



Cognitive impairment, legal need and access to justice

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Cognitive impairment has consistently been raised in the Law and Justice Foundation's Access to Justice and Legal Needs (A2JLN) research as affecting and compounding legal need and hindering its resolution. The sources of cognitive impairment identified were varied, including intellectual disability, dementia, mental illness and brain injury resulting from an accident, illness or substance abuse. However, the similar symptoms that arise from these disabilities appeared to contribute to the types of legal problems people with cognitive impairment experienced and the barriers they faced in accessing legal help and participating in legal processes.

INTRODUCTION

The A2JLN research program has explored disadvantage and access to justice through a mix of methodologies — quantitative and qualitative. The specific A2JLN reports referred to in this paper are listed on page 16. Drawing upon this research and supporting literature, this paper will:

- highlight legal issues commonly experienced by people with cognitive impairment
- explore the barriers they face to accessing legal assistance and participating in legal processes
- outline strategies suggested in our studies to address this disadvantage.

We will commence by defining the scope of cognitive impairment used in this paper.

WHAT IS 'COGNITIVE IMPAIRMENT'?

There is a body of literature that focuses on the effects of *intellectual disability* on a person's capacity to access justice. However, the Foundation's research, together with other studies, suggests that the issues people with an intellectual disability experience in relation to the law, legal assistance and legal processes can also be experienced by people with other forms of cognitive impairment, including: dementia, acquired brain injury as a result of an accident, an illness or substance abuse, mental illness and temporary periods of acute psychological distress.

In our studies these conditions appeared to affect the legal needs and access to justice of a broad range of people including homeless people, older people, people with mental health issues and prisoners. For example, the Foundation's study into the legal needs of homeless people, *No home, no justice?* noted:

*Mental illness and other cognitive impairment including memory loss and drug and alcohol use were also identified by stakeholders in this study as significant barriers to attending court or a tribunal. These disabilities can lead to people having difficulties in organising their lives and thus remembering and making necessary arrangements for their court dates.*¹

Whilst *The legal needs of older people in NSW* reported that:

*older people are more likely than other age groups to have intellectual impairments associated with cognitive disorders such as dementia and senility. In addition, older people may be more vulnerable to head or brain injuries arising from strokes or falls. All of these factors may result in diminished capacity to make decisions regarding property or financial interests, as well as various personal, health and lifestyle decisions.*²

Our research has also suggested that people who are acutely affected by mental illness, psychological distress, high anxiety or certain medications could also experience cognitive impairment, even if only on a temporary basis. To illustrate, a prisoner interviewed for the Foundation's study *Taking justice into custody: the legal needs of prisoners*, recalled her state of mind during her first days in custody:

*I didn't remember too much of the day — I felt so shocked. I got arrested and they were asking me all kind of questions, took all my stuff, and I don't really know, but, 'cause I was really shocked, and I was crying a lot.*³

Thus, the term 'cognitive impairment' is used in this paper in recognition of the broad range of disorders and states that may affect cognitive function, either temporarily or permanently.

Cognitive impairment and multiple disadvantage

Both our research and the broader literature have drawn strong associations between cognitive disability and other forms of disadvantage such as poverty/low income, low levels of education, public housing and being on social security benefits.⁴ It has been argued that the disadvantaged circumstances of people with a disability can increase their susceptibility to legal issues and compound the barriers to these issues being resolved.⁵ In *Triple disadvantage: out of sight, out of mind*, Jennings illustrates the point:

More often than not, women with disabilities live in a state of poverty. They are dependent on government pensions, are offered limited access to education, lack access to appropriate information on rights, experience a lack of choice in housing and transport, may be dependent on others for self-care, and live restricted social lives. It is this deprivation of experience and opportunity, and level of social and political discrimination, that renders women with disabilities more vulnerable to violence, rather than any actual experience of an 'impairment'.⁶

Any discussion of the legal needs of people with cognitive impairment must recognise the common experience of compounding disadvantage among this group.

LEGAL ISSUES EXPERIENCED BY PEOPLE WITH A COGNITIVE IMPAIRMENT

The Foundation's survey of legal need in six disadvantaged regions of NSW, *Justice made to measure*, found that people with disabilities (cognitive and otherwise) had increased vulnerability to a broad range of legal issues when compared with other people, and that these issues were less likely to be resolved.⁷ This finding is consistent with overseas legal needs surveys which also highlight clear links between disability, multiple and compounding legal issues and social exclusion.⁸ However, whereas *Justice made to measure* (and other legal needs surveys) looked at the broad category of 'disability', not cognitive impairment in particular, the Foundation's in-depth qualitative research (and other literature) has covered the specific relationship between cognitive disability and legal need. This research suggests that people with a *cognitive* impairment are particularly vulnerable to a range of legal issues.

Civil Law

Some of the civil law problems reported in our studies were directly related to the cognitive impairment, for instance: personal injury or victims compensation claims, when the disability was a result of the injury in question; discrimination on the basis of disability; and matters of capacity where substitute decision making was necessary. However, it was also apparent that civil law issues could arise from the socio-economic disadvantage commonly associated with disability. These legal problems included fines, debt, social security related issues and vulnerability to financial abuse. Whatever the cause, in some cases the person with cognitive impairment needed to bring the action (as a plaintiff), while in others they were the respondent to or subject of the legal process (e.g. as a criminal defendant). The following examples illustrate the various ways that cognitive impairment may intersect with legal need.

Substitute Decision Making

In situations where a person with a cognitive impairment does not have the capacity to understand and make important decisions on their own, legal orders may be sought to enable another person to make financial and other decisions on their behalf.⁹ *The Guardianship Act 1987 (NSW)* does not contain a definition of disability, but instead focuses on incapacity to make decisions. Section 3 states:

“person in need of a guardian” means a person who, because of a disability, is totally or partially incapable of managing his or her person.

In making a Financial Management order, the tribunal must be satisfied that:

- (a) the person is not capable of managing those affairs, and
- (b) there is a need for another person to manage those affairs on the person’s behalf, and
- (c) it is in the person’s best interests that the order be made.

In our studies, substitute decision making was largely discussed in the context of aging and dementia.¹⁰ However, the issues equally apply to people with significant cognitive impairment arising from other disabilities, and relate not only to financial decision making but to health issues as well. For instance, orders can also be made under the *Guardianship Act 1987 (NSW)* enabling a guardian to consent to certain forms of medical treatment for

a person who is unable to give informed consent to the treatment themselves. One area where such orders have been particularly controversial is in the sterilisation of women and girls with a cognitive impairment. Sterilisation is performed for a number of reasons, including menstrual management and the prevention of pregnancy. However it has been criticised as being a violation of the rights of women with a disability to have children and as an implicit form of eugenics.¹¹

Fines and Debt

Fines and fine-related debt have consistently been raised in the A2JLN research projects as legal issues commonly faced by disadvantaged people, including those with cognitive impairment. The relationship between cognitive impairment and fines is complex, as people are vulnerable to fines as a result of both their impairment and the attenuating socio-economic disadvantage. Further, once fined, people with cognitive impairment have particular difficulties in managing the complex and multi-agency fine enforcement process, resulting in further and entrenched debt. This process, and the challenges it presents to those subject to it, is described in detail in another *Justice Issues* bulletin, *Fine but not fair: Fines and disadvantage* (2008).

No home, no justice? and *Taking justice into custody* also highlighted the vulnerability of people with cognitive impairment (and those with limited literacy) to entering contracts and signing legally binding agreements which they did not fully understand.¹² In these circumstances a lack of comprehension can lead to breaches of these agreements, liability for debts that were not expected, accrued debt and being subject to debt-recovery processes.

Social Security

Social security was also raised in the Foundation’s A2JLN reports as a pertinent legal issue for people with cognitive impairment, with benefits being a primary source of income for many. Older people may be on the aged pension while people with a defined and long-term cognitive impairment may receive a disability pension. In our studies, some people also reported being on the Newstart Allowance, but with a ‘sickness certificate’.¹³ The disability pension has the benefit of fewer compliance requirements than other social security benefits such as Newstart. However, in keeping with broader policy shifts under the Welfare to Work

program, some people reported being moved from disability pensions to Newstart. An example from *Taking justice into custody* illustrated the difficulties this could present to people with cognitive impairment:

*A fellow who was on a Disability Pension for years ... he went to jail for six months and then came out on parole, and Centrelink basically said, 'Because you've been in custody, we've now got to go through the process of finding you eligible for Disability Pension again. In the meantime we'll put you on Newstart.' So it was a lower amount of money, he had to do a lot more to get it. The work diaries ... he didn't have the cognitive skills to do it.*¹⁴

— Probation and Parole Unit Leader

As described in the quote above, as the system is currently structured, the placement of clients with cognitive impairment on Newstart (compared to the Disability Support Pension) not only results in lower benefits but also their being subject to greater compliance requirements and harsher consequences for non-compliance, including, if a client is breached, a potential loss of eight weeks income.¹⁵

Family law and child protection

Issues raised in the A2JLN research program about family law and child protection illustrate the complexity of legal issues when cognitive impairment is a factor. Some of the participants in our studies had significant difficulties maintaining the custody of and access to their children when they had other complex needs. One young homeless woman with cognitive impairment described her situation:

*He's with DoCS because I had him when I was 16. I was underneath DoCS at the time ... I ended up having a mental breakdown. There was only three choices I had — give my son to my mother, give my son to my uncle or hand him over to DoCS. I wasn't going to give him to my mum because she was an alcoholic and was abusive. My uncle was the father. So, the only other choice I had was to give him to DoCS. I signed the papers and that.*¹⁶

A study of parents with a disability in NSW child protection matters reported that a disproportionate number of parents with a disability — particularly those with an intellectual and psychiatric disability — were appearing in child protection proceedings.¹⁷ It found that 7.1 per cent of all care proceedings in

the NSW Children's Court involved a parent with an intellectual disability.¹⁸ In the majority of these cases the child was put into the custody of another adult or made a ward of the state.¹⁹ A participant in the A2JLN consultations noted that '...once children have been removed from parents with a disability, it is very difficult to get them back'.²⁰

Criminal law

Victims of crime

There is evidence to suggest that people with a cognitive impairment are particularly vulnerable to crime victimisation.²¹ According to the Disability Council of NSW, '...it is widely reported that people with disabilities are over-represented as victims of crime, especially as victims of violence, fraud and sexual assault...'.²² This has been generally attributed to the person's vulnerability and dependence on other people and services.²³

The legal needs of older people study reported that 'elder abuse has been appreciated as a serious social problem...'²⁴ and that it often occurs in situations where the person abused is dependent on the abuser due to failing health or having a disability such as dementia. One respondent highlighted the vulnerability of some older people in institutional care:

*It seems that old people lose certain human rights when they go into nursing homes, which leaves them vulnerable to abuse. For example, there are incidents in which old people are physically or sexually abused and notwithstanding that they have bruises or wounds, the police are persuaded by the residential care staff not to pursue the matters on the grounds that the victims' complaints are not reliable because, for example, they are suffering dementia.*²⁵

The vulnerability of people with cognitive impairment to crime victimisation was apparent irrespective of the source of their impairment.²⁶

Offenders with cognitive impairment

The over-representation of people with a cognitive impairment as offenders in the criminal justice system has been discussed extensively in the literature²⁷ and is reflected in available statistics. Most estimates of the prevalence of intellectual disability in the general population are between 1

and 3 per cent.²⁸ The 2001 Inmate Health Survey conducted in NSW prisons found that 18 per cent of women and 27 per cent of men scored below the pass rate on an intellectual disability screener. Of those further assessed, 59 per cent of women and 39 per cent of men were determined either to have an intellectual disability or to be functioning in the borderline range.²⁹ It has been suggested that people with an intellectual disability may be more likely than other people to appear in the criminal justice system as:

- they may be more easily caught in the act or left ‘holding the bag’
- they may be susceptible to being exploited by others as an accomplice
- their intentions may be misunderstood
- they may express sexuality in a naïve and unacceptable way
- intellectual disability may be associated with other organic disorders which result in impulsive and unpredictable behaviour.³⁰

There is also emerging evidence of a link between brain injury and criminal offending.³¹

Once in the criminal justice and correctional systems, people with cognitive impairment appear vulnerable to extended and repeat incarceration. Borzycki has noted that people with an intellectual disability have higher rates of recidivism than people without an intellectual disability.³² *Taking justice into custody*, together with research undertaken in the United States, suggests that people with an intellectual disability are less likely to be placed on probation as an alternative to incarceration.³³

Taking justice into custody also noted that people with an intellectual disability appear more likely to be refused bail and held on remand than others.³⁴ Reasons for this include people being held in custody because they do not understand and cannot show they will keep the bail conditions, or because they lack the support in the community to ensure they keep these conditions.³⁵ Similar issues were raised in relation to parole, where, due to a lack of diversionary options or support in the community for offenders with cognitive impairment, they are not granted parole as readily as other inmates.³⁶ In the *Taking justice into custody* consultations a worker commented:

And there’s no support for them to come out to, so they don’t get considered for parole ... I couldn’t tell you the last time a person with an intellectual disability came up for parole. It just doesn’t happen. They always serve their full sentences.³⁷

The study also identified that people with cognitive impairment were more likely to have problems understanding and adhering to the terms of their parole when it was granted, and were more vulnerable to breaching and being returned to jail to complete the sentence.³⁸

In summary, the Foundation’s A2JLN research illustrates both the vulnerability of people with cognitive impairment to coming into contact with the law as victims, plaintiffs or perpetrators, as well as the potential value of the law as a tool that could be used in their interests, for example to claim compensation or ensure appropriate decision making on their behalf. And yet, as discussed below, our research indicates that this same group of people face a range of significant barriers to accessing appropriate legal assistance and to participating effectively in legal processes.

BARRIERS TO LEGAL ASSISTANCE AND LEGAL PROCESSES

The capacity of people with a cognitive impairment to effectively use the law or participate in legal processes is affected by a confluence of factors: factors relating to the individual and their circumstances, the interactions between individuals and legal systems, and the nature of the law and legal system itself.

Individuals and their circumstances

Lack of awareness of legal rights and options

An immediate barrier to pursuing a legal issue, evident in our research was a lack of awareness among people with cognitive impairment that the problem they faced had a legal resolution.³⁹ For instance, while crime victimisation was commonly reported as an issue for people with cognitive impairment, it remained unreported by some because it had not been understood that what had occurred was a criminal offence.⁴⁰ Remedies such as victim’s compensation also remained out of reach because people were not aware that compensation was a possibility or that help was available to make such a claim.⁴¹ In its study, *A Question of Justice*, the Disability Council of NSW stated:

*People with disabilities reported widespread confusion about their rights, how to exercise them, and lack of knowledge about available resources and supports. These were fundamental barriers and they identified community education about the justice system as essential for them to exercise their rights knowledgeably.*⁴²

Higher dependence on others to take action

In the Foundation's report *Public Consultations: a project to identify legal needs, pathways and barriers for disadvantaged people in NSW* and later in *Taking justice into custody*, examples were given of the dependence of people with cognitive impairment on carers and others to address legal and other needs. At the very least, this may mean that there is an extra 'step' in the pathway to legal assistance. However, depending upon the severity of their disability, it may also result in people not being able to bring their own legal actions. Some people with severe impairment may be denied the opportunity to participate in court processes unless a third party can gain standing to bring an action on their behalf.⁴³

Fear of retribution

As noted in a submission from the Disability Council of NSW, fear of retribution for raising a complaint can sometimes also act as a barrier to accessing justice for people with a disability.⁴⁴ This is particularly the case when the person is dependent upon the person they have a grievance about, be it a family member or a service provider. In one study of 550 reported incidents of abuse against people with an intellectual disability living in supported accommodation, of the 7 per cent of the cases that were investigated or prosecuted, over half of the defendants were staff at the residence.⁴⁵ In the Foundation's study *On the edge of justice*, some people with a mental illness reported being afraid of complaining about conditions in boarding houses because they feared further abuse or eviction.⁴⁶

Interactions between individuals and the system

Disability or impairment is not recognised

A number of reports have highlighted that it can often be difficult for police, lawyers and other legal service providers to identify that a person has a cognitive impairment, and because of this some people do not get the appropriate support they need.⁴⁷ People may not think to mention that they have a disability or

may actively try to hide their disability. For instance, some offenders with an intellectual disability have been found to be effective at disguising their lack of understanding, motivated by feelings of shame about their disability and a fear of being exposed.⁴⁸

There is also evidence to suggest that legal service providers do not always ask clients if they have a disability, and do not have consistent practices for collecting information about disability.⁴⁹ The Attorney General's Department's (AGD) Discussion Paper on the issue of capacity reflected on the need for a simple capacity assessment tool that could be used by a wide range of professionals, including lawyers and other court staff.⁵⁰ In response to feedback on the Discussion Paper, a *Capacity Assessment Toolkit* has been developed.⁵¹

Communication barriers

Another barrier raised in a number of the A2JLN studies related to difficulties in communication between legal practitioners and people with cognitive impairment.⁵² People reported having difficulties in telling their stories to lawyers and in understanding the advice lawyers gave them. In describing why she takes a case worker to meetings with lawyers, one inmate who had recently been released from jail said:

...I don't understand some people sometimes. I get really, really stressed out with the things they say and that, and what questions they ask, and all that. ... sometimes like I try to sit and really have a good think what they're saying, what the meaning is, for it.... But some, some stuff they ask me is like, I don't understand properly...⁵³

Further, in *Taking justice into custody* and *No home, no justice?*, respondents reported not admitting to their lawyer that they had not understood the advice given.⁵⁴ As a result lawyers were leaving conferences with cognitively impaired clients unaware that the client had not understood their advice. Communication difficulties can therefore arise from the inability of some interviewers to ascertain the person's level of communication and comprehension, and to adjust their questioning and the time they need to spend with clients accordingly.⁵⁵ An inability to understand the communication and comprehension levels of a client can pose a challenge to lawyers who do not have much time, are inexperienced, or who have

preconceived ideas about dealing with people with cognitive impairment.⁵⁶ In *The legal needs of older people* it was suggested that:

*Effective communication and sensitivity to complex client situations may be hampered by ageist attitude and organisational pressures arising from inappropriate allocations of time to clients, cost effectiveness and management of work loads.*⁵⁷

In the Disability Council of NSW study, legal practitioners spoke of struggling with these issues in the absence of policies, resources and support. They did their best, but were limited by the culture they worked in, procedural requirements and assumptions, and the constraints of time, resources and training.⁵⁸

Misconceptions about people with cognitive impairment

Societal misconceptions about cognitive disability are also reported to be a barrier for people with a cognitive impairment when needing assistance and redress for legal problems. Reported stereotyping of people with intellectual disabilities in legal contexts included the perception that they are incompetent, untruthful and lack credibility, and in terms of sexual assault, more promiscuous and consenting.⁵⁹ Such misconceptions could affect their participation and outcomes in legal processes:

*Commonly held perceptions of people with intellectual disability (for example, that they do not make credible witnesses, myths about sexuality) reduce the likelihood of charges actually being laid. Victims or witnesses may be seen as stupid, untruthful, and inconsistent in their recounting of events and easily flustered.*⁶⁰

Due to these misconceptions, the police and courts may not believe that a crime has actually been committed against a person with an intellectual disability.⁶¹ Similar issues were raised in *The legal needs of older people* regarding the perceived difficulties lawyers expect to face in obtaining instructions from older people in nursing homes where allegations of abuse have been made:

*It is difficult to get lawyers to take actions against nursing homes where elder abuse is alleged to have occurred, because such cases are perceived to be hard to take instructions on.*⁶²

The Disability Council of NSW also reported that:

*People with intellectual disabilities felt they were often judged to have less understanding and ability than they actually had. This was due to others not taking the time or effort to assess their needs or, indeed, ask them. As a result, they were often prevented from participating as fully as they were able.*⁶³

Concern was expressed that such perceptions may result in police, lawyers and judicial officers treating people with a cognitive impairment as ‘all alike’: while the capacity of some people with a cognitive impairment is underestimated, the ability of others is overestimated. As Blyth states, ‘...when seeking to understand intellectual disability, it is important to remember that the key word is variation.’⁶⁴ In order to appropriately address people’s needs, they need to be assessed on a case by case basis.

These stereotypes about people with cognitive impairments were reported to leave some people reluctant to seek help, believing that help would be unavailable and or that they would not be believed.⁶⁵ In *Public Consultations*, participants raised the issue that people with an acquired brain injury and people with a substance addiction may believe that their evidence will not be seen as credible in court, and that this belief may impact on their ability to participate with confidence in court and tribunal processes.⁶⁶

Anxiety, stress and legal processes

In *Taking justice into custody* the anxiety and stress arising from legal processes was reported to affect the capacity of some people to understand legal information and advice and act upon it. To illustrate, arrest, the criminal legal process and incarceration were all observed to be key stressors and crisis points for prisoners. Inmates described how anxiety, together with alcohol and other drug impairment and acute mental illness, affected their capacity to engage effectively with lawyers and the legal system early in their criminal legal processes.⁶⁷ A Legal Aid lawyer interviewed for the study commented:

*I see a lot of people who are in shock I reckon; they really don't have a clue and I think that is a huge barrier to them actually taking [anything] in. Their lawyer may well have given them written advice but they are not in a position, they are just not in the mental state where they can take it in.*⁶⁸

While clearly a range of factors may be at play, the interaction between individual capacity and the stressful nature of legal processes appeared to add to the barriers in accessing justice that are faced by people with cognitive impairment.

Systemic barriers

The reliance on formal written processes

Another challenge for those with cognitive impairment is that legal proceedings are often heavily reliant on written information, both to commence a matter and as part of its process. Indeed some processes, such as receiving and paying a fine, are basically paper-based processes.

A key observation made in *Taking justice into custody* was that as a result of not being able to understand legal information and the legal process, inmates actually avoided seeking help — written or face to face — even when avoiding help was to their detriment:

*And then if you are also dealing with things like either an intellectual disability or very poor literacy rates or low education rates or any of those things and someone whacks a twelve page form in front of you. A lot of people just say, 'You know, I never wanted that house anyway.'*⁶⁹

When assistance is avoided, people's issues can further compound.

The complex and stressful nature of legal proceedings

*For people with an intellectual disability who must appear in court, oftentimes charged with a criminal offence, the experience can range from bewildering to terrifying.*⁷⁰

Public Consultations reported 'the intimidating and alienating atmosphere of the courtroom' as the most commonly identified barrier to effective participation in the legal system for people with an intellectual disability.⁷¹ People with a cognitive impairment were reported to find giving evidence stressful and difficult, particularly when faced with tactics used to undermine their evidence. People may become flustered during cross-examination, and the cross-examiner's questioning technique may emphasise the person's disability.⁷² A Criminal Justice Support Network volunteer described the vulnerability of a client to this type of cross-examination:

*...the solicitor would repeat a particular idea endlessly, not accepting the client's statement that this was not correct, until the client began to doubt himself. I feel that being cross-examined like this is inherently unfair for a person with an intellectual disability because he or she is less able to see what the solicitor is doing. I had role-played with the client what might happen and encouraged him but it was extremely difficult for him.*⁷³

The stress of legal proceedings was exacerbated for some participants by the length of the proceedings and the waiting during and between court hearings. Describing the local criminal courts, a lawyer observed:

*...when matters are stood down in the morning and people have to wait around all day for matters to be heard, this can be a problem for clients with complex needs (e.g. people with mental illness, intellectual disability, drug and alcohol issues) who can become frustrated and leave before the matter is heard.*⁷⁴

Ironically, in this situation the matters described were stood down in the morning because the offender had complex needs, and to allow more time for the lawyer to speak with the client before the matter was heard. The impact of waiting and delay has also been raised in relation to family law cases, where again it could adversely affect people's participation in court:

*Parents with psychiatric or intellectual disability were identified as being particularly disadvantaged by having to wait in crowds of anxious/angry people. The tension undermines their mental state and subsequently affects their presentation in court.*⁷⁵

Perhaps one of the better understood difficulties arising from cognitive impairment is that people may find themselves in legal processes that they do not understand without appropriate support and information. Goodfellow and Camilleri reported that:

*...in many cases victim/survivors with cognitive impairments experience difficulties understanding the law and legal processes including the language used, following events, recalling and describing the assault — particularly under pressure and when being cross-examined.*⁷⁶

People with cognitive impairment may also have difficulties understanding the consequences of taking an oath and under the *Evidence Act 1995* (NSW), may not be eligible to provide evidence. While the *Evidence Act* does not contain a definition of intellectual disability, section 13 relates to witnesses who lack capacity to give sworn evidence. Section 13(1) states:

A person who is incapable of understanding that, in giving evidence, he or she is under an obligation to give truthful evidence is not competent to give sworn evidence.

For a time, people who, due to disability, could not understand the meaning of an oath were sometimes allowed to give unsworn evidence. This is no longer the case.⁷⁷

Taking justice into custody highlighted the additional barriers to comprehension that can arise from the use of an audiovisual link (AVL) — a video link between prisons and the courts — as an alternative to having prisoner defendants physically transported to court for appearances. While many prisoners preferred AVL hearings for practical reasons (e.g. not having to be transported in trucks, not losing their position or place at their current prison), it was apparent that for people with cognitive impairment, AVL added another layer of confusion and obscurity to the proceedings. A Criminal Justice Support Network worker commented:

*And audio visual links is an area where the support role is really quite crucial because it's very, very difficult to understand from that side what is actually happening in the court. And particularly for our clients [with intellectual disability], understanding that they're sitting in this room at the jail but they're actually ... in court. They don't make the connection that they're actually sitting in court.*⁷⁸

Alternative dispute resolution

Another form of legal process that people with cognitive impairment are exposed to is alternative dispute resolution (ADR). ADR is often put forward as a more accessible process than formal court proceedings. Benefits include lower costs and the more informal atmosphere. However, the National Alternative Dispute Resolution Council (NADRAC) suggests that people with an intellectual disability may not have the capacity to participate effectively in mediation processes due to the complexity of

some of the laws and rules involved and a lack of available information and guidance.⁷⁹ In particular, in a process which may not include a legal representative or advocate, it may be difficult for cognitively impaired people to identify what is in their best interest, understand the process and then pursue their interest through the process, without appropriate assistance and support.⁸⁰ In the *Public Consultations* report:

*Some disability advocates expressed concern regarding the ability of people with intellectual disability to effectively participate in ADR, due to the difficulties in identifying and articulating their own interests in an ADR setting, and the likely scenario that there will not be an equal power base between the participants.*⁸¹

Under-resourcing of specialist services

There are legal services in NSW that provide specialised legal assistance to people with a cognitive impairment. These include the Intellectual Disability Rights Service (IDRS) and the Disability Discrimination Legal Centre. There are also programs such as the Criminal Justice Support Network, run by IDRS, that provide support to people with an intellectual disability who are being questioned by police or appearing in court.⁸² However there is evidence to suggest that these services may not have sufficient resources to meet the volume of legal needs of clients with a cognitive impairment.⁸³ In *Public Consultations*:

*Submissions referred to difficulties associated with inadequate resourcing for the existing specialist legal services for people with intellectual disability. For example, the limited capacity of the Intellectual Disability Rights Service to provide assistance beyond referrals, or to provide legal assistance to the large number of people with intellectual disabilities within the prison system.*⁸⁴

In the same report, the NSW Council for Intellectual Disability expressed concerns over the level of resourcing to the Guardianship Tribunal, the Public Guardian, and the Community Services Commission.⁸⁵ A lack of diversion programs or prisoner education programs that are appropriate for offenders with a cognitive impairment was also raised, with some roundtable participants commenting on ‘...the limited application and effectiveness of diversionary schemes in criminal law for people with an intellectual disability.’⁸⁶

Taking justice into custody also provided examples of intellectually disabled inmates not being able to get parole because of a lack of appropriate programs.⁸⁷ Discussing the type of programs that would be appropriate, the *Framework Report* found that offenders with an intellectual disability need support in developing general living skills as well as offence specific interventions. The report found that such courses were hard to find.⁸⁸ It also indicated that the Drug Court and the Youth Drug Court were reluctant to accept offenders with an intellectual disability into their diversion programs.

Foundation research indicates that under-resourcing of non-legal services for people with disability (e.g. housing, employment and health/support) can also affect access to justice.⁸⁹ Non-legal services can directly assist disadvantaged people with legal problems by way of ongoing support, advocacy, information and referral. The NSW Council for Intellectual Disabilities also highlighted this link, arguing that:

*People with an intellectual disability often lack the support and supervision they need to help them live lawful and constructive lives.*⁹⁰

Thus people with a cognitive impairment face a range of individual and systemic barriers to effectively participating in legal processes. However, A2JLN and other studies have also highlighted a range of strategies to address these barriers and increase access to justice for people with cognitive impairment.

INCREASING ACCESSIBILITY FOR PEOPLE WITH A COGNITIVE IMPAIRMENT

Strategies which aim to increase access to justice for people with cognitive impairment can be placed into three broad areas:

- training advocates, support people and ‘independent third persons’ to assist people with a cognitive impairment to engage effectively with the legal system
- providing appropriate information and training for people with a cognitive impairment
- providing training for legal service providers, legal practitioners and court staff.

Advocates and support people

One way of assisting people with a cognitive impairment to effectively address their legal problems is to provide appropriate advocacy and support. As mentioned previously, a number of legal services in NSW provide assistance to people with a disability. These include the Disability Discrimination Legal Centre and the National Disability Advocacy Program Services. The IDRS (Intellectual Disability Rights Service) specialises in providing information, advice and representation to people with an intellectual disability who have a legal problem.

To protect the rights and interests of a person with an intellectual disability who is suspected of committing a crime, the police have an obligation to contact an ‘independent third person’ so that they can be present during police interviews. Currently the IDRS-run Criminal Justice Support Network (CJSN) provides a network of volunteer support workers and lawyers to assist people with an intellectual disability who come into contact with the criminal justice system at police stations, in court and in legal appointments. The service is available 24 hours and supports witnesses, victims and defendants with a cognitive impairment. CJSN currently services Sydney, South NSW and Hunter regions. CJSN volunteers can assist a person to understand the issues, access legal assistance, attend meetings and/or court hearings, bring along the relevant papers, dress appropriately and act as a ‘go between’ between the person and the solicitor.⁹¹

Other reforms aimed at making legal processes more accessible for people with a cognitive impairment include courts allowing people with a cognitive impairment to have a support person nearby while giving evidence. Robinson cites an example of a magistrate using his or her discretion to ensure a witness could give evidence as competently as possible. To begin with, the case was adjourned for three weeks to allow for preparation time:

*When the case resumed, Amanda was able to give her evidence in 15 minute sessions, and was able to have her mother sit in the witness box with her for moral support.*⁹²

Information and training for participants in legal processes

The Western Australian Disability Services Commission (WADSC) suggests that people with

cognitive impairment are able to participate effectively in legal processes and can make appropriate decisions if they are provided with information and support, stating that:

*...to be able to stand trial, people with intellectual disability need information they can understand, together with adequate time, support and teaching to assimilate and to understand the information.*⁹³

However, some stakeholders reported that courts and practitioners are not always aware of how to assist a person with a cognitive impairment to become better informed. Further, they may assume that a person with cognitive impairment does not understand the process because of the impairment, rather than realising that the person simply has not been informed about how to participate in a court process. The WADSC comments:

*The court should distinguish between informed and impaired, and people who are uninformed should have the right to access the necessary skills to stand trial.*⁹⁴

Recognising this, the Law Reform Commission (NSW) recommended that:

*All relevant government agencies responsible for informing the community generally about their rights and duties in relation to the criminal justice system should, so far as is practicable, ensure that they also prepare material that is appropriate for people with an intellectual disability.*⁹⁵

Examples of such material include:

- *So you have to go to court!* A DVD which covers issues relevant to people with cognitive disabilities who need to go to the local court (produced by the NSW Attorney General's Department)
- *Bail conditions: don't break them...it's just not worth it.* An animated DVD, produced by the CJSN, to assist a person to understand what bail conditions are and the importance of not breaking them
- *Getting Arrested – What to do!* A DVD produced by the CJSN, which traces the experience of a young man, when he is arrested. The DVD shows the viewer what happens and tells people what to do if they are arrested.⁹⁶

Participants consulted for the Attorney General's Discussion Paper on the assessment of capacity

favoured an approach which limited the assessment of legal or decision-making capacity to the specific circumstances and decisions in question. They found that this approach:

*...is useful as it recognises that capacity depends on the interaction between a person's underlying impairment and their circumstances. It promotes the provision of information and support to a person to enhance their capacity to make a particular decision and the review of the capacity assessment if circumstances change.*⁹⁷

Training for legal service providers

As indicated previously, training and information about cognitive impairment may assist service providers, legal practitioners and court staff to meet the needs of cognitively impaired people, including information on how cognitive impairment may affect offending behaviour, manner, comprehension, responses and performance in court.⁹⁸ Participants in the Disability Council of NSW study:

*....advocated compulsory disability awareness training initiatives. These could be an integrated requirement of professional qualification and practice. The earlier the training, the better.*⁹⁹

The Attorney General's Discussion Paper on capacity issues recommends providing legal and non-legal professionals who may have to deal with client capacity issues with better access to advice and guidelines.¹⁰⁰ The Capacity Assessment Toolkit produced by the Attorney General's Department in response to this paper is an example of such a resource.¹⁰¹ Another example is *Client Capacity Guidelines* developed by the The Law Society of NSW to assist solicitors when working with a client who may have limited capacity.¹⁰²

CONCLUSIONS

The impact of cognitive impairment on the legal issues people face and their capacity to address these issues has emerged as a theme in the Foundation's qualitative and quantitative A2JLN research. Cognitive impairment can arise from an intellectual disability, acquired brain injury, mental illness, alcohol and other drug related impairment and dementia. Anxiety and stress may also affect the capacity of people to understand and engage in legal processes at times of crisis (including

critical points in the legal process itself). In the Foundation's research, the effects of cognitive impairment were observed among older people, among the homeless, among people with mental illness, among prisoners, and in a survey of six disadvantaged regions in NSW.

The A2JLN research has illustrated how people with a cognitive impairment may experience legal issues which specifically relate to their impairment, such as personal injury compensation, substitute decision making and guardianship issues. In addition, this group are vulnerable to socio-economic disadvantage which in turn increases their susceptibility to a range of further legal issues including debt, housing and social security related issues. Some of the characteristics that render people vulnerable to legal problems appeared also to hinder the resolution of those issues.

To begin with, people may not take legal action as they are not aware that the issue they face is a legal issue or has a possible legal resolution. Difficulties in understanding legal information or advice and communicating with lawyers can add to the challenge of people pursuing a matter. Finally, the complexity, stressful and often drawn-out nature of legal processes can make it difficult for cognitively impaired people to pursue their interest through to a satisfactory outcome. The problems of access to justice for people with a cognitive impairment may be further compounded by the limited capacity of some legal professionals (in terms of time and skills) to recognise that someone has a cognitive impairment and to appropriately communicate with and support that person.

Negative misconceptions about people with cognitive impairments held by some members of the legal and law enforcement professions can sometimes result in a failure to believe these people and in a failure to take appropriate action on their behalf. This lack of action can contribute to a low sense of entitlement amongst people with a cognitive impairment and a fear of not being believed. Under these circumstances, a person may not voluntarily admit to having a disability and thus may fail to receive the specialised assistance that would enable effective participation in legal processes.

The A2JLN research program focused on legal need and barriers to accessing justice, rather than on specific strategies to address the identified

needs. However, strategies to enable people with a cognitive impairment to seek legal assistance and participate more effectively in legal processes became apparent during the research. These strategies included providing appropriate advocacy and support to people with cognitive impairment, and offering training and information for participants in legal processes who have cognitive impairment. Training for service providers, legal practitioners and court staff on how cognitive impairment may affect offending behaviour and manner, responses and performance in court, and on how to communicate effectively with people with cognitive impairment, was also put forward as a way to improve access to justice.

This paper has brought together valuable research about the legal need and access to justice issues facing people with cognitive impairment, particular from the A2JLN research program. There is more to learn, particularly about the experiences of people with a cognitive impairment in civil law processes, in family law and child protection processes, and in substitute decision making. It may also be valuable in future to focus on assessing strategies that can be used to increase the capacity of people with cognitive impairment to access and use the law to their advantage, and the capacity of the legal system to appropriately serve and assist this group.

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LOOKING FOR INFORMATION . . .

The Law and Justice Foundation of NSW is an independent, statutory organisation which aims to improve access to justice, particularly for socially and economically disadvantaged people in NSW.

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The Access to Justice and Legal Needs Program

The Law and Justice Foundation of NSW has undertaken the Access to Justice and Legal Needs (A2JLN) Research Program to identify the access to justice and legal needs of disadvantaged people in NSW. The objectives of the program are to examine the ability of disadvantaged people to:

- obtain legal assistance (including legal information, advice, assistance and representation),
- participate effectively in the legal system,
- obtain assistance from non-legal advocacy and support,
- participate effectively in law reform processes.

The program employs three methodological streams to address these objectives:

- the analysis of legal service usage data, giving particular insight into expressed legal need;
- original quantitative legal need surveys, giving insight into expressed and unexpressed/unmet legal need;
- in-depth qualitative research into the needs of particular disadvantaged groups.

Specific research published as part of this program to date includes:

Public consultations: a summary of the submissions received from organisations and individuals as part of the initial consultation process for the A2JLN Research Program.

The Data Digest: The Data Digest is a database for examining expressed legal need as identified through inquiries handled by public legal services. It currently includes legal inquiries to the Legal Aid Commission of NSW, LawAccess NSW, and community legal centres in NSW. The inaugural Data Digest report, published in 2004, presents service usage data from 1999–2002. A number of reports produced using the Data Digest are available on the Foundation's website www.lawfoundation.net.au. It is planned for public legal services to have secure access to a number of interactive online Data Digest tools.

Justice made to measure: NSW legal needs survey in disadvantaged areas: a quantitative survey of legal needs in six 'disadvantaged' regions of NSW, measuring a wide range of legal events, including those where help is sought from legal or non-legal advisers (expressed legal need), those handled without outside help and events where no action is taken (unmet legal need).

The Bega Valley pilot survey: a quantitative survey of the legal needs of 306 people conducted via telephone in Bega Valley. This was the pilot survey undertaken for the survey reported in *Justice made to measure*.

The legal needs of older people in NSW: a qualitative study into the legal issues commonly experienced by older people in NSW and the barriers faced by older people in accessing services to resolve legal issues.

No home, no justice? The legal needs of homeless people in NSW: a qualitative study into the capacity of homeless people in NSW to obtain legal assistance, participate effectively in the legal system and obtain assistance from non-legal advocacy and support agencies. The study also details the legal issues commonly experienced by homeless people.

On the edge of justice: The legal needs of people with a mental illness in NSW: a qualitative study into the legal issues faced by people with a mental illness in NSW, their capacity to obtain legal assistance, participate effectively in the legal system and obtain assistance from non-legal advocacy and support agencies.

Taking justice into custody: the legal needs of prisoners: a qualitative study of the legal and access to justice needs of prisoners and ex-prisoners. The study identifies the range of criminal, civil and family law issues prisoners face at different stages of incarceration, and the opportunities and barriers they face to addressing these issues.



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