

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

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**DONALD BEASLEY
INSTITUTE**



To Whare Wānanga o Ōtago



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Executive Summary

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.

1 Introduction

People with intellectual disability¹ are a specific group of disabled citizens who are recognised as being disadvantaged in their interactions with the legal system. As a result, legislation such as the Protection of Personal and Property Act (1988) ^[1] and the Intellectual Disability (Compulsory Care and Rehabilitation) Act (2003) ^[2] have been used to address the legal needs of people with intellectual disability. Such legislation, along with the presence of the New Zealand Disability Strategy ^[3], and more recently the United Nations Convention on the Rights of Persons with Disabilities, ^[4] would suggest that this country is relatively advanced with regard to policy and practice in the area of intellectual disability. However, New Zealand adults with intellectual disability continue to find it difficult to exercise their human rights and can experience difficulty in accessing the legal system.

In 2007 New Zealand, along with 81 States and the European Union, became a signatory to the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD) which was ratified in 2008. Comprising fifty individual articles, UNCRPD provides a strong, internationally mandated framework for ensuring that all persons with disabilities have their human rights recognised, promoted and protected, and their dignity protected. To uphold its obligations as a signatory to the Convention, New Zealand is required to demonstrate the ways in which it is working to ensure that the rights and freedoms of disabled individuals are met. At a broad level, existing legislation, and legal procedures and practises need to be considered to ascertain the extent to which they align with the aims the Convention. Undeniably, Articles 12 (Equal recognition before the law) and 13 (Access to justice) require more direct consideration, particularly in terms of legislation, legal processes and practices that promote, rather than limit, the rights of disabled people.

In 2012 the New Zealand Law Foundation invested in a two-year research project designed to explore the legal experiences of people with intellectual disability in New Zealand. It provided a mechanism for generating information that has the potential to inform legislation, policy and practice related to intellectual disability and the legal system, as well as to give expression to the Convention. As well as including people with intellectual disability, the research also sought the views of lawyers and judges understand the existing issues that impact on the ability for people with intellectual disability to have their legal rights and needs met.

¹ A range of definitions describe intellectual disability however for the purposes of this report the American Association on Intellectual and Developmental Disabilities 2010 is used. 'Intellectual disability' is characterised by significant limitations both in intellectual and adaptive functioning and in adaptive behaviour as expressed in conceptual, social and practical skills. This disability originates before age 18. The authors of this report acknowledge the preference expressed by self-advocacy organisation People First New Zealand for people with intellectual disability to be referred to as people with learning disability but for reasons of consistency and clarity have chosen to use intellectual disability in this report.

1.1 Background to the research

The current research was informed by several earlier research and consultation initiatives involving members of the research team over the past decade. Based on Legal Services Agency Research that identified that many disabled people do not have access to necessary legal services in New Zealand, Diesfeld et al explored the challenge of designing quality legal services for disabled people. They noted that *“while New Zealand has made a commitment to its disabled citizens, the philosophy and form of its future legal services will be additional evidence of this commitment”* ^[5]. Previous research in the area of parenting by adults with an intellectual disability led Johnson, Mirfin-Veitch and Henaghan to conclude that parenting outcomes were greatly impacted by the quality of legal representation parents received, as well as by the level of understanding judges and lawyers held about intellectual disability per se ^[6].

In 2011 the current team conducted a consultation project also funded by the New Zealand Law Foundation. This consultation had the specific purpose of *“providing informed assessment of the need for further research that is focused on the education and disability awareness of legal professionals, and has the potential to improve legal support and services to people with intellectual disability.”* Through this work the views and perspectives of judges, lawyers and disability sector representatives were canvassed. All three groups consulted agreed that people with intellectual disability frequently experienced disadvantage within the legal system. This was due in large part to difficulties recognising and responding to intellectual impairment in a legal context. The overwhelming majority of judicial consultation participants were interested in research that focused on learning from the experiences that people with intellectual disability themselves recounted in relation to their interactions with the legal system.

On the basis of this consultation, the need for a more comprehensive exploration of the experiences and support needs of people with intellectual disability within the legal system was confirmed. This led to the development of a research proposal with the following objectives:

- To analyse the recommendations for reform of systems and 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 the recommendations for legal and procedural reform by lawyers who have represented people with intellectual disability.
- To analyse the recommendations for legal and procedural reform by judges who have made legal decisions about people with intellectual disability.
- To develop and disseminate a range of educational resources designed to assist lawyers and judges to better meet the legal needs of people with intellectual disability.
- To develop and disseminate a range of educational resources designed to assist people with intellectual disability to negotiate the legal system.

This report provides a detailed overview of the key research findings relating to the first four of these objectives.

2 Method

2.1 Research approach

In order to achieve the objectives of this research a qualitative approach was implemented. Qualitative research typically explores and describes social phenomena, and often includes data gained directly from participants' lived experiences.

2.2 Ethical approval

Two forms of ethical approval were necessary to obtain for the purposes of this work. Full ethical approval was obtained from the Northern B Health and Disability Ethics Committee. In New Zealand the Ministry of Health administers the Health and Disability Ethics Committees, which monitors whether projects are conducted in a manner that meets *established ethical standards*. Additional approval was required from the Judicial Research Committee. It is administered through the Office of the Chief Justice and assesses research that is seeking to include members of the judiciary as participants. A detailed proposal was made to the Judicial Ethics Committee and approval for judicial involvement granted.

2.2.1 Research Advisory Group

As an additional mechanism for upholding ethical standards and ensuring the relevance of the research, a Research Advisory Group (RAG) was established before the research commenced. This group met for the duration of the project. The RAG included individuals experienced in intellectual disability and the legal system; including a person with an intellectual disability, a Maori representative, a clinical psychologist experienced in conducting specialist assessments in intellectual disability; a disability professional involved in supporting care recipients under the Intellectual Disability (Compulsory Care and Rehabilitation) Act; a District Inspector, and a former Court Liaison Nurse. The RAG provided advice and feedback to the research team on the interview frameworks intended for use with people with intellectual disability and lawyers. Also, the RAG was appraised of key issues as the study progressed so that members could assist the research team with analysis.

2.3 Participants

The research involved three individual groups of participants; people with intellectual disability, lawyers and judges. No attempt was made to match individuals with intellectual disability taking part in the research with lawyers who had previously represented them, or judges who had made decisions about them. Nor were lawyers or judges asked direct questions asked about specific people who were participants in the research. Importantly, individuals with intellectual disability reflected on their experiences of lawyers and judges who they were able to name. Similarly, lawyers and judges frequently described particular cases to illustrate the issues and barriers they had confronted, and the strategies they had employed. As is standard practice in

qualitative research, all participants were assured that their confidentiality would be preserved, and information relating to individual clients or cases anonymised for the purposes of written or oral presentations related to the research. A different recruitment strategy was employed for each participant group.

2.3.1 Recruitment of participants with intellectual disability

A total of forty individuals with intellectual disability consented to participate in the research. These individuals primarily were recruited through intellectual disability support services that were registered as locality organisations for the research. This is a procedural requirement of the Ministry of Health and Disability Ethics Committee to ensure that researchers have all the necessary authorisations prior to approaching health or disability service users to take part in research. Locality organisations from across New Zealand participated and therefore the project could be described as a national study. A representative of each of the locality organisations made the first approach to potential participants; individuals who were assessed as having an intellectual disability, were over the age of 18, and who were known to have been subject to legal processes or proceedings. If a person indicated that they were interested in taking part in the research they completed (or were supported to complete) a Participant Interest Form that was forwarded to the research team. At that point a member of the research team made contact with the interested person, and arranged a time to meet. At that meeting the study information was discussed, and individuals had the opportunity to ask questions about what their involvement would entail. If the person wished to continue into the study, the researcher explained the consent process, and the rights and protections offered to research participants. Consent was recorded in a written format and, in some instances, an oral format as well.

2.3.2 Recruitment of lawyers

Two sampling techniques were utilised to recruit fifteen lawyers as research participants. First, purposive sampling was implemented to identify and include lawyers who were known to have interest or experience in intellectual disability and the law. A key aspect of the project was to develop educational strategies for legal professionals. Therefore lawyers who had a level of relevant knowledge were recruited. To this end, some lawyers were approached individually by email followed by a telephone call. Others were identified through relevant organisations, legal centres or practices with which they were associated. A process of snowball sampling occurred later in the research whereby several lawyers expressed interest after attending preliminary presentations. Snowball sampling is also a legitimate sampling strategy, which allows for potential research participants to be suggested by others or to self-select.

2.3.3 Recruitment of judges

A total of thirteen judges took part in the research. The majority had previously participated in the consultation project conducted by the current research team in 2011. The consultation took the form of a short questionnaire. At the conclusion of the questionnaire judges indicated

whether or not they were willing to participate in more comprehensive research in the area of intellectual disability by providing their names and contact details. Similarly to the lawyer participants, several judges made contact with the research team after becoming aware of the research. Typically, these judges had heard about the research from judicial colleagues.

2.4 Data Collection

In accordance with the methodological approach taken in this research, data were collected through in-depth qualitative interviews. People with intellectual disability were invited to bring a support person to the interview and many participants, particularly those who were care recipients, chose to do so. Interviews were conversational in nature, and generally commenced with a discussion about the participants' backgrounds including their families and education. Information about their previous and current living situations and support was also collected at this stage. All interviews with participants with intellectual disability were face-to-face, either in their own homes, at their support service, or in a few cases, at other locations of their choosing.

Lawyer interviews were also conducted in person, typically at the lawyer's legal practice. Lawyer interviews began with the collection of basic demographic information including legal experience before focusing more specifically on issues related to the legal representation of people with intellectual disability. Judge interviews were conducted either in person, or over the telephone. Similarly to the lawyer interviews, brief demographic information was collected about the judges' legal and judicial experience prior to more in-depth discussions relating to their experiences and perceptions of intellectual disability and the legal system.

2.5 Data Analysis

A process of thematic analysis facilitated the analysis of research data. Thematic analysis is a method commonly used in qualitative research to assist with the organisation and interpretation of data. In the current study the full data set comprising 78 interviews was coded to identify common patterns within and across participant groups. These were then presented and discussed as themes or key issues. For the purposes of this report themes have been illustrated through the use of anonymised verbatim quotes.

3 The experiences of people with an intellectual disability

3.1 Who were the participants?

3.1.1 Gender, age and ethnicity

Thirty men and ten women participated in the study. Male participants ranged between eighteen and sixty-one years of age, while female participants ranged between twenty-six and forty-one years of age. Of the men, twenty two (73%) identified as New Zealand European, six (20%) as Maori and one (3%) as Samoan. Ethnicity was unrecorded for one person. Of the ten women, six (60%) identified as New Zealand European, two (20 %) as Maori, two (20%) as being of both New Zealand European and Maori descent

3.1.2 Legal experiences

The overwhelming majority of study participants were people who had been involved in the criminal justice system. Thirty of the participants reported that their legal experiences were predominantly related to criminal matters. Twenty people were care recipients under the Intellectual Disability (Compulsory Care and Rehabilitation) Act (IDCCR)², while another ten had been charged and convicted of criminal offenses but were not subject to IDCCR. There were only three women amongst this wider group of thirty. Interestingly, a number of the men and women who commented on their experiences within the criminal justice system also disclosed that they were parents and also been involved in custody issues that had been heard in the Family Court.

The ten participants who had not been charged or convicted of a criminal offense had a variety of legal experiences. Some talked specifically about their legal experiences as parents within the Family Court. All of these individuals had lost custody of their children, and as a result had had significant involvement in the Family Court, sometimes over an extended time period. A small number of participants had been witnesses within legal proceedings, complainants in sexual abuse cases, or had been involved in the Family Court in relation to personal orders and the Protection of Personal Property Rights Act. The exact number and gender of participants

² New Zealand's unique IDCCR Act was specifically designed to address the legal needs of people with significant intellectual disability who have offended at a serious level. At its core was the recognition that prison is rarely an appropriate environment for people with this group of vulnerable adults. Since its introduction in 2003 there has been relatively little empirical research or evaluation of the Act and its impact on those it was designed to assist.

within these legal categories has not been shared here in order to protect the confidentiality of those involved.

Unsurprisingly given the composition of the study sample, the vast majority of the participants were supported by formal disability support services. Care recipients resided within secure or supported community-based residential services. Those who were not care recipients typically lived in residential group homes or in their own homes under a Supported Independent Living contract, with regular support from disability support workers. A small number of individuals had individualised funding arrangements and lived in their own flats with little formal support. No one lived within their family home with parents or other family members.

3.1.3 Individual context

In order to learn about the legal experiences of people with intellectual disability, it was important to develop a sense of who the participants were, and where they had come from. The conversational approach taken by the researchers enabled this to occur naturally during the interviews. While there were some happy exceptions, it was evident that many of the individuals who took part in this research had experienced disrupted or broken family relationships, long-term and pervasive bullying and abuse, disjointed and inaccessible education, limited access to employment and a lack of material wealth.

Many participants had been institutionalised – some in large hospital based facilities that specifically catered for people with intellectual disability or mental health issues. Others had been institutionalised during childhoods in the form of long term involvement in State care. A number of the participants who had resided in Child Youth and Family group homes or foster homes reported that they had been abused in those placements. This abuse could be assumed to later have had an influence on how they responded to the world around them, their relationships with authority figures, the extent to which they trusted people, and their involvement with the legal system.

It was also common for participants to have been cared for by family members other than their parents from a young age. It was particularly common for grandparents to have assumed the care of their grandchildren with intellectual disability. This is suggestive that the parents themselves had a level of cognitive impairment that may have prevented them from providing “good enough” parenting or of pursuing a lifestyle not conducive to their children’s safety. In some cases these care arrangements had been formally mandated but some had been organised within the family. Approximately 50% of participants reported that they had either formally or informally been removed from the care of their parents at some point during their childhood.

3.1.4 School

With only a small number of exceptions, school was identified as being a negative and often demoralising experience for the men and women who took part in this study. This was found at

all levels of the school system. Some people identified that their hardest years were in the primary system, while others indicated that their disconnect with the education system occurred at intermediate or secondary level. The participants recognised that their difficulties were both academic and social.

One participant reflected that she had given up on school when she realised that she was not able to “keep up” with what was expected of her academically.

I: And so when you were at school, how was school for you?

P: Not good.

I: Not good? Tell me why.

P: The maths was hard, the reading was hard so I gave up.

I: How old were you do you think when you gave up?

P: 12...

As mentioned previously, bullying characterised the school experiences of almost everyone, and was perpetrated not only by students but also by teachers, as illustrated by the following comment.

P: I went to [local] primary but that was horrible.

I: Why was it horrible?

P: Because people picked on me. Teachers, they used to pick on me.

I: Why did they pick on you do you think?

P: Oh the real main thing [is] they get away with it.

This participant went on to say that high school was the “scariest moment” of his life and confirmed that the bullying continued through his secondary schooling. Importantly, this person was one of the youngest participants in the research therefore his reflections on his treatment at school were based on very recent experiences.

A small number of participants said that they had themselves taken on the role of bully while at school as a way of gaining and holding power, and of ensuring that they didn't get bullied themselves.

I: And what about friends and things at school. How was that?

P: Hard.

I: Hard to make friends? Why do you think that was?

P: Because I was a bully at school.

I: Were you?

P: Yep.

I: Why do you think you were a bully?

P: Because I used to name, call people names and then I stopped, because the teacher said if I didn't stop I'd get expelled at school.

I: So when you called people names, why do you think you did that?

P: Because I wanted to be top of the class.

Most people left school with relatively low levels of numeracy and literacy, few lasting social relationships, and limited life skills. This may explain why so few of the participants had ever found meaningful, regular employment.

3.2 Abuse

Unfortunately, abuse, both physical and sexual, was evident amongst the group of New Zealand men and women with intellectual disability who participated in this study. Of the 40 individuals who took part in this study approximately half the women and one third of the men disclosed that they had been physically or sexually abused. This is likely to be an underestimate as participants were not directly asked to disclose experiences of abuse but rather offered this sensitive information during the interview process. This is an important finding as despite considerable anecdotal evidence about the high incidence of abuse there has been little research that has been able to quantify this issue. Similarly to the general population, in most cases people with intellectual disability were abused by people known to them. One young woman disclosed that she had been removed from her family carer due to repeated sexual abuse, and went into foster care, saying *"I went all different ones, cause I kept running away."* After talking about the multitude of foster homes she had been in she was asked if she had been in any good foster homes. She identified that she had had a good foster home and the following conversation ensued.

I: What else was good about that place?

P: She let me call her mum and took me to [another town] cause she had a [family member] who lived there with a big swimming pool out in the back yard and a big boat next to it. I was having fun.

I: So you felt part of that family?

P: Mmm.

I: And how old were you when you were there?

P: Oh I can't remember.

I: Were you living with that family when [you stole something when you were 15?]

P: No.

I: So why did you stop living with them?

P: Cause they used to beat me up.

I: So this was the good place that you liked, but they used to beat you up?

P: Mmm.

This young woman was so desperate to feel part of a family, she was prepared to overlook the physical abuse that she received because she highly valued the small events that signalled to her, at least, that she was part of the family.

3.3 Factors that contributed to involvement in the criminal justice system

The men and women with intellectual disability who participated in this research who had been involved in the criminal justice system reflected on what led to them "getting into trouble." A

range of internal and external factors led them to behave in ways that resulted in them being arrested, charged and/or convicted of an offence. One man identified that his tendency to “get angry” was a recurring theme in his life, and one that invariably resulted in police involvement. Becoming angry had led, at various points in his life, to the dissolution of his relationship with his parents, placement in institutional care, him being violent toward a succession of female partners, and assaulting police whilst being questioned about his violent behaviour.

Deteriorating mental health and not being able to recognise the signs of this may have contributed to the criminal convictions of some participants with intellectual disability. When asked what might have led to him committing the criminal offence, one person answered “*my mind made me do it.*” This person went on to say that his anger got worse when he did not take his medication, and that his mistrust of the police also increased during these periods.

Alcohol was identified by a number of participants as having been a factor in their offending.

I. And when did you start drinking?

P. Just on the weekends.

I. Did you hang out with anyone while you did that? Or on your own?

P. I did it on my own. I have no mates whatsoever. I was what’s called a loner.

I had a drinking problem. That what caused – that’s what was the problem. Me drinking a lot...and getting into fights in town.

Reacting to intimidation was also a factor in the criminal convictions of a small number of participants.

P: And that’s when I got myself into real, big trouble.

I: OK. So do you mind telling me about what trouble you got into?

P: Uh the knife thing.

I: Yeah? You used a knife on someone?

P: Yeah. Only to scare him off but it didn’t work. He rung the police and I got arrested.

On the basis of this participant’s interview, there was a high likelihood that they had not been able to detail the events that led to them threatening the other person, either at time of arrest or during the legal process, thus raising the possibility that this person had been unfairly treated within the justice system.

Some people who had been convicted of a criminal offense were extremely upset with themselves for their actions, particularly when it involved hurting someone close to them.

I feel real angry at myself. I wish I’d never done it... but since I’ve done that, and now I’m not living at home things have actually been a lot more better for me.

3.3.1 Intellectual Disability (Compulsory Care and Rehabilitation) Act

As previously mentioned 20 participants in the current study were, or had recently been, care recipients. Participants often expressed a sense of relief that they had become care recipients

rather than having been sentenced to prison, as most expressed an acute fear of being incarcerated in a regular prison.

I. Would you be scared about going to prison?

P. Hell yeah. Seriously. You know what goes on there behind bars?

Unsurprisingly, there was huge variation in the extent to which participants understood the legal and psychiatric processes that they were subjected to as part of IDCCR, with some showing good understanding (as evidenced below) and others having little understanding of the process.

I. So when you became a care recipient, did you understand what that meant?

P. Yes I pretty much knew from top to toe. Like people thought that because I'm slow, people were talking to me about it...

P. I did some tests through the psychiatrist, and talked about things.

I. And what did they decide about you?

P. They written to the judge and explained it to the judge that this person has got a disability, and he finds things very difficult out in the world.

While few people were completely clear about the assessment and decision-making processes that determined whether or not they met the criteria for IDCCR, many could describe what was expected of them within the disability support services that provided their care while they were subject to IDCCR orders.

...cause when I came to the service [manager] told me...No hitting, no calling names, no fighting, no bickering. If you want to respect someone, you gotta treat them with respect.

For some people, being made a care recipient under IDCCR coincided with their first experience with formal intellectual disability services. People who had no experience of intellectual disability services at all often found it confronting to move into that environment after being made care recipients under IDCCR.

I: So how was it out here because this is the first time you've been in a community based service [isn't it?].

P. Scary

I. Scary. What was scary about it?

P. I haven't done it before. I felt happy that I was out of the police station. First it was scary, but then three days after that, I kind of got used to it.

I. So becoming a care recipient and coming to [the disability service] was a good thing?

P. I felt safe after two weeks.

This reported feeling of safety appeared to be related to the quality of the relationships that care recipients had with their care managers within disability support services. A number of participants highly valued the guidance they had received from care managers.

They're there to help you and get you help. That's what my [care manager] has done. And he's done an awesome job and I respect [him] real a lot.

The rehabilitative component of IDCCR could be seen in the accounts of a relatively small number of participants who talked about the impact of counselling, which often helped people to understand their behaviour and develop more positive strategies for dealing with anger and stress in the future.

When I get angry I'm going to say excuse me [name], I'm angry. I'll take my cell phone, I'd like to go for a walk around the block to clear my head, clear my thoughts. Because I'm not going to hit you again [name]. I'm going to walk away from the problem. I will talk to you after I have gone for my walk. Because I'll be more calm. My stress will be out of the now...And it works. It really works. Because I've had counselling.

Not all care recipients reported positive experiences. Care orders ranged from one year to three years in length, and some care recipients were very keen to get to the end of their orders. The need to "be good" in order to prevent an order being extended beyond three years was frequently acknowledged. For some, the motivation to be good was related to a strong desire to exit the confines of the disability support service while for others it was to avoid any further contact with the criminal justice system.

Cause I want to get out of here, this rotten hole. There's people who nick all my money...yeah, I'll do my time and get out of here.

Keep my head up and my arse down. Arse up and head down! I want nothing to do with the police, no, and nothing to do with judges and lawyers.

For others, care orders did not come to an end. A number of participants described the frustration and resentment they felt when care managers submitted applications for extensions to care orders. This situation caused significant tension between some care recipients and their care managers, and created the potential to threaten the extent to which they could continue to work together in a positive way.

P: ..they said no, extend it from 2011 to 2014.

I: Right so how did that process all work.

P: Pass.

I: So you knew that your care order was coming to an end, and how did you feel about that?

P: I thought I could stop it you know. Go my own way, but then [care manager] said [to my lawyer] that it needs to be looked at again and probably put another three years...

This example highlights a broader issue related to IDCCR in that some people with intellectual disability received extensions to care orders, thus effectively receiving a longer punishment than the offence would ordinarily carry.

Being subject to severe restrictions in personal freedoms was another difficult aspect of becoming a care recipient for some participants, particularly those who had not been used to being accountable to others in a disability support setting. Individuals whose orders ended and

were then supported in less restricted conditions were particularly able to reflect on this (and often referred to themselves as 'civils').

Sometimes it's hard because when I wasn't civil, I wanted to go to places. But now, cause I'm civil, now I can go to anywhere I want to go, but I've got to sign in and out.

While coming to the end of an order was a highly valued achievement, it was not uncommon for people to choose to continue being supported by the disability services that had been responsible for managing their care and rehabilitation as care recipients under IDCCR.

I. Did you want to stay in the service and be supported by the service?

P. Yeah, cause I was going to move out on my own. Sometimes I have my bad days... oh I'm moving out I don't want to live here any more, this place sucks and all this... [but] now I'm going to stay... I'm not ready to leave yet.

I've wanted to leave home. And I couldn't look after myself. There was fact that I could literally not look after myself. I have to have staff help me with cooking and things. I can't actually go and look after myself in a flat, I have to have staff. But I'm doing good now. Where I can go out on the streets. I'm a civil now.

Some of the participants who had criminally offended expressed a desire to live a different sort of life. Many believed that if they offended again they would end up in prison, and the desire to avoid incarceration was strong. Strategies included: going out for long walks, not "having a go" at the police, not drinking or gambling, taking medication, having good support and generally staying out of trouble.

I've got to stay out of trouble now...cause if I go there again I'll be locked up and I don't want that, and [disability support person] doesn't want that.

Good support stops me from getting tangled up in the legal system.

3.4 The qualities of a good lawyer

There was a high degree of recognition that people with intellectual disability were reliant on a good lawyer to ensure that their legal rights were upheld. People with intellectual disability 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 (my lawyer hearing my story).

3.4.1 Communication

People with intellectual disability were acutely attuned to how people talked about, with, and to them. In order to be active participants in the legal issues and processes they required legal information to be communicated in a way that they could understand. This was achieved through eliminating unnecessary legal jargon, and keeping the information to the key points. Participants with intellectual disability were able to articulate what effective communication was to them.

Yeah he was easy to talk to and he wasn't complicated in how he actually talked.

Being a good lawyer too, you know, it is just being at their level. Like there's this lawyer [that I know] and he gets down to [your] level. He's quite humble about it. He's not way up there. Do you know what I mean?

Participants expressed that accessible communication is not delivered in a patronising or condescending manner.

3.4.2 Relationship

In order to feel well supported, participants saw effective and responsive lawyers as those who showed care and concern for their clients with intellectual disability. When people were able to access the same lawyer each time they had a legal issue, it was more likely that this more personal type of relationship could develop. Lawyers who bridged the divide between themselves and their clients by dressing less formally, and providing support in ways that recognised the person were particularly valued.

Cause he really cares for people, and makes an extra effort...like he makes sure he can get places for people on bail. Yeah, he just goes the extra mile. Like he bought some magazines in for one guy, some hunting magazines...and some lawyers would walk down there and you know [be all dressed up in a suit] whereas he just comes down in a pair of jeans and a T-shirt.

3.4.3 Trust

Participants were highly attuned to lawyers who were not committed to working in a way that respected their wishes and legal instructions. Therefore, participants highly valued lawyers who they felt they could trust to be completely on their side, and to fight for their legal rights. In some cases lawyers were the only uncompromised advocates for people with intellectual disability.

I: Who was the most supportive of you?

P: Probably my lawyer.

I: Your lawyer?

P: Yeah.

I: And what was it about your lawyer that was important to you?

P: I don't know. I felt he was on my side I suppose.

P. She's brilliant. Absolutely brilliant.

I. What was good about her for you?

P. She was sort of more likely telling the judge you know, I've got a disability and that, and you know, she knew I was sorry for me being violent.

A number of people had the same lawyer over an extended period of time and relating to multiple legal issues and jurisdictions. In these cases individuals with intellectual disability reported a strong relationship with their lawyer and felt that their lawyer worked hard for them.

3.4.4 Hear my story

Many people with intellectual disability said that it was very important that lawyers (and judges) took the time to listen to the experiences that had shaped their lives. For many participants, if lawyers (and judges) were prepared to take the time to understand more about them, better legal processes and decisions were made.

To actually get someone to talk to them at their level. To understand where they are, why they did that. And help them. Not go over their heads, go right into them and ask them. Why did you do this? What was it that actually made you do this? I think they really need to listen to how people are.

Reflecting on this point, another participant felt that if someone had taken more time to hear her story, a different legal decision may have been reached.

I. What do lawyers and judges need to do?

P. Ask them about what has happened during their past. If anything has happened so they know. Cause if they don't know, then how do you know the person?

I. Perfect. That's a really good piece of advice.

P. Cause you need to know about the person. If you don't know them, how are you going to explain to them?

I. Do you feel like you had a chance to explain why you did what you did?

P. No.

I. OK. And do you think if you had a chance to explain, that it might have made a difference?

P. Yeah.

I. And what do you think you would have said if someone had said, "tell me why you did that?"

P. I would have said what he said to me...

Participants identified situations when lawyers had not acted in their best interests due to an inability or unwillingness to communicate with them. In the following example the person was forced to seek information from another party, in this case a policewoman, due to a lack of communication from a lawyer.

I. You said you weren't so keen on your lawyer. Did you always understand what your lawyer said to you?

P. No.

I. Did they explain things in ways that you could understand?

P. No.

I. OK. What about the judge? Did you understand what the judge was telling you about the...

P. Not really.

I. OK. So who did make it clear to you what was going to happen each time?

P. The police officer. The lady officer... I had to ask her what was going on and she explained to me what was going to happen. Cause I could only ask her.

3.5 The role of the judge

Participants in this study were very clear about the role of the judge in legal proceedings with many referring to the judge as *the big boss*. People were aware that the judge made the critical decisions in the court.

He says sentence us or not sentence us.

Due to the status accorded to the judges, participants were often pleased to be acknowledged by judges.

I: Did [lawyer] tell you when you went into the court where you'd have to stand?

P: Yes.

I: And did he tell you that he'd do the talking.

P: I done talking, I did talk to the judge.

I: And the judge talked back to you?

P: Yeah, he talked to me. I did up a letter to him, and he saw that, and then nothing!

I: So tell me, what do judges do?

P: Makes decisions...he makes the big decisions...where you go.

For some people, having a judge address them in the court, or having the chance to address the judge themselves, was very important. They suggested that a responsive legal process acknowledged their presence and invited them to contribute. Participants also seemed to see good judges as ones who understood the impact of their intellectual disability.

For my sentence, when I went to court for my sentence, and in my own way, I wrote a letter to the victim...my sister helped me. And [she gave it to the victim]. And my sister made a copy and gave it to the judge, and the judge said I accept your letter and your apology. And that was good.

It's a serious sentence. But cause I had a disability, he recommended me to go and see a psychiatrist and see some other people and I did that and the people I went to see have made a report and given it to the judge. And he read it... and knew I had a disability. But I was very lucky, because I had a good lawyer and good judge.

(Further detail is provided about the impact of less responsive interactions between judges and people with intellectual disability is provided in a later in this report at 3.9).

3.6 The court process

Most participants agreed that appearing in court was an uncomfortable experience, and was particularly frightening when appearing for the first time. A young woman recounted her experiences after being arrested for a serious offense.

P: The first morning I had to go into the big van. To court.

I: Yeah. And how was that?

P: Scary

I: Was it? What was scary about it?

P: When he went to go bang with the big thing.

I: Oh I see, so it was scary when you got into the court?

P: Yeah. And I had to stand there, had my pants up. Cause I kept asking for my belt buckle, and they wouldn't give it to me.

I: Right, and [your] pants were too big?

P: Yeah, baggy.

Court was a frightening experience, made worse by the safety processes that meant that this young woman was embarrassed and compromised in front of the judge, a person she knew to be very powerful. Others shared this view.

Oh you just feel like, like you're, like your whole body, your knees shake, your hands sweat, you don't feel like it's you know you're nervous, nah, its not really a place that you feel safe in.

The court process was also perceived by some being unnecessarily slow. When decisions that did not favour the individual were made, they were seen as unfair by a few. Furthermore, when there was confusion about where the person would live post-sentencing, this sense of unfairness was exacerbated.

P: The courts are stupid.

I: Why are they stupid?

P: Cause they don't treat people fairly.

I: Ok, and why do you think you're treated differently to anyone else?

P: I was not treated fairly. I was being picked on, and it took forever. Then they put me in one place [then said], nah, you're in the wrong place – you should be in this place here.

3.7 The impact of cross examination

Only a small number of participants had talked specifically about the experience of being cross examined. These individuals reported that the cross examination process was extremely stressful and confronting. One person talked about struggling to keep up with the pace of the questions. While she wanted to answer, she felt she could not answer quickly enough, and therefore lost the opportunity to give her evidence effectively.

P. I wanted to say something, but I kind of got pushed away.

I. What do you mean pushed away?

P. Well I couldn't really say what I wanted to say, because I wanted to say something but I couldn't. I was like nah, all I could do was cry. Cause it was too hard. Couldn't understand, it was too pushy. He was too fast speaking, stuff like that.

This person was disconcerted by her view that the lawyer was not representing the situation accurately. Also, she was also acutely affected by being alone on the stand. She felt that if she had had access to a support person she may have been a more credible witness. The lawyer was impatient and disrespectful when she asked for clarification. The judge did not appear to intervene.

P. I was getting very stressed out, cause I wanted let go, because he was just going and going and going and half of it was all lies.

I. It's interesting, because sometimes lawyers do that to make you answer. But that just made you scared and wanting to leave.

P. Yeah, well I didn't have anyone beside me. And I didn't have anyone you know to talk to. Too hard, cause I was up there by myself.

I. If you had somebody with you to explain it would that have been easier?

P. Yeah.

I. Right, it's interesting.

P. Every time I kept on saying can you please repeat that again, rolled his eyes at me and gave me evil looks really. Bigger you then. And I was going no, I want to get out, cause I couldn't cope and I couldn't be comfortable because ... it was just getting too much.

This example illustrates the challenges that people with intellectual disability can face during cross examination, particularly when legal professionals are unwilling to accommodate the specific needs of the witness.

3.8 Protection of Personal and Property Rights Act

The Protection of Personal and Property Rights Act (PPPR) (1988) was designed to protect and promote the rights of people deemed unable to fully manage their own affairs. The PPPR Act has been frequently used in the lives of people with intellectual disability³. A small number of participants in the current study were subject to personal orders under the PPPR Act. Most commonly, family members of people with intellectual disability had made applications to the Family Court to become welfare guardians. Not everyone in this study who had a welfare guardian wanted one. One participant expressed how it felt to have a welfare guardian appointed:

I think I feel really, really hurt.

Some participants were deemed to be wholly incompetent on the basis of a report from a general practitioner, which was then accepted by the person's lawyer and subsequently a Family Court Judge. Participants with intellectual disability who found themselves in this situation also perceived that they had not been properly consulted.

I. So when the orders have been made it sounds like people haven't talked to you?

P. That is correct.

An aspect of one person's order under PPPR required her to accept support from an intellectual disability support agency despite her clear directive that she did not want or require support.

I. How did you feel about having support when you did not feel like you wanted that?

³ Key aspects of the PPPR Act include ensuring that people subject to personal orders under the legislation live in the least restrictive environment possible, and are supported to exercise and develop capacity.

P. I feel not happy at all. Because I don't know why that happened.

People who were forced to accept a welfare guardian felt that they were prevented from making decisions of their own.

They hated me and my decisions.

Given that the people who participated in this study all had the capacity to provide informed consent to participate in the study, and could express themselves verbally in an interview, it is not surprising that some individuals resented having a welfare guardian.

3.9 Parents with intellectual disability

As previously mentioned, a number of people who participated in this study were parents. A small group within the wider sample highlighted their experiences within the Family Court related to parenting. All these parents had had their children removed by CYF through legal processes mandated by the Family Court under the Children Young Persons and their Family's Act.

About five years or so [ago] our wee man got taken off us. With our wee daughter.

These processes had, understandably, been extremely distressing for the parents, who all felt their children had been removed without justification, and with little thought to the ongoing emotional needs of the family. Without exception, the parents felt judged by Child Youth and Family (CYF) and the Family Court, and powerless to challenge the decisions relating to the care, custody and guardianship of their children.

How do we feel now? I can talk [on behalf] of my wife too. We've moved on, because we can't fight with the Court. We can't fight through CYFs. You know? No one listened to us.

Parents had experienced the heartbreak of losing custody of their children, some without warning. Some parents had lost custody of their children at birth and were aware that this was going to occur. Some had parented with constant questions about their parenting competence which culminated in children being removed after protracted discussion. Others had lost custody abruptly as a result of a court approved Without Notice application, which mandated the immediate removal of a child.

As previously mentioned, parents felt acutely judged by CYF and the Family Court. They also contended that there was no regard for the grief and distress felt by parents with intellectual disability when children were removed for reasons of alleged poor parenting, or alleged harm to their children. This was worsened by an awareness (through the media) of children who were not removed from their parents, despite CYF involvement, and who had died as a result of extreme violence by their parents or caregivers.

I don't think anybody knows what it feels like when we get blamed for something we did not do. They're not nice. Like they've been out there, people who do hurt their kids. You know you hear it on the radio all the time. CYF involved with Mum and Dad. And what happened? The kid died.

None of the parents in this study had successfully negotiated the legal system in order to have their children returned to their care. Legal representation quickly became focused on retaining an appropriate level of access, but in most cases the parents' rights to ongoing access appeared overshadowed by the CYF imperative to achieve placement permanency for their children.

While some parents felt they had the support of their lawyers, others were disappointed in the legal representation they had received. This was partially because parents were unable to select their lawyers. It was also influenced by the strong perception that their lawyers were not following their instructions.

- P. *I fired her.*
I. *You fired her?*
P. *Because I was not happy with how [she did] her job? And then we moved on to [lawyer's name]...and I think her not doing her job.*
I. *When you say that lawyers weren't doing their job, what was it that you didn't think they were doing for you?*
P. *I don't really think her really asked the judge if I can say how I feel [only the lawyer talked to the judge]. Where I feel the judge would listen to us. You know? And I'm not like a bad person, and I would not get mad or anything at court.*

One parent was aware that reliance on legal aid also limited the opportunities to seek legal representation of her choice. This participant had been told by her lawyer that nothing more could be done because the legal aid she had been allocated had run out.

I think because we got no money to get a good lawyer... and what legal aid pay out you know. Or like the lawyers can ring up and their costs overran to make a phone call, and they [they don't] get paid, [they do nothing] they sit in the office all day.

Ultimately parents with intellectual disability advised lawyers to be non-judgemental and caring.

Don't be so judgemental and care about the person you're representing.

Parents shared a perception that Family Court judges needed to be more inclusive of them during cases relating to the care and custody of their children. This was for two reasons. There was a strong perception that CYFs often was not challenged, even when there were real issues regarding the decisions made about the competence of the parents with intellectual disability.

... because I think CYFs got all their rights, then got all their paperwork done, then where we got no right. We can't fight them. Our lawyer can't fight them because you know [it's] not about what we want.

Most importantly, however, parents wanted judges to listen to them, and to learn about who they were as parents and people.

Yeah, judges are alright but I don't think they listen to the little people enough.

I think a judge has... not listen to their lawyer all the time. Listen to us, and like listen to what I've got to say, you know? Like judges might not agree with us but let the judge see what we like as people.

3.10 Complainants in sexual abuse cases

It is important to note that only a very small number of participants with intellectual disability had been complainants in sexual abuse cases, and none recently. This is in contrast with the level of abuse disclosed by participants, and may be reflective of a reluctance on the part of police and lawyers to proceed to trial in such cases. Research has indicated that there is a perception that people with intellectual disabilities are often unable to give robust evidence to achieve a conviction. That may be one reason why relatively few cases with victims who have intellectual disability process to trial.

People who had been complainants in sexual abuse cases when they were younger told stories that were suggestive of this. One person reported that the reasons why the prosecution did not proceed were unclear.

P. He did get let off.

I. Why did he get let off?

P. I don't know.

3.11 Looking towards the future

Despite having had difficult times in their lives, many of the participants with intellectual disability maintained a sense of optimism about the future. Often their hopes for the future centred on life roles and relationships that most people aspire to, as eloquently expressed by a care recipient who had recently completed his care order.

I: [Do you have] any advice that you'd give someone that's gone through the court process like you have, about how to make it?

P: I would just go, hold your head up high, walk through the court doors with your arms down and look forward. Just look for the brighter future and whatever mistake you've actually made, you can always, always mend it. And there's nothing to say that [you won't] be able to get a job, and you'll be able to get your own flat, and you'll be able to get a family. You've just got to wait for them to come. I know you probably want it now, and it doesn't come as quick as what you want it, but nah, if anybody wants to ask for my advice through the court, if it was a mate, I would just be there for them and [say] like just hold your head high man. Just have your shoulders down, don't walk staunch. Just look to the future, don't look back on the past because you'll dwell on it, you'll make the matter worse. So go forward and you'll be sweet.

3.12 Recommendations for legal and procedural reform

The current research explored the legal experiences of people with intellectual disability in order to identify their recommendations for legal and procedural reform.

Analysis of interviews contributed by people with intellectual disability unearthed a strong and unequivocal message. People with intellectual disability were clear that a more responsive legal practice would be achieved when the lawyers and judges placed a greater emphasis on getting to know them as people and were committed to listening to their stories and keeping them at the centre of all legal representation.

People with intellectual disabilities did not have grand plans for reforming the processes and procedures that underpin the justice system. They simply wanted to be treated with dignity and respect. For this reason their recommendations for a more responsive legal system were strongly focused on the personal qualities and characteristics of lawyers and judges.

The key recommendations from people with intellectual disability therefore centred on an imperative for lawyers and judges to recognise the importance of these elements to responsive legal representation and decision making. Traversing the legal system was frightening and stressful for many. Having a lawyer who acknowledged their disability and took the time to understand the life experiences that might have contributed to their legal issue was, for some people, critical to ensuring that legal decisions were just and appropriate.

Such understanding would be appropriately developed through hearing from people with intellectual disability themselves about positive and negative experiences of the legal process and legal professionals. It would also be achieved through greater emphasis on the skills required for attentive listening and questioning in both undergraduate legal education and through continuing legal education.

It was suggested that lawyers and judges should always back up information or decisions provided verbally with a written version of the key points. This would obviously need to be in a plain English format.

I. If you were thinking about someone else like that you had to have a lawyer, what do you think are important things for lawyers to do?

P. Do your job right.

I. And how...

P. Write things down that you're going to tell the person before it actually happens.

I. What about judges? What do you think would be good advice for judges?

P. Same thing. If they're going to do something, make sure they write the things down what they're going to say, so that [people with intellectual disability] know what they're going to say and understand.

It was suggested that people with intellectual disability themselves might be appropriate people to support their peers within the legal system.

And they also need someone like myself, who's gone through the [system] to help them better understand the criminal justice system like I have learnt, and I can teach them, this is what you cannot do or can do. And hopefully they might understand it a little bit clearer.

Finally, a recommendation was also made that a person with specialist knowledge of intellectual disability be available to people as soon as they are arrested. It was thought that this would assist with the person's interaction throughout the rest of their journey through the legal system.

I mean I reckon there should be a person like that, to help with people with [disability] problems. So the cops can understand more about the person, and they can sort of relate, work it out... The catching's [being arrested] fine, but I want someone who virtually understands [disability] inside and out... I mean when you get arrested, and when they get there. I know you can't see your family, so there should be some kind of support for [the disabled] person.

4 Lawyers' perspectives

4.1 Introduction

Fifteen lawyers from across New Zealand elected to participate in this research. The sample included lawyers practising in criminal, civil and family law who had legal experience ranging from six to 38 years. Specific details relating to the gender, employment situation, legal specialty and location have been omitted to preserve the lawyers' anonymity due to the small size of the research sample.

Two key research objectives underpinned the involvement of lawyers as research participants. The first objective was to identify and highlight the barriers and difficulties lawyers experienced when representing people with intellectual disability. The second objective sought lawyers' recommendations for a more responsive legal system for people with intellectual disability. Findings related to both these objectives are presented in this section.

4.2 The barriers and difficulties experienced by lawyers when representing people with intellectual disability in the legal system

Lawyers identified a range of barriers and difficulties when representing clients with intellectual and other disabilities in the legal system, which were then grouped into themes. Key themes included: offering legal representation to people with intellectual disability; identifying intellectual disability; getting to know the person; communication; confronting the system; the role of support people; working with the judiciary; inadequacies in the legal aid system; Intellectual Disability (Compulsory Care and Rehabilitation) Act; Protection of Personal and Property Rights Act; and people with intellectual disability in prison.

4.2.1 Offering legal representation to people with intellectual disability

The lawyer participants observed that people with intellectual disability have diverse unmet legal needs. Importantly, the lawyer participants were part of an arguably diminishing number of lawyers willing to expend considerable time and effort to represent vulnerable individuals with disabilities. Lawyer participants appeared to be drawn to working with people with intellectual disability for two main reasons. The first related to a feeling that it was morally and ethically imperative to offer legal representation to individuals who are disadvantaged in the New Zealand legal system.

We've always worked from the ethic, if someone needs assistance we provide them assistance. And so that's why we still, to our severe disadvantage do a lot of legal aid. And this work [in the area of intellectual disability] is all legal aid work.

People with intellectual disability were disadvantaged in part due to a lack of appreciation of their specific needs within the legal system. Also, lawyers reported that people with intellectual

disability were often subject to restrictions upon their liberty or had limited access to justice. (Both these issues are discussed in more detail later in this section). Of note, lawyers reported that they genuinely enjoyed working with people with intellectual disability. Lawyers found creative ways to make accommodations in the traditional legal system and to increase the active participation of people with intellectual disability.

I think you do a lot of work that you don't get paid for. So simply on an economic basis, its not the best work to do, but there's more to life than that.

Many of the lawyers who participated in the current study expressed that effective lawyers had specific personal characteristics. Good lawyers were seen as those who were respectful, non-judgemental and empathetic listeners, who were also committed to developing their knowledge in the area of intellectual disability.

[Lawyers who are effective with people with intellectual disability] are generally people who are approachable themselves, and you could tell that they had a compassion for people in this case...In my experience I have found that the kinds of people who are like that are often people who have had some experience in their own family, or circle of friends, of someone who you need to go the extra mile for, and so that has turned them into the kind of person they are.

And I'd say that working with this client base is more of a challenge, and requires more...emotional perseverance and emotional intelligence than a complicated commercial matter

It appeared that once lawyers were seen as having an affinity for working with people with empathy, patience and respect, people with intellectual disability and those who supported them tended to seek them out.

I really fell into doing the sort of work I did almost by accident. I never set out to represent clients with mental health or intellectual disabilities or head injuries, but it seemed just to happen. And I think it happened because I got a reputation from the legal aid office here for being patient and I would often have clients reassigned to me who had burnt bridges with a number of lawyers so one thing led to another.

Lawyers themselves acknowledged that those who "specialised" in representing people with intellectual disability were often skilled in providing legal representation for other marginalised populations. These lawyers were seen as typically being generous with their time and expertise and were, as a consequence, widely utilised by the legal and disability communities.

A common attribute has been that the criminal lawyers that you might prefer to refer to, have also got expertise in the youth justice sector, so they're also good at dealing with kids and teens. A sad aspect of that, though, is that these people tend to be overworked and underpaid and will do lots, go the extra mile, and are easy to burn out.

By its very nature, legal representation of people with an intellectual disability was relatively more time consuming, complex and multi-faceted. Rarely was this representation adequately

compensated. Consequently, it was perceived that relatively inexperienced lawyers often represented people with intellectual disability.

I mean look, it's not a general criticism but there are people like that who just don't want to know about it. They just want the good paying, straight-forward work, and they see it pretty much as a business model and this doesn't fit the business model and that's that. So that does trouble me.

4.2.2 Identifying intellectual disability

The need to identify intellectual disability early was raised as an issue by several lawyers. Timely identification of intellectual impairment was seen as necessary to facilitate the most appropriate legal processes and procedures for the person.

The difficulty is that not everyone realises that someone's intellectually disabled, so they fall through the net.

Practical difficulties associated with recognising and assessing intellectual disability were also highlighted, particularly untangling the subtle differences between a diverse range of cognitive and social impairments. Lawyers were cautious about making assumptions about a person's capacity.

We might suspect there is an intellectual disability going on, and there might be a subtle difference between someone who has incredibly good practical skills but has a learning disability. But perhaps not an intellectual disability.

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. Identification at this stage could then influence how a person was questioned, which lawyer should be contacted, and how the matter might proceed to court more appropriately. Lawyers reported that often intellectual disability was only flagged once a person appeared in court and, even then, was dependent upon the lawyers' ability to recognise that the person had disability related needs.

We just haven't cottoned on to the fact that where we go wrong is at the police station... it's too late when we've got to the court room.

According to the participants in the current study, lawyers can feel reluctant to label people with mild forms of intellectual disability. The participants indicated that they were concerned that people with less obvious intellectual disabilities may: never have been identified as having an impairment; be potentially stigmatised if they acquired this label; and not be in contact with disability services that could confirm the condition.

In contrast, there was also a perception that if the court is alerted to intellectual impairment, the person could obtain appropriate services and disposition.

I guess what happens is the police or the Crown, the person calling the witness often don't want to say to you, by the way they've got an intellectual disability, but it actually

might be better to be forthcoming about that, because judges have got lots of powers [like] the questions have to be clear and not confusing and obviously that differs for different witnesses. But if you don't have the information you know at the start then it will be difficult.

Lawyers reported that it was important for them to have information about the person's capacity to engage in the proceedings. Some lawyers conducted their own informal screening process by posing questions that are asked during formal assessments of a person's fitness to stand trial. Lawyers usually did this prior to any formal assessment of their clients commencing through the activation of Section 38 reports to establish fitness to stand trial. If the client struggled to answer the questions, a Section 38 report was then requested.

Well before I tell them [about the roles and processes in the court] I usually ask them. And those sort of questions come out in a Section 38 report [which] is the fitness to stand at trial, [so I ask] do you understand what the judge does? What the policeman does, what the lawyer does? Who are the people in the room, and what do you think they do, and what is the difference between guilty and not guilty, and things like that. So I usually ask them that, rather than just telling them...and then if they don't appear to know [the answers to these questions] then I wouldn't actually tell them, I'd get a Section 38 report to see whether they are fit to stand trial.

4.2.3 Getting to know the person

Across the spectrum of legal proceedings, lawyers expressed the importance of getting to know the person with an intellectual disability. Several lawyers reported that this was essential for quality legal representation. These lawyers recognised the value in developing trusting relationships with their clients with intellectual disability. Developing a trusting relationship involved taking the time to get to know their clients' life stories. For those accused of criminal conduct, lawyers needed this information to understand the person's conduct, broader context and relevant triggers. Lawyers referred to the importance of respecting the person, and understanding the context of their lives and conditions. Furthermore, lawyers emphasised the importance of allowing adequate time for interviews in a comfortable and safe location.

Respect for the person

Showing respect for the person was an obvious element of responsive legal representation. Lawyers were aware that people with intellectual disability were not always respected in their private lives and by the wider community. For this reason some lawyers took special care to understand how their clients' life experiences and their impairments impacted on their behaviour and demeanour.

And I've learnt over the years with clients with high and complex needs, you have to be reasonable. You can't get, you know, take the moral high ground, or get all self-righteous and say this is not on, you're wasting my time... You've actually got to respect the client and show an understanding of their condition by just working with them to calm down.

Affording clients respect was very important, particularly when people with intellectual disability disclosed distressing and painful personal information.

And some clients will not be ready within a short period of time to get to a point where they're able to disclose something that is like a significant revelation, and I had that experience with one client who had experienced severe sexual abuse and had spent his whole life with it bottled up.

Learning their stories

Lawyers reported on strategies to understand their clients' perspectives. For some lawyers, this process involved taking a detailed narrative about the client's life early in their legal relationship. It was considered that this background information could then help to understand both reasons that may have led to their involvement in the legal system, and how best to respond to any specific communication or behavioural needs.

And you know that must come back to the doorstep of counsel because the lawyer is ultimately the gatekeeper or the protector of the client's rights, and its part and parcel of their duty to the court. Their overriding duty to the court is to make proper enquiry, and the beauty of the brief life history, even a five minute history is you know what questions to ask is you know Mum and Dad separated at 5, he suffered a traumatic brain injury at 6...He the suffered at the hands of his step-father, with sustained violence until he exhibited terrible tantrums in the playground at intermediate and was removed from formal schooling. Now that's a fairly common history but if you don't ask the questions, and you're not taking time to take an interest, that person can equally present as being a very stropky, anti-social type of person who will then be at great risk of being put in the wrong box by everyone.

Taking time and making time

Developing trusting relationships with clients extended to spending time reassuring them about impending legal processes, updating progress, or simply recapping advice or information previously given. For a number of lawyers, this openness to listening and responding to the person's concerns sometimes led to a reduction in the person's anxieties and a subsequent decrease in the amount of contact they required. Most lawyers talked about the frequency with which they interacted with their clients with intellectual disabilities beyond the parameters of their legal aid entitlements. Lawyers referred to the balancing process of establishing trust and managing clients' needs within time constraints.

At the peak leading up to the sentencing, she would call three times a day at minimum and she clearly has some kind of cognitive impairment... So it was a tremendous drain on myself and my secretary but she appreciated it and she ended up slowly but surely reducing the level of contact... And she's still struggling. It's a year later and obviously I elect to assist her and other clients, because I realise the extent of their disability...

One of them in particular is what I'd call a very high needs client in terms of, you know, she'd ring up a number of times a day sometimes, even when there's not much happening. So it's ongoing. And our staff deal with that pretty well...

Getting to know the person was seen by some of the lawyers as a way of protecting their clients from being misinterpreted and thereby disadvantaged within the legal system.

Misinterpretation by all the various people in the system is the biggest risk, and judges are not immune from misinterpreting too, because they're not...if you're not actually telling the judge look this condition exists, the ship just carries on sailing. The condition's unaddressed, and the sentence has passed and no one knows there was a condition that had contributed to the offending.

Meeting where the client is most comfortable

In order to establish a comfortable context for their clients with intellectual disability, lawyers were flexible about where they met to discuss legal matters. While most clients were relaxed about meeting at the legal office, lawyers were mindful that more familiar settings, such as the local café or their clients' residences, were more acceptable to other individuals. As well as reducing anxiety, meeting in familiar surroundings with people known and trusted by the client also created the opportunity to learn additional information that could assist the representation

.

Clients who are on bail will generally meet me at my office and they'll generally conduct fairly lengthy interviews. I do visit people in their homes on occasion. When I do I've always found it very enlightening both in terms of meeting the person and meeting the extended family because you just pick up nuances...

4.2.4 Communication

Determining the most appropriate way to communicate with clients with an intellectual disability was an ongoing process for most lawyers, and one based on the specific needs of individual clients.

Checking understanding

A pervasive concern for lawyers related to establishing whether they understood their clients and whether their clients understood them. Lawyers found it helpful if they understood the extent of their clients' cognitive impairment. Lawyers also reported that they served clients better if they themselves knew how to communicate with people with intellectual disability. Some lawyers appreciated that each client, regardless of the presence of an impairment, processes information differently and has unique needs. Some lawyers were not confident that their clients made fully informed decisions.

I think sometimes you're not sure on how much they're understanding. And I think sometimes, you know, there's just a great range. But their communication with you can

be very limited...and sometimes it's a case of not knowing whether they're understanding it, and all the implications when they're making decisions and why they're making decisions.

Several lawyers reported that it is beneficial for lawyers to have backgrounds in education. This background provided skills to check a person's comprehension. Some lawyers believed that lawyers can (and should) be taught these skills very easily.

I'm fortunate that I've come from a teaching background, so I know how to check for comprehension, and it's not rocket science, but it's certainly something of which many counsel have no knowledge...a lot can go missed when you haven't checked comprehension, and if someone is complying because they're afraid or anxious, or just nodding, or not responding, it's taken as having understood. So checking comprehension is very important, and that can be taught.

Facilitating an understanding of legal processes and roles

Lawyers acknowledged that most people were nervous about appearing before the court. However, many people with intellectual disability found court proceedings and legal processes particularly distressing, often based on historic bullying and marginalisation. Also, this was exacerbated for people who had a general lack of exposure to legal knowledge and processes.

First of all I find out what they know about the law. About the courts and the process. Then I ask them, and whoever their supports are, to come with me, and we try to go through, even if I only get to see them on the day, I still try to take them through earlier, show them the courtroom, show them where the judge is going to sit, where they might have to get up and testify... and I always just say to them, all you've got to do is tell the truth and you won't have a problem.

A number of lawyers reported that familiarising their clients with intellectual disability with the court environment was an important aspect of assisting them to prepare for their involvement in legal proceedings.

I've flown a bit in the face of propriety with that one, and I will take any route I need to, to take the client into the courtroom, whether there's people sitting there or not, and just very carefully showing them, rather than telling them where everybody's going to sit. Who the judge is, who those people are up the front. Where they will sit. What's going to happen. Because I think showing is, and demonstrating is very important.

Finally, lawyers noted that alternative forms of communication might be required when representing people with intellectual disability. Consequently, it was necessary to agree on the form of communication that was most accessible for people.

It is an issue acting for disabled people that some might not be able to function on emails, some might not be able to function on the telephone, and some might not be able to function face-to-face so well... so you have to model your approach on the person, and their level of disability.

Of note, some people with intellectual disability do not have the funds, access to, or knowledge of computers, emails, texting and mobile phones. Some may have limited literacy skills. Lawyers reported that these matters must be attended to. Also, people with intellectual disability may have physical and sensory impairments that require accommodation. These might include architectural access, transportation, visual and hearing assistance and sign language/cultural interpreters. Ideally, lawyers should attend to these matters as an element of providing quality legal representation.

4.2.5 Confronting the system

Lawyers noted a number of pervasive systemic challenges faced by people with intellectual disability traversing the legal system, particularly in relation to criminal matters.

Pressure to plead guilty

Some lawyers felt that the justice system was preoccupied with achieving resolution, sometimes at the expense of upholding a person's legal rights. In the case of people with intellectual disability, some held the view that they were particularly vulnerable to being pressured to plead guilty.

There is a huge pressure to plead guilty. You get a discount in the sentence.

There's a systematic bias towards resolution, which means a plea...it's an inconvenience to the system to actually fight for someone's rights.

In some cases, this pressure occurred at the time of arrest. Some lawyers reported that the police sometimes gained confessions from alleged offenders with intellectual disability without appropriately considering the person's disability related needs.

During the interview I went to the toilet, and he actually got a confession out of the guy, and I just said 'you want to try and use that, and I'll tie you up in knots, because you don't appreciate he doesn't understand what you asked him...

Acquiescence

The lawyer participants observed that people with intellectual disability have a tendency to acquiesce or agree to suggestions put to them by other people due to a desire to please or to communicate understanding.⁴ This makes them even more vulnerable to the pressures to confess.

A number of my clients say they just go through, and they mimic. And so you have what's called acquiescence... A number of people don't realise this, and they often accept acquiescence as an understanding.

⁴ Refer Appendix 1: Background research, legislation and policy document.

Minimising intellectual disability

Lawyers reported that intellectual disability may be present but not readily apparent. Understandably, to avoid discrimination and stigma, some people do not announce their impairment. People who have avoided services, and have not been formally labelled as having an intellectual disability, may be at great risk in the legal system. They may suffer if there is a presumption that they have a higher level of intellectual capacity. People may be disadvantaged if their impairment is not recognised and accommodated in the legal system.

One of the big problems I've noticed, is that sometimes intellectual disability, people's understanding is a lot less than the way they present verbally... And so trying, you know, to convince the police they don't understand, and it's like, 'I just heard him, and he clearly understands', and so there's a bit of a mismatch there.

4.2.6 The role of support people

Lawyers commented upon other “supporters” who engage with people with intellectual disability in the legal system. While lawyers were generally positive about support people’s assistance, the lawyers also noted some tensions may occur due to competing needs and conflicts of interest, particularly in the case of disability support staff and family. These tensions are discussed later in this section.

Court Liaison Nurses

The role of the Court Liaison Nurse (CLN) was well known by lawyers in the current research, who were largely supportive of the role. Some lawyers saw themselves as having a role in providing whatever background information they could to help busy CLNs to make accurate assessments.

I think its important again for the lawyer, because depending on the day, the Court Liaison Nurse might have a number of responsibilities in a number of courts. So what I typically so is I will ask the court liaison nurse to leave the courtroom and go to a side room, into one of the interviewing rooms, and I'll give them a brief outline and that helps them to bring even more clarity to their assessment process.

Disability support staff

Lawyers were positive about the contributions of intellectual disability service staff in supporting their representation of people with an intellectual disability. Lawyers recognised that the presence of support people was often beneficial when legal information was conveyed to clients. Lawyers were aware that sometimes important elements were lost in translation due to the person’s difficulty in recalling, and retelling, information. Support staff had the potential to facilitate effective communication between lawyers and their clients with intellectual disability both by educating the lawyer about how to be responsive to a person’s communication needs, and by retelling and reinforcing legal information.

I think it is important for the communication side of things, if the support person needs to know, that they hear is directly from me as opposed to the client telling them what the lawyer told him. [It] can get very muddled I think.

From the lawyer's perspective it's also a safety net to make sure that there's a level of understanding about the advice that's been given and received.

Lawyers also noted that disability support staff could play a particularly important role when they had a relationship of trust with the person they were supporting, and could facilitate the relationship between the lawyer and the client.

I think often the clients will have a good relationship, the trust, with the support person, and so sometimes they may only have met me, and you know they're not necessarily all that trusting of what we're saying, and so it they've got a really good relationship with a support person, the support person can sort of paraphrase it back, what I said, and all of a sudden its acceptable

Support staff were also seen as having the ability to provide additional or new information at critical times, thus enabling the lawyer to represent their client well. It was noted that the level of knowledge and experience of support staff is what moved them beyond being a supportive presence to someone who could actually assist lawyers to build a stronger case for their clients.

And the level of knowledge of the support person is important. So if you've got a client with an intellectual disability who has an experienced care manager who decides to take time out to attend an important court appearance, then that helps the lawyer who represents to the client in a more comprehensive way. But if you just send a support person who has had a change over of shift early that morning and is not familiar with the client, then that is going to mean if the lawyer is interested to find out more, you know its going to be more difficult to gather that information without the care manager being there.

While generally support people were viewed as having a positive influence, some lawyers expressed caution. For example lawyers recognised the potential conflicts of interest between individuals with intellectual disability and their support staff, particularly in legal matters that involved both, or when the support person was a witness.

You've got to be a bit careful that you can't rely too much on the support person doing the communicating for you, and you know there is the capacity I think for the support person to put some pressure on them, in terms of their decision-making and things. And there are cases where potentially there are conflicts in terms of support people, [when] they are also providing information to the Police or the person's charged with assaulting one of the support person's colleagues, and there are conflicts there, so you know, I guess that's something to be wary of.

Further to this point, a number of lawyers remarked on what they saw as an increase in people being charged with assault on support staff. There was a perception that this increase coincided with the IDCCR legislation, and that in some instances the charges were inappropriately laid.

I do think they get charged too quickly and too easily when it could be resolved through mediation and through training both sides of the parties.

Lawyers also commented upon the tension that is created when support people (including family members) approach a legal issue with a specific approach or outcome in mind, or have a particular view of the person. Lawyers expressed the difficulties that this poses for them and their clients.

Some of the support people are quite zealous in their support... but it can also be a slight problem because they'll have very fixed ideas about the injustices that need to be righted, or the approach to the case. Or they might have fixed ideas about the person themselves, which I don't want to assume when I'm meeting them for the first time.

This issue was particularly noted in relation to lawyers' experiences of working with the PPPR Act.

Lawyers also mentioned a need to be vigilant about the roles that support staff may have played in encouraging people with intellectual disability to plead guilty. This was usually done on the basis of encouraging the person to take responsibility for his or her own actions. However, the implications of a lay person urging a person to plead guilty are significant. A person's access to justice may be seriously compromised if he or she enters a guilty plea without relevant legal advice.

I mean the ones I've had that have pleaded guilty, they've certainly been pretty clear cut strong... so I haven't had any qualms about – I haven't felt like they were jumping in and pleading guilty when they shouldn't be. But there is, overall quite a willingness to plead guilty. And you don't know whether they've been primed- up by support people. You know "you did this, you should take responsibility."

Family

Family were also seen as having the potential to offer good support to both the people with intellectual disabilities and their lawyers. Families were particularly valued for being able to recognise when a client was getting overwhelmed.

You know I've had some where they've been sort of reading triggers that somebody's getting stressed. Which I didn't.

Communication Assistants

The role of communication assistant was not widely known by the lawyers who participated in this research. However, those lawyers who were aware of the role were positive regarding its contribution to just processes. Lawyers noted that counsel may request communication assistants. They work similarly to New Zealand Sign Language interpreters. Their role is not to advocate, but to translate.

Counsel can have access to a communication assistant who will be available for every part of the court process to stand alongside a person who may have a difficulty intellectually...could be intellectual, could be deaf, could be any kind of cognitive impairment, going through the court process. And this is a great idea, but as far as I know, most lawyers don't know about it.

As the preceding comment highlights, the opportunity to involve specialist support in the court for people with intellectual disability is currently being under-utilised through a lack of awareness.

4.2.7 Working with the judiciary

Lawyers perceived judges as frequently being required to make decisions in the absence of information because the legal system typically limited the amount of direct contact that judges have with parties and witnesses. Lawyers perceived that this created an inherent challenge for the judiciary who were expected to make informed and appropriate legal decisions.

I think the primary difficulty, if I can put it that way, is that judges are heavily dependent on counsel. And the difficulty is that any judicial officer coming in from the cold so to speak, because they've never met the person before and they're just handed a charge sheet, and they've somehow got to make the right decision and see that a just result occurs. And I just don't think it is possible for a judge to do that without all of the lawyers taking time to get to know the client, and when they have a disability it is very important to get clarity on the level of disability.

Lawyers noted that some judges worked hard to try to communicate effectively with people with intellectual disability. However, many people, including those with intellectual impairments, have difficulties understanding proceedings due to the law's complexity and the stress of being in court.

Well I just think they're pretty constrained in terms of being under a lot of pressure. Having a lot of people, you know, they've got a list of 60 people to get on with. I think they try, some more than others to communicate simply and clearly, but I think it would be a great mystery. I mean a lot of clients standing in the dock have no idea what just happened to them, let alone people going in with a disability.

In an attempt to achieve more informed legal decisions, some lawyers were extremely committed to developing an in-depth knowledge of their clients' life circumstances and conveying it to the judge. If lawyers could assist judges to gain a greater insight into a person's disability, and the life events that had impacted on them, more responsive decisions were typically made.

And obviously I'm talking about situations where you've established where the client, who is fit, has committed an offense, but there are a lot of extenuating circumstances, and judges do hold out the olive branch and are prepared to be courageous by and large and give a more lenient sentence than would otherwise be given, if their have been good foundations laid in the submissions of the lawyer. So that the judge can

understand; right I understand what has happened to this person and I'm prepared to provide my discretion.

Lawyers recognised that judges, like lawyers, did not always possess experience or specific skills in working with people with intellectual disability in legal contexts.

I think judges are trying to hear a case objectively and dispassionately, and so having to take into account someone's impairment, is in slight conflict with their training to try and look at everything through that dispassionate lens. So I imagine that's one challenge for a judge. The other thing, is just like a lot of lawyers, they haven't had any real training or experience dealing with [people with disabilities]

For more humane and appropriate processes, lawyers suggested that the criminal court environment should be less formal, and looked to the Family Court as an example.

I think the judges have got to understand too, that it takes a bit longer and we need to have patience. They need to sit back and also deformatize the whole process. It would be better if it was in a – like a Family Court type process rather than a courtroom process because you know the whole thing is adversarial and it doesn't suit, it doesn't fit the disability needs...

4.2.8 Inadequacies in the legal aid system

A significant theme evident within the lawyers' data related to inadequacies in the legal aid system. The current study highlighted that legal aid allowances rarely compensated the actual time required by lawyers to work effectively with clients with intellectual disability.

I think it's really just reliant on lawyers doing a lot of work for free. And there are only a certain number of them prepared to do that.

Working with an intellectually disabled person is going to take so much more time and effort, and extra help that won't fit into that four hours [that legal aid allows]

As previously discussed, in order to work effectively with clients with intellectual disability some lawyers undertook a range of tasks that they were not typically required to provide to non-disabled clients.

Because you've got to take the time out to orientate the person in the process. Teach them what a lawyer is, teach them what a judge is, teach them what the rules of law are, and you know, that's not a one day job. You know that might be a junior partner or a junior lawyer's job, or one of the legal executive's jobs. But we still need funding to be able to do that.

Thus, lawyers experienced legal aid restrictions on their investigation of the legislation and preparation with clients with intellectual impairment. A lawyer discussed the implications.

... there are lawyers in court, who clearly don't understand the Act, and they're just agreeing to what the judge is saying about procedural things. Which if the judge has got it right, that's not really a problem. But it is quite concerning overall.

While acknowledging that legal aid was generally insufficient when working with clients with intellectual disability, one lawyer noted that regardless of the guidelines, lawyers have an ethical duty to commit the amount of time the case requires regardless of funding restrictions.

...and the real issue is not finding fault with the current regime, but rolling your sleeves up and being prepared to do the long interview irrespective of what the guideline may be because your duty is to do that. You can then, if you really want to, take it up with the Ministry of Justice and apply for an extension. And they can actually be quite reasonable if you give sound reasons. But I do have to accept that doing this work requires you to be less concerned about the economic bottom line because you're simply not going to earn the same income as other lawyers.

Limited legal aid funding was not the only issue lawyers discussed. Lawyers felt that the reduced access to a lawyer of choice had resulted in people with intellectual disability being disadvantaged in terms of their access to justice.

Yeah, three big changes. The first one was removing lawyer of choice. So you used to be able to choose your lawyer. You'd have a big following of clients therefore big caseloads. The second one was when they brought in the Public Defense Service, so that cut the available work by half. And then they brought in fixed fees, which just means you get paid less. But it was really, the biggest change was not being able to choose your lawyer...And that one of the areas I'm sure we'll get to but that has an impact for those with intellectual disabilities.

Lawyers found it particularly concerning that the removal of the lawyer of choice option potentially increased the vulnerability of people with intellectual disability by requiring them to disclose their story multiple times which, in turn, reduced the opportunity to develop a trusting relationship with their lawyer.

There are certainly some economies of dealing with people over and over, and that was one of the reasons why I didn't like the decision to remove the ability to choose your lawyer from those lower categories of cases. Because it makes people tell their story over and over... That person knew all their history, and that made things a lot easier for the person involved. Whether it was because they've got some mental health problems, or they were sexually abused as a child, whatever it was, they were able to only have to tell their story once.

Thus, many lawyers identified two central legal aid issues for people with intellectual disability: the importance of adequate legal aid funding and the ability to choose one's legal counsel.

4.2.9 Intellectual Disability (Compulsory Care and Rehabilitation) Act (IDCCR)

Many of the lawyers who participated in the current study had considerable experience in representing clients subject to the IDCCR legislation. At a broad level the legislation was seen as providing a necessary legal pathway for serious offenders with a significant level of intellectual impairment.

I think the IDCCR Act is essential and I say that because I have acted for a lot of clients, as a lawyer for the care recipient, on extension of orders under Section 85 or reviews of secure or supervised care recipient orders. And there's no question that any of the clients who qualify under Section 7 would be at terrible risk in a custodial environment and I say that because the threshold is so high, in the way that Section 7 is applied, that by and large the people who are supervised care recipients or secure care recipients are unquestionably impaired, and have a level of impairment that would make it utterly inhumane for them to be in a mainstream custodial environment.

While supporting the legislation in principle, many of the lawyers raised concerns about the IDCCR Act. They felt that it did not necessarily serve people with intellectual disability well and, in some cases, seriously impinged on people's human rights and access to justice.

For some lawyers, the fact that the legislation only applied to a very specific group within the wider population of people with intellectual disability was problematic. Lawyers were very aware that many offenders with intellectual disability did not meet what they considered to be the *high threshold* for IDCCR. Consequently, many people with mild intellectual disability were subject to the conventional criminal justice system, to their disadvantage. Thus, people with milder intellectual disability were identified as often unsupported within the conventional criminal justice system, and potentially very vulnerable if imprisoned.

It doesn't seem to be applying to many people in terms of the court process, and there are a lot of people, you know [who] can be borderline intellectual disability and they're not qualifying under the Act but they shouldn't be in the mainstream way of dealing with everyone else. And I think those people are probably getting the raw end of the stick. I think people with more severe intellectual disability, I think the Act probably copes pretty well with them.

A number of lawyers felt that the legislation was seriously flawed with regard to process. Under IDCCR Act, the court establishes whether or not the person committed the offense prior to making an assessment of the person's level of intellectual impairment. This is the opposite of what occurs in other jurisdictions. This process was seen as disadvantaging people with intellectual disability because it precluded them from a legal defence utilised by other members of the community.

Other jurisdictions have a process: 'are you mentally impaired?', then, 'did you do it?' – meanwhile we have it the other way around: 'did you do it?' THEN 'are you mentally impaired?...It's unfair because you could be theoretically completely innocent. I mean, you may have done it, but you may have had a proper excuse known to law, which means you're not guilty.

The IDCCR Act is based on the acknowledgement that care recipients should have access to appropriate, individually responsive, and accessible rehabilitation. Some lawyers reported that they saw little evidence that care recipients actually did have adequate levels of rehabilitation.

[Rehabilitation], the Cinderella of the system. It just doesn't happen. It's given no real thought, no real resources, and there's no real commitment to rehabilitation.

Lawyers also felt that some care recipients, through no fault of their own, were unjustly subject to continuing coercive care because rehabilitation was not available.

So if someone was going... to have consideration of whether their order should be extended, how much discussion would take place around whether the fact that insufficient rehabilitative activity had occurred, which may have contributed to why they're still there.

For this reason, it was suggested that greater emphasis and monitoring should be placed on the rehabilitative component of IDCCR care orders.

Maybe there should be a checklist – what rehabilitation have you had? What's happened? What successes have there been and why hasn't there been other rehabilitation? There's no real analysis.

Lawyers also reported that some care recipients were subject to longer periods of restriction than non-disabled people. While acknowledging that some benefits may accrue to care recipients, some lawyers critiqued the IDCCR Act's restrictive regime:

...so clearly there are a lot of positive aspects to the provision of care, but you still come back to that question about; at what point is any regime too cautious and too over protective? And certainly by comparison mental health clients, [provided their mental health is stable], have graduated leave, even as a special patient, with Ministry of Health approval, and will eventually be into supported accommodation with less security, far less security than a person who is a supervised care recipient.

Further to this point, in the decade since the legislation was enacted, some lawyers had observed a tendency for disability support services to apply to have orders extended for care recipients. Lawyers implied that an incentive to apply for extensions might be the high level of funding that accompanied services for care recipients.

People becoming care recipients, there is an additional resourcing that comes with that... it's probably quite attractive to some services.

The care provider will say, 'well actually, we've had a team meeting and we don't actually think it's in their best interests that they get off, and we actually think that they would benefit from an order'. And generally... I have to say to the care provider, 'yeah, but I've got to do the best for them, and if they tell me that they want off, then despite your agenda, sorry, and despite, I can see that you've probably got the bigger picture and oversight, I just can't do that'. So I've had discussions like that.

Finally, it was also noted that under IDCCR Act care recipients were dependent on their Care Coordinator to make an application to discharge an order, care recipients themselves could not initiate the process. Some lawyers saw this a serious breach of care recipients' human rights.

Under the legislative scheme, the care coordinator can apply to discharge you from the system, but you, as the detainee, can't... and that is your ultimate arbitrary detention.

... part of the training should be the UNCRPD access to justice Article 13 and Article 12 and Article 11 and of course remembering natural justice is part of our legal process. To deny one group natural justice is to deny them their Bill of Rights. It's to deny them human rights. And this is exactly what they're doing under IDCCR and it has to stop... and I do believe that all cases should be getting a review, because you have to look at the robustness of testing capacity.

4.2.10 Protection of Personal and Property Rights Act 1988

Lawyers with experience in representing people with an intellectual disability subject to the PPPR Act reported that they sometimes felt challenged by the fact that they were in the position of representing the person in a legal process which had (most often) been instigated by family. Sometimes the lawyer who pursued the best interests of the person with an intellectual disability were in conflict with the family.

Well the Act itself is pretty clear, the subject person's got to participate, you know, as far as they can in the decision making. And so I am aware that some people who hold orders actually think they are licensed at that point, and that they can do anything.

Furthermore, lawyers were critical that there is merely a three-yearly review, with no additional monitoring of welfare guardianships. While out-of-cycle reviews can be requested, the person with an intellectual disability subject to the order was highly unlikely to have the knowledge or the capacity to initiate such a process, leaving them reliant on other people, who were sometimes equally powerless, to do so on their behalf.

Welfare guardianship on its own, separate from a property manager, is a position that comes under no scrutiny...the welfare guardian is appointed for three years. So essentially every three years they do come before the court and there's some scrutiny there. But in the time between is where we have a lot of people popping up, and they're usually friends or caregivers who've noticed something wrong and wanting to have the welfare guardian removed or have their behaviour addressed...And there's no straightforward way to do that.

4.2.11 People with intellectual disability in prison

As noted above, lawyers expressed that many people with borderline or mild intellectual disability are subject to incarceration, and that regular prisons are inappropriate settings for this group of offenders.

No I don't think the system works well at all. I think there needs to be far greater recognition at a national level of their special needs when they're in prison.

It's terrifying for them... all the bullying, and sort of holding your own ground, they can't do it.

A concern was also expressed that people with intellectual disability usually serve their entire sentence, rather than receiving parole, or the opportunity for parole after they have served a third of their sentence as is the case for other offenders. It was unclear what contributed to this situation. One explanation was a lack of knowledge about parole application or inadequate legal advocacy. Another explanation was that people do not have access to rehabilitation programmes and therefore are viewed as a continuing risk.

I mean they're eligible for parole at one third. And I don't know whether they're waiving their parole hearing so they're not going at all, or whether you've got a psychologist saying, well... because there are no programmes in prison for those with intellectual disability they're doing nothing. No rehabilitative work in prison, and so I think they're probably being assessed as high risk.

While prisoners were eligible to free legal representation to prepare bail applications, it was felt this was not widely understood by prisoners. In the case of people with intellectual disability, it would be extremely unlikely that they would be able to successfully advocate on their own behalf to achieve parole earlier.

The parole is funny in terms of legal representation. And I can't remember what it is. It may be 75% of people don't have a lawyer, and they don't encourage you to have a lawyer. So you have to be – you can certainly get legal aid, but you have to proactively go and get a lawyer, find your own lawyer, apply for legal aid... I think people with intellectual disabilities would have a greater advantage in having a lawyer and they probably aren't.

4.2.12 Recommendations for legal and procedural reform

The second objective relating to lawyer participants in this research related to the development of recommendations for legal and procedural reform. The lawyers interviewed were all people who had an interest in providing quality representation for people with intellectual disability. Some of the lawyers could be described as specialising in this area, while others incorporated clients with intellectual disability within a wider scope of legal practice. The preceding section outlined the barriers and challenges that lawyers identified as impacting on people with intellectual disability as they traversed the legal system, and on them as legal professionals. This section presents the lawyers' recommendations for a more responsive legal system. Some lawyers expressed the view that failing to address this issue for people with intellectual disability would lead to *the disadvantaged getting more disadvantaged*.

Specialist Lawyers, Judges and Courts

There was strong support for development of specialisation in intellectual disability law at all levels of the legal system. A number of lawyers felt that people with intellectual disability would receive enhanced legal representation if lawyers possessed the communication and

interpersonal skills required to effectively convey legal information, and specific knowledge of relevant legislation.

You should have, basically, specialist practitioners dealing with people who are intellectually disabled.

I think it; particularly the way legal aid is I think it would be better to have a panel of trained lawyers. Because not everyone can do everything, and expecting everyone to be up with every aspect of the law, and be good at dealing with every type of person, [is] not realistic. But I think having a panel that offer continuing education updating the research, and about law, case law changes...

I think you have to have Specialist Courts with experts that [understand] learning disability and the legal process.

Some lawyers thought that existing models could provide a model or blueprint for a Disability Specialist Court.

A specialist court more like the Family Court where you sit down and make a decision as a group where the [providers are there] and the prosecution sit down and you look at a solution together. You find out the truth. You question them in a process that's more conducive to their abilities to understand.

A number of lawyers provided examples of initiatives, which highlighted the steps that had been taken internationally to address the needs of people with intellectual disability. These examples confirm that people with intellectual disability within the legal system often have unique needs and vulnerabilities, and some other countries are making concerted efforts to provide more responsive legal systems and legal representation. Some efforts included mandatory training for lawyers representing people with intellectual disability, which was also a recommendation to emerge from this research.

If you're a duty solicitor in England, you're not allowed to give advice to the mentally disabled or those with learning difficulties unless you've done the appropriate training course. We don't have a training course.

Some lawyers also recommended that due to the complexity of the IDCCR Act, mandatory training with corresponding registration should be established.

I think IDCC&R lawyers need training... similar to the Courts in Canada. They have First Nation Courts over there. They have First Nation lawyers. They have to be registered as First Nation lawyers in order to practice. Now we have IDCC&R lawyers, but I think we should have a registration process where they go through some training to be registered, and that training is not just a one day seminar, but it's about having the disability community teaching them. Like People First New Zealand, running the floor, along with a couple of lawyers to get the lawyers to talk and engage.

4.2.13 Education

As the previous commentary indicates, education was a very significant theme within the lawyer contributions. Increased education, including by people with intellectual disability themselves, was seen as a priority in New Zealand. The lawyer participants spoke at length about specific education needs. Lawyers were of the view that increased content in the area of intellectual disability and the law should be delivered within undergraduate and continuing legal education. It would include relevant procedural and substantive law relating to the IDCCR Act, the CPMIP Act and the PPPR Act.

Education would raise lawyers' understanding of intellectual disability. Also, education should encompass communication skills, including conveying information appropriately and checking comprehension. It was felt that developing skills in how to better understand and engage with clients with intellectual disability was more pertinent than knowledge of legislation. Again, it was noted that people with intellectual disability themselves would be effective contributors to education programmes.

I think the one thing which I always found good at law school was having people come and speak to you... you're more likely to pay attention and sort of take it in if someone's living with the condition but who's also articulate and able to talk about how they would like to be treated.

It was also recommended that practising lawyers should be able to access education in the area of the IDCCR legislation and that such education should have a focus on competency and supported decision-making.

I think I tend to use a supported decision-making process rather than a substituted decision-making [process]. But I have concerns about lawyers representing learning disabled because there is no training at tertiary level around it and I've argued and argued that there needs to be training around disability generally, but specialist training for those that are IDCCR lawyers. They tend to take them on and say yes I'll do that, but they haven't got the background training, and often section 9 is the biggest. You know the biggest issue around competency, and there's an assumption of lack of competency and they don't understand disability as a whole. It's about communicating in a different way.

Access to ongoing professional development was identified as being important to lawyers and judges and that it would be appropriate for Continuing Legal Education and the Institute of Judicial Studies to join forces to deliver it.

Sometimes I think they're training the judges, can't they train the lawyers at the same time, and the court staff and the police? You know there are a lot of different skills in all those things but a lot of general education could go to us all in the same room.

4.2.14 Increased education for police

There was a strong perception that the police should be involved in ongoing efforts and initiatives designed to encourage more responsive legal practice for people with an intellectual disability. The police were seen to be seriously under educated in this area.

...and you have to educate the police because they've got no education at all. The human rights training, the Bill of Rights training... there's nothing with intellectual disability.

I've told the police several times, I've actually been in touch with several that are involved in management and training, that they need someone like myself that can train them more competently in how to address the issue of disabilities but in particular learning disability and Deaf are the two main issues. You now, where the law isn't taught to them, so they may not know for instance that it's illegal to smack your children. Because they haven't had it in sign language or they haven't had it in plain speak or easy read or in a video format for them to understand. And so if they don't know the legislation – don't take advantage of that.

It was also recommended that exploration of the potential for forensic nurses to be located at the police station to facilitate the identification of intellectual disability, and to initiate the appropriate legal processes and procedures. This system was identified as occurring in some parts of the United Kingdom and conducive to a more just and responsive system for people with intellectual disability in New Zealand.

In London and Manchester they have forensic nurses, not just at court, but at the police station to see whether you're fit to be interviewed.

4.2.15 Restorative Justice

Restorative justice processes were seen as having the potential to deliver benefits for people with an intellectual disability. Facilitated well, restorative justice might offer a more accessible pathway for offenders with intellectual disability to understand the impact of their offending on others, and to determine an appropriate punishment. It would also offer a way for the courts to stay informed about people particularly when no other appropriate rehabilitation or support service is available.

I think that the courts feel a bit out of the loop. That we feel like there isn't much we can achieve. Particularly with repeat offenders... so that's very frustrating. And it would be helpful if there was some sort of restorative justice process that gave feedback into the system.

Restorative justice helps offenders understand the impact of their behaviour on the victims. This is a particular area of difficulty for some people with intellectual disability who can struggle to understand the conceptual and emotional elements of remorse or being sorry, and to adequately express them.

With regard to people with intellectual disability who had criminally offended, lawyers identified that many of their clients were aware that what they had done was wrong, but that they frequently did not understand the human impact or potential consequences of their actions.

...in terms of explaining the consequences to the community, and the harm to victims and those things, I don't know that they got any of that. In saying that, a lot of my clients without an intellectual disability – well they switch off you know? And they don't necessarily have empathy for victims or things like that.

4.2.16 Screening for intellectual disability

It has been widely acknowledged that there are many people with an intellectual disability involved in the legal system, and particularly in the criminal justice system. Many people with intellectual disability require additional support while they progress through the justice system and beyond but have a level of impairment that does not qualify them for such assistance. It was recommended that the needs of people with mild intellectual disability must be addressed. Recommendations included the creation of a *working model to assess intellectual disability*. The model would detect mild intellectual disability that might not meet the relatively high threshold of the IDCCR Act but would indicate that the person requires disability support and appropriate accommodation within the legal system.

5 Judges' perspectives

5.1 Introduction

Thirteen New Zealand judges participated in this research. Most of the judges served in District Courts and they had practised from between eight and twenty-six years. Across the sample, judges had a diverse range of experience encompassing Youth, criminal and civil (including Family) courts. Specific details relating to the gender, court jurisdictions and location of the participating judges has deliberately been omitted in order to preserve their anonymity. Verbatim quotes from judge interviews illustrate the themes identified through the analysis of the judges' interviews.

5.2 Judges' perceptions of the barriers and difficulties experienced by people with intellectual disability in the legal system

The judge participants identified a range of themes regarding the barriers and difficulties encountered by, and with, people with intellectual disabilities. Specific themes relating to this objective were: identification of intellectual disability; time limitations; complexity of court processes; communication; vulnerability of people with intellectual disability as complainants or witnesses; and inadequacies in the legal aid system.

Importantly, all of the judges agreed that complainants and defendants with intellectual disability are a vulnerable group within the New Zealand legal system. The judges also reported that legal professionals often experience difficulty in meeting the needs of people with intellectual disability in a legal context. Consequently, people with intellectual disability may be disadvantaged in some legal contexts.

I have noticed over the years in my role that some of the most difficult cases are those where the defendant does have an intellectual disability. The most frequent of which tend to be those on the Autism Spectrum, or those with ADHD, those with fetal alcohol syndrome, those with head injuries... and I'm just conscious that we don't deal with these people as well as we should.

This observation is indicative of the concerns that judges have for people with intellectual disability within the legal system.

5.3 Identifying intellectual disability

Judges observed that it is important to have early, accurate identification of people with intellectual disability when they enter the legal system, in whatever capacity.

Judge participants reported that the judiciary are very reliant on other people to identify whether a person has an intellectual disability or other cognitive or sensory impairment. The

police, lawyers, and CLNs were specifically identified as having critical roles in alerting judges to the presence of intellectual or other impairments. However, only CLNs were consistently identified as having the necessary skills and expertise to recognise intellectual disability. Judges reported that some police and some lawyers competently recognised intellectual disability. However, both occupational groups were perceived as requiring further education in the identification of intellectual disability and its impact.

You've got to identify the issue early on. You've got to identify it earlier and that means involving the forensic nurse early on.

Most judges reported that early identification of intellectual disability was essential for appropriate legal processes for people with intellectual disability. Judges reported that it was common for people with intellectual disability to remain invisible within the system if legal professionals and court personnel were not appropriately educated to recognise intellectual disability, and its associated impacts. Because formal court processes typically restrict the ability for a judge to have extensive interaction with those appearing in court proceedings, judges were concerned to identify intellectual disability early.

So by the time it comes to the trial process, that's quite a formal and straight jacketed, you know, prescribed process that has limited interaction between a judge and any witness, because by the very nature of the proceedings they're there to give evidence, not to talk to judges.

Linked to this, judges reported that even when they were committed to working in ways that were responsive to the needs of people with intellectual disability, it was possible for an individual to be at an advanced stage in the legal process before intellectual disability was identified. One judge reflected on the importance of informed lawyers as a way of mitigating this risk.

But you can get right through. We had a guy who elected trial by jury on a whole lot of charges, and there were a whole lot of summary matters under the old system, and he pleaded guilty following the sentence indication to the trial matters, then there was a new solicitor assigned, and he raised issues about fitness to plead and so then we got two Section 38 Reports, and I found him to be unfit to plead. So I set aside the convictions, and now we're going down that route. So it was only as a result of another solicitor getting involved, and being unhappy with the interaction and then realising that he'd previously been dealt with as a care recipient under the IDCCR legislation that he raised it ... so that just wasn't really my doing, it was more the solicitor red flagged it for me.

The Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003 (IDCCR) was acknowledged as providing one mechanism for assessing the level of impairment experienced by defendants with intellectual disability. However, like lawyers, most judges perceived this legislation as serving only a very small group of individuals who had more significant levels of cognitive impairment, and who had legal needs that were very specific. Judges who participated

in the current study 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 a more significant level of intellectual impairment that they were skilled at minimising or “hiding”. Such individuals are sometimes referred to as being on the “borderline” (of meeting the assessment criteria for intellectual disability). Furthermore, usually people with this level of impairment have had little or no involvement from formal disability supports. Thus, those individuals avoided the stigma of intellectual disability but also were not identified as having such a condition until they were assessed under the IDCCRA, as one judge reported:

...And then visually they appear to be strong... it is quite difficult because often people have adapted in such a way that often they're verbally quite strong, or they appear strong, and they've adapted, you know they're getting by in the world... then you get the impression that they're confident and they know what they are on about... So someone can appear confident. You look at their history and see well they've been before the courts on numerous occasions, they must know what's going on. But when you get a report, then you find out, well they are functioning at a very, very low level... it's all a bit of a front basically.

There was a strong perception that these individuals “on the margins” were more likely than non-disabled people to be incarcerated.

Oh I still think there are plenty of people with intellectual disabilities ending up in prison...borderline people. So it seems to me there are people who fall between the stalls...

Judges also highlighted the specific vulnerabilities of people with Autism Spectrum Disorder (ASD), Attention Deficit Hyperactivity Disorder (ADHD), Fetal Alcohol Syndrome (FAS) or Acquired Brain Injury (ABI). People with these conditions were viewed as being both over-represented and under-recognised in the criminal justice system.

I suspect there's an awful lot more head injury people who are out there who are just struggling their way through without any real support, because they're awkward, don't fit in square boxes easily.

A number of judges commented that there is a failure to appreciate that many people who appear in the criminal courts are affected by a range of conditions which may have been a factor in their conduct. Furthermore those conditions may, in turn, impact on the person's ability to understand legal processes or instruct legal counsel.

... a huge percentage of defendants that appear in criminal courts suffer from ASD, ADHD or fetal alcohol syndrome.

As previously mentioned, currently there is no formal system for responding to the diverse needs of individuals who do not meet the specific criteria for intellectual disability defined in the IDCCR legislation. Consequently, there appears to be a significant number of people who require support within the legal system but who do not qualify for government resources that may assist

them to have their legal needs more adequately met. Furthermore, it was recognised that currently there is an absence of services designed for people with less obvious cognitive and social impairments such as ASD, ADHD and FAS. Judges were clear that such individuals have significant needs that frequently are not being met either within the legal system or the community.

For some judges, the widely held perception about the importance of identifying intellectual disability as early as possible in the legal process was accompanied by a tension about the cost of ordering specialist reports. Several judges reported that their need to balance the early identification of intellectual disability through a formal assessment process with the considerable financial cost. Linked to this ambivalence was a sense of uncertainty about how to determine whether a person would benefit from being involved in the IDCCR process, or whether the conventional criminal justice route was more appropriate.

The other thing I guess I am conscious of is that I know the reports are expensive... but just because someone is offending criminally, and I've got a few issues, you know, doesn't mean that it warrants a Section 38 sort of intervention. But then some might say it's better to find out earlier.

One proposed response was the introduction of an appropriate and uncomplicated screening process administered as individuals enter the court process. Several judges suggested that this would identify a wider range of people who may be vulnerable within the legal system. However, the cost and logistical barriers to introducing such a system were acknowledged.

Somebody in court to screen people would be a huge, huge advance. But how we achieve that, I'm damned if I know.

5.4 Time limitations

All judges agreed that working responsively with people with intellectual disability required additional time but that time was typically a scarce commodity within court contexts. Because of the pressures associated with processing large numbers of cases, judges did not always feel able to attend to people with intellectual disability in an optimum manner.

You know we tend to be brusque in our dealing with people who are sitting on a list of about 60, and you're trying to get through it, it's a rush, and it's one thing I don't think our system does deal with well. And those people I don't think should be stood up in the courtroom. I think they should be in a private room of their own with a judge sitting at the table level with them, and you know, those are mad ideas that I have from time to time, but I really do think that.

This judge highlighted that additional time and a less formal court environment would be beneficial. Insufficient time was also seen as having the potential to exacerbate the issues associated with identifying intellectual disability, referred to previously. The pressures of

processing large court lists in a short space of time made it imperative that identification of intellectual disability occurred prior to the proceeding.

Judges are often dependent - we have such a short space and time with them often. And you know, you've got a busy list and you're sort of reliant on council to say, well hold on, have you got some issues?

Judges raised additional issues related to time. Time consuming cases could be perceived as arduous and complex. Also, some individuals with intellectual disability encountered procedural delays that were frustrating and confusing. Consequently, on some occasions, court staff could perceive the individuals with intellectual disabilities as "slightly aggressive".

But certainly the process in civil proceedings can be very frustrating because the process rules, and for many people, particularly with intellectual disabilities. They can't understand why the process is there...

5.5 The complexity of court processes

A significant theme evident within the judges' data related to the complex nature of legal and court processes and the ability of people with an intellectual disability to be genuinely involved in them. This complexity related to both individual and systemic factors.

5.5.1 Individual capacity

Due to the nature of their impairment, people with intellectual disability typically experience difficulty in understanding new and complex information. For many, the legal system was unfamiliar and confusing. As a result, participants with intellectual disability were often perceived as struggling to be active participants in the legal processes.

I think for a lot it's bewildering. You know, I mean it is. But as you know, the law is set in process and the judge has got to decide whether the person can stand trial... that's the most discomforting part of criminal law I would say – how people with intellectual disability, and I think mental illness are dealt with ... and the thing is it is much easier to be, if you like, paternalistic where the crime that's alleged is less serious.

Judges were acutely aware of these difficulties. They recognised that the extent to which people with intellectual disability could be involved varied according to their individual capacity. On the one hand, the judges shared a commitment to ensuring that people with intellectual disability understood court processes and decisions. On the other hand, judges were not always certain that the individuals with intellectual impairment adequately understood the proceedings. This issue was further complicated when a person had poor mental health in combination with intellectual disability.

They may have quite good understanding of some things but poor capacity in other areas. The other difficulty there often is that sometimes, intellectual disability can be combined with mental illness which has an additional sort of complicating factor. So I

mean I think the answer really is that the court system struggles to be sure that the intellectually disabled person understands what's going on.

5.5.2 Understanding legal roles

People with intellectual disability may not fully comprehend the various roles of people within the legal system. However, judges perceived that their own role was well understood by people with an intellectual disability.

Well that would be my perception, is that they might not be aware of what all the various people in the court are doing, and what their roles are, but by and large they seem to understand that the person sitting on the bench is the person who's calling the shots if you like... he or she is the one who's going to tell them what they're going to have to do.

5.6 Communication

Communication was a prominent theme in this research. Judges emphasised both the nature and impact of communication difficulties for people with intellectual disability in the courts, and the strategies that they as judges employed to mitigate them. Despite the constraints imposed by the formal processes of the courts, all of the judge participants reported that they attempted to adapt their own practice to be responsive to the communication needs of people with intellectual disability. The following section details their methods.

The judges reported that, typically, lawyers speak on behalf of their clients with intellectual disability. For the most part, judges reported that they tried to speak directly to the person with an intellectual disability. They appeared to do so for three main reasons: to acknowledge the person; to understand the person's perspective; and to reduce any communication disadvantage the person might experience due to his or her disability.

5.6.1 Acknowledging the person

Most judges reported that they attempted to engage directly with individuals when they were aware they had an intellectual disability. They noted that for those people with an intellectual disability who had previously been in court, this level of engagement often came as a surprise because it had generally not happened before. People with intellectual disability were often not aware that judges could speak directly to participants in legal proceedings.

So most of them are so intrigued by the fact that they've actually got a judge that not only seems to understand them, but who wants to talk to them and not everybody else in the court. That they actually do stop and listen, and I think they're pretty grateful.

Judges who engaged directly with people with intellectual disability appeared to be motivated by a desire to gain a deeper understanding of the person's life context, including what may have led to them being in court. This deeper probing was sometimes prompted by a judge's concern about a person's obvious vulnerability. For example, the following referred to a

situation encountered during a pre-trial hearing during which a judge intuited that the person may have been at risk of having his access to justice denied.

And I thought what on earth's going on here. He just does not look like the type who should be in this court, let alone facing a charge like this...so I just rode over his lawyer and talked straight to his mother and said "look what's going on with your son?" So she started explaining a few things [about his disability and his life] ...and then the lawyer came in and suggested that in fact the police may have arrested the victim and not the perpetrator...

Several judges also identified the need to attend to the drivers of crime in order to be able to deliver appropriate judgements.

I know very real and pragmatic reasons why people start committing crimes, and I think only a very, very small proportion of them are actually bad people.

5.6.2 Facilitating increased understanding

All judges discussed the importance of increasing the understanding of people with intellectual disability so that they could more fully participate in the legal process. Judges in the current research were very committed to ensuring communication was as effective as possible. They also recognised that communication barriers were created both by inaccessible language, and by the rituals and architecture of the court.

Judges were acutely aware of the need to simplify their language in order for it to be accessible to people with intellectual disability. However, judges were not always sure that they succeeded.

I've worked with or encountered people with obvious disability and I enjoy it. I enjoy the challenge of really trying to communicate with them at an appropriate level. But I'm always looking for some sign and trying and to make sure I communicate at the right level, which I don't always succeed in. I feel I have a lot to learn really.

I go through all that process, and then I try to put the whole lot in straight-forward language... in short sentences, straight forward when I talk to them... I'm not sure that it's good enough. I think we can all do better.

While the judges in the current research were cognisant of the general principle of accessible language and communication, they also recognised that very effective communicators adapt to the disabled person's needs.

You can't sort of formalise this because it depends upon the people. It depends upon the individual. Some people will function at a reasonable level of communication where you can talk to them normally. Other people won't and what you've got to do is remember just exactly what you're about. Are we engaged in a meaningful exchange of information? ... You've got to craft your communication accordingly. While at the same time avoiding appearing condescending which is very difficult.

5.6.3 Overseeing the interactions between lawyers and their clients with intellectual disability

Judges reported mixed views in terms of the quality of the interactions they observed between people with intellectual disability and the lawyers who represented them. Judicial participants acknowledged that many lawyers provided exemplary representation to clients with intellectual disability and believed that those lawyers had self-selected due to their interest and commitment to working with vulnerable individuals.

It varies hugely. But some lawyers are very quick to pick up and work with the client, at the client's appropriate level. Even if they haven't done it before you see it happening...and I think by and large that the people who do it these days, who are doing litigation are people who are not doing it for the money. I think they like the variety of people they deal with...I actually think that the kind of people who do this kind of work, for the law, are by and large pretty adaptable and ordinary people. And empathy is what makes us human isn't it?

A lot of them have a liking for people with disabilities. There's nobody doing it to make money.

We have a group of lawyers here who have been very, very good with that work. And they tend to get most [people with intellectual disability].

While noting good practice, most judges also reported that they observed lawyers who did not possess the skills to appropriately interview, or to convey information about legal processes, to their clients with intellectual disability. Judges felt that the key to working effectively with this group required empathy, experience and an openness to doing things differently. Judges gave 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.

Well for a start I always cut the lawyers out ... and I always talk, no matter what the situation, I talk to the person concerned themselves, and I usually come down from the bench, and I get them to come and sit near me. And we just hold a normal conversation, and I just try to simplify everything I say.

One thing I've tried to guard against is the lawyer talking to me on our level, in front of the person with a disability. And so that's why I take control of some of these hearings, to make certain it doesn't happen.

While most judges were confident about engaging people with an intellectual disability in conversation during court processes, regardless of the court jurisdiction, some judges avoided doing because they feared that this may be too confronting. It appeared this reservation was because the judge's status might be alarming to the person with an intellectual disability. These judges felt such an approach was difficult in the criminal court and were concerned not to make an already difficult situation worse. That is, anxious people could become more anxious if the

judge spoke to the individual directly. Judges were particularly concerned that a person's case may be disadvantaged if the person became increasingly distressed.

...Even asking someone who's at a relatively high level of functioning – they're in the dock, the spotlights on them as I ask them the questions, it's pretty difficult for someone to speak in public. So if you ask someone with an intellectual disability to speak, I'm very loathe to really try to engage. Except sometimes I'll make some positive comments you know, "I'm pleased to hear you're doing very well," because I don't know how they're going to react.

Thus, some judges expressed that they attempt to find a balance between meaningful, informative communication with the person, while not increasing the person's anxiety.

5.6.4 Drawing on others to support communication

While judges were committed to developing their own skills to a level that allowed them to effectively communicate with individuals with intellectual disability, most highlighted the important contributions of other people when working in the context of the legal system. As well as lawyers, CLNs, disability support professionals and family were all identified as playing a critical role in supporting judges to ensure that people with intellectual disability are able to understand legal information.

The role of Court Liaison (Forensic) Nurses

Judges were universally positive about the role undertaken by Court Liaison Nurses. As highlighted earlier in this section, the early identification of intellectual disability was seen as being critical to the extent to which the Court could respond to a person's disability related needs. For many judges, it was the Court Liaison Nurse who first recognised intellectual disability, and subsequently brought it to the judge's attention.

Fortunately most of them have been flagged by the forensic services in the court so you know that you've got a problem heading your way in the form of intellectual disability or mental health issues or something of that nature...

The presence of skilled professionals who quickly and accurately identified that a that a person may not have the capacity to participate in the legal process, or may need additional support to do so, was seen by judges as both a filtering system and a mechanism for ensuring access to justice.

I have the highest admiration for them. I mean I think they do a brilliant job in very difficult circumstances. Because the early identification of people who might be in trouble either [because of their] mental health or intellectual disability is vital. So that's before anyone makes any unwise commitment on behalf of the person, we need to all know the capacity of the person we're dealing with.

Several judges noted that CLNs or forensic nurses were not available to all courts, particularly those in smaller centres. Lack of access to this service meant judges were forced to make an

assessment of a person's disability or mental health needs without the requisite knowledge to do so.

The trouble with that is that it leaves judges' in the position of trying to make some sort of assessment themselves and I mean – we're not trained and we don't have a clue. The other great thing about it is, that with the liaison, you end up knowing [more about the person's history]. I mean you're given a lot of knowledge and that's so good. You just make better decisions for these people, and you make them more quickly and efficiently.

Lawyers, CLNs, Disability Support Professionals and Family

Lawyers, CLNs, disability support professionals and family were all seen as being able to provide background information that could assist judges to understand more about the person's individual situation, and consequently to make more informed and appropriate decisions.

Because of the way the process works, and because of the limited time we have, and because of our own lack of particular expertise in this area, I think it's critical that there are people there who have an insight and background in dealing with the person, and know their particular issues, so they can explain it to you as they need to explain it. I think their role is vital – my lifeline anyway.

Some judges were keen to see support people and family take a more prominent role in the court, and felt that it would be appropriate to encourage a greater level of participation and involvement.

I think they (judges) can do more to empower these people in the room to become involved. I think they see themselves as the person who's brought this person to court, they don't see themselves as having a role, whereas the judge could invite them to have a role.

It was noted that while greater involvement of support people had the potential to contribute to a more responsive legal system, it was important that those involved in such roles, whether family or disability professionals, receive education about the limits of their involvement and influence.

Maybe the Ministry of Justice has a role in ensuring that anyone who's coming into court, sitting beside the person whether they are a witness or an accused understands the limits of their role.

Communication Assistants

Another more formal role designed to facilitate the involvement of people with intellectual disability in the legal system was the Communication Assistant. Not all of the judge participants were familiar with this role. Those judges who were aware of the role saw it as a professional one, with the Communication Assistant acting in a manner similar to a sign language interpreter translating legal information for a person with an intellectual disability. Judges who had observed this role were supportive of its function and understood its utility in the court.

It's actually provided for under the Evidence Act, Section 80 of the Evidence Act, so there would be powers in court to provide communication assistants to a witness or to a defendant... In the case I was referring to before, I did up the protocol for the court so they knew as to how the communication assistant needs to carry out that role...

Another judge described an alternative role used to support people with intellectual disability in the court – that of intermediary. This person did not “translate” but rather alerted the judge to communication issues, including questioning that was inaccessible to the person.

We have a recent example... where a young girl who has a serious intellectual disability was actually provided with an intermediary – not in the English sense where the intermediary translates the questions, but the intermediary was there to say to the judge, “judge I don’t think she has understood that, or I don’t think the question is appropriate”.

This second example puts the onus on legal professionals to alter their own language and communication style to meet the needs of people with intellectual disability rather than relying on another person to simply translate for them.

5.7 People with intellectual disability as complainants or witnesses

One of the key challenges for people with intellectual disability in the legal system was found to occur when they were complainants or witnesses. A significant number of the judges had experience of presiding over such cases that involved people with intellectual disability as complainants or witnesses, and several judges drew on their previous experience of representing individuals in this situation. It was noted that a substantial number of such cases involved alleged physical or sexual abuse. The judges with experience in this area reported that people with intellectual disability could be competent witnesses if they received appropriate support, including accommodations within the court. For example, Mode of Evidence Applications were used to mandate alternative means of providing evidence to the court.⁵

P: So how it happened was that there was a Mode of Evidence application by the Crown, and what they wanted to do was to lead their evidence in a particular way... and their original statements were taken by way of DVD... and then they gave evidence behind a screen.

I: So making those kinds of accommodations in the court – does that happen frequently?

P: I wouldn’t say it’s frequent, but it’s not unusual if that makes sense... as a judge [you need to] consider such things as what do we do about the oath or affirmation. In terms of their degree of understanding, or are we just getting them to promise to tell the truth... As a judge we consider the Mode of Evidence application and often [the] Mode of Evidence [is] opposed [as it was in this case] by the defence lawyer.

⁵ A Mode of Evidence Application is explained at: <http://www.justice.govt.nz/publications/global-publications/a/alternative-pre-trial-and-trial-processes-for-child-witness-in-new-zealands-criminal-justice-system/increasing-the-use-of-alternative-ways-of-giving-evidence>

Judges reported on the implications if such an application was filed.

And I remember one in particular, I was prosecuting and she was the complainant. And she began, and I guess this was a big insight for me that I've carried for a long time. She got in the witness box and immediately crouched down and sat in a little huddled ball in the witness box. And it took me about quarter of an hour to get her to peep out over the top.

Thus, there are legal mechanisms to provide evidence in alternative ways in New Zealand. In many instances, this may provide humane means for vulnerable witnesses to provide evidence. Several judges remarked that it is important that these procedures be employed in relevant cases.

5.7.1 Cross examination

One of the most significant barriers identified by judges as impacting on people with intellectual disability related to their capacity to understand and respond to cross-examination. Responding to cross-examination is complex. More specifically, the ability of people with an intellectual disability to capably engage in cross-examination may have significant social justice implications.

Judges were particularly aware of the difficulties presented for people with intellectual disability whilst being cross-examined. Judges stressed the importance of lawyers not using double negatives, which tends to lead people to focus on the first part of the question rather than the second, thus resulting in confusion and potentially inaccurate responses. Judges identified cases in which juries doubted people with intellectual disability who had been subjected to arduous, and arguably inappropriate, cross-examination.

And then what you've got to be alive to as a judge is that the [lawyer's questioning] of the person, it's got to be appropriate to their capabilities. And it was quite tricky because it was hard to gauge what their level of functioning was... So you know she was quite clear as to what happened but then when she was cross-examined, there were all these things put to her that she agreed with. But I don't think necessarily she was agreeing with them. It was more she had an agreeable personality.

Judges were concerned to include people with intellectual disability amongst the group of people termed vulnerable witnesses. Comprehensive work in the area of vulnerable witnesses has tended to be on children "but it also focuses on people who for one reason or another, have difficulty relating to the legal system". Judges expressed a commitment to improving the quality of evidence.

We are simply not getting the best evidence and we've got to do something about the way in which we treat vulnerable witnesses.

Many of the judges reported being vigilant about monitoring cross-examination, based on the understanding of people with intellectual disability.

And also questions containing too many concepts. Trying to comprehend what the actual question is. I'll invariably step in and say well you know, start again and just break it down into bite size pieces that the person can understand. So they're all techniques and issues that I think we, as judges are all aware of.

Perhaps most worrying, some judges highlighted the fact that victims of sexual abuse who have intellectual disability may face very significant challenges during the criminal proceedings.

My experience is that the complainants have found it very difficult to give evidence. It's hard enough when you're telling your story. But when you're challenged about it... I think most judges would support them giving their evidence in chief by a pre-recorded video, or out of the courtroom. But in the end the court system says they've got to be able to be challenged by the lawyer for the accused, and that's very, very difficult for them.

5.8 Inadequacies in the legal aid system

Some judges strongly criticised the current legal aid system in New Zealand. Changes to the system implemented in 2009⁶ were seen as having produced a cost driven, prescriptive service that was no longer responsive to the needs of many vulnerable individuals reliant on legal aid for legal representation. Two key issues were identified as having created the most significant problems. First, there was a strong view that the reduction in the quantity of legal aid hours able to be claimed for by lawyers had resulted in reduced access to justice for many people, including those with intellectual disability. Again, this was seen to be as particularly pertinent to those with mild intellectual impairment who were not subject to the IDCCR legislation.

I think the legal aid system in this country has been scaled back to the point where many people who need representation and would require representation for proper access to justice are being denied it. And I think that particularly for people with mild intellectual disability...

As signalled above, the reduction in the quantity of hours able to be claimed by lawyers also compromised the quality of legal representation able to be offered to people with intellectual disability. Judges recognised that lawyers frequently needed to spend more time with their clients with intellectual disability at all phases of the legal process in order to provide competent legal representation. The current system was seen as prohibiting an individualised approach to legal representation by offering a "one size fits all" approach. Judges reported that this had caused some lawyers to withdraw from legal work with clients who were likely to need more time that would not be funded by the legal aid scheme.

I mean, people with intellectual disability – obviously it takes a lot more time, and to get communication established with them, and to make sure they understand what's going

⁶ The NZ Legal aid reforms began in 2009. See: <http://www.justice.nz/services/legal-help/legal-aid/reform>

on, to talk to them and their support people around them, to get an overall picture and all that takes a lot more time than they allow for under the system.

Yes and again the process is not particularly helpful there, in that invariably people with this sort of disability have had a legal aid lawyer assigned under the legal aid system and the current state of our legal aid system is such that it is very cost driven. Being very prescriptive in terms of how much the lawyer gets paid for – the limited amount of time and attendances allowed under the system. And so unless you've got a lawyer who has a particular passion or interest in this area, who's not going to be too worried about not getting paid for all the work that they do, then the amount of contact by virtue of the system itself tend to be somewhat limited.

Second, the judges commented upon the legal aid reforms that resulted in clients' inability to secure a Counsel of Choice. This change was seen as significantly impacting on people with intellectual disability, who are no longer able to easily request a lawyer that they already know, and whom knows them.

They've eliminated Counsel of Choice in the legal aid system for category one and two. I think that was a terrible mistake, You know it's better for people to have a lawyer – the relationship of lawyer and client is more than a person who stands up for you in Court.

And it would make things a lot easier when the lawyer knows all about the background, seen all the previous 38 reports. And it just seems to me that there isn't that flexibility in the system. I would have thought it would be more cost effective as well...

Ultimately, judges who participated in this research held the view that further reform of the legal aid system is required to ensure that people with intellectual disability, and other vulnerable individuals, receive adequate legal representation.

Yeah, restore it. I don't think it was perfect the way it was, and you can't have it gold plated because it simply doesn't work that way. But I think it should be restored...I don't know how it should be devised, but there should be some other system that would better provide for the representation of those who require it and can't afford it, and particularly those with intellectual disability.

5.9 Recommendations for legal and procedural reform

The second objective relating to judicial participants in this research was the development of recommendations for legal and procedural reform. Examples of the ways in which judges adapted their own practices, challenged the practices of others, and dispensed with some of the more traditional conventions of the court can be seen in the themes presented earlier in this section of the report. Analysis of these strategies has facilitated the development of specific recommendations for legal and procedural reform in the area of intellectual disability. The recommendations were found to be either practical or systemic in orientation and have been presented accordingly.

5.9.1 Practical strategies

Courtroom attire and architecture

Judges noted that traditional courtroom attire and architecture could be intimidating for people with intellectual disability. A number of judges noted that opportunity for a more informal approach, including less traditional courtroom architecture, procedures and attire was common practice in Youth Court and Family Courts, and in some areas of mental health. They observed that these approaches could be, and in some cases were already were, applied to the Criminal Court when working with people with intellectual disability.

And little things [that] I think make a difference in mental health and they could flow into intellectual disability. For example I never wear a tie in court for that, and I always sit, I never sit behind a desk. I sit with them and always shake hands... And I think it just makes them feel more comfortable because people are terrified.

The architecture of the court. The way it is laid out. There are all sorts of physical barriers to communication, desks, tables, the bench itself, the dock, the people, the presence, the ways it's laid out, the whole thing.

However, some judges noted that safety considerations in the Criminal court justified the existing court architecture.

One issue you'll always get in terms of the layout, if you like, or courtroom architecture is the issue of security... I'm not only talking about the security of the judge, I'm talking about the security of all the other players and members of the public present in court.

Taking a more holistic approach

A less formal court context and more holistic approach was perceived as positive characteristics of the Youth Court, including a greater emphasis on exploring and supporting the positive social connections in young offenders' lives. This was seen as equally relevant and beneficial for people with intellectual disability.

And in the Youth Court we have a lot more time, it's more of an engagement process with the person and their family and so yes, we can make a lot more inquiry, to the level of understanding and so forth.

Timing of court appearances

Judges were acutely aware of how distressing the experience of appearing before a busy court could be for some people with intellectual disability. Several practical suggestions were made that could reduce this discomfort. One suggestion was to time appearances to occur during the traditional lunch break of 12.30 so that *"the bulk of the people have been moved."*

Consideration of a closed court

Similarly, closed courts were recommended for cases involving people with intellectual disability.

The courts have to be shut. The courts should be shut when they're dealing with this group.

It is important to note that in the criminal area, this recommendation was tempered with the acknowledgement of the ethical dilemma related to balancing the right of the public to be informed when a person is alleged to have committed an offense (regardless of who it is) and the confronting nature of an open court for people with intellectual disability.

P: I think there is a wall of tension between the right of the public in a sense to be informed about the alleged offending and so forth by intellectually disabled people as any other [but] there's a conflict between that and the impact that the entire dramatic scenario has on many intellectually disabled people.

I: Right, you mean the court?

P: The court. It's a deeply shaming, spot lit environment for them, and for example, those who have got a coping capacity [who have] been mainstreamed and so on all their lives, they equally have been appallingly bullied ... but they're singled out, they're made to stand in the [dock]. It just confirms the bullying that's been their life long experience really. So I don't like that.

Plain English judgements

The need to ensure judgements are written in accessible language was another strategy put forward by a small number of judges. In the interests of facilitating greater understanding for people with intellectual disability who are litigants, these judges were of the view that it was important to be mindful of who the judgement was being written for, and therefore, how the information relating to their legal issues should be communicated to them.

So I think the obligation on the writer of the decision is to make it simple and get it right in the simplest form. Who do you write it for? If you're on the Supreme Court or Court of Appeal, of course you write it for posterity. When you've at our level you write it for the participant. You write for the litigants. So you... I try and aim to write for [my] audience. And your audience are the people who are before you as litigants. And that involves people with intellectual disability, so you write for them.

Awareness of intellectual disability

Developing increased knowledge and understanding in the area of intellectual disability was identified as being an important aspect of developing a legal system more responsive to people with intellectual disabilities, and of achieving procedural and legal reforms to support this. Raising awareness of people with intellectual disability in the legal system was seen as a critical first step toward this goal.

The big thing is to raise awareness. Once you have done that then you'll start getting people looking more carefully [at] what's going on.

Many judge participants were aware of the challenges and barriers for people with intellectual disability, and were proactive in their attempts to address them. They also believed that their

legal colleagues would benefit from increased opportunities to receive information related to this area.

Judicial participants felt that awareness of intellectual disability would be most effectively achieved through face-to-face seminars provided by people with specific expertise in intellectual disability. It was thought that this would facilitate a deeper understanding of intellectual disability and its impact.

I think we actually enjoy meeting other people in other disciplines. It widens our scope, and I think one criticism that can be levelled at judges is that they spend too much time thinking, you know, in some sort of separate institution. And that needs to be broken down. We're just part of the community doing a specific job.

A number of judges felt it would be beneficial to hear about the specific legal experiences of people with intellectual disability themselves.

Judges would be really interested in the comments made by people with intellectual disability on the process they've been through.

Ensuring that current undergraduate law students, as well as police trainees, receive increased education relating to intellectual disability was highlighted as a necessary step for the future. It was also suggested by some judges that new and existing judges engage with intellectual disability education, and not just those involved in the criminal court, because people with intellectual disability are present across all court jurisdictions.

5.9.2 Systemic strategies

There were four key systemic recommendations and these related to: the appropriateness of an adversarial legal system; developing intellectual disability jurisprudence; the introduction of specialisation; and attitudinal change at a societal level.

The appropriateness of the adversarial legal system

Working within the limits of the conventional system was seen as a systemic barrier for people with intellectual disability. The most significant factor was New Zealand's largely adversarial legal system. The majority of the judges commented on the difficulties that New Zealand's adversarial legal system posed for people with intellectual disability. It was widely agreed that the adversarial process was ill suited to people with intellectual disability.

[The] adversarial system has incongruities and incompatibilities around the intellectually impaired, as it does for young people.

While judges noted that they were able to run their own courtroom as they chose, at least to a certain extent, the adversarial legal system, and customary method of cross examination, restricted the way judges could approach cases involving people with intellectual disabilities.

The impact of the adversarial system was seen as significant for defendants, but particularly for complainants.

That's where our adversarial system simply does not work.

Many judges who participated in the current research held the view that an inquisitorial approach would be more effective when working with people with intellectual disabilities in legal contexts.

There is a strong argument for saying that in any case involving children or people with intellectual disabilities, these inquisitorial systems should be used.

It was noted that an inquisitorial approach was taken on occasion in the area of mental health.

You go into the Mental Health Unit. You listen to the patient. You'll listen to the patient, you'll hear counsel, you'll listen to doctors, and then you'll make a decision. And that's not adversarial – you don't allow it to become adversarial.

Judges acknowledged that achieving the significant change necessary to implement a more inquisitorial system in this country would be challenging.

But it would be possible with ... legislative change which would obviously have to be based on research and submissions, and the whole process, to develop some vaguely inquisitorial enquiry.

Developing intellectual disability jurisprudence

The judges recommended wider awareness of intellectual disability, and more humane legal processes and practical strategies across the legal profession. Some judges referred to this as developing intellectual disability jurisprudence and recommended better accommodation of people with intellectual disability within the legal system. This was particularly pertinent to those people who did not meet the specific criteria set down in the IDCCR and CPMIP legislation, but who were still acknowledged as having specific need for procedural accommodations.

One judge explained how processes could be modified.

Well I think we're at a pretty crude stage still but a number of trials are being concluded so that there are a lot of breaks where the lawyers have a chance to explain to the person being tried what happened over the last 45 minutes or hour to recognise two things: one is concentration may be difficult beyond a certain period. There will need to be instructions obtained by the lawyer of the accused on a regular basis before the evidence is forgotten or becomes confused. So essentially anything that they can do to accommodate the person's disability. That may include say having some sort of care worker there, who has a close relationship with them.

Examples were given of international initiatives and approaches that were seen as having the potential to inform practice in New Zealand, in this case how to appropriately question people who may have difficulty exercising their legal capacity.

I'm still learning but I'm fascinated by the way in which it operates in England. The English system is light years ahead of us. They have judges who go to special courses and seminars and teach them what is and is not an age-appropriate question... They have what I call direction conferences with counsel where they discuss the nature of the witness... These are psychological reports that give the judge and counsel a very clear picture of what they're dealing with. They have judges who are far more interventionist than we are.

Ultimately, the development of practices to accommodate people with intellectual disability was seen as facilitating greater access to justice for people with intellectual (and other) disabilities. The theory was that the greater the number of educated legal professionals, the more humane the process would be for people with intellectual disability.

The introduction of specialisation

In keeping with the above recommendation, significant comment was made in relation to specialisation in the area of intellectual disability.

Specialist disability courts

Many, though not all, judges held the view that the model of specialist intellectual disability courts would be very useful. Successful specialist courts were seen as mandating more in-depth exploration of the drivers of crime and appropriate dispositions.

But you've got to get that compromise between the heavy-handed courtroom versus a better approach [that's] not so frightening for people.

People with intellectual disability were seen as just one group within a wider population of people with social and cognitive impairments who would benefit by a more specialised approach to meeting their legal needs.

If we people who are like-minded within Justice and Health, were able to reach the point where we actually do have a specialist court up and going for ADHD, Fetal Alcohol and ASD, then I will, as far as I am concerned, have achieved a milestone.

However, despite belief in the potential benefits facilitated by a specialist court, the judicial participants in the current study were generally pessimistic about the likelihood of this recommendation being achieved. Funding constraints were seen as the biggest barrier to such an initiative, but a difficulty in challenging traditional processes was also noted.

Specialist lawyers and judges

Specialisation in intellectual disability extended to lawyers and judges. Regardless of whether or not a specialist disability court could be achieved, there was widespread consensus that specialisation in the area of intellectual disability for lawyers and judges would be a positive development.

In an ideal world, and this is probably not possible, in an ideal world probably we should have a specialist bar of people who have particular training and experience in this area who should be a pool of people who are approved to oversee clients in that area.

An existing initiative in the area of mental health was reported which required lawyers to demonstrate their knowledge and expertise in the area of mental health law and ability to work with people with mental illness.

That means you've got to show that you know what the law is all about, and that you've got empathy for people and you don't just get to the top of the list because you happen to be the next one up.

One judge who was not convinced of the need for a specialist court was more inclined to see a system whereby judicial specialisation could be supported.

I don't think we need a specialist court ... no that would be just one more court. But I do wonder if, and this is not something I'm sure about. I think in England there are some judges who spend most of their time doing serious sex cases, and there are some judges who are accredited in a particular area to preside over these particular trials. Now I think you might find that there's some real resistance within the judiciary for that but it's certainly an option.

6 Discussion

People with intellectual disability have previously been acknowledged as being vulnerable within the legal system. The current research has confirmed this vulnerability but has also been successful at highlighting the positive approaches and practices to working with people with intellectual disability taken by the lawyers and judges who took part. It is important to acknowledge that the legal professionals who participated in this research were motivated to do so because they had an existing interest in the legal experiences of people with intellectual disability and a commitment to adjusting their own practice to better meet the needs of this group. Their experiences, views, practices and recommendations are not necessarily reflective of their wider legal or judicial peers.

6.1 Listening to me

People with intellectual disability, lawyers and judges all expressed the view that a more responsive legal system required prioritising a commitment to learning about, listening to and respecting people. All three groups recognised that information relating to both the impact of a person's impairment, and their life context, provided the platform from which to deliver optimum legal representation or legal decision making. For people with intellectual disability, being an effective communicator, non-judgemental and prepared to hear their story were some of the hallmarks of an effective lawyer. Similarly, judges who were responsive to their disability and sought to understand the factors that may have contributed to their legal issue, were valued. Having the opportunity to communicate with the judge was also important to many, possibly as a reflection of the fact that the judge was seen as holding the power in legal processes.

Lawyers and judges also recognised that the quality of their own work was enhanced by listening to and learning from people with intellectual disability. Those who participated in the current study were motivated to make a positive difference in the lives of their clients, or to deliver informed and meaningful decisions. Despite this commitment however, they too experienced practical and system barriers when trying to meet the needs of people with intellectual disability in the legal system.

6.2 Communication

Ensuring that legal information was communicated in an accessible manner was a significant theme evident in the research. While people with intellectual disability felt that communication would be greatly enhanced simply by getting to know them, slowing down, saying things simply, and writing information in plain language, lawyers and judges considered that communication assistance, intermediaries and other support people could effectively assist in legal proceedings. It was also felt that specific training in the area of communication and intellectual disability would be beneficial, particularly that which encompassed strategies for checking comprehension.

6.3 Education

Legal professionals recognised a need to increase content on disability and diversity at the level of undergraduate legal education. Particularly required was the opportunity to develop skills in interviewing and questioning clients, and the engagement with case studies relating to people with intellectual disability. Continuing education in this area was also suggested as being necessary for practising lawyers and judges. This was to rectify a current gap in content relating to intellectual disability. There was a strong interest in people with intellectual disability taking a role in the delivery of education as an effective way of making an impact on legal professionals.

6.4 Specialisation

This research highlighted strong interest in the benefit of specialisation. Both developing expertise that could translate into a specialist bar, and/or creating specialist disability courts were recommendations frequently raised by legal and judicial participants. Mandatory training for individuals working in the field of intellectual disability, particularly those representing clients under IDCCR, was also supported.

At a more systemic level, judges questioned the appropriateness of the adversarial legal system for people with intellectual disability. A number of judges suggested that a more inquisitorial approach would far more effectively accommodate the needs of people with intellectual disability. The negative impact of traditional cross examination on people with intellectual disability was also noted.

6.5 Legal Aid

The current legal aid system was seen by all three participant groups as limiting access to justice for people with intellectual disability. Legal aid allocations were not seen as recognising the increased time needed to represent people with intellectual disability in a manner that is responsive to their individual needs, and give effect to their right to be active participants in legal processes and issues that concern them. While additional legal aid can be sought in some cases, participants in this research felt there should be immediate access to increased hours when a client was recognised as having intellectual disability. Insufficient legal aid can lead to lawyers not pursuing all legal avenues due to their knowledge that the work will not be covered by legal aid, or conversely to accepting that large components of their work with clients with intellectual disability will be performed pro-bono. It was strongly felt that a large proportion of the work that goes into quality representation of people with intellectual disability is unrecognised and unpaid. This is perceived to have led to a decreasing pool of lawyers prepared to take on this work. Another issue related to inadequacies in legal aid related to people with intellectual disability is the removal of an automatic right to Counsel of Choice. Counsel of Choice enables people with intellectual disability to return to lawyers who have

represented them before, therefore know them and their previous life and legal experiences. Findings generated through this research have highlighted the importance of developing knowledge of the life contexts and communication skills and styles of people with intellectual disability. There are benefits to an ongoing relationship with a chosen legal representative. Counsel of Choice was also seen by lawyers and judges as contributing to enhanced legal representation, and a greater ability for lawyers to provide information critical to appropriate and just decisions. Also, Counsel of Choice was seen as being more cost effective as important knowledge about the person could be drawn on thus avoiding a constant repeating of information, assessments and processes.

6.6 Other areas of interest

The findings that have been generated through the current research also have the potential to inform the development of knowledge and practice in other areas. This is one of only a few studies that have engaged with care recipients subject to IDCCR and it is certainly the first to include the views of legal professionals. The findings regarding how to work effectively with people with intellectual disability has made valuable contributions to current discussions on supported decision making for people with intellectual disability. This report represents a comprehensive overview of the broad findings of the research. Future publications will explore these and other issues in greater depth.

7 Conclusion

The current research represents a comprehensive exploration of the experiences 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 explore and understand the perspectives of all three groups, identify the most significant challenges, and analyse recommendations. This has the potential to guide legal reform in the area of intellectual disability and the law.

All three participant groups had a shared commitment to promoting greater responsiveness and accessibility at all levels of the legal system. Furthermore, encouraging legal professionals to understand the person was seen as a critical starting point. People with intellectual disability, lawyers and judges all agreed that taking time to get to know the person, the impact of their impairment, and their positive and negative life experiences was essential. This activity communicates dignity and respect for people with intellectual disability.

This research has generated findings and recommendation that puts New Zealand in a strong position to give effect to its responsibilities as a signatory to the United Nations Convention on the Rights of Persons with Disabilities. Article 12 requires disabled people, including those with intellectual disability, to have equal recognition before the law while Article 13 calls for equal access to justice. This research suggests that some New Zealanders with intellectual disability may not yet be fully realising these rights. Implementing recommendations developed through this study will provide concrete evidence of New Zealand's commitment to the Convention.

8 References

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