

# Developing a more responsive legal system for people with intellectual disability in New Zealand

## Executive Summary

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## Introduction

People with intellectual disability are a specific group of disabled citizens who are recognised as being disadvantaged in their interactions with the legal system. The implementation of disability specific legislation and policy, and more recently, New Zealand's decision to become a signatory to the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD) would all suggest that New Zealand has adequately considered and responded to the human rights and legal needs of people with intellectual disability. However, despite this attention, it remains common for adults with intellectual disability to experience difficulty exercising their human rights, and to encounter barriers when accessing the legal system.

This report provides an overview of findings generated through a New Zealand Law Foundation funded research project. Commencing in 2012, this two-year study created an opportunity to explore the legal experiences of people with intellectual disability and those of lawyers and judges with knowledge of this group. It is intended that the research be used to inform legislation, policy and practice in the area of intellectual disability and the legal system. Furthermore, the research has the potential to contribute information about the extent to which New Zealand is giving expression to the UNCRPD, in particular Articles 12 (equal recognition before the law) and 13 (access to justice), and to identify issues and areas that require attention.

This report delivers findings related to the following four objectives:

- To analyse the recommendations for reform of systems or processes by people with intellectual disability who have been involved in criminal or civil proceedings.
- To identify how lawyers and judges respond to barriers and difficulties encountered while working with people with intellectual disability.
- To analyse recommendations for legal and procedural reform suggested by lawyers who have represented people with intellectual disability.
- To analyse recommendations for legal and procedural reforms suggested by judges who have made legal decisions about people with intellectual disability.

## Method

Qualitative research methodology was implemented to achieve the objectives of this research. Ethical approval was obtained both from the Ministry of Health, Health and Disability Ethics

Committee and the Judicial Research Committee. A Research Advisory Group comprising individuals with experience in intellectual disability and the legal system was also instituted as an additional mechanism for upholding ethical standards and ensuring the relevance of the research.

Three participant groups informed the research: people with intellectual disability (40); lawyers (15) and judges (13). No attempt was made to match any of the participants according to their previous legal relationships, nor were lawyers or judges asked specific questions about any of the individuals with intellectual disability who were involved in the research. While individual experience and case examples formed the basis of analysis, the confidentiality of all participants was upheld through the omission of key contextual details, or personal information that had the potential to be identifiable.

People with intellectual disability were recruited through national intellectual disability services. Inclusion criteria were: the person was over the age of 18; formally assessed as having an intellectual disability; and known to have been subject to legal processes and procedures. Lawyers and judges were recruited through a combination of purposeful and snowball sampling procedures. Data were collected through in-depth qualitative interviews. Research data were analysed thematically, with the intent of developing a set of key findings and issues.

## Findings

### People with intellectual disability

Thirty men and ten women participated in the study with the majority of participants (30) reporting that they had been involved in the criminal justice system. Twenty of the individuals were or had been care recipients under the Intellectual Disability (Compulsory Care and Rehabilitation) Act (IDCCR). The 10 remaining participants possessed a variety of legal experiences including those relating to custody and access issues as parents in the Family Court, as the subjects of personal orders under the Protection of Personal and Property Rights Act, and as witnesses or complainants in legal proceedings, including sexual abuse cases. It was common for participants to describe difficult or dysfunctional family relationships, frequent bullying at school and in the community, low educational attainment and high rates of physical and sexual abuse.

People with intellectual disabilities identified four key elements integral to quality legal representation: communication (I am able to understand my lawyer); relationship (I get on with my lawyer); trust (I believe my lawyer is there for me); and openness (the lawyer listens to my story). In order to be active participants in the legal issues and processes that involved them they required legal information to be communicated in a way that they could understand. The elimination of unnecessary legal jargon, and the reduction of information to the key points, were two critical ways by which this could be achieved. Effective lawyers were seen as those who

showed care and concern for their clients, and people with intellectual disability particularly valued being able to build a relationship with a lawyer over time. Given that lawyers were sometimes the only uncompromised advocates in their lives, people with intellectual disability looked for lawyers who they perceived as respecting their wishes and legal instructions, and as being prepared to fight hard for their legal rights. Finally, participants in this research appealed to lawyers and judges to take the time to listen to the events and experiences that had shaped their lives in order that better legal representation processes and decisions could be made.

For most, appearing in court was an uncomfortable and often frightening experience. While only a small number of participants specifically described their involvement in the process of cross-examination, these individuals talked about the stressful and confronting nature of this. In particular, the pace and complexity of cross-examination made it difficult to cope with. People who were the unwilling subjects of care orders under the Protection of Personal Property Rights Act, and parents who had had children removed under the Children Young Persons and their Families Act typically recounted significant grievances about their legal experiences including the quality of legal representation they received.

People with intellectual disability contended that more responsive legal practice would be achieved when lawyers and judges placed more emphasis on the importance of understanding the context of their lives, and the link this had to the delivery of quality legal representation and decision making. Developing strategies for ensuring that lawyers and judges had the skills to communicate effectively with people with intellectual disability was also perceived to be critical to achieving equal recognition before the law and access to justice. Participants with intellectual disability saw some benefit in learning about legal processes and systems from their peers, and also made the recommendation that a person with specialist knowledge in intellectual disability should be made available to support them from the time of their arrest.

## Lawyers

Fifteen lawyers from across New Zealand elected to participate in the research. These lawyers practised in criminal, civil and family law, and had legal experience ranging from six to thirty-eight years. Lawyers identified a range of barriers and difficulties when representing clients with intellectual disabilities. It was widely noted that this group of clients had diverse, unmet legal needs with a diminishing pool of lawyers willing to expend the time and effort required to represent them. The lawyers who participated in this study typically felt an ethical and moral obligation to represent vulnerable clients, and genuinely enjoyed working with people with intellectual disability. In combination, these factors motivated lawyers to undertake legal representation for clients with intellectual disability despite the financial implications that generally resulted for lawyers.

Legal representation of people with an intellectual disability was perceived to be relatively more time consuming, complex and multi-faceted, and rarely was this representation adequately compensated. The timely identification of intellectual impairment was seen as necessary to facilitate the most appropriate legal processes and procedures for the person, although the difficulty in achieving this was also acknowledged. In the criminal context, some lawyers held a strong view that identification of intellectual disability should ideally occur at the time of arrest, at the police station. This would influence how a person was questioned, which lawyer was contacted, and the appropriate disposition of the case.

Determining the most appropriate way to communicate with clients with an intellectual disability was an ongoing concern, and process, for most lawyers. Lawyers reported that having a broad understanding of intellectual disability, and the nature of their client's cognitive impairment in particular, was critical to effective communication. Having the skills to check understanding was perceived to be a basic and necessary strategy for lawyers practising with this vulnerable group.

Lawyers noted a number of systemic challenges faced by people with intellectual disability in the legal system, particularly in relation to criminal matters. Some lawyers held the view that this group were vulnerable to being pressured to plead guilty, sometimes at the expense of their legal rights. Lawyer participants also observed that people with an intellectual disability have a tendency to acquiesce or agree to suggestions put to them by other people and that police and legal professionals should be aware of, and take steps to minimise this risk.

A significant theme evident in the lawyers' data related to inadequacies in the legal aid system. The current study highlighted that legal aid rarely compensated the actual time required by lawyers to work effectively with clients with intellectual disability. This led to a concern that these clients may not receive the quality of legal representation that they are entitled to. Furthermore, the reduced access to a lawyer of choice was also perceived as disadvantaging people with intellectual disability.

The IDCCR legislation was discussed by many lawyer participants. At a broad level the legislation was seen as providing a necessary legal pathway for serious offenders with a significant level of intellectual impairment. While supporting the legislation in principle, a number of lawyers identified areas and issues of concern. Lawyers were very aware that many offenders with intellectual disability did not meet the specific criteria of the legislation, and consequently were subjected to the conventional criminal justice system, unable to access necessary accommodations, and potentially vulnerable if imprisoned. Concerns were also raised about some procedural aspects of the legislation which were perceived as impacting on some individuals' access to justice.

The Protection of Personal and Property Rights Act was also seen as having the potential to lead to breaches of a person's right to equal recognition before the law and access to justice. Most significantly, lawyers with experience in the application of this legislation were critical that there is only a three-year review, with no additional monitoring of welfare guardianship. While out-of-

cycle reviews can be requested, people with intellectual disability themselves are highly unlikely to have the knowledge or capacity to initiate such a process, thus leaving them reliant on other people who may, or may not, have the requisite skills to do so.

In order to develop a legal system more responsive to people with intellectual disability, lawyers offered the following strategies for legal and procedural reform. The lawyer participants spoke at length about specific education needs. Lawyers were of the view that increased content in the area of intellectual disability should occur both at undergraduate and continuing legal education levels.

There was strong support for the development of specialisation in intellectual disability law at all levels of the legal system. Some lawyer participants expressed support for the development of a specialist disability court, and saw both the Youth and Family Courts as providing useful blueprints. Mandatory training for lawyers wishing to work with clients with intellectual disability and in the area of the IDCCR Act was also recommended as a requirement critical to ensuring the unique needs of this group are met.

Lawyers felt that the police should also be involved in ongoing efforts and initiatives designed to encourage more responsive legal practice. It was also recommended that there be ongoing exploration of the potential for forensic nurses to be located at the police station to facilitate the early identification of intellectual disability and to initiate the appropriate legal processes and procedures. Restorative justice processes were seen as having the potential to deliver benefits for people with intellectual disability. It was recognised that while many people with intellectual disability require support and accommodations to traverse the legal system they do not have the level of impairment to qualify them for such assistance. Identifying a screening tool able to detect mild intellectual disability was seen as a necessary first step in meeting their needs. Finally, rethinking legal aid allocations to reflect the additional time required to represent clients with intellectual disability, and restoring counsel of choice, was recommended by the lawyer participants.

## **Judges**

Thirteen judges from across New Zealand participated in this research. Most served in District Courts and had a diverse range of experience encompassing criminal, civil Youth, and Family Courts. Judges all agreed that complainants and defendants with intellectual disability comprise a vulnerable group within the New Zealand legal system, and that the judiciary and other legal professionals experience difficulty in meeting their needs in legal contexts.

Judges noted the importance of achieving early and accurate identification of people with intellectual disability when they enter the legal system, and that the judiciary are very reliant on other people to undertake this task. The police, lawyers and court liaison nurses were all identified as playing an important role in alerting judges to the presence of intellectual

impairment, however only court liaison nurses were identified as possessing the necessary skills and expertise to consistently do so. Early identification of intellectual disability was reported as being essential to being able to implement appropriate legal processes and accommodations.

While the IDCCR Act was acknowledged as providing one mechanism for assessing the level of impairment experienced by defendants with intellectual disability, most judges perceived this legislation as serving only a small group of disabled individuals. Judges were particularly concerned with addressing the difficulties faced by individuals who were on the margins of meeting the criteria for intellectual disability or who had more 'hidden' impairments as this group do not qualify for government resources that may assist them to have their legal needs more adequately met.

All judges agreed that working responsively with people with intellectual disability required additional time but that time was in short supply in the courts. This meant that the judges felt that they were not always able to respond to people with an intellectual disability in a manner that recognised and accommodated their support needs.

Judges were concerned about the complexity of legal and court processes, and the ability of people with intellectual disability to be genuinely involved in them. This created a tension. Some judges were committed to ensuring that people were informed of court processes and decisions, while not always being certain that a person had understood.

Communication was a prominent theme in the research. All of the judges reported that they had attempted to adapt their own practice to be responsive to the communication needs of people with intellectual disability.

Judges recognised that communication barriers were created both by inaccessible language, and by the rituals and architecture of the court. Judges reported mixed views regarding the quality of interactions they observed between people with intellectual disability and lawyers. Judges provided many examples of intervening in exchanges between lawyers and people with intellectual disability as a way of increasing the person's ability to understand, or to challenge, inappropriate cross-examination techniques.

Judges saw themselves as being assisted in the court by lawyers, court liaison nurses, disability support professionals and family. Court liaison nurses were extremely highly valued and some judges were also keen to see disability support professionals and family assume more prominent roles within the court. This view was tempered with the need to educate such individuals about the limits of their role to avoid compromising court processes and practices. Another more formal role seen as having potential benefit was that of Communication Assistant, although this role was not universally well known.

One of the most significant barriers experienced by people with intellectual disability was their ability to understand and respond to cross-examination. Those unable to capably engage in

cross-examination may be significantly disadvantaged in their access to justice. This is particularly pertinent in abuse cases.

Judges were critical of the legal aid system which was seen as no longer being responsive to the needs of many vulnerable individuals. The reduction in legal aid funding compromised the quality of legal representation and was seen as causing some lawyers to withdraw from legal aid work with clients whose relatively more time-consuming representation was not adequately funded by legal aid. Judges were also concerned that counsel of choice had become more difficult to access, thus decreasing the opportunity for people with intellectual disability to maintain a long term relationship with lawyers they knew, and who knew them.

A number of judges noted the benefit of a more informal approach, including less traditional courtroom architecture, procedures, and attire. To minimise the distress caused by exposure within a busy court environment, some judges advocated scheduling court appearances at quieter times of the day. Further to this, the option of a closed court was also suggested as being appropriate for this group. In recognition of the communication needs of people with intellectual disability the need to write plain English judgements was highlighted.

There was strong support for developing awareness and education in the area of intellectual disability as a mechanism for moving towards a more responsive legal system. Judges felt that the legal profession would benefit from increased opportunity to learn from the disability sector, including people with intellectual disability themselves. Ensuring that current undergraduate law students, as well as police trainees, received increased education related to intellectual disability was highlighted as a necessary step for the future.

Many of the judges in the current research commented on the difficulties that New Zealand's adversarial system posed for people with intellectual disability. These judges reported that an inquisitorial approach would be more effective.

Specialisation was strongly supported by the judge participants. They identified specialist disability courts, and lawyers and judges as having the potential to more appropriately and positively meet the legal needs of people with intellectual disability.

## **Conclusion**

The current research represents a comprehensive exploration of people with intellectual disability in the New Zealand legal system. The inclusion of people with intellectual disability, lawyers and judges in a single study has provided a unique opportunity to understand the experiences of all three groups, identify the most significant challenges, and to highlight recommendations which have the potential to guide change. The fact that all three groups identified similar strategies for legal reform provides a sound platform to implement legal and



procedural reform to achieve a more responsive legal system for people with intellectual disability in New Zealand.