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Unfitness to Plead Project: Cost-Benefit Analysis of Supporter

AIM: To estimate the financial costs of unfitness to stand trial findings, a guilty plea to avoid unfitness findings, and the outcome following a support person's intervention via the analysis of two scenarios, and to use this estimate to develop a cost-benefit analysis of the supporter role.*

[NOTE: These costings are at a draft stage. A more comprehensive cost-benefit analysis is underway. These interim findings have been prepared especially for the Senate Committee Inquiry into the Indefinite Detention of Persons with Cognitive and Psychiatric Impairments in advance of its Darwin hearing in October 2016].

** The researchers acknowledge that there are significant non-financial costs associated with the case study, including distress on individuals and families, and rights-based issues, as well as diversion of resources from other pressing issues in the criminal justice system. This costing exercise forms one element of a much broader research project that seeks rights-based solutions to the issue of accused persons with cognitive disability being detained indefinitely in the criminal justice system. More information on the project is available on request.*

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Case Study

A client, "David" was charged with indecency, after allegedly exposing himself to fellow residents at his supported residential facility. David is a young man with a cognitive disability. After the charge, the Magistrate ordered that David not return to his supported residential facility, so he moved to his brother's home. David was very socially isolated at his brother's home, and was spending time at a local shopping centre where it had been alleged he was continuing to expose himself. Before the support worker became involved in the case, the courts considered two options.

Option 1 – Pursue an Unfitness Hearing

The magistrate suggested it might be appropriate to pursue an unfitness hearing so that a support package could be provided for David. The Community Legal Centre (CLC) initiated a mental impairment assessment, which reported that the client would never be fit to stand trial or have insight into his alleged crime. A finding of fitness to stand trial could not occur in the magistrate court, and so would need to be elevated to a higher court. The process typically takes a year or more during which time David would have remained at his brother's home. The higher court would then order two reports. One lawyer estimated that assessments cost between \$900-1500 depending on the complexity of the request.

(A number of other steps would follow, which, due to the schedule of our research, we have not yet been able to cost. For example, if the psych assessors both found the person unfit, the judge could pursue an adapted 'special hearing' would follow. We have not been able to cost a special hearing as yet. If the assessors did not reach the same conclusion, another assessment might be requested. Regardless, the judge would make a decision as to whether the accused was indeed unfit to stand trial. If the defence counsel or the prosecution challenged the judge's decision, a jury would have to be empanelled to determine whether a special hearing ought to take place.)

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. (It is already clear to the defence counsel that court appearances have caused significant distress). There is no guarantee that the support package will be satisfactory to the magistrate and others involved in the initial trial. The supervision order is essentially indefinite. Although review mechanisms are in place, the order might last longer than if David was sentenced and convicted. If David breaches the order, he is liable to face an indefinite deprivation of liberty.*

Option 2 – Plead Guilty and Claim Mitigating Circumstances

The magistrate considered a second option. David's defence counsel could enter a guilty plea 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.

Potential Benefits: *A relatively speedy resolution.*

Potential Drawbacks: *David would have the conviction against his name, and would be placed on a sex offender registration list. It is likely he would not understand what was happening with his court proceedings. Sex offender registration law would require that he is monitored in a range of areas of life, including with regard to where he lives, what telecommunications he uses, including for example, setting up a Facebook account. David would need to report regularly to justice officials for the duration of the sentence. This would not rule out his being found unfit to plead at a later date. Persons with cognitive impairment are more likely to breach conditions compared to others and therefore are more likely to return to court. It would be highly unlikely, according to David's defence counsel, that he would be able to comply with the reporting requirements that go with being on the sex offender registry. In their terms, 'this path would set him up to fail'.*

Option 3 – What Actually Happened where a Supporter Assisted

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, and the court were considering the two options, the client support worker was asked to assist with the case. The client support worker arranged a meeting between David, his case worker, guardian and defence lawyer. The discussion centred on David's current situation (namely, the offending behaviour, his unstable housing situation and the social isolation, which potentially exacerbated alleged offending in a local shopping centre). They discussed possible support structures, including sex education programs and a male-only residential support facility. The relevant government department then provided a care plan, and the supporter co-ordinated communication between relevant parties.

The support person assisted to communicate this process to David. David was quite happy to stay at his brother's house but the case manager, guardian and defence lawyers were concerned – and the prosecution was concerned, as the client support worker discovered – that the lack of support meant he was spending most of his time at the local shopping mall. They were concerned that David would not agree to leave his brother's place to stay in the new, proposed residential facility. However, after the Client 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 provided safer options for social and community engagement for David, which they believed reduced future possibilities of offending. A sex education program was pursued.

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 most unusual for this prosecution team to withdraw a case.

Costing

The following financial costings are a conservative estimate based on the information currently available to researchers. We have focused the costings on court processes.

Table 1: Option 1 – Unfitness to plead finding.

Agency Contacts	Frequency	Costs
Magistrates	1	656.22 ¹
Defence counsel (Legal Aid) – Magistrates/Local Level	1	911.49 ²
Legal Aid Unfitness/Mental Impairment Assessment	1	1,200.00
Higher court (County/District)	1	6,821.26 ³
Defence Counsel (Legal Aid) – Higher Court (County/District)	1	5,215.33 ⁴
Unfitness Psych Assessments	2	1,200.00 ⁵
Total	7	33,659.4
Other Processes Not Yet Costed		
Special Hearing		?
Additional Assessment		1,200.00
Empanelling Jury		?
Supervision Order Admin.		?
Condition Breaches(?)		?
Total		?

¹ Magistrates Court cost for specific offense – Offensive Behaviour (*Lifecourse institutional costs of homelessness for vulnerable groups report* (2012) plus 2.5% (~CPI) for each year since 2011)

² Legal Aid average cost per case local court level (*Lifecourse institutional costs of homelessness for vulnerable groups report* (2012) plus 2.5% (~CPI) for each year since 2011)

³ Average cost for District Court sentenced matters (*Lifecourse institutional costs of homelessness for vulnerable groups report* (2012) plus 2.5% (~CPI) for each year since 2011)

⁴ Legal Aid average cost per case district court level (*Lifecourse institutional costs of homelessness for vulnerable groups report* (2012) plus 2.5% (~CPI) for each year since 2011)

⁵ Figure based on the figures supplied in case study 1 where 2 psych assessments would be ordered costing between 900 and 1500 (a cost of 1200 is applied)

Table 2: Option 2 – Guilty plea to avoid unfitness finding.

Agency Contacts	Frequency	Unit Costs of Agency Contacts
Magistrates	1	656.22
Defence counsel (Legal Aid) – Magistrates Level	1	911.49
Court Outcome - Good Behaviour Bond ⁶	1	2,851.06
Mental Impairment Assessment to apply 'Verdins Principles'	1	1,200.00
Total	4	5,618.77
Other Processes Not Yet Costed		
Sex Offender Registry Admin.		?
Offender reporting admin by social services supporting David		?
Potential Condition Breaches(?)		?
Total		?

Table 3: Optio 3 – Actual Outcome with Supporter.

Agency Contacts	Frequency	Unit Costs of Agency Contacts
Magistrates	1	656.22
Defence counsel – Magistrates Level	1	911.49
Support Person – Medium Complexity Client	1	3,500.00 ⁷
Total	3	5,0671
Potentially Significant Costs Processes Not Yet Costed		
Training		?
Supervision, Coaching, Mentoring		?

⁶ Based on the Australian Institute of Criminology national average expenditure per offender sentenced to community corrections programs per day was \$13 (2007-08) plus 2.5% (~CPI) for each year since 2008, for a 6 month good behaviour bond sentence (<http://www.aic.gov.au/publications/current%20series/facts/1-20/2009/7%20criminal%20justice%20resources.html>).

⁷ 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 than simply using an average. The only data available to cost this; that CLC receives \$30,000 to employ someone for six months 0.6 FTE, the qualitative information 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.

Case Studies to Emerge from the Support Program – Yet to be Costed

Case 2

A Community Legal Centre interviewee detailed the following case to researchers:

We've got other ones where the issue was somebody hitting a staff member in a group home. That particular person should – you know they should get active and say, 'maybe she's got a thing about that particular staff member', 'how can we avoid this happening'? That doesn't happen. In a way they were very happy to get rid of her. So that particular person was in a country area. She couldn't go back to the home after breaching an assault charge. So she ended up in prison for two months. She was an Aboriginal woman, grew up in out of home care, she was in jail for two months, back to court, still no option for her, back to prison for another two months in between hearings. Eventually they got her somewhere, but by this time she had spent four months in prison. So somebody's got to be watching.

And, I don't know whether the solicitors feel powerless as well but... we find we can achieve a lot just because we're persistent. I think if you're there beside the person and you see yourself as their support, then that's the sort of thing you'll do. People in other roles, you know in their little silos, and they don't really take up on what's actually happening to the person and how wrong it is.

In contrast to the case above, consider the following case of a client support worker assisting a person in a very similar situation. A client was charged with assaulting a staff member of a group home that she lived in. Lawyers were seeking ways to challenge the case. The client supporter worker suggested that they should read staff protocol for that particular service provider. The supporter identified that the staff member had not followed staff protocol, which the supporter was easily able to locate and compare against the charge sheet. This was something the CLC lawyer admitted never having thought to do. As a result, the charges were dropped, and no hearing was required. The group home reportedly re-trained staff on the service's staff protocol.

Case 3

"TJ" is a young man who lived in a group home had significant intellectual disability, and significant daily support needs. He had become interested with a neighbour who paid him quite a bit of attention initially, but at some point she decided that she didn't want to spend time with him. He did not understand that and kept pursuing attention from her. Eventually she sought an Apprehended Violence Order ('AVO') against him. This is not uncommon. TJ had no idea of the meaning of an AVO, which would have been explained to him if he had a support person. Somehow the service wasn't able to keep him away from the neighbour. He did something quite minor to breach the order; he threw an empty drink can at her.

The magistrate was concerned that because the man lived so close to his neighbour it would be inappropriate to grant bail so he was placed in remand. 3 months later the man's guardian sought out a disability-specific CLC, because she was concerned that his condition was deteriorating. His initial CLC – which was a state-based legal aid service – had not pursued a further bail application. The CLC solicitors visited him in remand and followed up with the government department who ran

his group home. The department agreed to find another group home and a week later, a bail application was successful.

According to an interviewee at the CLC:

Had we had a support person there through all of that I really don't think that could have happened. Because if you're there and it's all happening, you just get the "guts" of what an unfair, wrong thing this is to happen. So a support person can do things like chase legal aid to make another bail application, talk to the group home staff about whether there's anything that can be done that would satisfy the court that he is not going to get into trouble with his neighbour. It just astounds me that that could happen to someone when they're surrounded by government group home workers, and they have legal aid, and a person with really significant needs arising from their disability ends up in prison for three months for throwing a can at someone and breaching an [Apprehended Violence Order]!

And the other thing I think that's really important is that often people in a disability job think well the courts and justice system looks after justice so they're not an assertive or an active participant, they just think they can just — 'it'll look after itself because that's the justice system', and that's so far from the truth.