Fitness to stand trial, human rights and possibilities from England and Wales

Jeanette Stewart, Mary Woodward and Ilana Hepner

The capacity of individuals with disability, including cognitive or mental health impairments, to access justice on an equal basis has been considered recently in several Australian jurisdictions. Impairments can render individuals vulnerable in the legal system, affecting their reliability as a witness or their fitness to be tried, especially when limited support is available to help these individuals meet the test and criteria for fitness to stand trial. This article considers the situation in Australia in light of human rights perspectives and compares it with the England and Wales approach where special support measures have been introduced to help individuals access justice. The article recommends that better support measures be introduced in Australia that would be consistent with a human rights framework calling for support to enable individuals with disability to access justice. In particular, the introduction of intermediaries, as used in England and Wales, would go some way towards helping vulnerable individuals to access justice.

GIVING EVIDENCE AND FITNESS TO STAND TRIAL

A witness or a defendant’s competency to give evidence is governed by statute at the Commonwealth, State and Territory level in Australia. The relevant statute in the Commonwealth, New South Wales (NSW), Victoria and Tasmania is the uniform Evidence Act, while in Queensland, South Australia, Western Australia and the Northern Territory statutes pre-dating the uniform Evidence Act apply.

Under ss 12 and 13 of the Evidence Act 1995 (Cth):
1. Every person (regardless of age, race and gender) is competent to give evidence unless they do not have the capacity to understand a question about a fact or do not have the capacity to give an answer about a fact that is able to be understood and this incapacity is not able to be overcome.
2. Mental, intellectual or physical disabilities are examples of reasons that lead to a person having a lack of capacity to understand a question or give an answer.
3. A person incapable of giving evidence about one fact might be competent to give evidence about other facts.
4. A person who is competent of giving evidence is not competent to give sworn evidence if they do not have the capacity to understand that they are under an obligation to give truthful evidence.
5. If a person is unable to give sworn evidence, they may be competent to give unsworn evidence if the court has told the person that it is important to tell the truth.
6. Evidence given by a witness will not become inadmissible because that witness ceases to be competent of giving evidence.
7. The court is able to inform itself as it sees fit as to questions of competency, including obtaining information from persons with specialised knowledge.

The term “unfit to stand trial” refers to defendants who are either temporarily or permanently unable to meet legal criteria or “standards” to stand trial. The term is distinguished from the defendant’s mental or cognitive condition at the time of an alleged offence, though this may or may not be related to their ability to stand trial. In NSW, Pt 2 of the Mental Health (Forensic Provisions) Act 1990 sets out the provisions relating to persons affected by mental disorders and unfitness within
Fitness to stand trial, human rights and possibilities from England and Wales

the Supreme and District Courts. At the present time, diversionary processes remain in place for matters heard in the Local Court, as set out in Pt 3 of the Act.

Fitness hearings are not adversarial. Legal clarification as to the test for fitness to plead followed a number of cases; notable amongst these were R v Pritchard, where Baron Alderson set out a number of criteria for the determination of fitness to stand trial (Pritchard criteria). The legal test was further expanded in R v Presser, where Smith J set out what are now referred to as the “Presser criteria” for the determination of unfitness to stand trial. The Presser criteria are regularly applied throughout Australia. The criteria, relying heavily on adequate communication skills, include the ability to:

1. understand the charge;
2. plead to the charge and exercise the right to challenge jurors;
3. understand generally, the nature of proceedings (that it is an inquiry) as to whether the accused person did what they are charged with;
4. follow the course of proceedings;
5. understand the substantial effect of any evidence that might be used against them;
6. make their defence or answer the charge; or
7. give any necessary instructions to their legal counsel.

The legal test and criteria have been subsequently approved and relied on in a number of cases including Ngatayi v The Queen and Kesavarajah v The Queen and have been, in varying ways, incorporated within legislation. The appropriateness of the test and criteria has been the subject of consideration recently in several Australia jurisdictions.

In NSW, under s 14 of the Mental Health (Forensic Provisions) Act 1990, an individual found “unfit” to stand trial, is referred to the Mental Health Review Tribunal. Under the Act, the Tribunal determines whether the person will become fit within 12 months from the finding of unfitness. The Supreme Court will consider the Tribunal’s findings and may subsequently grant bail for up to 12 months, to allow the person to be detained in an appropriate mental health facility (for example, for appropriate psychiatric or medical treatment). The Director of Public Prosecutions (DPP) will consider proceedings in cases of individuals who the Tribunal determines will not become “fit” to stand trial. The DPP may elect not to proceed with the matter, or may elect to progress to a special hearing. The special hearing relates to the procedure by which the evidence against the individual is tested in order to determine whether the accused committed the offences charged. The hearing recognises that the individual is unable to fully participate in a trial, and allows for criminal procedure to be modified and “fair” for the individual who is found unfit.

Beyond the scope of this article, but worth noting briefly, is that there are significant legal consequences for some individuals found unfit to stand trial. Highlighted in R v Gallagher, Beech-Jones J, in finding the accused not fit to stand trial, cautioned:

It is no light matter to find a person unfit to be tried. A common consequence of such a finding is that the person can suffer indefinite incarceration without trial.

---

1 Mental Health (Forensic Provisions) Act 1990 (NSW), s 12.
2 R v Pritchard (1836) 7 C & P 303; 173 ER 135.
4 Ngatayi v The Queen (1980) 147 CLR 1.
5 Kesavarajah v The Queen (1994) 181 CLR 230.
7 R v Gallagher [2012] NSWSC 484 at [36].
Those with a cognitive or intellectual disability found unfit to stand trial can face indefinite detention. For example, under s 19 of the Criminal Law (Mentally Impaired Defendants) Act 1996 (WA), there are no limits on the periods of custody orders for those found unfit to stand trial. Similarly, those found unfit to stand trial under s 43ZC of the Criminal Code (NT) can face supervision orders for an indefinite term. There is also concern that innocent people may plead guilty in order to avoid the consequences of being found unfit.

Freckelton has discussed the issue of “indefinite detention” of persons found unfit to stand trial or guilty by reason of mental impairment, highlighting the potential danger of such persons to “fall between the cracks” and to lose “their liberty for longer than is necessary or fair”. He added: indefinite detention should be made subject to an automatic periodic review so as to protect against miscarriages of justice, changing societal values and shifts in the potential for rehabilitation, treatment and monitoring.

There are also concerns that the criterion-determined fitness approach is problematic itself, not least because psychiatric and cognitive/intellectual difficulties are assessed within a unitary set of criteria whose rules were:

developed without proper regard for the distinctive characteristics and needs of the people whose very interests they are designed to protect.

Indeed, there are now a number of national and international jurisdictions proposing revision of existing legal tests to assess an individual’s fitness to stand trial. More recent developments have also been related to consideration of the requirements for a fair trial, driven by human rights perspectives.

**FITNESS TO STAND TRIAL: VULNERABILITY FACTORS**

In law it is presumed that people have capacity to enter a plea when appearing before a court, and there is no need to inquire otherwise unless the issue of fitness is raised suggesting that the individual may not provide sworn evidence. However, factors known to lead to vulnerability have the potential to impact negatively on an individual’s cognitive or communication abilities rendering them vulnerable within the legal system. People with disability therefore can face a number of barriers when interacting with the legal system. For example, individuals who have communication difficulties may be particularly disadvantaged in court on the basis of the high level of language demands required by the giving of evidence. In addition, Gudjonsson and Clare have noted that individuals with intellectual disability are more disadvantaged than those without such disabilities within the justice system.

Vulnerability, according to Gudjonsson, is a product of various social, emotional, cognitive, situational and physiological limitations. Under s 306M(1) of the Criminal Procedure Act 1986 (NSW), a vulnerable person is defined as a child or a cognitively impaired person. Section 306M(2) provides that “cognitive impairment” includes:

- an intellectual disability;
- a developmental disorder (including an autistic spectrum disorder);
- a neurological disorder;
- dementia;

---


9 Australian Law Reform Commission, n 6, p 159.


11 Freckelton, n 10 at 473.


Fitness to stand trial, human rights and possibilities from England and Wales

- a severe mental illness; and
- a brain injury.

Vulnerability can manifest as a result of a number of conditions, including acute or progressive neurological conditions (for example, stroke or dementia), conditions related to drug or alcohol abuse (for example, alcohol-related brain impairment), acquired conditions (for example, traumatic head injury), or acute or chronic mental health conditions (for example, schizophrenia, major depression). The impact of acquired conditions affecting an individual’s cognition and capacity to stand trial was exemplified in R v Gallagher. The accused had a history of alcohol abuse, traumatic brain injury and epilepsy. The resulting cognitive and intellectual impairments rendered the accused unable to give instructions, provide her version of the facts, make a defence or answer to the charge against her. She was found unfit to stand trial.15

Developmental stage may also be an important factor leading to vulnerability; younger people may not have reached sufficient maturity,16 while the cognitive or physical abilities of older adults may be affected by conditions such as dementia, stroke or heart attack. For older adults charged with offences allegedly committed many years ago (such as sex offences), age-related factors may affect their capacity to participate meaningfully in a trial.

Disability also can present as a vulnerability, particularly for individuals with intellectual and mental health impairments. Such individuals are overrepresented at all stages of the criminal justice system as both victims and defendants.17

Individuals with intellectual disability, for example, may have difficulties with expressive (speaking) or receptive (understanding) language, leading to problems in communicating with legal officers, understanding and following pertinent information related to their case, being able to offer a plea or defend themselves under cross-examination. Vulnerable individuals with communication difficulties are particularly disadvantaged with double negative or leading questions (for example, a question that subtly prompts the respondent to answer in a particular way).18 They may have limited attentional or memory abilities, be unable to understand or respond appropriately in social or legal settings.19 Irace noted that people with intellectual disabilities have been shown to be more prone to suggestibility and leading questions, they can have difficulties comprehending questions or understanding the implications of the answers they give, they may unintentionally provide a misleading statement, or they may provide an account of events that is not accurate in a bid to leave the police station as quickly as possible.20 They may also be eager to please authority figures and provide answers they perceive as being desirable as opposed to necessarily correct. They may not recognise that they have not understood a question, may not be able to seek clarification, or may try to answer questions to which they do not necessarily know the answer to avoid appearing “dumb or stupid”.

Similar obstacles are faced by Indigenous Australians, but for reasons more specific to their cultural identity rather than cognitive issues. For example, they may have difficulty conceptualising legal concepts that fall outside their specific cultural laws, and there have been cases of Indigenous Australians who were disadvantaged in understanding various legal rights, for example, their right to remain silent.21

15 R v Gallagher [2012] NSWSC 484 at [38].
21 See the case of Marion Noble, who was arrested in 2001 after being accused of sexually assaulting two children in Carnarvon.
Stewart, Woodward and Hepner

The importance of cognitive abilities as underlying components of an individual’s fitness to stand trial is increasingly being recognised. Empirical research has highlighted the role of attention, language, memory and executive functioning with respect to the Presser criteria.22 White et al., for example, reported that psychologists and psychiatrists also recognised that factors other than IQ alone (for example, various cognitive factors) could significantly impact on the accused’s ability to meet the Presser criteria.23 These studies highlight the need for thorough examination of an individual’s cognitive and intellectual abilities when the issue of fitness is raised.

The courts have for some time recognised psychiatrists and clinically trained psychologists as experts for the purpose of assessing fitness to stand trial. Psychologists specialising in clinical neuropsychology, forensic psychology or clinical psychology have the expertise to draw on empirically validated assessment methodologies to assess and provide evidence of an individual’s psychological, intellectual and cognitive abilities. Experts therefore highlight the difficulties that an individual might experience at trial, while also assessing these difficulties against each Presser criteria.

In R v Briggs, the accused had a history of intellectual disability.24 The issue of fitness being raised led to the examination of the defendant by clinical neuropsychology and forensic psychiatry experts acting for the DPP and for the defence. The neuropsychology experts, having identified the defendant’s underlying intellectual and cognitive impairments, provided evidence to show how these difficulties would be barriers to the defendant satisfying all the Presser criteria. Applying Presser, Latham J found the accused unfit to stand trial, noting:

the decisive factor is the very limited nature of the accused’s capacity to process information of a conceptual nature, which would impact adversely on his capacity to appreciate the nature of the evidence against him, the course of the proceedings and his capacity to give meaningful instructions to counsel.25

CURRENT SUPPORTS

Accommodations to assist vulnerable individuals to give evidence varies across jurisdictions, and depend on factors specific to the case, a defendant’s particular vulnerabilities and certain procedural matters (such as cross-examination). For example, Aboriginal Client Service Specialists26 work at various Local Court sites in NSW to assist communication between the court and the Aboriginal community, and services such as the Intellectual Disability Rights Service27 provide a specialist legal advocacy service for those with an intellectual disability in NSW. These provisions need to be distinguished from community or statutory-based support systems that help prepare and educate people with legal problems or court matters, and from supports that are available to vulnerable individuals giving evidence in a proceeding.

For example, s 41 of the Evidence Act 1995 (NSW) has specific limitations on inappropriate and offensive questioning under cross-examination that apply to all witnesses, whether vulnerable or not. The Act sets out a number of provisions that can be made available to vulnerable individuals, particularly designed to assist individuals with physical or sensory disabilities. Under the Act, a witness who cannot hear adequately may be questioned in an appropriate way, or a witness who


23 White et al., n 22.


26 The Aboriginal Client Service Specialist (ACSS) Program is managed by the New South Wales Department of Justice and Attorney General: see http://www.hawlink.nsw.gov.au/hawlink/cpdl_cpd.nsf?OpenPrint/CPD_projects#ACSS.


890 (2015) 22 JLM 886
Fitness to stand trial, human rights and possibilities from England and Wales

cannot speak adequately may give evidence by any appropriate means. Further, s 306ZK of the Criminal Procedure Act 1986 (NSW) entitles a vulnerable witness to choose a person who they would like to have present during hearings. In some cases, modifications to the court processes enable the way in which evidence is given, for example, by way of pre-recorded interview or by way of closed-circuit television.28

There are no further examples in the legislation of how to accommodate witnesses or defendants who might have specific communication difficulties or other support needs, or how disabilities might be overcome.29 The rationale for not including further examples was that such a prescriptive recommendation to adjustments might limit the use of alternative adjustments and hence the types of incapacities that might be overcome,30 although the court does have discretion to direct questions in an “appropriate way” for witnesses who are unable to speak or hear.31

The provision of formal education and advice about the legal journey and hearing (for example, information about court processes and procedures) may in some cases be sufficient to increase an accused person’s ability to stand trial. However, a lack of training and understanding of the particular needs of vulnerable individuals may present a specific barrier to justice. Accordingly, lawyers, judges and police have also been increasingly provided with guidelines as to how to recognise and deal appropriately with individuals who have intellectual disabilities. Best practice guidelines have, for example, been provided in NSW.32

There are specific rules governing the manner in which a lawyer can ask questions, specifically not to mislead, confuse, harass or humiliate the witness. There are also protective provisions. Section 41 of the Evidence Act 1995 (NSW) enables a trial judge to disallow inappropriate or aggressive cross-examination of vulnerable and special witnesses.33 It imposes a duty on the court to disallow improper questions put to witnesses in cross-examination or to inform witnesses that they need not answer improper questions.

Under the Criminal Procedure Act 1986 (NSW), vulnerable persons have the right to nominate someone who can accompany them while giving evidence. Section 306ZK provides that the support person:

may be with the vulnerable person as an interpreter, for the purpose of assisting the person with any difficulty in giving evidence associated with an impairment or disability, or for the purpose of providing the vulnerable person with other support.

Section 15YO of the Crimes Act 1914 (Cth) restricts such support to “accompanying the individual” and does not permit active involvement, for example, to prompt or influence the defendant’s answers or disrupt proceedings in any way.

However, it also appears that in practice, and despite legislation designed to assist witnesses to overcome barriers related to communication or complex needs, the courts tend to use only those basic measures specifically designated in legislation.34

28 Criminal Procedure Act 1986 (NSW), Pt 6, Divs 2-4.
29 DLA Piper Australia, Background Paper on Access to Justice for People with Disability in the Criminal Justice System (2013).
31 Evidence Act 1995 (NSW), s 31(1) and (2).
33 See also Crimes Act 1914 (Cth), s 15YE.
HUMAN RIGHTS PERSPECTIVES

More recent developments have been related to consideration of the requirements for a fair trial, driven by disability discrimination and human rights perspectives. Embodied within the Convention on the Rights for People with Disabilities (CRPD), which came into force in Australia in August 2006, is respect for autonomy and legal access for those with disabilities. Article 12.2 imposes a legal obligation on state parties to recognise the rights of individuals with a disability to enjoy legal capacity equally with others, while Art 12.4 imposes the legal obligation that legislative, common law and administrative measures relating to legal capacity are introduced or remain in force.

Under the CRPD, it is every individual’s right, regardless of their level of decision-making ability, to be recognised as a person before the law. Assessments of decision-making capacity in this context are seen as potential threats to an individual’s legal capacity. There is a need to implement supports necessary to augment an individual’s strengths and highlight modifications to overcome difficulties in such a way that justice can be accessed. It has become imperative that policy and procedural changes make available the necessary accommodations to ensure those barriers that impede access to justice are identified and addressed. Under Art 13(1), state parties must ensure that “procedural and age-appropriate accommodations” in the criminal justice system are available, and further, that denial of such reasonable accommodation represents a ground upon which a claim of discrimination under the CRPD can be made.

There is a need to develop more active approaches to help circumvent barriers to an individual’s fitness to stand trial. Indeed, a number of policy and political considerations have followed that aim to identify disability specific barriers, with the development of policies and procedures to enhance participation. Moreover, there is evidence of insufficient recognition of the need for special supports for vulnerable individuals within the criminal justice system.

REGISTERED INTERMEDIARIES: ENGLAND AND WALES

Vulnerable witnesses

Legislative provisions in England and Wales allow for certain modifications or measures to be made to help vulnerable witnesses to give evidence. Notably, a court may direct that evidence or examination of a witness be provided through an “intermediary”. This novel approach involves the active assessment of factors that might facilitate a witness’s ability to provide evidence. In 2004, the Better Trials Unit of the Ministry of Justice (formerly within the Home Office) set up the Witness Intermediary Scheme under s 29, of the Youth Justice and Criminal Evidence Act 1999 (UK), to implement the provision of Registered Intermediaries (RIs) for vulnerable witnesses. Under s 16, vulnerable witnesses are defined as anyone who is:

- under 17 years of age; or
- whose quality of evidence may be affected by mental disorder or impairment of intelligence and social functioning or physical disability/disorder.

While RIs are not to “discuss, assess or comment upon a witness’s competence to give evidence”, their unique skills, experience and abilities provide a mechanism by which some underlying barriers may be circumvented and thereby enable people who might otherwise not have been able to give evidence and be cross-examined to participate in the investigative and trial processes.


37 UK Ministry of Justice, The Registered Intermediary Procedural Guidance Manual (Version 2.0, February 2012) at [1.7].

892

(2015) 22 JLM 886
Further, RIs need to be active in the facilitation of communication "between counsel and the witness and must intervene when necessary if complex questions are asked or if the agreed 'ground rules' are not adhered to". Unlike the current provision in Australian jurisdictions of a "support person", RIs have a role in communicating directly with an individual and the court. RIs will accompany and sit with an individual during their police interviews and trial, monitor the communication in court, intervene where recommendations about communication are not followed or where questions are not understood. Thus, the function of an RI under s 29 is to communicate:

- to the witness, any questions put to the witness;
- to any persons asking such questions, the answers given by the witness in reply to them; and
- to explain such questions or answers so far as necessary to enable them to be understood by the witness or the questioner.

Procedurally, a police officer or member of the Crown Prosecution Service, having identified a witness as having difficulty with "communicating", can request an assessment by an RI. The process is facilitated by a centralised matching service designed to match the witness according to their particular communication needs with the most available and appropriately skilled RI, who then completes an assessment of the witness’s communication abilities and provides recommendations to the police and/or court about the need for, and type of, different modifications (including use of a RI) required in order to enhance and facilitate the individual’s ability to give evidence. With approval from the court, the RI takes an active role in facilitating the witness’s journey through the legal process to enable their participation in procedures and ensure their communication with legal officers is as "complete, accurate and coherent as possible." 39

Vulnerable defendants

The Witness Intermediary Scheme, however, does not extend currently to vulnerable defendants because they are specifically excluded under the Youth Justice and Criminal Evidence Act 1999 (UK). This situation is expected to change when proposed amendments to the Act by s 104 of the Coroners and Justice Act 2009 (UK) are enacted. The amendments will provide statutory backing for extending the use of intermediaries to defendants requiring assistance with providing oral evidence. While this disparity exists between vulnerable witnesses and vulnerable defendants, courts may invoke their inherent power in cases where there is a need to support a vulnerable defendant at trial on the principle of the right to a fair trial and may give direction for the appointment of an intermediary for a defendant. Such an intermediary is appointed outside the Witness Intermediary Scheme and is acting in the capacity of an "unregistered" intermediary.

In June 2012, the Prison Reform Trust called for special measures, including the use of intermediaries, to be introduced in statute for vulnerable defendants. 43 Similarly, in Lord Bradley’s review of people with mental health problems or learning disabilities in the criminal justice system, he commented that:

[i]mmediate consideration should be given to extending to vulnerable defendants the provisions currently available to vulnerable witnesses. 44

41 In the United Kingdom, implementation of this provision has been deferred secondary to considerations including cost, resource and infrastructure.
42 O’Mahony BM, Milne R and Grant T, “To Challenge, or Not to Challenge? Best Practice when Interviewing Vulnerable Suspects” (2012) 6(3) Policing 301.
Questions have also been raised as to how special measures might enhance a defendant’s ability to participate in trial and should be fairly incorporated into the test for unfitness. For example, judicial recognition of the need to facilitate communication of vulnerable defendants was emphasised in *R v Walls*, where Thomas LJ held that:

There are available to those with learning disabilities ... facilities that can assist. Consideration can now be given to the use of an intermediary under the court’s inherent powers ... Plainly consideration should be given to the use of these powers or other ways in which the characteristics of a defendant evident from a psychological or psychiatric report can be accommodated with the trial process so that his limitations can be understood by the jury, before a court takes the very significant step of embarking on a trial of fitness to plead.

Furthermore, a recent England and Wales High Court case ruled that denying a defendant’s use of registered intermediaries, when these were available to victims and witnesses, would result in “inequality of arms” and the “risk of unfairness”. Notably, the court held that:

the scheme as currently operated would allow a witness for the Crown to be supported by an RI ... but the defendant against whom he gave evidence is denied one under the same scheme. The intelligent observer would be puzzled by why that were so.

Data are also emerging from organisations such as Communicourt, a leading intermediary service within England and Wales that arranges intermediaries for many cases involving vulnerable defendants. In a 2014 report, Communicourt reported data collated on 249 cases involving intermediaries over a 12-month period. 93% of the cases involved male defendants and 50% of the defendants were aged 25 or under. Intermediaries provided assistance at police interviews, conferences, including those regarding giving instructions and plea changes, and throughout trials, sentencing hearings, and probation services in pre-sentencing assessments. Approximately half of the referred clients had some degree of intellectual disability (known as learning difficulties in the United Kingdom), and many had diagnoses of a mental illness, autism spectrum disorder or attention deficit hyperactivity disorder. 37% of the cases were related to charges of sexual offences, including rape; 30% were related to allegations of offences including common assault, actual bodily harm and grievous bodily harm; 14% related to theft, burglary and criminal damage, with the remaining cases including homicide, fraud, drugs and handling stolen goods. The fact that the defendants had been deemed eligible for the use of an intermediary suggests a level of communication difficulty that likely prevented them from fully comprehending and/or expressing themselves in the justice process. It could be argued therefore that without the use of intermediaries, those vulnerable individuals, many of whom were charged with extremely serious offences, may otherwise have been denied access to a fair trial.

The need for an intermediary within a trial of a vulnerable defendant is exemplified in an article by O’Mahony detailing some of the communicative exchanges within the trial of a woman with intellectual disabilities charged with homicide for whom he was acting as intermediary. The following is an extract from a cross-examination showing how difficult it can be to simplify words and concepts for vulnerable individuals, and that without intervention from an intermediary can make the situation even more confusing:

Prosecution Counsel: Have you forgotten which your left is now I am asking you about it?
Defendant: I forget. I have to think.
Prosecution Counsel: Imagine I am you and my back is to your front door, left is that way; do you follow?
Defendant: Is it?

45 *R v Walls* (2011) EWCA Crim 443 at [37].
46 *R (Application of OF) v Secretary of State for Justice* [2014] EWHC 1944 at [46].
47 *R (Application of OF) v Secretary of State for Justice* [2014] EWHC 1944 at [47].
49 Communicourt, n 48, p 4.
Fitness to stand trial, human rights and possibilities from England and Wales

Prosecution Counsel: Just imagine; we will call it “blogging” direction, just think of it as “blog direction”.

Defendant: What does “blog” mean?

Prosecution Counsel: It is just an imaginary word because you can’t understand the word left, so I have just taken an imaginary word, if you go in that direction from your house you would go down to the end of your street and go round to her back door, can’t you? Another extract from the same trial demonstrates that even when an intermediary intervenes to highlight likely language difficulties, judicial officers might overestimate the individual’s understanding and underestimate the need for simplification (noting the complex language that the judge uses when he tries to explain what the prosecution barrister meant):

Prosecution Counsel: (To the defendant): If you do not understand a word I use please can you indicate it?

Defendant: Yes.

Prosecution Counsel: If you don’t indicate it I am going to assume you understood the word; do you follow?

Defendant: Yeah.

Intermediary intervention: Your Honour, Miss XXXX may not even understand the word “indicate,” so if you could check that.

Judge: Hang on, let’s keep a balance here. (To the defendant): Miss XX, if you don’t understand Mr XX’s questions, you say so. That is simple. If you don’t say that you don’t understand we are entitled to assume that you do understand.

Defendant: Okay, yeah.

Judge: That is pretty simple with the problems you have. Either you can tell us you understand or you don’t. I don’t see a problem with that.

Prosecution Counsel: (To the defendant): Do you understand the word “indicate”?

Defendant: No.

Prosecution Counsel: You don’t, I see, so you were thrown by that. Northern Ireland has also explored ways of managing the communication needs of vulnerable individuals. In May 2013, a Registered Intermediaries Scheme pilot covering suspects, defendants, as well as victims and witnesses was launched. The pilot ran until mid-November 2014, after which an evaluation was to be conducted to help inform a decision on the possible future roll-out of the scheme. The initial phases of the pilot attracted support for the scheme, with Northern Ireland’s Justice Minister David Ford welcoming the positive impact of the pilot in assisting vulnerable victims, witnesses and defendants in communicating more effectively.

The use of special measures for vulnerable defendants has also attracted interest in terms of the legal test for unfitness to plead and stand trial. The Law Commission of England and Wales has proposed that the current test for fitness be replaced with a specifically defined model of “decision-making capacity”, with special measures being available and playing a greater role in determining whether vulnerable defendants are able to meaningfully participate in their trial. Within this context, the Commission has proposed that special measures be introduced enabling fitness to stand trial assessments by experts to be admissible for vulnerable defendants, and that every effort be

---


31 O’Mahony, n 50 at 80-81.


made to receive evidence from a vulnerable defendant who may be considered fit to plead but has a condition making it difficult or disadvantageous for them to give evidence at a trial.55

Notably, the Commission observed that the role of special measures was not considered within the test of fitness in Pritchard, and:

[i]f a factor in the reformed legal test for the decision-making capacity of the accused is the possibility of having special measures to assist the accused, this will presumably increase the prospects of some defendants who would currently be found unfit to plead being able to stand trial.56

In Australia, the Victorian Law Reform Commission has highlighted the need for measures to be introduced to optimise fitness for those found unfit to stand trial in its review of the Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 (Vic).57 The Commission noted that while there is some provision for courts to consider the availability of measures to optimise an individual’s fitness, there is a need for more modifications to be available, such as adjustments in court and education, to enable an accused to become fit to stand trial.58 The Commission also recommended specific “in-court” measures, including the use of a support person (communication specialist or intermediary), to interpret what is said in court to the accused to facilitate their understanding, and improve communication methods in the court.59

The Commission’s consultation process revealed agreement that:

the law should recognise that fitness to stand trial can be enhanced if appropriate support is provided in court, and that accused with mental conditions should be provided with more support in court.60

Similarly, the Victorian Parliament Law Reform Committee in its inquiry into access to and interaction with the justice system for people with intellectual disabilities, noted that when information is given in simple terms and support is provided to assist them in understanding court proceedings, most defendants with an intellectual disability or cognitive impairment will be fit to stand trial.61

While recognising that in some cases the degree of impairment would render individuals unfit to be tried, the Committee concluded that most barriers could be overcome with adjustments in court proceedings and the availability of support measures.62 Recognising the range of measures currently available, the Committee noted that the Office of Public Prosecutions had highlighted that there was little to support individuals with specific intellectual or cognitive disabilities and that the use of witness intermediaries as adopted in the United Kingdom could be adopted in Victoria.63 The Committee therefore recommended that the Victorian Government consider establishing a witness intermediary scheme that would be modelled on the scheme in the United Kingdom.64

INTERMEDIARIES IN AUSTRALIA?

A central tenet of this article is that in spite of the raft of procedural modifications that may be available, current provisions may, for some individuals, be insufficient to address the specific vulnerabilities that have led to failures under Presser thresholds. More specifically, there appear to be limited mechanisms for addressing or accommodating specific cognitive or communication difficulties in order to meet necessary fitness thresholds. Fitness hearings may seek to determine the availability of specific modifications, but in cases where those modifications are insufficient, or absent, the

55 Law Commission, n 54 at [4.29]-[4.31].
56 Law Commission, n 54 at [4.25].
58 Victorian Law Reform Commission, n 6, p 86.
59 Victorian Law Reform Commission, n 6, p 87.
60 Victorian Law Reform Commission, n 6, p 87.
61 Law Reform Committee, n 36, p 44.
62 Law Reform Committee, n 36, p 279.
63 Law Reform Committee, n 36, p 283, referring to Office of Public Prosecutions, Submission No 20 (9 September 2011) p 9.
64 Law Reform Committee, n 36, p 285.
outcome will be a finding of unfitness. Notably, in *R v Briggs*, consideration was given to whether the presence of a defendant's nominated support person could alleviate difficulties following and understanding proceedings, and ultimately alleviate these as issues in relation to fitness. Expert opinion was to the effect that, unless the support person had knowledge and understanding of intellectual disabilities and unless there were substantial changes made to the course of the trial, the presence of the support person might not be sufficient to alleviate the difficulties. Indeed, it was felt that the defendant's failures on fitness thresholds would not be substantially changed by the provision of a support person.

Support persons under s 15YO of the *Crimes Act 1914* (Cth) are limited to the extent that they may accompany the person, but they are not permitted to prompt, influence the person's answers or disrupt the questioning of the person. Their role appears to be related to "moral or emotional" support.

In its 2014 discussion paper on equality, capacity and disability, the Australian Law Reform Commission recommended that amendments be made to the *Crimes Act 1914* to incorporate more comprehensive provisions for vulnerable individuals in need of support persons. The recommendations included that the:

*Crimes Act 1914* (Cth) should be amended to provide that a witness who needs support is entitled to give evidence in any appropriate way that enables them to understand questions and communicate answers; and that the court may give directions with regard to this.97

It is clear from O'Mahony's extracts above that the intervention from a communication specialist (such as an intermediary in England and Wales) is necessary to help judicial officers simplify their language sufficiently when a case involves an individual with specific language deficits. Similarly, the Australian Law Reform Commission observed that, "[t]he wording of s 13(3) [of the *Evidence Act 1995* (Cth)] implies that a person's lack of capacity may be overcome by forms of support or assistance being provided to them in giving evidence", and proposed that "the *Evidence Act* – consistently with the National Decision-Making Principles – should expressly provide that competence must be determined in the context of the available support".

Further, the Victorian Law Reform Commission made recommendations as to how the unfitness to stand trial provisions under the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) might be improved:

Unfitness to stand trial is not a "black and white" issue, but is decision-specific, time-specific and support-dependent. The law should accommodate the varying abilities, choices and needs of accused who may be unfit to stand trial to the greatest extent possible. Once an accused has been found unfit, measures should be taken to ensure that better use is made of the adjournment period to optimise their ability to become fit prior to a court determining that they are permanently unfit.

The Victorian Law Reform Commission also commented that if defendants had access to "special measures" (for example, in the case of a reformed test of unfitness), this might enhance the prospects of some who would otherwise be found unfit to plead being able to stand trial.

The need for modifications during a trial was also recognised by the New South Wales Law Reform Commission to the effect that a trial judge should consider a number of issues, including:

whether modifications to the trial process can be made or assistance provided to facilitate the person's understanding and participation.

The authors view such recommendations warmly. First, they provide recognition that fitness to stand trial can be enhanced if appropriate support is provided in court. Secondly, the authors believe

---

67 Australian Law Reform Commission, n 6, p 180.  
68 Australian Legal Reform Commission, n 6, p 180.  
69 Victorian Law Reform Commission, n 6, p 67.  
70 Victorian Law Reform Commission, n 6, pp 89-90.  
71 New South Wales Law Reform Commission, n 6, p 35 (Recommendation 2.2).
that experts are in a unique position to assess clearly and identify those factors that have led to failures on some or all of the relevant fitness criteria. It is but a logical step to include consideration as to whether specific supports might circumvent some or all of the factors leading to failures. The outcome of fitness assessments may therefore be as dependent on the assessment findings as they are on whether the expert considers these to be remediable. Such issues could be brought to the attention of the court. At the very least, the authors consider that experts should be furnished with guidance as to existing (or potential availability of) supports and accommodations, so that they could consider more informatively whether the implementation of such supports might alter what might otherwise be a finding of unfitness. The authors envisage that where these supports are not available or practicable, or where there is a clear need for more specialist intervention, the use of specialists to facilitate communication, such as the intermediaries used in England, Wales and Northern Ireland, would be constructive. The generation of clear guidelines on assessing a person’s competence and capacity to be a reliable witness is also an important step towards meeting the rights outlined in the CRPD.

There is emerging awareness of the need to provide vulnerable individuals with more specific support in order to enable participation in legal proceedings. Concerns about the lack of present supports resulted in a 2012 report by Disability Rights Now to the United Nations that in Australia the “capacity of people with cognitive impairments to participate as witnesses in court proceedings is not supported and this has led to serious assault, sexual assault and abuse crimes going unprosecuted”. Concerns have also led to complaints being lodged by the Aboriginal Disability Justice Campaign, with the Australian Human Rights Commission, to the effect that Australia is in breach of human rights responsibilities including the International Covenant on Civil and Political Rights, the CRPD and the International Convention on the Elimination of All Forms of Racial Discrimination.

RECOMMENDATIONS

Fitness hearings certainly present diverse ethical and legal challenges with significant legal outcomes. Driven now by principles within the CRPD is the fact that state parties are obliged to develop supportive models of legal capacity. In Australia, necessary accommodation has not yet been extended to allow those identified components impeding fitness to be modified beyond current supports. The provision of supports, however, may for some vulnerable defendants be sufficient to minimise barriers thereby reducing their likelihood of being found unfit.

Vulnerable individuals with communication difficulties or with complex medical or mental health needs require support to give evidence both as a witness to criminal proceedings and as a defendant to proceedings. The absence of support has the potential to deny both victims and defendants their basic rights to access justice. The Disability Discrimination Act 1992 (Cth) makes disability discrimination unlawful and promotes equal opportunity for people with disabilities in many aspects of public life. Furthermore, under human rights law, States and Territories in Australia are mandated to afford persons with disability equal recognition under the law and equality of access to justice.

There are compelling reasons why vulnerable defendants should not be excluded from measures that might enable their effective participation in legal proceedings, and the adoption of such modifications may have distinct advantages with vulnerable individuals in Australia. Similarly, Australia can learn from the practice in England and Wales and from the pilot scheme in Northern Ireland.

In keeping with philosophies embodied within disability rights, human rights and an individual’s right to a fair trial, the authors contend that the availability of special measures for vulnerable individuals considered unfit for trial is worthy of consideration for the following reasons:

Fitness to stand trial, human rights and possibilities from England and Wales

1. There is growing recognition of the specific cognitive or intellectual foundations of fitness to stand trial.
2. There is emerging and strong evidence for the use of intermediaries in England and Wales to the effect that in spite of often very severe disabilities, many vulnerable defendants (and witnesses) can nonetheless give reliable evidence.
3. There is emerging strong evidence that communication difficulties are not regarded as insurmountable barriers to justice, but can be circumvented through the use of active measures.
4. Experts making fitness assessments may be in a position to take support measures into account in making their recommendations as to whether a person is fit or unfit.
5. There are significant legal consequences for some individuals found unfit to stand trial, and in some cases indefinite detention. The use of special measures for some individuals may be sufficient to enable their ability to stand trial.
6. It upholds the right to equality, as well as the right to a fair hearing and access to justice in the Charter of Human Rights and Responsibilities Act 2006 (Vic) and the CRPD.

These recommendations are consistent with the benefits of support measures as highlighted by the Victorian Law Reform Commission, for instance, that the assessment of fitness would encourage the use of such measures in specific cases, that the availability of support measures could be considered in expert assessments of fitness, and that such measures would promote more meaningful participation.

Notwithstanding the current legal complexities and debate surrounding the test of fitness, the authors submit that the use of intermediaries (whether registered or in an unregistered capacity) is one such special measure that could be a potentially promising approach in Australia to assist vulnerable individuals to access justice.