and Equal Recognition Under the Law for People with Disabilities in Israel and Beyond, 39 Cardozo L. Rev. 557 (2017) available at <http://cardozolawreview.com/wp-content/uploads/2018/08/KANTER.TOLUB_.39.2.pdf> (last accessed August 5, 2019). [↑](#footnote-ref-13)
14. Ley General Para la Inclusión de las Personas con Discapacidad, Capitulo IX (2011) available at <https://www.globaldisabilityrightsnow.org/sites/default/files/related-files/267/2011_Disability_Law.pdf> (last accessed August 13, 2019). [↑](#footnote-ref-14)
15. Código Nacional de Procedimientos Penales, art. 109, inciso XII. Available at: <http://www.ordenjuridico.gob.mx/Documentos/Federal/pdf/wo92363.pdf> (last accessed August 13, 2019) [↑](#footnote-ref-15)
16. This program was implemented by Documenta, Análisis y acción para la justicia social, a Mexican NGO with the support of Mexico’s City Courts. At the moment, the intervention of facilitators has taken place only in the criminal justice system and in proceedings that are taken before a judge. Working in other justice systems, such as the civil courts, and in previous stages, for example, when a person wants to report a crime before the police, remains a challenge. [↑](#footnote-ref-16)
17. 42 United States Code § 12101(b)(1) available at <https://www.law.cornell.edu/uscode/text/42/12101> (last accessed August 1, 2019). [↑](#footnote-ref-17)
18. 42 United States Code § 12132 available at <https://www.law.cornell.edu/uscode/text/42/12132> (last accessed August 1, 2019). [↑](#footnote-ref-18)
19. Tennessee v. Lane, 541 U.S. 509, 530 (2004) available at <https://www.law.cornell.edu/supct/html/02-1667.ZO.html> (last accessed August 7, 2019). [↑](#footnote-ref-19)
20. U.S. Department of Justice, Civil Rights Division, Examples and Resources to Support Criminal Justice Entities in Compliance with Title II of the Americans with Disabilities Act (2017) available at <https://www.ada.gov/cjta.html> (last accessed August 1, 2019). The National Center on State Courts provides materials to state courts on ADA compliance. See, <https://www.ncsc.org/Topics/Access-and-Fairness/Americans-with-Disabilities-Act-ADA/Resource-Guide.aspx> (last accessed August 14, 2019). [↑](#footnote-ref-20)
21. Washington State Court Rules, General Rule 33 available at <https://www.courts.wa.gov/court_rules/?fa=court_rules.display&group=ga&set=GR&ruleid=gagr33> (last accessed August 1, 2019). [↑](#footnote-ref-21)
22. Standing of Victims of Crimes, Law 4/2015. For an explanation of the statute see Ministerio de Justicia, Law 4/2015 of 27 April, on Statute of Victims of Crimes (2016)(in English). [↑](#footnote-ref-22)
23. Constitutional Court, STC 77/2014 (24 de junio de 2014) [↑](#footnote-ref-23)
24. Detainees with Disabilities in Europe, Recommendation 2132 (2018), available at <http://assembly.coe.int/nw/xml/XRef/Xref-DocDetails-EN.asp?FileID=24814&lang=EN> (last accessed August 7, 2019). See, also, Resolution 2223, Detainees with Disabilities in Europe, (2018) available at <http://assembly.coe.int/nw/xml/XRef/Xref-DocDetails-EN.asp?FileID=24813&lang=EN> (adopting Recommendation 2132)(last accessed August 14, 2019). [↑](#footnote-ref-24)
25. One of the most useful examinations and explications of legal capacity is Michael Bach & Lana Kerzner, A New Paradigm for Protecting Autonomy and the Right to Legal Capacity (2010) prepared for the Law Commission of Ontario (Canada), available at <https://www.lco-cdo.org/wp-content/uploads/2010/11/disabilities-commissioned-paper-bach-kerzner.pdf> (last accessed August 6. 2019). For an argument for the abolition of the insanity defense and other capacity related matters in light of the CRPD, see Tina Minkowitz, Rethinking Criminal Responsibility from a Critical Disability Perspective: The Abolition of Insanity/Incapacity Acquittals and Unfitness to Plead, and Beyond, 23 Griffith Law Review (2014), available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2930530> (last accessed August 15, 2109) [↑](#footnote-ref-25)
26. Forced treatment to achieve “restoration” of competency is often by way of the involuntary administration of psychotropic medications. In the United States, for example, the Supreme Court has held that a defendant may be forced to take medication to restore competency only in a rare case in which the government can show it has an important interest in adjudicating the crime. Sell v. U.S., 539 U.S. 166 (2003) available at <https://supreme.justia.com/cases/federal/us/539/166/> (last accessed August 6, 2019). However, according to scholars “instead of becoming rare, forced medication has become routine and can prolong cases for years.” Lee Nacozy, Competency on Trial: Judges Routinely Force Medication on Mentally Unstable Defendants, ABA Journal (February 19, 2019) available at <http://www.abajournal.com/web/article/competency-on-trial-judges-routinely-force-medication-on-mentally-unstable-defendants> (last accessed August 6, 2019). [↑](#footnote-ref-26)
27. S.H. 2038 (2005), p. 42. For a more comprehensive description of the statute, see Neta Ziv, Witnesses with Mental Disabilities: Accommodations and the Search for Truth – The Israeli Case, 27 Disability Studies Quarterly (2007) available at <http://dsq-sds.org/article/view/51/51> (last accessed August 13, 2019). [↑](#footnote-ref-27)
28. A “severe” crime in Israeli law includes sexual offenses, aggravated assault, trafficking, manslaughter and murder. However, if a person with a disability is involved in an investigation as a suspect, the accommodations offered in the law apply regardless of the severity of the offense.  [↑](#footnote-ref-28)
29. The federal Americans with Disabilities Act (ADA) also requires justice professionals to ensure effective communication throughout the system and proceedings, including the provision of auxiliary aids and services. (The ADA is described later in this contribution.) The Massachusetts high court based its decision on state anti-discrimination law. [↑](#footnote-ref-29)
30. McDonough, petitioner, 457 Mass. 512 (2010), available at <http://masscases.com/cases/sjc/457/457mass512.html> (last accessed July 30, 2019). [↑](#footnote-ref-30)
31. All the briefs in the case are available at

<http://ma-appellatecourts.org/display_docket.php?src=party&dno=SJC-10609> (last accessed July 30, 2019) [↑](#footnote-ref-31)
32. Section 219 of the Criminal Procedure and Evidence Act. No. 9 of 1981, provided: “No person appearing or proved to be afflicted with idiocy, lunacy, or inability or laboring under any imbecility of mind arising from intoxication or otherwise whereby he is deprived of the proper use of reason, shall be competent to give evidence while so afflicted or disabled.” The Court’s ex tempore order is in Moshoeshoe et al. v. Director of Public Prosecution et al., Constitutional Case/14/2017 (6 April 2018). [↑](#footnote-ref-32)
33. Id. Judgement (n.d.). [↑](#footnote-ref-33)
34. Mass. Gen. Laws ch. 233, § 23E available at <https://malegislature.gov/Laws/GeneralLaws/PartIII/TitleII/Chapter233/Section23e> (last accessed July 30, 2019). [↑](#footnote-ref-34)
35. Estatuto de la Víctima, Ley 4/2015, available at <https://www.boe.es/buscar/act.php?id=BOE-A-2015-4606> (last accessed August 6, 2019). [↑](#footnote-ref-35)
36. Available at [http://www.interior.gob.es/documents/642012/3479677/plan+de+accion+delitos+de+odio/d054f47a-70f3-4748-986b-264a93187521](http://www.interior.gob.es/documents/642012/3479677/plan%2Bde%2Baccion%2Bdelitos%2Bde%2Bodio/d054f47a-70f3-4748-986b-264a93187521) (last accessed August 5, 2019). [↑](#footnote-ref-36)
37. [Trueblood v. State of Washington Department of Human and Social Services](https://www.dshs.wa.gov/bha/division-behavioral-health-and-recovery/trueblood-et-al-v-washington-state-dshs), No.2:2014cv01178, Washington Western District Court, 2015. A description of the many proceedings and orders in the case is available at <https://www.disabilityrightswa.org/cases/trueblood/> last accessed August 7, 2019). [↑](#footnote-ref-37)
38. The programs were partially funded by more than $60,000,000 in contempt fines levied against the State for failing to meet the court ordered deadlines. Id. [↑](#footnote-ref-38)
39. The programs are described at <https://www.kingcounty.gov/depts/community-human-services/mental-health-substance-abuse/diversion-reentry-services/legal-competency.aspx> (last accessed August 6, 2019). [↑](#footnote-ref-39)
40. The program is described at <https://www.england.nhs.uk/commissioning/health-just/liaison-and-diversion/about/> (last accessed August 13, 2019). [↑](#footnote-ref-40)
41. Available at <https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_14_client_with_diminished_capacity/> (last accessed August 1, 2019). [↑](#footnote-ref-41)
42. Despite its generally commendable approach, this rule can be problematic. See, Robert D. Fleischner and Dara Shur, Representing the Client Who Has or May Have “Diminished Capacity”: Ethics Issues, 41 Clearinghouse Rev. 346 (2007) available at <https://www.povertylaw.org/clearinghouse/articles/representing-clients-who-have-or-may-have-diminished-capacity-ethics-issues>, (last accessed July 24, 2019). [↑](#footnote-ref-42)
43. Committee for Public Counsel Services, Assigned Counsel Manual (2019) available at [https://www.publiccounsel.net/wp-content/uploads/Assigned-Counsel-Manual.pdf#page=61](https://www.publiccounsel.net/wp-content/uploads/Assigned-Counsel-Manual.pdf%22%20%5Cl%20%22page%3D61) (last accessed August 6, 2019). [↑](#footnote-ref-43)
44. Ley por la que Reforma la Legislación Civil y Procesal en Materia de Discapacidad, available at <http://www.nreg.es/ojs/index.php/RDC/article/view/375>. [↑](#footnote-ref-44)
45. Youth Justice and Criminal Evidence Act of 1999, Sect. 16. Available at <https://www.legislation.gov.uk/ukpga/1999/23/section/16> (last accessed July 29, 2019). [↑](#footnote-ref-45)
46. Youth Justice and Criminal Evidence Act 1999, § 29, available at <https://www.legislation.gov.uk/ukpga/1999/23/section/29> (last accessed August 5, 2019). [↑](#footnote-ref-46)
47. R. v. Cox*,* EWCA Crim 549 (2012)(nevertheless, the court held that the right to a fair trial of a defendant with a serious psychosocial disability was not violated by the trial judge’s refusal to appoint an intermediary). [↑](#footnote-ref-47)
48. Article 21 BA of the Criminal Evidence (Northern Ireland) Order 1999, available at <https://www.legislation.gov.uk/nisi/1999/2789/article/21BA> (last accessed July 30, 2019) [↑](#footnote-ref-48)
49. For a comparison of the programs and their outcomes see Penny Cooper and Michell Mattison, Intermediaries, Vulnerable People, and the Quality of Evidence: An International Comparison of Three Versions of the English Intermediary Model, 21 Int’l J. of Evidence & Proof 351 (2017)(noting the promise of intermediaries, but the lack of research on outcomes and effectiveness) available at <https://journals.sagepub.com/doi/pdf/10.1177/1365712717725534> (last accessed July 26, 2019). [↑](#footnote-ref-49)
50. See, <http://www.disabilityrightsvt.org/Programs/csp.html> (last accessed August 5, 2019). [↑](#footnote-ref-50)
51. Available at [https://www.aisrael.org/\_Uploads/dbsAttachedFiles/law(1).pdf](https://www.aisrael.org/_Uploads/dbsAttachedFiles/law%281%29.pdf) (last accessed August 5, 2019). [↑](#footnote-ref-51)
52. Tasmanian Law Reform Institute, Facilitating Equal Access to Justice: An Intermediary/Communication Assistance Scheme for Tasmania? (Jan. 2018) available at <https://www.utas.edu.au/__data/assets/pdf_file/0011/1061858/Intermediaries-Final-Report.pdf> (last accessed July 26, 2019). [↑](#footnote-ref-52)
53. Ley por la que Reforma la Legislación Civil y Procesal en Materia de Discapacidad, available at <http://www.nreg.es/ojs/index.php/RDC/article/view/375>. [↑](#footnote-ref-53)