Cost Benefit Analysis of Support Workers in Legal Services For People with Cognitive Disability

September 2017

Ruth McCausland (UNSW)
Rebecca Reeve (UNSW)
Piers Gooding (UoM)
Eileen Baldry (UNSW)

This analysis forms part of the Unfitness to Plead Project at the Melbourne Social Equity Institute, University of Melbourne. Project partners: UNSW Sydney, Victorian Aboriginal Legal Service, Intellectual Disability Rights Service, Northern Australian Aboriginal Justice Agency

AIM:

To estimate the economic costs of the court and related criminal justice processes relating to an individual case study of an accused person with a cognitive disability, including unfitness to stand trial proceedings, and to use this estimate to develop a cost-benefit analysis of the support program developed as part of the 'Unfitness to Plead Project'.[1]

BACKGROUND

The support program formed part of an action-based research project in which accused persons with cognitive disabilities were supported to participate in criminal proceedings. The support workers assisted clients with intellectual, cognitive and psychosocial disabilities and complex communication needs to participate in proceedings. The six-month program took place in three jurisdictions in Australia, and was located within three community legal services. The project had an emphasis on assisting Indigenous people with cognitive disabilities. Two of the services were Aboriginal-controlled. The disability support workers, based at the community legal centres, offered different types of assistance, including: helping clients to attend meetings, liaising with community support services, providing communication support to individuals in courts, and assisting lawyers and legal services to operate in a more accessible way. The aim of the formal support was to optimise the participation of accused persons with cognitive disability by focusing on the supports they may require to achieve equality before the law in line with the Convention on the Rights of Persons with Disability.[2]

CASE STUDY

This case study examines the police, court, justice and custody costs associated with three typical pathways for a person with cognitive disability charged with an offence, one of which involves support provided by this program. The de-identified case study is an amalgamation of different stories recorded throughout the project. The analysis calculates the criminal justice-related costs to government of the typical pathway scenarios for the 12 months following court proceedings, drawing on relevant research and legal, community and government sources.[3]

[1] http://socialequity.unimelb.edu.au/research/projects/disability-and-mental-health/unfitness-to-plead
[2] See particularly, CRPD articles 5, 9, 12, and 13.
[3] This analysis is specific to the Victorian jurisdiction; the support program was also conducted in New South Wales and the Northern Territory. It is important to note that the typical pathways for people who are likely to be found unfit to stand trial can vary between jurisdictions, including indefinite detention, as can associated costs.

SUMMARY

'David' is a 38 year-old man with intellectual disability charged with indecent assault. We compare the actual outcome of his case (Pathway 3) with typical pathways for accused persons whose fitness to stand trial is in question (Pathways 1 and 2), based on interviews conducted as part of this project as well as broader research in this area. We calculate the criminal justice-related costs to government associated with the possible processes and outcomes for each pathway over a 12 month period.

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

Outcomes and costs:

- Forensic unit: **$393,756**
- Supervision order: **$88,157**
- Acquittal: **$74,342**

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

Outcomes and costs:

- Incarceration: **$133,412**
- Community order: **$47,182**
- Community order with Disability Justice Plan: **$14,949**
- Conviction but no penalty: **$10,238**

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

Outcome and cost:

- Charge withdrawn with support: **$5034**

FINDINGS:

This case study analysis demonstrates that a relatively modest program intervention at a crucial point in criminal justice proceedings can improve the timeliness and quality of outcomes for accused persons with cognitive disability, and potentially provide significant cost savings to government.

Resourcing trained supporters to work in legal services could assist in reducing the significant economic and social costs of people with cognitive disability cycling in and out of the criminal justice system.

CASE STUDY

'David'[4] is a 38 year-old man with an intellectual disability living in a supported residential facility in Victoria. David was charged with indecent assault after allegedly assaulting a female fellow resident.

After the charge, the Department of Health and Human Services (DHHS) removed him from that supported residential facility, and he moved to live with his aunt. David was very socially isolated at his aunt's home, though he expressed a wish to stay there. His aunt herself had significant disability support needs. David was spending time at a local high street where he was allegedly indecently exposing himself. Police and prosecution were aware of this, and were concerned that he posed a risk of reoffending.

David had presented to the court four times before the Community Legal Centre (CLC) disability support worker became involved in his case. Each time, the case had been adjourned so that the court could gather sufficient information to respond to David's circumstances.

Before the support worker became involved, two options were being considered: (1) pursuing a determination of unfitness to stand trial, or (2) entering a guilty plea.

After outlining these two possible pathways, we will explain what happened once the CLC disability support worker assisted the person (Pathway 3).

We provide a table of costs associated with each of the three pathways, calculated using Victorian data and research where available.

[4] Details have been changed to preserve confidentiality.

PATHWAY 1 – UNFITNESS HEARING

> "The magistrate said: 'Well, maybe this matter needs to then go in for a fitness test or a fitness trial so that support can be provided'."
>
> Excerpt from interview with defence lawyer, 2016.

The magistrate considered the possibility that David was unfit to stand trial. In response, the CLC initiated a mental impairment and fitness to plead evidentiary assessment. The expert who compiled the report concluded that David would never be fit to stand trial or have insight into his alleged crime.

A determination of David's fitness to stand trial could not occur in the magistrate's court under Victorian law, and so would need to be elevated to a higher court.[5] The process could take at least 12 months. It is not unusual, according to Victoria Legal Aid, even for typical trials 'to occur up to two or three more years after the alleged offences were detected or committed'.[6] The VLRC note that '[i]t can take an average of 14 months for a matter to be finalised in Victoria from date of initiation in a summary court to date of finalisation in a higher court'.[7] This figure appears to relate to a typical trial, and unfitness to stand trial proceedings under the CMIA are likely to take longer than typical trials.[8]

During this time, David would have been required to remain at his aunt's home, or could have been remanded in custody, particularly because there was concern about the likelihood of reoffending without other support in the community. Compared to prisoners without an intellectual disability, research has found that prisoners with an intellectual disability present with more extensive criminal offending histories, illustrating that people with an intellectual disability are overrepresented in the prison system and have higher recidivism rates.[9] It is not uncommon for accused persons with intellectual disabilities to be remanded in custody, particularly given there are limited housing options for people with disabilities.

---

[5] *CL (A Minor) v Lee* (2010) 29 VR 570. if the question of fitness to stand trial is raised for an indictable offence triable summarily in the Magistrates' Court, 'the matter must be uplifted to a higher court for an investigation of unfitness and if appropriate, a special hearing': Victorian Law Reform Commission, *Review of the Crimes (Mental Impairment and Unfitness to Be Tried) Act 1997*, Consultation Paper No 17 (2013) 56 [4.20] ('*VLRC Consultation Paper*'). The Victorian legislation defines 'court' to mean the Supreme Court and County Court and restricts the definition to the Magistrates' Court in relation to requesting certificates of available services for certain orders: *Crimes (Mental Impairment and Unfitness to Be Tried) Act 1997* (Vic) ss 3 (definition of 'court') 47.

[6] Victoria Legal Aid, *Delivering High Quality Criminal Trials, Consultation and Options Paper* (2014) 29.

[7] Victorian Law Reform Commission, *Review of the Crimes (Mental Impairment and Unfitness to Be Tried) Act 1997*, Report No 28 (2014) [2.39].

[8] According to the Director of Public Prosecutions in Victoria, John Champion SC:

> due to a series of different hearings and processes involved, matters involving mental impairment can seem to take longer to finalise than if the offence was being dealt with under the normal court process. The different processes can seem even more mysterious, and can lead to confusion for those involved as lay participants.

Cited in Victorian Law Reform Commission, *Review of the Crimes (Mental Impairment and Unfitness to Be Tried) Act 1997*, Report No 28 (2014) [8.10].

[9] Victorian Law Reform Commission, Access to Justice (2011), p. 15; Corrections Victoria, Intellectual disability in the Victorian prison system: Characteristics of prisoners with an intellectual disability released from prison in 2003-2006, Department of Justice, Melbourne, 2007.

Under the CMIA, the question of unfitness to stand trial is determined by a jury in an investigation presided over by a judge.[10] In order to get the matter to the higher court – which in this case is the Victorian County Court – a report would be required from the defence, and the court would also order a report through forensic services to compare with the report obtained by the defence. If the psych assessors both determined that David was unfit to stand trial, and the jury agreed, the judge could pursue a 'special hearing'.[11] Special hearings are essentially truncated trials designed to ensure that an individual's liberty is not restricted without a proper basis.[12] In Victoria, most special hearings occur in the County Court, though they can be heard in the Supreme Court.[13] If it was determined that David 'committed the offence charged or an offence available as an alternative',[14] the court would be permitted to elect between a custodial order and a 'community-based' supervision order.[15]

In this case, if it was found that he committed the offence charged it is likely that David would be subject to a non-custodial supervision order. According to the VLRC, the majority of people with intellectual disability subject to supervision orders are subject to non-custodial supervision orders.[16] Supervision would be provided by Disability Services (through DHHS), which is the service that would supervise services to all people with an intellectual disability or cognitive impairment who are subject to a supervision order under the CMIA.[17]

In the less likely case that David was given a custodial supervision order, he would be placed in custody in a secure residential facility run by the Disability Forensic Assessment Treatment Service.

Another possibility is acquittal, which would be highly unlikely under the circumstances. According to the VLRC, '[i]t is very rare for the court to release a person unconditionally under the CMIA'.[18,19]

---

[10] *Crimes (Mental Impairment and Unfitness to Be Tried) Act 1997* (Vic) s 8(2). It is noteworthy that the CMIA is under review. Proposed amendments are currently before the Victorian Parliament, which may impact on the existing requirement to empanel a jury).

[11] *Crimes (Mental Impairment and Unfitness to Be Tried) Act 1997* (Vic) Pt 3.

[12] In *Subramaniam v The Queen* (2004) 211 ALR 1, 12 [40], the High Court noted that the purpose of these hearings is:

> first … to see that justice is done, as best as it can be in the circumstances, to the accused person and the prosecution. She is put on trial so that a determination can be made of the case against her. The prosecution representing the community has an interest also in seeing that justice be done. A special hearing gives an accused person an opportunity of being found not guilty in which event the charge will cease to hang over her head, and if she requires further treatment that it may be given to her outside the criminal justice system.

[13] Victorian Law Reform Commission, *Review of the Crimes (Mental Impairment and Unfitness to Be Tried) Act 1997*, Report No 28 (2014) [2.45].

[14] *Crimes (Mental Impairment and Unfitness to Be Tried) Act 1997* (Vic) s 17(1)(c).

[15] *Crimes (Mental Impairment and Unfitness to Be Tried) Act 1997* (Vic) s 26(2).

[16] Victorian Law Reform Commission, *Review of the Crimes (Mental Impairment and Unfitness to Be Tried) Act 1997*, Report No 28 (2014) [2.71].

[17] Victorian Law Reform Commission, *Review of the Crimes (Mental Impairment and Unfitness to Be Tried) Act 1997*, Report No 28 (2014) [2.70].

[18] Victorian Law Reform Commission, *Review of the Crimes (Mental Impairment and Unfitness to Be Tried) Act 1997*, Report No 28 (2014) [2.36].

[19] It is important to note that cases determined under the CMIA in Victoria rarely occur. This is the same in most jurisdictions. The Victorian Law Reform Commission (*Review of the Crimes (Mental Impairment and Unfitness to Be Tried) Act 1997*, Report No 28 (2014) [2.25]) found that over a 12-year period from 2000–01 to 2011–12, there were 159 cases determined under the CMIA in the higher courts (the Supreme Court

Pathway 1 – Unfitness to Plead finding

Potential Benefit: *David avoids conviction. A support package could be mandated by the court as part of the community supervision order. Court-ordered supervision may result in greater resources being available to David than under typical disability service provision.*

Potential Drawbacks: *The process is long and drawn out, which can cause stress and anxiety for David and his family. (The defence counsel reported that court appearances, even adjournments, caused David significant distress). The alleged victim and her family may also find this delay – and ultimately, a lack of conviction – to be confusing and difficult to accept.*

The likelihood of David reoffending whilst awaiting trial without specialist support is high.[20] This would increase contact with police and the likelihood of breaching bail conditions during this time, as well as contributing to a perception that David is a serial offender, possibly leading to the magistrate being less likely to give him a community supervision order.

There is also no guarantee that the services provided for under the non-custodial supervision order will be satisfactory to the magistrate and others involved in the initial trial, meaning that a custodial order is a realistic possibility.

A supervision order is essentially indefinite, although a nominal term is set which ensures the detention is reviewed at a specific time, which would be set for the end of the period that is equivalent to the maximum penalty for the offence.[21] Indecent assault is an indictable offence that carries a maximum penalty of 10 years' imprisonment,[22] meaning the nominal term would be set at 10 years. Although review mechanisms are in place, the order might last longer than if David was sentenced and convicted.

If David breaches the order, which is likely given its length and his history, a custodial order may be imposed, which entails an indefinite deprivation of liberty,[23] though – again – a nominal term would be set, at the end of which a review process would occur.[24] *David's regular police contact is likely to continue if he is acquitted, given the underlying factors contributing to his contact with the criminal justice system have not been addressed and there is no specialist disability support in place.* [25]

---

and County Court). That is, cases where there was an issue of unfitness to stand trial and/or mental impairment that resulted in a finding and an order being made (either an unconditional release or a custodial or non-custodial supervision order. In 2011–12, CMIA cases made up only approximately one per cent of the total cases that resulted in a sentence or a CMIA order in the higher courts (Ibid [2.27]). Because these cases seldom occur, it makes it difficult to generalise as each case under the CMIA is likely to be very unique.

[20] Law Reform Committee, Parliament of Victoria, *Inquiry into Access to and interaction with the Justice System by People with an Intellectual Disability and their Families and Carers* (2013); Villamanta Disability Rights Legal Service Inc., *People who have an Intellectual Disability and the Criminal Justice* System (2012); Disability Rights Service, *Enabling Justice: A report on Problems and Solutions in relation to Diversion of Alleged Offenders with Intellectual Disability from the NSW Local Courts System* (2008).

[21] *Crimes (Mental Impairment and Unfitness to Be Tried) Act 1997* (Vic) s 28(1).

[22] *Crimes Act 1958 (Vic)* s 40.

[23] *Crimes (Mental Impairment and Unfitness to Be Tried) Act 1997* (Vic) s 27(1).

[24] *Crimes (Mental Impairment and Unfitness to Be Tried) Act 1997* (Vic) s 28(1).

[25] Baldry, McCausland, Dowse & McEntyre, *A Predictable and Preventable Path: Aboriginal people with mental and cognitive disability in the criminal justice system* (2015); Villamanta Disability Rights Legal Service Inc., *People who have an Intellectual Disability and the Criminal Justice* System (2012); Disability

Table 1: Criminal Justice Costs of Pathway 1 – Unfitness to plead finding

Agency Contacts	Frequency	Costs if acquitted ($)	Costs if supervision order ($)	Costs if custodial order ($)
Defence counsel (Legal Aid) – Magistrates' Court[26]	1	975	975	975
Magistrates' court cost[27]	1	559	559	559
CLC Unfitness Hearing (Mental Impairment Assessment) [28]	1	938	938	938
County/District Court (Unfitness Hearing)[29] [30]	1	15,650	15,650	15,650
Defence Counsel (Legal Aid) – District Level (sentenced matters) Plea (1 court day) [31]	1	2900	2900	2900
Counsel's fees in Crimes (Mental Impairment and Unfitness to be Tried) Act Matters[32]	1	590	590	590
Unfitness to Plead Clinical Assessments ($938 each)	2	1876	1876	1876
Special Hearing[33]	6 court days[34]	7948	7948	7948
Empanelling Jury - $50/day per juror ($40 per day plus meal costs)[35] for 30 jurors	6 days	9000	9000	9000

Rights Service, *Enabling Justice: A report on Problems and Solutions in relation to Diversion of Alleged Offenders with Intellectual Disability from the NSW Local Courts System* (2008).

[26] Victoria Legal Aid, Handbook, costs payable in criminal law matters, Table E – Lump sum fees for Magistrates' Court stage of an indictable crime (lump sum general preparation fee $600 plus Appearance committal mention $375)

[27] Magistrates' Court cost for specific offense – Offensive Behaviour in 2015/16 AUD (*RoGs 2017 report, Table 17A.3, Magistrates' Courts costs for Victoria ($499*) *weighted by BOCSAR data on number of adjournments relative to average for an offensive behaviour charge with guilty plea and penalty not incarceration (weight=1.12))*

[28] Victoria Legal Aid, Handbook, payments to lawyers and service providers, disbursements, Table S (evidentiary report)

[29] It is important to note that the operation of the CMIA is extremely complex, and difficult to fully cost. As the VLRC noted, in order to examine the operation of the CMIA, their investigation needs coverage of 'multiple jurisdictions and government departments and people from a range of professional and non-professional backgrounds' (Victorian Law Reform Commission, *Review of the Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 (Vic)*, Report No 28 *(*2014) [2.80].

[30] Average District Court cost in 2015/16 AUD (*RoGs 2017 report, Table 17A.3, District Court costs for Victoria)*

[31] Victoria Legal Aid, Handbook, costs payable in criminal law matters, Table F – Lump sum fees for County Court and Supreme Court stage of an indictable crime matter (County Court fees for: Counsel – post committal negotiations $600 plus Plea fees: preparation$474, appearance fee (first day) $1527, Sentence $299)

[32] Victoria Legal Aid, Handbook, costs payable in criminal law matters, Table T – Counsel's fees in Crimes (Mental Impairment and Unfitness to be Tried) Act Matters (County Court)

[33] Victoria Legal Aid, Handbook, costs payable in criminal law matters, Table F – Lump sum fees for County Court and Supreme Court stage of an indictable crime matter (County Court fees for: Special hearing: preparation $158, appearance fee (first day) $2080, 5 subsequent days @ $1142 per day)

[34] Days calculated as per advice from Victorian Aboriginal Legal Service on mid point of range of length of special hearings.

Incarceration in Forensic Unit[36]	1 year	N/A	N/A	353,320
Supervision Order Administration[37]	1 year	N/A	9,819	N/A
Police contact if no specialist disability support (contact with 2 constables @ $37.11 per hour[38] x 2 hours per week for 52 weeks)	208 hours	7719	N/A	N/A
Reoffending ($68,912.19 – Police incident: 2111.29;[39] Defence counsel: 975;[40] Magistrates' court: 558.88;[41] and custody: 358.61 per day[42] for 26 weeks) x 0.38[43]	1	26,187	26,187	N/A
Condition Breach ($68,912.19) x 0.17[44]	1	N/A	11,715	N/A
Total		**$74,342**	**$88,157**	**$393,756**

[35] Estimates used on advice from Victorian court staff regarding usual number of jury members and average costs per day.

[36] AIHW mental health services in Australia, Table EXP.6: Recurrent expenditure (a) ($) per patient day(b) on specialised mental health public hospital services: Forensic Average Cost Victoria 2014/15; $968 per day x 365 days.

[37] RoGs 2017, Table 8A.18, Vic recurrent expenditure per community corrections offender per day $26.90 multiplied by 365 days for a 12 month good behaviour bond.

[38] $63,757 per year for 38 hours per week (http://www.policecareer.vic.gov.au/police/about-the-role/salary-and-benefits) plus 15% on costs (ABS 6348.0 - Labour Costs, Australia, 2010-11: employee earnings account for 87.3% of labour costs, 1/0.873 = 1.15, i.e. 15% on cost). 63,757x1.15 = $73,320.55 per year = $37.11 per hour.

[39] 2015-16 NSW Police expenditure of $ 3,763,368,400 (ROGS 2017 Table 6A.1: net recurrent expenditure + payroll tax + user cost of capital + capital expenditure) 20% deducted to account for police work that does not relate directly to crime (Smith et.al.2014). The remaining budget ($3,010,694,720) was then divided by the number of recorded criminal incidents in NSW for July 2015 to June 2016 (1,425,996 incidents, data provided by BOCSAR Reference: jh17-15041) to come up with a cost per incident of $2111.29.

[40] Victoria Legal Aid, Handbook, costs payable in criminal law matters, Table E – Lump sum fees for Magistrates' Court stage of an indictable crime (lump sum general preparation fee $600 plus Appearance committal mention $375)

[41] Magistrates' Court cost for specific offense – Offensive Behaviour in 2015/16 AUD (*RoGs 2017 report, Table 17A.3, Magistrates' Courts costs for Victoria ($499*) *weighted by BOCSAR data on number of adjournments relative to average for an offensive behaviour charge with guilty plea and penalty not incarceration (weight=1.12))*

[42] The Productivity Commission's Review of Government Services (2017) was used to identify recurrent expenditure per prisoner per day $352.38 (Table 8A.18) plus payroll tax $6.23; total payroll tax for prisons (Table 8A.1) divided by 365.25 days per year divided by average daily number of prisoners (Table 8A.4). These were summed to calculate the cost per day as $358.61 per prisoner.

[43] The likelihood of reoffending is calculated through analysis of the MHDCD Dataset which found that in the 12 months after court finalisations for all males with ID in the MHDCD Dataset convicted of sexual assault and related offences and acquitted, 38% reoffended https://www.mhdcd.unsw.edu.au/australians-mhdcd-cjs-project.html

[44] The likelihood of breaching a supervision order is calculated through analysis of the MHDCD Dataset which found that in the 12 months after court finalisations for all males with ID in the MHDCD Dataset convicted of sexual assault and related offences and acquitted, 17% breached their supervision order https://www.mhdcd.unsw.edu.au/australians-mhdcd-cjs-project.html

PATHWAY 2 – GUILTY PLEA

The magistrate considered a second option before the initial expert report was returned. David could enter a guilty plea in the Magistrates' Court[45] and claim mitigating circumstances due to the nature of his disability. 'Verdins principles' could be applied to sentencing (in which the length of the sentence is reduced if offending is linked to disability). David would likely have been placed on a good behaviour bond. Because the expert report concluded that David was unable to provide instruction, David's lawyer did not feel that it was ethical to proceed down this pathway.

It is worth outlining the processes and costs associated with a guilty plea, however, because there is a widely-acknowledged risk that current unfitness to plead laws may create an incentive for even innocent people to plead (or be advised to plead) guilty, in order to avoid the consequences of a finding of unfitness.[46] Chief Justice Martin of the Supreme Court of Western Australia, in an extra-judicial comment, observed that:

> Lawyers do not invoke the legislation, even in cases in which it would be appropriate, because of the concern that their client might end up in detention, in custody, in prison, for a lot longer period than they would if they simply plead guilty to the charge brought before the court.[47]

Law reform initiatives at the Commonwealth, state and territory levels, have brought attention to the issue,[48] including under Victorian law.[49] Research specifically focused on Aboriginal people with cognitive disability in the criminal justice system has found that solicitors may advise clients to plead guilty as a means to get their matter resolved quickly and also to avoid a potential finding of unfitness to plead that may lead to worse outcomes.[50] This is more common in regional and remote areas where solicitors

[45] The majority of cases involving accused adults with cognitive disabilities most likely occur in magistrates' courts (Victorian Law Reform Commission, *Review of the Crimes (Mental Impairment and Unfitness to Be Tried) Act 1997*, Report No 28 (2014) [2.28]. As the VLRC noted:

> …the Magistrates' Court ordered sentences in 80,900 cases [between 2011-12]. […] These statistics reflect that there is a significantly larger volume of cases that are determined in the Magistrates' Court involving relatively less serious crimes and quicker disposal methods. In the higher courts matters are more serious and complex and can involve a jury trial to determine criminal responsibility, and hence take more time to finalise. The Children's Court deals with matters that involve young people and a wider range of offences than the Magistrates' Court in terms of seriousness and complexity, and these require a specialised approach (VLRC, Report No 28 (2014) [2.28])

[46] Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Report No 124 (2014) 196 [7.20].

[47] 7.30, '"Urgent need" for law change as mentally-impaired accused detained indefinitely, WA Chief Justice Wayne Martin says' *7.30: Australian Broadcasting Corporation* (online), 10 July 2015 <http://www.abc.net.au/news/2015-07-10/push-for-mentally-impaired-accused-law-change-in-wa/6611010>.

[48] 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); Australian Law Reform Commission, above n ; See also Law Reform Committee, Parliament of Victoria, *Inquiry into Access to and interaction with the Justice System by People with an Intellectual Disability and their Families and Carers* (2013); Department of the Attorney General (WA), *Review of the Criminal Law (Mentally Impaired Accused) Act 1998*, Final Report (April 2016).

[49] Victorian Law Reform Commission, *Review of the Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 (Vic)*, Report No 28 (2014).

[50] Baldry, E., McCausland, R., Dowse, L. & McEntyre, E. *A Predictable and Preventable Path: Aboriginal people with mental and cognitive disability in the criminal justice system* (2015).

face particularly heavy case loads and there is a lack of court diversion or other community-based options for people with intellectual disability.[51]

If David's defence counsel did enter a guilty plea and the magistrate decided to proceed within the Magistrates' Court, he may be eligible for a Justice Plan. In Victoria, because David has an intellectual disability as defined in the *Disability Act 2006*, he would have access to the Justice Plan regime under s 80 of the *Sentencing Act 1991*. The *Sentencing Act 1991* (Vic), Part 3BA, Division 2, provides that the court may request a plan of available services for offenders with intellectual disability once they have been found guilty of an offence and the court is considering imposing a corrections order or releasing the offender on adjournment. Electing to have a matter heard summarily in the Magistrates' Court in Victoria by way of plea enables the engagement of the Justice Plan regime which effectively requires disability services to provide the same service provision that he would be eligible for if he were found unfit to stand trial under the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997*.

It is important to note that a person subject to a Justice Plan does not have to consent to the plan, which can be imposed. In drafting the Plan, authorised persons must have regard to the objectives and principles specified in Part 2 of the *Disability Act 2006* and which are designed to reduce the likelihood of the person committing further offences. According to the Disability Services Criminal Justice Practice Manual, '[t]he person with an intellectual disability should be involved in developing the justice plan, although they do not have to consent to its content prior to it being presented to court'.[52] The Manual also promotes engagement with any relevant community support organisations, which may be supporting the person. This is particularly relevant if the person is residing in supported residential accommodation. When creating a justice plan, disability client support workers must adhere to the guiding principles for planning as per s 52 of the *Disability Act 2006*.

A guilty plea without mitigating circumstances could have led to a custodial order, community-based order with supervision, or no penalty.[53] Without the specialist disability support provided via a Justice Plan, there is a reasonable likelihood of David having ongoing contact with police and breaching his community order or reoffending within the 12 months and returning to court.[54]

[51] Baldry, E., McCausland, R., Dowse, L. & McEntyre, E. *A Predictable and Preventable Path: Aboriginal people with mental and cognitive disability in the criminal justice system* (2015).
[52] Victorian Government Department of Human Services, *Disability Services Criminal Justice Practice Manual 2007* (Melbourne, 2007) 34.
[53] Of the 74 males with intellectual disability in the MHDCD Dataset who have been convicted of sexual assault and related offences, 27 received a custodial order. Of the 47 men who were not incarcerated, 8 received community-based orders and 39 received no penalty.
[54] Baldry, E., McCausland, R., Dowse, L. & McEntyre, E. *A Predictable and Preventable Path: Aboriginal people with mental and cognitive disability in the criminal justice system* (2015); Villamanta Disability Rights Legal Service Inc., *People who have an Intellectual Disability and the Criminal Justice* System (2012); Disability Rights Service, *Enabling Justice: A report on Problems and Solutions in relation to Diversion of Alleged Offenders with Intellectual Disability from the NSW Local Courts System* (2008).

Pathway 2 – Guilty plea to avoid unfitness finding

***Potential Benefits**: A relatively speedy resolution (notwithstanding that at the time of the supporters intervention, the client had already had 'about four to five appearances' in court, according to his defence lawyer).*

***Potential Drawbacks:** David would have a conviction against his name, and would be placed on a sex offender registration list. If he were placed on a Good Behaviour Bond, without a Justice plan, David would be required to notify Corrections Victoria of any changes in his circumstances, but wouldn't be actively monitored. Without a Justice Plan and associated specialist support, the likelihood of David breaching his bond and reoffending is high.*

Table 2: Criminal Justice Costs for Pathway 2 – Guilty plea to avoid unfitness finding

Agency Contacts	Frequency	Costs if no penalty	Costs if Justice Plan	Costs if community order	Costs if custodial order
Defence counsel (Legal Aid) – Magistrates' Court[55]	**1**	975	975	975	975
Magistrates' court cost[56]	1	559	559	559	559
Court Outcome - Good Behaviour Bond[57]	1	N/A	9,819	9,819	N/A
Mental Impairment Assessment to apply 'Verdins Principles'	1	N/A	938	938	N/A
Justice Plan administration (Average cost p/a $1673[58])	1	N/A	1673	N/A	N/A
Police contact if no specialist disability support (contact with 2 constables @ $37.11 per hour[59] x 2 hours per week for 52 weeks)	208 hours	7719	N/A	7719	N/A
Sex Offender Registry administration p/a (Compliance Manager @ $442.30/day x 2 days per year[60] +	1 year	985	985	985	985

[55] Victoria Legal Aid, Handbook, costs payable in criminal law matters, Table E – Lump sum fees for Magistrates' Court stage of an indictable crime (lump sum general preparation fee $600 plus Appearance committal mention $375)

[56] Magistrates' Court cost for specific offense – Offensive Behaviour in 2015/16 AUD (*RoGs 2017 report, Table 17A.3, Magistrates' Courts costs for Victoria ($499*) *weighted by BOCSAR data on number of adjournments relative to average for an offensive behaviour charge with guilty plea and penalty not incarceration (weight=1.12))*

[57] RoGs 2017, Table 8A.18, Vic recurrent expenditure per community corrections offender per day $26.90 multiplied by 182.5 days for a 12 month good behaviour bond sentence.

[58] As the Victorian Government were unable to provide sufficient detail to estimate unit costs around the development, implementation and monitoring of a Justice Plan, the cost was estimated based on the following: one week over a year of a Disability Justice case manager's time, cost estimated by annual salary (midpoint of range: https://apply.correctionsjobs.vic.gov.au/jobs/DOJ-1289934) $75,650 plus 15% on costs = 87,000 p.a. = $1673 per week.

[59] $63,757 per year for 38 hours per week (http://www.policecareer.vic.gov.au/police/about-the-role/salary-and-benefits) plus 15% on costs (ABS 6348.0 - Labour Costs, Australia, 2010-11: employee earnings account for 87.3% of labour costs, 1/0.873 = 1.15, i.e. 15% on cost). 63,757x1.15 = $73,320.55 per year = $37.11 per hour.

[60] As Victoria Police were unable to provide unit costs associated with an individual being included on the Sex Offender Registry, the cost was estimated based on the following:

annual $100 per person register cost)					
Condition Breach ($68,912.19 – Police incident: 2111.29;[61] Defence counsel: 975;[62] Magistrates' court: 558.88;[63] and custody: 358.61 per day[64] for 26 weeks) x 0.38[65]	1	N/A	N/A	26,187	N/A
Corrections custody (358.61 per day)[66]	1 year	N/A	N/A	N/A	130,893
Total		**$10,238**	**$14,949**	**$47,182**	**$133,412**

Per page 24 of http://www.lawreform.vic.gov.au/sites/default/files/SOR_info_paper.pdf, the Compliance Manager is responsible for initial interview and annual reviews with sex offenders on the register and ongoing notification obligations. This was assumed to amount to at least 2 days work per annum. A current advertisement for a Compliance Manager (for the ACNC) is advertising the position at ASP level E1 which is $99,734 per annum plus 15% oncosts = $115,000 per year. At 2 days per annum this equates to $885 per year ($442.30 per day). In addition, a $100 registry cost per registered offender was attributed, amountint to $985 per year per person on the register.

[61] 2015-16 NSW Police expenditure of $ 3,763,368,400 (ROGS 2017 Table 6A.1: net recurrent expenditure + payroll tax + user cost of capital + capital expenditure) 20% deducted to account for police work that does not relate directly to crime (Smith et.al.2014). The remaining budget ($3,010,694,720) was then divided by the number of recorded criminal incidents in NSW for July 2015 to June 2016 (1,425,996 incidents, data provided by BOCSAR Reference: jh17-15041) to come up with a cost per incident of $2111.29.

[62] Victoria Legal Aid, Handbook, costs payable in criminal law matters, Table E – Lump sum fees for Magistrates' Court stage of an indictable crime (lump sum general preparation fee $600 plus Appearance committal mention $375)

[63] Magistrates' Court cost for specific offense – Offensive Behaviour in 2015/16 AUD (*RoGs 2017 report, Table 17A.3, Magistrates' Courts costs for Victoria ($499*) *weighted by BOCSAR data on number of adjournments relative to average for an offensive behaviour charge with guilty plea and penalty not incarceration (weight=1.12))*

[64] The Productivity Commission's Review of Government Services (2017) was used to identify recurrent expenditure per prisoner per day $352.38 (Table 8A.18) plus payroll tax $6.23; total payroll tax for prisons (Table 8A.1) divided by 365.25 days per year divided by average daily number of prisoners (Table 8A.4). These were summed to calculate the cost per day as $358.61 per prisoner.

[65] The likelihood of reoffending is calculated through analysis of the MHDCD Dataset which found that in the 12 months after court finalisations for all males with ID in the MHDCD Dataset convicted of sexual assault and related offences and acquitted, 38% reoffended https://www.mhdcd.unsw.edu.au/australians-mhdcd-cjs-project.html

[66] The Productivity Commission's Review of Government Services (2017) was used to identify recurrent expenditure per prisoner per day $352.38 (Table 8A.18) plus payroll tax $6.23; total payroll tax for prisons (Table 8A.1) divided by 365.25 days per year divided by average daily number of prisoners (Table 8A.4). These were summed to calculate the cost per day as $358.61 per prisoner.

PATHWAY 3 – SUPPORTER INTERVENTION

During the course of David's trial the Unfitness to Plead Support Program had been initiated. After David had appeared in court on four separate occasions, each time resulting in an adjournment, the CLC disability support worker was asked by the defence lawyer (at the same CLC) to assist with the case. The CLC disability support worker arranged a meeting between David, his Department of Health and Human Services (DHHS) case manager, his guardian and defence lawyer.[67]

The discussion between the CLC disability support worker, case manager, guardian and defence lawyer centred on David's current situation; namely, the offending behaviour, his unstable housing situation, and his social isolation, which potentially exacerbates alleged offending in a local high street. They discussed possible support structures, including relationship and sex education programs and David living at a male-only supported residential service. The DHHS then provided an updated care plan, and the CLC disability support worker co-ordinated communication about this development between relevant parties, including assisting David to make the decision about how to proceed.

> "So a meeting was convened to have a discussion about (a) his current state, and then (b) about what sort of support structures could be set up around this particular client. Addressing things also such as positive sexuality type programs […] DH[H]S then provided a care report or a care plan which we then use, we provided that to prosecution and said: 'We know that you're pursuing this prosecution on the basis that you're trying to set up support structure around this particular client. But here is the proposal that we can provide with his guardian and with disability support services,' and they were able to then come back to us and say, 'well, in the circumstances we're satisfied that he's no longer at risk of committing further offences so we'll withdraw this matter' – as opposed to going to a fitness trial, because the fitness report that we had for him stated that he was unlikely to ever be fit in the future. In fact, he had no insight whatsoever with respect to his offending…"
>
> - Excerpt from interview with lawyer, 2016.

The CLC disability support worker communicated this process to David. David was quite happy to stay at his aunt's house but the case manager, guardian and defence lawyers were concerned – as was the prosecution – that the lack of support meant he was spending most of his time at the local high street. They were concerned that David would not agree to leave his aunt's place to stay in the new proposed residential facility. However, after the CLC disability support worker explained the options and the risks to David, he agreed to move to the new group-home. For the service providers, the new home reportedly provided safer options for social and community engagement

[67] For clarity, we should reiterate the distinction between the CLC disability support worker from the case manager: the CLC disability support worker is based at the CLC, and is employed as part of the unfitness to plead pilot project, and assists the accused person to participate in proceedings. In contrast, the case manager is essentially employed by the DHHS and co-ordinates disability and other social services. The Guardian holds substituted decision-making powers over some areas of David's life; for example, medical decision-making.

for David, which they believed reduced possibilities for any future offending. A relationships and sex education program was part of the support package. This proposal was offered to the police and prosecution, who were satisfied that the likelihood of David committing offences in the future was greatly reduced. They withdrew the charges. According to the defence lawyer, it was quite unusual for this prosecution team to withdraw a case.

> It was great to have a support worker […] facilitate this, which we could then provide to prosecution saying 'there's no point pursuing these charges. Because we're going to a costly and time consuming fitness trial.' I mean ordinarily just for this client in particular we had about four to five appearances and the stress of having those appearances for the client was huge. […]
>
> It was a learning process not only for myself and the practitioners here, but it was a learning process for prosecutors as well. For [the specific prosecutors] […] to withdraw the charges based upon the fact that there was appropriate care was ground breaking for us. Because ordinarily police prosecutors would uplift the matters to the County Court and let the OPP prosecutors deal with it. So then they [would] just wipe their hands. But the frustration that the prosecutors in Melbourne were facing is that, I suppose, the reasons for why people were offending weren't being addressed.
>
> So that's why they [normally] found the need to have it uplifted but in this circumstance they withdrew and it was on the basis that he didn't pose any future threat. They use that as a case example for how to pursue matters in the future that's I suppose beneficial not only to the client but to the community.
>
> - Excerpt from interview with lawyer, 2016.

Pathway 3: Actual outcome with supporter

***Potential Benefits**: Charge withdrawn, support services put into place, and a relatively speedy resolution (though again, recognising that the client had already appeared in court four or five times, according to his defence lawyer), freeing up a solicitor at the community legal centre to provide better quality services.*

***Potential Drawbacks:** The outcome may be dissatisfying and confusing for the alleged victim and her family.*

Table 3: Criminal Justice Costs of Pathway 3 – Actual Outcome with Supporter

Agency Contacts	Frequency	Unit Costs of Agency Contacts
Defence counsel – Magistrates' Court[68]	1	975
Magistrates' Court cost[69]	1	559
Support Person – Medium Complexity Client[70]	1	3500
Total	**3**	**$5034**

[68] Victoria Legal Aid, Handbook, costs payable in criminal law matters, Table E – Lump sum fees for Magistrates' Court stage of an indictable crime (lump sum general preparation fee $600 plus Appearance committal mention $375)

[69] Magistrates' Court cost for specific offense – Offensive Behaviour in 2015/16 AUD (*RoGs 2017 report, Table 17A.3, Magistrates' Courts costs for Victoria ($499*) *weighted by BOCSAR data on number of adjournments relative to average for an offensive behaviour charge with guilty plea and penalty not incarceration (weight=1.12))*

[70] This figure is an estimate of the average cost of a client depending on their level of complexity as this approach was deemed to be a better reflection of the diversity of the clients supported than using an average overall cost. Under the pilot, the CLC received $30,000 to employ someone for six months 0.6 FTE. Qualitative data gathered indicated that a support person is likely to have approximately 10 clients, and questionnaire responses indicated that the level of complexity of clients (high, medium, low) affects the contact hours and work involved, and that the distribution of clients for a support worker is approximately (20% - high complexity, 40% - medium complexity, 40% - low complexity). Assuming the costs are normally distributed, and that as indicated by the questionnaires that this particular case study client fits in the medium complexity bracket, and that the distinction between 'medium' and 'high' complexity in terms of work load is not substantial, the estimated average cost of $3,500 for a 6 month period is approximately 0.45 standard deviations above the mean.

Conclusion

The case study examined indicates the economic as well as social benefits of the support program developed as part of the Unfitness to Plead project.

While this case study focuses specifically on the criminal justice system-related costs for a 12 month period around court proceedings, there are likely to be broader and longer term economic and social costs associated with Pathways 1 and 2 that could be offset by the supporter role. Research in the field indicates that criminal justice costs increase over time as people with cognitive disability become entrenched in the criminal justice system and are further disadvantaged, while more holistic, community-based, cost-effective, specialist disability support can counter this and support people with cognitive disability to access alternative pathways out of the criminal justice system.[71]

This case study demonstrates that a relatively modest program intervention at a crucial point in criminal justice proceedings can improve outcomes for accused persons with cognitive disability, and provide significant cost savings to government.

While this case study is set in Victoria, its analysis has national implications for the way the criminal justice system responds to accused persons with cognitive disability. Without specialist disability support, people with cognitive disability may face indefinite detention but also serial detention and incarceration, where they cycle in and out of the criminal justice system on short sentences or remand; this has been found to be the case for Aboriginal and Torres Strait Islander people in particular.[72]

This case study provides evidence that resourcing trained supporters to work in legal services could assist in reducing the significant economic and social costs of people with cognitive disability cycling in and out of the criminal justice system.

[71] McCausland, Baldry, Johnson & Cohen, People with mental health disorders and cognitive impairment in the criminal justice system Cost-benefit analysis of early support and diversion (2013).
[72] Baldry, McCausland, Dowse & McEntyre, *A Predictable and Preventable Path: Aboriginal people with mental and cognitive disability in the criminal justice system* (2015).