Study on Procedural Adjustments for Defendants with Cognitive Impairments, Neuro-Diverse Conditions, Mental Health Conditions

About Fair Trials

Fair Trials is a global criminal justice watchdog with offices in London, Brussels and Washington, D.C., focused on improving the right to a fair trial in accordance with international standards. Fair Trials' work is premised on the belief that fair trials are one of the cornerstones of a just society: they prevent lives from being ruined by miscarriages of justice and make societies safer by contributing to transparent and reliable justice systems that maintain public trust.

About this Study

Fair Trials has conducted this study to contribute to the Equality and Human Rights Commission's 2019 inquiry that aims to understand the experiences of disabled defendants that come into conflict with the criminal justice systems of England & Wales, and Scotland,[1] by highlighting how various legal systems outside the UK have attempted to ensure the fairness of criminal proceedings involving defendants with cognitive impairments, mental health conditions, and neuro-diverse conditions.

For the purpose of this study, we have adopted the language and definition of 'disabled defendants' used by the Equality and Human Rights Commission for its 2019 inquiry. In other words, an individual is 'disabled' on account of social perceptions and systemic social structures, rather than on the basis of medical conditions. The primary focus of this research is on how criminal justice systems improve effective participation of disabled individuals with cognitive impairments and neuro-diverse conditions, but we also studied a small number of examples of how different jurisdictions also improve access to justice for defendants with mental health conditions.

This research focuses on the rights of criminal defendants at the 'pre-trial' stage (post charge, but before trial), and procedural adaptations available during that period, and it has been conducted as an exploratory study that provides a broad overview of laws and practices in various jurisdictions.

This study was based primarily on desk research, relying mainly on written resources (including reports and academic articles) that are accessible to the public. It is also based on Fair Trials' own experiences of surveying and consulting the 'Legal Experts Advisory Board' (LEAP), an EU-wide network of criminal justice experts coordinated by Fair Trials on issues relating to vulnerable suspects and accused persons.

[1] Equality and Human Rights Commission, https://www.equalityhumanrights.com/en/inquiries-and-investigations/inquiry-does-criminal-justice-system-treat-disabled-people-fairly

Overview

Fair Trials attempted to find a wide range of examples of informative practices from a broad range of jurisdictions, but our research seems to highlight a lack of sufficiently visible laws, policies, and practices in most jurisdictions that are specifically designed to facilitate effective participation by disabled defendants. We acknowledge that this research has been limited by a lack of access to non-English language materials, but our view is at least partially supported by existing research, and by criminal justice experts that we have engaged through meetings and surveys.

By far, the most informative examples came from Common Law jurisdictions, such as Australia and New Zealand, where we found considerably more examples and materials on procedural adaptations for disabled defendants than in any other. This can be attributed at least partially to the study conducted by the Australian Human Rights Commission in 2014 on the experiences of disabled defendants who need communication support or have 'complex and multiple support needs'.[2] Immediately following the publication of this report, the Australian Human Rights Commission put out a call for examples of programmes and services that try to address the needs of disabled defendants, which highlighted a broad range of schemes available across the country.[3]

Key examples of procedural adaptations we identified from jurisdictions in Australia and New Zealand included:

- Police officers specially trained to identify mental health issues and disabilities, and on how to respond appropriately;
- Mental health nurses and other suitably qualified professionals at police stations and courts;
- Third party support, primarily for the facilitation of communication in the form of support persons and communication assistants; and
- Special court procedures intended to facilitate effective participation by defendants, such as ground rules hearings.

We noted that a number of these examples were ostensibly modelled on existing mechanisms in England & Wales, and in many others, practice in England & Wales provided inspiration on how existing laws and policies should be interpreted or adapted.

On the other hand, in North American jurisdictions, there were very few examples of procedural adaptations specifically targeted to safeguard the rights of disabled defendants, but there was widespread recognition of the need to address the over-representation of individuals with mental health conditions. We were cautious not to equate mental health conditions to cognitive impairments, but we recognise that there is a significant overlap between the two,[4] and that quite often, there are

[2] Australian Human Rights Commission, 'Equal before the law – Towards disability justice strategies' (2014) https://www.humanrights.gov.au/our-work/disability-rights/publications/equal-law

[3] Australian Human Rights Commission, https://www.humanrights.gov.au/our-work/disability-rights/programs-and-services-assist-people-disability-criminal-justice-system

[4] UK government, 'When a mental health condition becomes a disability' https://www.gov.uk/when-mental-health-condition-becomes-disability; Mencap, 'What's the difference between a learning disability and a mental health problem?', https://www.mencap.org.uk/blog/whats-difference-between-learning-disability-and-mental-health-problem

similar challenges faced by defendants affected by either mental health conditions or cognitive disabilities. We found that the primary approach in most North American jurisdictions was not to make processes fairer for defendants, but to focus on diversion and reoffending. We found few examples of how procedures facilitate participation, but they nevertheless provide useful examples of multidisciplinary coordination in cases involving vulnerable defendants.

Positive Examples from Europe?

One region where we found it particularly difficult to find positive or informative examples of how criminal justice systems are adapted to meet the needs of disabled defendants was Europe.

The European Union has been aware of the need to ensure stronger safeguards for vulnerable suspects and accused persons across its Member States, and in 2013 it adopted a Commission Recommendation on procedural safeguards for vulnerable persons suspected or accused in criminal proceedings.[5] The primary aim of this recommendation was to strengthen human rights protections for defendants who are unable to participate effectively in criminal proceedings on account of their age, mental or physical condition, or cognitive impairments. The Recommendation does not contain very specific safeguards that Member States should put in place, and it largely reaffirms the principle of non-discrimination, and asserts the need for vulnerabilities to be taken into consideration to ensure the effective exercise of basic fair trial rights. The Commission Recommendation is, as the name suggests, a recommendation only, with no binding legal effect on Member States, and we are not aware of any positive attempts made by Member States to change their laws and policies to bring them in line with these provisions.[6]

This challenge was highlighted in a 2018 report by the Austrian NGO, the Boltzmann Institute for Human Rights, which worked with partner organisations in four other EU Member States (Slovenia, Czech Republic, Bulgaria, and Lithuania) to evaluate the extent to which each country's laws and policies complied with the Recommendation. The results were disappointing, and they revealed that all countries studied had close to no special procedural safeguards for disabled defendants, other than allowing guardians to accompany the defendant during certain stages of the proceedings.[7] Where best practices were identified, these were isolated and anecdotal, and not as a result of systematised efforts to improve procedural safeguards through laws and policies.[8]

This is consistent with Fair Trials' own experience of engaging defence lawyers, academics, and NGO representatives across the EU on this issue. In 2017 we hosted a meeting of about one dozen criminal justice experts from our network on vulnerable suspects and accused persons. None of the attendees

[5] Commission Recommendation of 27 November 2013 on procedural safeguards for vulnerable persons suspected or accused in criminal proceedings 2013/C 378/02

[6] According to Ingrid Breit, DG Justice and Consumers, European Commission, at the 2019 LEAP Annual Conference (https://www.fairtrials.org/news/fair-trial-defenders-meet-zagreb-discuss-justice-europe-and-ways-forward)

[7] Boltzmann Institute for Human Rights, 'Dignity at Trial – Enhancing Procedural Safeguards for Suspects with Cognitive and Intellectual Disabilities' (2018), https://bim.lbg.ac.at/sites/files/bim/attachments/1_handbook_dignity_at_trial.pdf

[8] E.g. Czech Republic League of Human Rights, 'Dignity at Trial – Key Findings of the Czech National Report' (2018) 6-7 https://bim.lbg.ac.at/sites/files/bim/attachments/1_handbook_dignity_at_trial.pdf

were able to identify positive examples of specific laws and policies designed to make criminal trials fairer for adult disabled defendants.[9] We also surveyed a wider group of criminal justice experts in August 2019, asking them to give us examples of how legal systems across the EU make special adaptations for disabled suspects and accused persons. Responses contained very few relevant examples, but one notable exception was Spain. In 2018, Plena Inclusion, a Spanish non-profit organisation that promotes the rights of disabled persons, published a report that analysed the extent to which local laws and policies facilitate access to justice for disabled people with cognitive impairments.[10] However, even this report contains relatively few examples of procedural adjustments specifically for disabled criminal defendants, and the few that are included are geographically very limited.

Our research does not provide a basis to conclude that examples of good practice simply do not exist in the EU, but it might be indicative of a lack of engagement in this issue amongst policy makers and the criminal defence community in the region.

Early Detection

Although the main purpose of this study was to research procedural adaptations for disabled defendants during post-charge, pre-trial stages, we found it helpful to also review a few examples of how the needs of disabled defendants are identified at earlier stages of criminal proceedings by the police, lawyers, and other professionals. This is because the practical availability of procedural safeguards at the pre-trial stages is likely to depend significantly on the earlier identification of impairments, and because investigative acts by the police inevitably have an impact on subsequent proceedings.

We identified four main models for early intervention in cases involving disabled defendants at the arrest and investigation stages:

1) A frontline specialist model (e.g. North America, New South Wales, and Spain), in which police officers receive basic training on mental health, and work collaboratively with other professionals to respond appropriately to incidents involving vulnerable individuals;
2) A specialist investigator model (e.g. Israel), which designates highly specialised police officers to perform particular roles, particularly with regard to investigations;
3) The 'watch-house' nurse model (e.g. New Zealand), which places mental health professionals within police premises to screen and assist individuals entering the criminal justice system via arrest; and
4) Defence lawyer models (e.g. United States and Spain), which emphasises the role of defence lawyers in the identification of cognitive impairments, neuro-diverse conditions, and mental health conditions.

[9] Fair Trials, 'Communique issued after the Legal Experts Advisory Panel Advisory Board Meeting, 1 December 2017, Stockholm, Sweden' (2017), https://www.fairtrials.org/sites/default/files/publication_pdf/LEAP-%20Vulnerable%20suspects%20-%20communique.pdf

[10] I de Araoz, 'Acceso a la justiciar: ajustes de procidimiento para personas con discapacidad intellectual o del desarollo' (2018)

New South Wales (Australia) – Frontline Specialists

We found several examples of specialist training for the police on disability and mental health (with the primary focus being on mental health, rather than cognitive impairments and neuro-diverse conditions more broadly) and specialised police procedures in mental health-related cases, many of which were inspired by the 'Crisis Intervention Team' ('CIT') model originally developed in Tennessee in the United States. The CIT model designates specially trained police officers to respond to incidents involving individuals with mental health issues, either alone, or accompanied by medical professionals, with the view to ensuring safety, and making appropriate arrangements for diversion.[11]

New South Wales adapted the CIT model, establishing its own 'Mental Health Intervention Team' ('MHIT') programme, which places specialist police officers, who have received 4 days training at various police stations, to respond to mental-health related incidents. The MHIT itself consists of a project officer, a police commander, and a senior mental health professional, who collaboratively shape the police's mental health strategies and mental health training programme.[12] The 4-day training programme includes training on identifying the symptoms of mental illnesses, and strategies to facilitate communication.[13]

The MHIT programme was evaluated in 2009 following a two-year pilot period. It was found that the programme 'compared favourably with established best practice for police training in interacting with mental health consumers'.[14] Positive outcomes included more effective inter-agency collaboration between the police, healthcare providers, and NGOs, and the increased use of de-escalation techniques during police interactions with individuals with mental health conditions. However, the same evaluation also found that the programme did not have significant impact on the use of coercive force by the police, and found no direct evidence that MHIT training resulted in fewer cases of individuals requiring medical attention for physical injuries.[15]

This programme was expanded in 2014, making it mandatory for all frontline police officers to receive an intensive one-day training on mental health.[16] This created a two-tiered mental health training scheme, with all frontline police receiving basic training, and a select group of more specialist police officers present in each police station.

Spain – Frontline Specialists

[11] E Kane and ors, 'Effective of current policing-related mental health interventions in England and Wales and Crisis Intervention Teams as a future potential model: a systematic review', *Systematic Reviews* 6 (2017)
[12] New South Wales Police, 'Mental Health' https://www.police.nsw.gov.au/safety_and_prevention/your_community/mental_health
[13] Ibid.
[14] V Herrington and ors., 'The Impact of the NSW Police Force Mental Health Intervention Team: Final Evaluation Report' (2009)
[15] Ibid., 2-4
[16] Australian Broadcasting Corporation, 'Mental health training introduced for NSW police working on the frontline' (2014), https://www.abc.net.au/news/2014-02-24/mental-health-training-introduced-for-nsw-police/5279446

A similar strategy for helping the police to interact with disabled persons has been adopted in Spain on a much smaller scale. In 2016, the local police in Fuenalabrada, a municipality on the outskirts of Madrid, initiated a project to help police officers to respond more effectively to the needs of persons with autism spectrum disorder ('ASD').[17] A key factor that distinguishes this model from comparable schemes found in New South Wales and in the United States is that training for frontline police officers is complemented by a standardised system for enabling disabled persons to self-declare their conditions and their needs.

This project includes training for local police officers provided by psychologists on the behavioural characteristics associated with ASD, and best practice guidance on how police should act when interacting with individuals with ASD. From 2018, local residents with ASD and their families were also given the option of obtaining a card that they can use to help police officers communicate with them. This card compiles information about the individual provided by those closest to them, and alerts police officers about how they should adjust police procedures to accommodate their needs.[18]

Israel - Specialist Investigators

In Israel, the Knesset enacted the Investigation and Testimony Procedural Act (Accommodations for Persons with Mental and Cognitive Disabilities) in 2005, which includes a range of accommodations for both disabled defendants and disabled witnesses. The 2005 Act came about as result of extensive lobbying from the Israeli NGO Bizchut, the national Human Rights Centre for People with Disabilities, based on the organisation's own experience of working closely with vulnerable defendants.[19]

One innovative aspect of the 2005 Act is the requirement that defendants with a cognitive disability are investigated by a 'special investigator'. Special investigators are appointed by the Minister for Welfare (rather than the Ministry of Public Security, which is the governing body of the police). They receive special training for this role, and they tend to come from a wide variety of backgrounds, including social work, psychology, criminology, or special education.[20]

Special investigators have powers equivalent to those of 'ordinary' police investigators, but they have a special role in helping to ensure that disabled defendants are able to comprehend their rights. In particular, their duties include informing the defendant about their 'duty' to tell the truth, and about their privilege against self-incrimination.

It is unclear from the available sources what other responsibilities special investigators have, and if they continue to have a role in the criminal proceedings post-charge. It was also unclear how law enforcement officials are able to identify a defendant's cognitive impairments in the first place, that would lead to the engagement of a special investigator.

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[17] Araoz (n 10), p 98
[18] Ibid. pp 98-99
[19] N Ziv, 'Witnesses with Mental disabilities: Accommodations and the Search for Truth' *Disability Studies Quarterly* (2007) 27(4)
[20] S Primor and N Lerner, 'The Right of Persons with Intellectual, Psychosocial and Communication disabilities to Access to justice Accommodations in the Criminal Process', *Bizchut* https://namati.org/wp-content/uploads/2013/06/Making_criminal_process_accessible_to_persons_with_disabilities_Bizchut.pdf

Nevertheless, special investigators appear to be an innovative approach to making police investigations fairer for disabled defendants. Rather relying on a third party to overcome communication challenges, a specially trained official has the dual responsibility of carrying out investigations, whilst also helping the defendant to communicate more effectively. It can be questioned if this model guarantees a sufficient level of procedural fairness and impartiality, in comparison to having an independent third party who helps to detect special needs and facilitates communication. There is clearly a need for additional safeguards to make sure that the special investigator interprets the statements and gestures of the defendant impartially, and not, for example, skew the statements against the defendant.

Bizchut has highlighted the positive impact of special investigators, pointing to anecdotal examples of how, with special training, investigators were able to decipher statements that might have otherwise been misinterpreted. However, we could find no independent research that evaluated the broader impact of special investigators.

South Australia- Specialist Investigators

In South Australia, the Summary Offences Regulations 2016 includes provisions relating to 'prescribed interviewers', who are police officers or other public servants who have received special training to interview vulnerable witnesses.[21] The 2016 Regulation requires that for certain serious offences, vulnerable 'witnesses' are interviewed by a prescribed interviewer, rather than an 'ordinary' investigator.[22] These provisions seem to relate solely to vulnerable 'witnesses', as opposed to defendants, implying that there is no legal obligation for interviews of vulnerable defendants to also be conducted by specially-trained personnel.

However, as mentioned below, this issue is at least partially mitigated by the fact that police officers in South Australia are legally required to seek the assistance of a 'communication assistant' if they suspect that a defendant has a cognitive impairment.

New Zealand - 'Watch House' Nurses

New Zealand started a 'watch house nurse' ('WHN') project in the mid-2000s, in recognition of the fact that while a large proportion of individuals arrested by the police had substance abuse and/or mental health issues, police officers did not have adequate expertise to ensure their needs were met.[23] The watch-house nurse scheme places nurses in police stations, where they assess and assist detainees with mental health (or substance dependence) related problems, make appropriate referrals for treatment, and help police officers identify mental illnesses. We could find no information to suggest that WHNs' assessments are specifically designed to identify cognitive impairments more broadly.

[21] s. 20
[22] Evidence Act 1929, s. 74EB
[23] https://www.police.govt.nz/sites/default/files/publications/evaluation-watch-house-nurse-pilot-initiative-2010.pdf, p 17

In Christchurch, for example, around six mental health nurses are responsible for monitoring individuals who enter police custody cells, and assess over one-in-five detainees.[24] The main objective of the WHN scheme seems to be to facilitate diversion, and to ensure that individuals with mental illnesses receive the appropriate treatment and support. The extent to which watch house nurses also assist in ensuring the fairness of criminal proceedings post-arrest is unclear from the available literature, but it has been recognised that they facilitate early identification of vulnerabilities, and early referrals for assessment, which no doubt have an impact on subsequent stages of the proceedings. This is particularly so, where watch house nurses are able to liaise with Court Liaison Nurses (explained below) in relation to defendants who are not diverted from police custody.[25]

There are reports, however, that WHNs are now being withdrawn from certain police stations. The justification appears to be that there has been a reduction in the number of cases in which the assistance of a nurse is required, and (unspecified) changes to the ways in which police address the needs of detainees who are substance dependent, or display symptoms of mental illnesses.[26] This move has been subject to criticism from lawyers, NGOs and politicians, who claim this undermines the needs of vulnerable defendants.

Defence Lawyers (United States and Spain)

We also found several jurisdictions that have developed tools and mechanisms to help criminal defence lawyers identify their clients' cognitive impairments and mental health conditions, so that appropriate assistance and procedural adjustments can be sought.

In the United States, 'holistic defence' services have been set up in various parts of the country since the 1990s. These services are run by non-profit organisations, such as Bronx Defenders and the Neighborhood Defense Service of Harlem,[27] and they are founded on the principle that criminal defence lawyers need to address a diverse range of their clients' needs that go far beyond criminal defence itself. Holistic defence services are comprised of a multi-disciplinary team that brings together not just lawyers specialising in various fields of practice, but also non-legal staff, such as social workers who can help to address underlying issues that bring individuals into contact with the criminal justice system.[28]

A study of Bronx Defenders, in particular, found that internal social workers play a crucial role in the identification of mental health conditions. Social workers at Bronx Defenders regularly carry out psychosocial assessments of their clients, which they can use to recommend treatment for mental health conditions, and to collect mitigating evidence that can help to contextualise their behaviour.[29]

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[24] https://www.stuff.co.nz/national/health/84748666/absolute-crisis-of-those-locked-up-in-christchurch-police-cells

[25] P Tarrant, 'An exploration of the role of the court liaison nurse within the New Zealand criminal courts'(2014) 16 https://pdfs.semanticscholar.org/37bd/9cc6f0d6ea387597870f30a52ea48b6f2885.pdf

[26] https://www.stuff.co.nz/auckland/114329358/removal-of-mental-health-nurses-from-auckland-police-cells; http://www.scoop.co.nz/stories/PA1907/S00159/mental-health-nurses-cut-from-police-cells.htm

[27] www.neighborhooddefender.org; www.bronxdefenders.org

[28] J M Anderson and ors.'The Effects of Holistic Defense on Criminal Justice Outcomes', 132 Harv. L. Rev. 819 (2019)

[29] *Ibid.* p 839

We could find no examples of the holistic defence services in operation in jurisdictions outside the United States, but the United States is not alone in recognising the importance of the role of lawyers play in the identification of the needs of disabled defendants. In Spain, for example, Plena Inclusion has produced a tool designed to help lawyers identify possible cognitive impairments, and decide whether or not to seek the assistance of a relevant professional to assess their clients. This is a checklist of standardised questions, and it is accompanied by a guide on how lawyers should interpret responses from their clients.[30]

'Appropriate Adults' and support persons

We found several jurisdictions, which recognised a role for support persons (other than a close family member, friend or a guardian) to accompany and support disabled defendants at various stages of criminal proceedings. There was some variation in the role of support persons between different jurisdictions, and the degree to which their role is legally-recognised. Support persons, or 'appropriate persons' all had in common the primary role of assisting communication between the defendants and others parties in criminal justice proceedings. In other words, they all provided assistance beyond just 'emotional support', that aimed to facilitate effective participation in a practical way. However, some also had a more interventionist role, including helping individuals to understand legal advice, make decisions, and appoint a lawyer.

In certain jurisdictions, the distinction between support persons and communication assistants (explained in more detail below) was not clear.

Victoria (Australia)

The Victoria Police Manual stipulates that an 'independent third person' (ITP) should be present when the police interview a defendant with a cognitive impairment or mental illness that affects their communication capabilities.[31] The presence of ITPs can also be arranged (although it does not seem to be mandatory) for other types of police proceedings, including when body samples or fingerprints are taken, and for police bail hearings.[32]

An ITP can be a relative, a close friend, or a volunteer from the Office for the Public Advocate,[33] a statutory body tasked with promoting and safeguarding the rights and interests of disabled people. ITPs from the Office of the Public Advocate are trained to have an understanding of police procedures and to be aware of the challenges faced by defendants with cognitive impairments during police interviews.[34]

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[30] Araoz (n 10), p 71
[31] Office of the Public Advocate, 'Independent Third Person Program', https://www.publicadvocate.vic.gov.au/our-services/publications-forms/volunteer-program/volunteer-brochures/550-independent-third-person-brochure/file
[32] Victoria Legal Aid, 'Police procedure if you have a cognitive disability', https://www.legalaid.vic.gov.au/find-legal-answers/police-powers-and-your-rights/being-arrested/police-procedure-if-you-have-cognitive-disability
[33] Australian Institute of Criminology, 'Police interviews with vulnerable adult suspects' (2011), https://aic.gov.au/publications/rip/rip21
[34] Office of the Public Advocate (n 31)

The ITPs' main role is to facilitate communication between the defendant and the police. This includes helping the defendant to contact a lawyer, a family member, or a friend; helping to ensure that they understand their rights; and helping to facilitate effective participation by the defendant during police questioning (for example, by requesting breaks, and requesting police officers to rephrase certain questions).

It is the responsibility of the police to contact the ITP, and they can do so by calling the ITP call centre, which is operated by the Office for the Public Advocate. Once appointed, an ITP would typically be able to speak with the defendant in private before a police interview takes place, and help them understand their legal rights, in particular, their right to remain silent, and their right to legal assistance.[35] We were unable to find any information that suggested that ITPs in Victoria had an ongoing role to play after a charging decision has been made, nor was there any suggestion that ITPs are frequently present during court hearings.

Given that the responsibility is on the police to make arrangements for the ITP to be present during interviews, the effectiveness of the ITPs as a procedural safeguard seems to depend heavily on the police officer's ability to identify cognitive impairments. The Australian Institute of Criminology noted in 2011 that the Department of Health and the Police had set out guidelines on how to identify cognitive impairments in their joint protocol for mental health. However, we could not find such guidance in the most recent version of this protocol.[36] The Office of the Public Advocate suggests that police officers might be able to identify cognitive impairments based on their own experience, and by asking general questions about the defendant's lifestyle.[37]

Whatever the content of these guidelines, it has been reported that police still struggle to identify cognitive impairments, and determine appropriate action to be taken where such impairments are identified, particularly if the defendant has an indigenous ethnic background.[38]

New South Wales (Australia)

Under New South Wales's laws, vulnerable persons giving evidence in criminal proceedings have the right to be accompanied by a parent, guardian, relative, friend, or a 'support person'.[39] The laws do not explicitly define who this 'support person' should be, nor does it clarify what their function is. Although the statute appears to restrict the involvement of support persons to 'a criminal proceeding in any court',[40] as explained below, in practice, this support seems to be available to arrested individuals in police stations.

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[35] Australian Institute of Criminology (n 33)
[36] Department for Health and Human Services, 'Victoria Police protocol for mental health', https://www2.health.vic.gov.au/Api/downloadmedia/%7BD8FDFA30-0A2B-498B-B9AB-CCA9BB4EC005%7D
[37] Office of the Public Advocate (n 31)
[38] E Baldry, 'How the justice system fails people with disability – and how to fix it', *Australian Broadcasting Corporation* (2016), https://www.abc.net.au/radionational/programs/ockhamsrazor/australian-justice-system-disability-indigenous/7326240
[39] New South Wales Criminal Procedure Act 1986, No 209, s. 306ZK
[40] *Ibid.,* s. 306ZK(1)(a)

Until recently, New South Wales had a scheme operated by a local disability advocacy organisation, the Intellectual Disability Rights Service ('IDRS'), to provide support to individuals with cognitive impairments who are in contact with the criminal justice system. Known as the Criminal Justice Support Network ('CJSN'), this scheme provided training and provided volunteers, known as 'support persons' to assist defendants in numerous settings. In July 2019, the CJSN was replaced by the Justice Advocacy Service ('JAS'), also run by the IDRS.[41] JAS has been described as an expansion of the CJSN with further improvements. We could identify no noticeable differences between the CJSN and JAS, in terms of the role of support persons, and given its recent establishment, there is currently very limited information about the new scheme.

In addition to providing individualised support to those with cognitive impairments, the CJSN also had an advisory role, training support persons outside the CJSN, and advising criminal justice actors such as court staff, police officers, and lawyers, to improve their communication skills, and raise awareness of support services for disabled individuals.[42]

Like ITPs in Victoria, the main responsibility of support persons appears to be to facilitate communication, but unlike ITPs, support persons can provide assistance to individuals throughout criminal proceedings, rather than just at police stations.[43]

At police stations, support persons can help defendants to understand their rights, provide emotional support, and facilitate communication between the police and the defendant. IDRS appears to also envisage more 'lawyer-like' responsibilities for support persons, by highlighting that they can help arrested individuals to make informed decisions about their options, and to remember the legal advice they have already been given.[44]

Support persons can also be present during court proceedings, client-lawyer meetings, and mediations, and are able provide a wide range of assistance beyond the facilitation of communication. They can, for example, call a defendant prior to their court hearing to ensure they attend, and they can meet with their clients before court hearings to explain what to expect during the proceedings.[45] The role of support persons also includes the provision of emotional support, and providing practical assistance – for example, by helping to complete forms.[46]

Other Jurisdictions

[41] IDRS, 'About the Justice Advocacy Service' (2019) https://idrs.org.au/site18/wp-content/uploads/2019/04/About-Justice-Advocacy-Service.pdf
[42] IDRS, 'Enabling Justice – A Report on Problems and Solutions in relation to Diversion of Alleged Offenders with Intellectual Disability from New South Wales Local Courts' (2008), http://www.idrs.org.au/pdf/historic/enabling_justice.pdf, 68-69
[43] IDRS, 'CJSN support at court and court related processes', http://www.idrs.org.au/support-criminal-justice/cjsn-court-support.php
[44] IDRS, 'CJSN support at police stations', http://www.idrs.org.au/support-criminal-justice/cjsn-police-support.php
[45] IDRS (n 43)
[46] IDRS, 'Fact Sheet' (2014), http://www.idrs.org.au/pdf/factsheets/FACTSHEET_about_CJSN.pdf

In Ireland, a 2007 circular provides for an 'appropriate person' to be appointed by the Legal Aid Board to support an individual with 'impaired capacity' to help them understand the proceedings, communicate with the court, and instruct lawyers. In practice, these appropriate persons are usually 'advocates' from the National Advocacy Service.[47]

Singapore too, has an 'Appropriate Adult' service, which is run by MINDS, a local NGO that promotes the welfare of disabled people. Appropriate Adults are volunteers, whose main responsibility is to facilitate communication between investigating officers of various law enforcement agencies and individuals who have special communication needs on account of their disability or mental health problems.[48] Volunteers attend a one-day training course to qualify as Appropriate Adults, and although there are very few eligibility criteria for the role, MINDS targets healthcare professionals, such as psychiatrists and therapists to volunteer.[49]

Communication Assistance

Communication with disabled people can be facilitated by 'alternative and augmented communication' ('AAC'). This is a broad term that covers a wide range of communication methods alternative to conventional speech (such as the use of gestures, communication boards, and increasingly through the use of more recent, web-based technologies, such as tablets).[50] These alternative methods of communication may or may not involve the assistance of a particular communication tool, but AACs are generally understood to be limited to tested and recognised forms of communication, in which language professionals are able to specialise.[51]

AAC is often distinguished from 'facilitated communication' ('FC'),[52] which refers to the process by which a disabled person uses a keyboard to communication with the emotional and/or physical support of a facilitator. The scientific basis for FC, and its effectiveness in terms of facilitating expression has been questioned,[53] and there have been criticisms that FC makes disabled people vulnerable to manipulation by facilitators. Nevertheless, the use of FC appears to have been accepted as a valid way of facilitating communications, including in the US, where courts have accepted that vulnerable witnesses can provide evidence through FC.[54]

There are clear benefits to communication assistance for disabled defendants, many of whom might have severe language difficulties, but it seems from our research that very few jurisdictions have legally recognised and systematised the role of intermediaries, language therapists, or other

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[47] E Flynn, Disabled Justice?' (2017), 96-97
[48] Minds, 'Appropriate Adult (AA) Service', http://www.minds.org.sg/AppAdultSvcs.html
[49] Minds, 'Appropriate Adult (AA) Service', http://www.minds.org.sg/AppAdultSvc.html
[50] D N Bryen and C H Wickman, 'Ending the Silence of People with Little or No Functional Speech: Testifying in Court' (2010) 31(4) *Disability Studies Quarterly*
[51] Flynn (n 47), 93
[52] *Ibid.*
[53] B Hemsley, L Bryant et al., 'Systematic review of facilitated communication 2014-2018 finds no new evidence messages delivered using facilitated communication are authored by the person with disability' (2018) *Autism & Developmental Language Impairments*
[54] *People v Webb*, 157 Misc.2d 474 (1993) 597 NYS.2d.565

professionals whose role it is to facilitate communications between disabled defendants and actors involved in the criminal justice process.

New Zealand

In New Zealand, the 2006 Evidence Act provides that defendants are entitled to communication assistance to enable the defendant to understand proceedings, as well as to give evidence.[55] The communication assistant can be appointed either at the request of the defendant themselves (in practice this is often done by their lawyers),[56] or by the judge on their own initiative.[57] This law was adopted despite previous opposition from the Ministry of Justice, which argued *inter alia* that intermediaries would compromise cross-examinations, and were not suitable for adversarial systems.[58] The current model for communication assistance in New Zealand courts is inspired by the Registered Intermediary Scheme in England and Wales, but with some notable differences.[59]

There is no centralised list of accredited communication assistants (CAs), but case-law requires that they should all have expertise in assessing communication needs, and identifying appropriate communication adaptations for disabled individuals.[60] Most CAs are language therapists, but they can also be psychologists, social workers, or even teachers.[61] In rare cases, an individual with no special qualifications might also be accepted as a CA by the courts,[62] for example a caregiver, who is in a unique position to understand and interpret for the individual, given their very particular linguistic idiosyncrasies.

CAs are funded by the Ministry of Justice, in the same way that interpreters are funded,[63] but they can also be funded by legal aid, the prosecution, or the police. However, Benchmark has reported that the police in New Zealand have not made use of CAs so far.

Typically, CAs are appointed during the court process.[64] If a CA is required for court proceedings, an application has to be made to the court, even if the CA had been engaged prior to the initiation of court proceedings (the application might request that the CA engaged prior to court proceedings continue to provide assistance to the defendant).

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[55] s. 80(1)
[56] E Henderson, 'Helping communication impaired defendants and witnesses', *LawTalk* (2016), https://www.lawsociety.org.nz/lawtalk/lawtalk-archives/issue-902/helping-communication-impaired-defendants-and-witnesses
[57] *Ibid.*
[58] Tasmania Law Reform Institute, 'Facilitating Equal Access to Justice: An Intermediary/Communication Assistant Scheme for Tasmania' (2018), https://www.utas.edu.au/__data/assets/pdf_file/0011/1061858/Intermediaries-Final-Report.pdf, 43
[59] Benchmark, 'Guidelines – Communication Assistance' https://www.benchmark.org.nz/guidelines/communication-assistants
[60] *R v Hetherington* [2015] NZCA 248
[61] Benchmark (n 59)
[62] *R v Willeman* [2008] NZAR 644
[63] E Henderson (n 56)
[64] Benchmark (n 59)

However, it has been recognised that criminal justice professionals, such as defence lawyers and the police often find it challenging to identify the need for communication assistance, and make the appropriate referrals. Furthermore, research has found that the role of CAs are not widely known amongst defence practitioners.[65] NGOs have worked to address this challenge. For example, Benchmark has included in its guidelines how lawyers might be able to detect symptoms suggestive communication impairments, and Talking Trouble Aotearoa New Zealand ('TTANZ') have produced a referral form to facilitate the process of referrals.[66]

There does not seem to be a standardised legal procedure for the appointment of CAs, but an information sheet published by TTANZ describes the processes followed by its CAs, which gives an indication of how such procedures operate in practice. Following an initial referral to TTNAZ (which may come from various sources, including a social worker, lawyer or a police officer), defendants are assessed by a psychiatrist or psychologist, and if they are found to have a cognitive impairment, a communication specialist is appointed to take a further 'Communication Assistant Assessment'. The main objective this assessment is to understand the extent to which the defendant is able to handle the communication demands of a legal setting.[67] This is a relatively short process, that takes no longer than a few hours.[68]

This results in the production of a court report, which contains recommendations on the type of adjustments that the court may need to make to facilitate the defendant's participation in the proceedings. Even if the assessment concludes that the physical presence of a CA is not needed, the findings of the CA's report can nevertheless inform how court proceedings should be conducted. According to the TTANZ, it seems common in New Zealand for pre-trial meetings or ground rules hearing to take place, in which appropriate procedural adaptions are discussed, and the extent of the role of the CA during court hearings are determined.[69]

Benchmark has identified a number of roles that CAs can play throughout the proceedings after they have conducted an initial assessment, which include:

- Advising and/or assisting during questioning, including during police interviews;
- Advising and/or assisting during client-lawyer discussions;
- Assisting with pre-trial courtroom visits;
- Advising on appropriate courtroom adaptations to improve participation by the defendant;
- Advising lawyers on their preparations for cross-examinations and evidences in chief; and
- Monitoring and assisting defendants' participation and understanding of the proceedings.

<u>South Australia</u>

[65] B Mirdin-Veitch and ors, 'Developing a more responsive legal system for people with intellectual disability in New Zealand' (2014) 34

[66] Talking Trouble Aotearoa New Zealand (TTANZ), 'Communication Assistant Referral Form' http://talkingtroublenz.org/wp-content/uploads/2018/03/Communication-Assistant-Referral-Form-Adult-March-2018.docx

[67] TTANZ, 'Court Communication Assistant Information Sheet' (2018) http://talkingtroublenz.org/wp-content/uploads/2018/03/TTANZ-Court-Communication-Assistant-current-process-March-2018.pdf

[68] TTANZ (n 67)

[69] TTANZ (n 67)

In South Australia, the local government introduced a set of reforms in 2015 that aims to improve access to justice for individuals with communication needs. These include new legal provisions in the Evidence Act, that gives criminal defendants the right of access to assistance by a 'communication partner',[70] throughout court proceedings, both during and before trial.[71]

These laws do not specify the type of qualifications that a communication partner should have. Instead it leaves it up to the appropriate government minister to approve individuals (or a class of individuals) who are officially tasked with providing communication assistance during criminal proceedings.[72] Additionally, courts can also approve which people can provide communication assistance, seemingly on an *ad hoc* basis.[73] These do not need to be recognised communication partners, and again, there are no legal requirements with regard to their qualifications. The Attorney General's department of South Australia has set up a Communication Partner Service, staffed by volunteers (hired after a three-day training programme), who can be called upon to provide assistance during court proceedings, and at police stations.[74]

There are similar protections for suspects during police interviews under the Summary Offences Regulations 2016. Under the 2016 Regulations, investigating officers are legally required to make arrangements for communication assistance for suspects with complex communication needs, either through the assistance of a communication assistant, and/or through the use of a prescribed communication device.[75]

Communication assistants for the purpose of the 2016 Regulation include 'communication partners' approved by the appropriate minister under the Evidence Act, but the Regulation also makes it possible for police officers to appoint any other individual to carry out this role.[76] Police officers are not legally required to ensure the presence of a communication assistance at all, if it is not reasonably practicable to make such arrangements in the given circumstances.

In comparison to most other jurisdictions we reviewed, the role of communication assistants and the availability of such assistance appear to be much better recognised and more clearly-defined by law in South Australia. While statutory recognition of the role of communication assistants throughout the criminal proceedings is no doubt positive, there are also noticeable issues in the South Australian model.

One issue is that the law does not sufficiently define or regulate who should be providing the communication assistance. Instead, broad discretion is given to the police, the judiciary, and the government to approve appropriate individuals. This might not be problematic if all parties had developed stringent criteria to ensure that only suitably qualified professionals provide communication assistance. However, the fact that the Communication Partner Service relies

[70] s. 12AB
[71] Tasmania Law Reform Institute (n 58), 57
[72] s. 4
[73] s. 12AB, s. 14A
[74] South Australia Attorney-General's Department, 'Communication Partner Service' https://www.agd.sa.gov.au/projects-and-consultations/disability-justice-plan/communication-partner-service
[75] s. 19
[76] s. 22

exclusively on 'volunteers', who have undergone only a few days' training suggests that the government might be underestimating the skills typically held by language therapists, social workers, and other professionals, that enable them to facilitate effective communication with individuals with cognitive impairments in complex settings. This seems to suggest that despite the terminology used to describe the assistance by 'communication partners' their role is, in practice, much more similar to that of 'Appropriate Adults' or 'Independent Third Parties'.

What was also unclear was what systems were in place in South Australia to ensure that cognitive impairments and complex communication needs are identified by criminal justice professionals.

Ireland

There are legal provisions under Irish law regarding the involvement of intermediaries in criminal justice proceedings, but these appear to apply to child witnesses only. Under the Evidence Act 1992, a witness under the age of 17 can give evidence in court proceedings with the assistance of an intermediary, on the application of either the prosecution or the defence.[77]

An intermediary can be appointed by the court, if it is satisfied that their involvement would be in the interests of justice, bearing in mind the age and mental condition of the child witness. The law does not specify the type of qualification the intermediary should have, and only requires the court to be satisfied that the intermediary is 'competent to act as such'.[78]

Although the law has made it possible for intermediaries to be involved in criminal court proceedings since 1992, they were reportedly never used until 2016, to assist a child victim in a sexual offence case.[79] The ineffectiveness of Irish legal provisions relating to intermediaries has been criticised, because it operates on an *ad hoc* basis, with no regulation, and no standardised system of referrals, which places the onus on the vulnerable witnesses and defendants to use their own networks to ensure the support they need.[80]

Israel

In Israel, the Investigation and Testimony Procedural Act 2005 provides that disabled individuals who give evidence in court should have the assistance of 'therapeutic professionals', such as psychologists and social workers, who have experience of working with disabled people. Their primary role is to facilitate communication, for example, by intervening during questionings, and help disabled individuals to give evidence, and to assist in ensuring that the court is able to understand that evidence. In practice, therapeutic professionals can advise on how questioning should take place

[77] s. 14
[78] *Ibid.*
[79] C Fitzgerald, '"At the moment, court is a very frightening place for a child" – young victims in Ireland's legal system', *The Journal* (2016) https://www.thejournal.ie/child-court-protection-2784424-May2016/
[80] C Edwards and ors, 'Access to Justice for People with Disabilities as Victims of Crims in Ireland' (2012) 8-9 https://www.ucc.ie/en/media/academic/law/ccjhr/publicationsseptember2018/AccesstoJusticeforPeoplewithDisabilitiesasVictimsofCrimeinIreland2012.pdf

during court proceedings, and helping to interpret the responses (both verbal and non-verbal) from the individual.

It was not possible to ascertain the exact remit of therapeutic professionals' responsibilities, and in particular, if they have a role outside the courtroom, or before the trial begins. Also, whilst it is clear that the 2005 Act as a whole contains safeguards for both defendants and witnesses, it was unclear from our research if the specific provision relating to therapeutic professionals applied to disabled defendants.

Other Jurisdictions

Research by the Tasmania Law Reform Institute seems to show that only few criminal justice systems across the world have embraced communication assistance as a way of facilitating effective participation by disabled defendants.[81] This research found that although several jurisdictions had communication assistance schemes, most were limited in scope, and aimed primarily or exclusively at assisting vulnerable 'witnesses'.[82] However, as evidenced by the changes seen in New Zealand and South Australia in the past decade, there seems to be a growing trend for more jurisdictions to trial the use of intermediaries or communication assistants.

One of the most recent examples is Victoria, where the 'Intermediary Pilot Programme' was launched by local courts in 2018 to facilitate the giving of evidence by vulnerable witnesses in court. The programme includes the establishment of an 'intermediary matching service' to facilitate referrals to suitable professionals, and in addition to their interpretative role, the scheme also envisages an advisory role for intermediaries, to inform suitable procedural adaptations for court proceedings.[83] Defendants are specifically excluded from this programme, which is restricted to complainants in sex offence cases, and any vulnerable witness apart from the accused, in homicide cases.[84] We could not find any suggestion that the programme will be expanded in the future to benefit a broader group of disabled people in contact with the criminal justice system, such as defendants, and victims of other offences.

Similarly, in Spain, NGOs in various regions of the country have established intermediary services to assist disabled individuals in court. Referred to as 'facilitators' ('*personas facilitadoras*'), professionals with expertise in intellectual disabilities and forensic psychology aid communication in court.[85] However, these schemes appear to be exclusively for complainants, and not for defendants. Plena Inclusion also recognised in its report that there were local examples of AAC being used to assist disabled persons in court proceedings. It was unclear from the report if the use of such assistance was in any way regulated by law, and if AAC was available to both witnesses and defendants in criminal proceedings.[86]

[81] Tasmania Law Reform Institute, (n 58)
[82] For example, the intermediary scheme in New South Wales applies only to child witnesses
[83] Paras 22-23
[84] Para 11
[85] Araoz (n 10), p 76
[86] p 97

Although not explicitly referred to as 'communication assistants' or 'intermediaries', the Evidence Act of New South Wales recognises a role of 'interpreters' as a 'support person'.[87] The statute recognises that a support person may accompany a vulnerable defendant as an interpreter for the purpose of facilitating communication, if the defendant has difficulties giving evidence on account of their disability or impairment.

Court Liaison Nurses

We were able to find several examples of jurisdictions in which medical professionals, in particular, nurses and other clinicians were present at criminal courts, to help to ensure that disabled defendants who come into contact with the court system have their vulnerabilities identified.

New Zealand

Court liaison services and court liaison nurses ('CLNs') have been a part of the New Zealand court service since the 1990s. Their main roles include providing consultation and liaison services to a variety of actors in the criminal justice system, such as the court and the police, and conducting 'informal' assessments of individuals who might have mental illnesses. The main purpose of such assessments is to support determinations regarding fitness to stand trial,[88] but they also play a broader role of informing judges about any mental illnesses or disabilities that a defendant might have, which can influence appropriate further actions by the court.

CLNs are not subject to uniform standards or procedures throughout New Zealand, but research has found that they broadly follow similar procedures for identifying defendants who might require their assistance, by cross-referencing names of individuals on court lists against health records. They also take referrals from other criminal justice professionals, including lawyers, judges, prosecutors, and the police.[89]

Although CLNs are perceived to play a positive role in ensuring that disabled defendants receive appropriate support, concerns have been raised that they receive no specific training that prepares them to work in a criminal justice setting.[90]

Victoria (Australia)

In Victoria, the Mental Health Advice and Response Service ('MHARS') was set up to address the challenges of the overrepresentation of individuals with mental illnesses within the criminal justice system. [91]

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[87] New South Wales Evidence Act 1986, No 203, s. 306ZK (3)(b)
[88] L Hunt, 'Preserving the Dignity of the Mentally Unwell: Therapeutic Opportunities for the Criminal Courts of New Zealand' (2017), 19 https://www.fulbright.org.nz/wp-content/uploads/2017/08/LUNT-Preserving-the-Dignity-of-the-Mentally-Unwell-Therapeutic-Opportunities-for-the-Criminal-Courts-of-New-Zealand-.pdf
[89] *Ibid*., 20
[90] Tarrant (n 25)
[91] Community Forensic Mental Health Service, 'Mental Health Advice and Response Service', https://www.forensicare.vic.gov.au/wp-content/uploads/2016/11/Forensicare-MHARS-6pp-DL_v7.pdf

The MHARS is made up of a team of mental health clinicians, and their primary role is to support individuals with mental illnesses (whether or not they have been diagnosed) who come into contact with the court. They provide mental health advice to the judiciary, corrections services, and various court users to make sure that there are appropriate mental health interventions and referrals are made for those in need of such assistance.

Ground Rules Hearings

We could find very few examples of legal systems that have pre-trial case management hearings specifically for the purpose of ensuring effective communication with defendants with cognitive impairments, that are comparable to Ground Rules Hearings ('GRHs') in England and Wales. New Zealand was a notable exception.

Similar to those in England & Wales, GRHs in New Zealand are pre-trial case management hearings that facilitate discussions between the parties involved in the proceedings to agree on appropriate adjustments to court proceedings.[92] In particular, GRHs typically include discussions regarding the appropriate use of language to be used during trial, especially during cross-examinations. Where the party to the proceedings benefits from the assistance of a communication assistant, GRHs would set parameters for the role of the CA.

Ground rules hearings in New Zealand are regarded as optional, and there do not appear to be laws or court rules mandating their use. However, GRHs seem to be an increasingly common practice in New Zealand courts, and some courts are reported to be arranging GRHs 'routinely'[93].

GRHs are also a feature of the intermediary pilot programme in Victoria. Under this scheme, GRHs must be held if an intermediary has been appointed.[94] They need to take place at least 7 days before the date of the trial, and the intermediary's report on communication needs of vulnerable witnesses need to be made available to all parties before the GRH takes place. The main objective of GRHs is to agree on special measures to accommodate the needs of vulnerable witnesses, including *inter alia* the manner in which questions are asked, the type of questions that can be asked, and the use of communication tools, such as visual aids. Given that the intermediary pilot programme only provides for the appointment of intermediaries for complainants, it can be assumed that the primary focus of GRHs in Victoria is to accommodate the needs of disabled witnesses, but not defendants.

Specialised Procedures

In some legal systems we reviewed, we did not find many examples of laws and policies that adjust criminal justice procedures to facilitate effective participation in criminal justice proceedings. However, there were more examples of legal systems that sought to address the needs of individuals

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[92] Benchmark, 'Pre-trial Case Management' https://www.benchmark.org.nz/guideline-summaries/pre-trial-case-management

[93] *Ibid.*

[94] Magistrates' Court Victoria, Practice Direction No 6 of 2018 https://www.vicbar.com.au/sites/default/files/Practice%20Direction%206%20of%202018%20Intermediary%20Pilot%20Program%20at%20Melbourne%20Magistrates%27%20Court.pdf

with cognitive impairments or other comparable needs by establishing specially designed alternative procedures. We found this to be the case particularly in North American jurisdictions, where there has been a growing trend since the 2000s of setting up Mental Health Courts ('MHC's), which are 'problem-solving' courts designed to divert defendants away from ordinary criminal justice procedures, to a programme a judicially supervised treatment and monitoring.

More recently, the problem-solving court model has been adopted in some jurisdictions to specifically address the needs of disabled defendants. These have many characteristics in common with MHCs, but slightly different objectives and procedures.

Mental Health Courts

MHCs have specialised procedures that are aimed at getting appropriate treatment for defendants, where mental health conditions are regarded as the underlying cause of a defendant's conflict with the criminal justice system.

There is no uniform model for MHCs, but some common characteristics have been identified amongst MHCs in the United States:[95]

- It is a specialised process for certain defendants with mental health conditions;
- It substitutes ordinary criminal proceedings with a non-adversarial, problem-solving model;
- Participants in the programme are identified through specialised screenings and assessments;
- Participants take part in a judicially supervised treatment plan developed collaboratively by a multidisciplinary team that involves court staff and mental health professionals; and
- Participants are incentivised to adhere to the treatment, and conversely, failure to do so may result in sanctions.

In many ways, direct comparisons to MHCs are not appropriate for the purposes of this study. Firstly, they are specifically aimed at mental illnesses, and often focused on the 'treatment' of the health conditions that are linked to the defendant's contact with the criminal justice system. Some MHCs explicitly exclude defendants whose cognitive impairments are caused by a disability for this reason. Secondly, the focus on MHCs are on 'problem-solving', and not necessarily on improving access to justice. As a general rule, the determination of the facts of a criminal case falls outside the remit of MHCs, so there is little to no emphasis on making the procedures themselves fairer by adapting procedural safeguards. Lastly, they exclude a large class of defendants who clearly need to benefit from special procedures. Most MHCs tend to be limited to defendants accused of minor crimes, and eligibility for the programme often depends on the defendant pleading guilty.

Nevertheless, the examples of MHCs and other problem-solving courts might provide useful insight into how criminal justice systems ensure the needs of defendants with comparable challenges are addressed, and there might be aspects of MHCs, such as screening and referral procedures, and models for interdisciplinary collaboration, that might be informative.

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[95] Bureau of Justice Assistance (BJA), 'A Guide to Mental Health Court Design and Implementation' (2005) 2 https://csgjusticecenter.org/wp-content/uploads/2012/12/Guide-MHC-Design.pdf

United States

The first MHC in the United States was set up in the 1990s, and the numbers have since expanded dramatically, to over 300 MHCs across the country. MHCs have been advocated by various organisations, including the Center for Court Innovation, and the Bureau of Justice Assistance (BJA).[96] As mentioned above, there is no uniform model for MHCs in the United States, and each, even within the same state have slight differences.

Referral and Screening

Referrals to MHCs can come from numerous sources, and most MHCs accept referrals from *inter alia* the police, prison staff, court staff, the prosecution, defence lawyers, and friends and family members.[97] Some MHCs have developed more streamlined procedures for referrals designed to ensure early identification of needs, and to reduce the likelihood of inappropriate referrals.

For example, in Hamilton County in Ohio, there is a pre-trial services programme that aims to identify individuals with mental health issues by including questions in standard interviews designed to detect relevant symptoms. If mental health issues are identified through this process, pre-trial staff arrange a psychiatric assessment, which forms the basis of a report is produced before the defendant's first appearance in court. The existence of a psychiatric report at this stage, which includes details about the defendant's mental health status, and sometimes also contains the psychiatrist's recommendations about the appropriate conditions for release, can help to ensure that the defendant's mental health is taken into full consideration vis-à-vis pre-trial decisions, including those regarding detention.[98]

Although not a deliberately streamlined procedure as such, the Urban Institute reported that a large proportion of referrals to MHCs in New York City came from prisons.[99] This is because all defendants entering detention facilities are screened for mental health, which is part of standard medical examination for all new detainees. If a mental health issue is identified, a referral is made to mental health services within 72 hours so that an assessment can be made by a health professional or social worker. This process does not automatically lead to a referral to the MHC, but increases the likelihood that the mental health condition is identified pre-trial.

In Allegheny County in Pennsylvania, MHC staff have produced forms that can be used by members of the community to refer defendants to the MHC, and have provided training for agencies most likely to be the source of referrals, including the judiciary, the police, defence lawyers, and prosecutors.[100]

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[96] The Council of State Governments Justice Center, 'Mental Health Courts', https://csgjusticecenter.org/mental-health-court-project/

[97] BJA (n 95) 47

[98] BJA (n 95) 47

[99] S Rossman and ors, 'Criminal Justice Interventions for Offenders with Mental Illnesses – Evaluation of Mental Health Courts in Bronx and Brooklyn' *Urban Institute* (2014) 67

[100] BJA (n 95) 47-48

Multidisciplinary Approach

As mentioned above, a key feature of MHCs in the United States is the interdisciplinary collaboration between health professionals, court staff, and specialist legal professionals. For example, the Brooklyn MHC team in New York consists of a team that includes the project director (who oversees the overall coordination of the MHC programme), the clinical director (who supervises a team of clinical staff that performs psychosocial evaluations); social workers; and a psychiatrist (tasked with conducting psychiatric evaluations of defendants, and training judges). Judges, prosecutors, and defence lawyers are specially assigned to the MHC, which helps to ensure that legal professionals engaged in the proceedings have the relevant experience and specialism.[101]

The majority of defence lawyers in the Brooklyn MHC came from two local legal aid providers, each of which designated a lawyer within their respective organisations with experience and expertise in dealing with defendants with mental disorders.[102] We found this to be a relatively uncommon example of a concrete measure recognising the importance of specialist training for lawyers who assist vulnerable defendants.

The NGO Centre for Court Innovation conducted an evaluation of the Brooklyn MHC, which it set up jointly with other parties, observed communication patterns in the Brooklyn MHC, and found that the clinical director played a particularly important role in facilitating collaboration between members of the MHC's multidisciplinary team. She did so by sharing her knowledge through one-on-one interactions with each of the parties. There was positive feedback on communication amongst users of the court, and this was attributed at least partially to the strength of relationships and implicit trust between staff members, rather than through the use of formalised meetings.[103]

Procedural Adaptations

As noted above, the effective participation of individuals with cognitive impairments is not the main objective of MHCs, and perhaps for this reason, there is little information about the type of accommodations made during MHC proceedings to make them fairer for defendants. It is telling that the BJA published a 'Guide to Mental Health Court Design and Implementation' in 2005, which seemed to contain almost no guidance on how hearings should be adapted to ensure procedural fairness for defendants.

However, it was clear from the available literature on MHCs that MHC procedures are usually designed to be less adversarial,[104] and that they tend to be less formal. For example, in the Brooklyn MHC, researchers observed the tendency amongst judges to talk directly to defendants, rather than through their lawyers, giving the impression that the proceedings were more defendant-centred than ordinary criminal proceedings. Judges also tended to speak to defendants in a conversational style, using open-

[101] K O'Keefe, 'The Brooklyn Mental Health Court Evaluation – Planning, Implementation, Courtroom Dynamics, and Participant Outcomes' *Centre for Court Innovation* (2006) 14
[102] *Ibid.*
[103] O'Keefe (n 101), 43-44
[104] BJA (n 95), 4-6

ended, casual questions to begin proceedings. They also addressed the defendant before addressing any other actors in the courtroom.[105]

The Center for Court Innovation's research did not evaluate in any great detail how effectively individuals were able to participate during the course of the MHC's proceedings in Brooklyn, although it did observe how judges interacted with defendants with the courtroom (focusing in particular, on the level of eye-contact) and defendants' own perceptions about their experiences. Defendants who were surveyed gave overwhelmingly positive feedback about their experiences, and gave positive responses when asked if they felt they had the opportunity to express themselves.[106]

Ontario (Canada)

MHCs can also be found in jurisdictions across Canada. We were able to find examples of MHCs in several provinces, including Québec and Alberta,[107] but they seemed to be most prevalent Ontario, where according to recent research in 2017, there are almost 20.[108] Most MHCs in Ontario appear to have been established on an *ad hoc* basis,[109] and there is no regulatory framework that governs their procedures, nor do they benefit from designated funding. This means that practices and procedures of MHCs vary from court to court, even within the same province.

We found from the research conducted by the Ontario's 'Human Services and Justice Coordinating Committee' that for the most part, MHCs in Ontario shared many characteristics with those in the United States.[110] However, there were some noticeable differences in certain courts. For example, unlike the vast majority of other MHCs, one court in Toronto does not require participants to enrol on to MHC proceedings voluntarily, recognising the difficulties that individuals with severe mental illnesses face in providing informed consent.[111]

Mental Health Court Workers

A notable feature of Ontario's MHCs is the role of 'Mental Health Court Workers' ('MHCW'), who appear to play a central role in supporting the operation of MHCs. MHCWs are specialist social workers, who have good knowledge of mental health issues, as well as of the range of social services that defendants with mental illnesses might be able to access. They play a central role in determining a defendant's eligibility for the MHC including by assessing their mental health using screening tools,

[105] O'Keefe (n 101), 37
[106] O'Keefe (n 101), 40-41
[107] Justice Québec, 'Programme d'accompagnement justice et santé mentale', https://www.justice.gouv.qc.ca/programmes-et-services/programmes/programme-daccompagnement-justice-et-sante-mentale/; Provincial Court of Alberta, 'Mental Health Court', https://albertacourts.ca/pc/areas-of-law/criminal/mental-health-court
[108] Human Services & Justice Coordinating Committee (HSJCC), 'Mental Health Courts in Ontario - A Review of the Initiation and Operation of Mental Health Courts Across the Province' (2017), 20 http://ontario.cmha.ca/wp-content/uploads/2017/11/Mental-Health-Courts-in-Ontario-1.pdf
[109] Community of Interest for Racialized Populations and Mental Health and Additions, 'Racialized Populations and Mental Health Court Diversion' (2019), 9 http://ontario.cmha.ca/wp-content/uploads/2019/05/Racialized-Populations-and-MH-Court-Diversion-May-2019.pdf
[110] HSJCC (n 108)
[111] HSJCC (n 108), 9

and they provide ongoing support to defendants within the programme, for example, by helping to ensure that defendants attend their medical or court appointments.

MHCWs also play an active role in determining the outcomes for defendants. Their duties include providing advice to lawyers, judges, bail supervisors, and others who are involved in the proceedings, but it was unclear from the available literature if such advice also included ways of improving communication between the defendant and others involved in the proceedings.

A notable role of MHCWs is to also assist defendants whose cases fall outside the remit of the MHC. These defendants might also be able to benefit from the services of MHCWs, who might, for example, facilitate bail arrangements, or inform sentencing decisions.

Despite the very broad and multidimensional role that MHCWs play both in and out of MHC proceedings, we could find very little information about the type of training that MHCWs get. It does appear however, that in many courts in Ontario, support services are provided by the Canadian Mental Health Association, a national community association with local offices in throughout the country.

Multidisciplinary Collaboration

Research by the Ontario government's Human Services & Justice Coordinating Committee research found that 'pre-court' meetings are a common feature of MHCs in Ontario. These provide opportunities for MHC actors to meet and discuss the progress and care of participants, and they shape determinations on eligibility and suitable diversion plans.[112] These meetings always include the MHCW and the prosecutor, with defence lawyers being present most of the time. However, it is relatively rare for defendants to be present at these meetings, and this perhaps raises concerns about the lack of inclusion in decision-making processes.

Like in Brooklyn MHC, most MHCs in Ontario have a 'designated' prosecutor, who are specifically assigned to the court for their experience of handling mental health cases. However, this does not always mean they have received training. In addition, some MHCs also have specialised duty lawyers to represent defendants, but we could find no information about the training they receive to develop their specialisation.

<u>Western Australia</u>

Western Australia has a specialist court that, unlike most examples seen in the United States and Canada, specifically targets disabled defendants rather than those mental health conditions. Known as the 'Intellectual Disability Diversion Programme' ('IDDP'), this court aims to address the over-representation of disabled defendants, and those with Autism Spectrum Disorder in the criminal justice system.

[112] HSJCC (n 108), 11

The operation of the IDDP is limited to one court in Perth, where it sits once a week. Its aims are comparable to those of MHCs in North America, in that it aims to reduce vulnerable individuals' future contact with the criminal justice system, identify as yet undiagnosed disabilities, and increase access to appropriate support. However, unlike MHCs, the IDDP does not focus on the 'treatment' of the individual as the solution to the defendant's contact with the criminal justice system. Rather, it tries to a achieve an outcome that is proportionate, fair, and appropriate, taking into consideration the defendant's condition or impairment, that involves a 'plan' to be monitored by the IDDP court.[113] It is notable that the programme is strictly restricted to defendants who have either pleaded guilty, or are about to do so. In some ways, IDDP appears more like a sentencing procedure, rather than an alternative to a substantive criminal trial.

Like MHCs, the IDDP involves a multidisciplinary team that includes the judge, court staff, prosecutor, defence lawyer, and probation ('adult community corrections').[114]

Referrals to the IDDP can be made by various parties, including health professionals, the prosecutor, or by the defendant themselves. Initial decisions regarding eligibility for the IDDP seem to be made jointly by the IDDP judge, prosecutor, and a probation officer, with the involvement of the defendant and their lawyer.[115] From the information available, there was no suggestion that there was necessarily involvement from a medical professional at this stage, but seeking information about the nature and existence of the defendant's condition or impairment seems to be a normal part of this process.[116]

Once a positive eligibility decision is made, an assessment report is ordered, which can involve interviews with various experts, including medical practitioners. This results in an assessment report that has recommendations for the type of support plan that would be most suitable for the defendant. The IDDP judge has final say on whether or not the defendant enrols on to the support plan.[117]

The IDDP is a relatively unique example of an MHC-like problem-solving court model being adapted specifically to address the challenges faced by disabled individuals. For reasons similar to those outlined above, direct comparisons with the IDDP for the purpose of this study has limited use. This is particularly because it is not a model designed to improve defendant participation in the criminal justice process, but to promote fairer outcomes when the question of guilt is not contested. Still, it offers a notable alternative to how criminal justice is normally done for defendants with disabilities.

There is not much literature available on the IDDP, nor critical evaluation of the programme, but we noted certain aspects of this model which on the outset seem unsatisfactory, or in need of additional safeguards. In particular, IDDP seems to differ from many MHCs in North America, in that neither

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[113] Magistrates Court of Western Australia, 'Intellectual Disability Diversion Program Court' https://www.magistratescourt.wa.gov.au/I/intellectual_disability_diversion_program_court.aspx
[114] *Ibid.*
[115] Western Australia Department of Justice, 'Intellectual Disability Diversion Program (IDDP) Court Guidelines' (2018) 10-11
[116] *Ibid.*
[117] *Ibid.*, 7

medical professionals nor specialist social workers seem to be a central part of the multidisciplinary team. Initial screenings and eligibility decisions are made primarily by the judge, prosecutor, and probation, and consultations with medical experts do not seem to be mandatory. This might raise questions about the effectiveness of procedures for determining eligibility, perhaps because they place too much onus on actors who, despite having experience of working with vulnerabilities, might not have the professional experience to identify complex symptoms of undiagnosed defendants.

The other major flaw is the dependence on the defendant making a guilty plea. While it is recognised that the IDDP is a diversion programme, there still need to be fair procedures for entry into the programme. Decisions on pleas are no doubt complex decisions requiring defendants to understand *inter alia* their rights, and the consequences of their plea, which are not always easy to predict. The IDDP can only be described as a fair system for disabled defendants, if it is accompanied by adequate procedural safeguards to ensure that the initial decision to make a guilty plea was made competently – something that is undoubtedly a serious challenge for most defendants that this programme targets.

Manitoba (Canada)

A model similar to the IDDP has recently been adopted in Manitoba. The 'FASD Justice Programme' started in 2019, with the specific focus on addressing the challenges faced by defendants with Foetal Alcohol Spectrum Disorder ('FASD'). The FASD Justice Programme is a sentencing procedure, and its aim is to provide a special court environment that tries to understand the link between the defendant's FASD diagnosis and the commission of a crime, and determine the appropriate sentence on that basis.[118] There is no need for a guilty plea to enter into the programme.

It is notable that Manitoba has a separate MHC in addition to the FASD Justice Programme, which works very similarly to other models found in North America, and is aimed at ensuring the identification and treatment of mental illnesses that might be linked to the commission of a crime.[119] On the other hand the FASD Justice Programme cannot be described as a 'problem-solving' procedure as such, at least for adult defendants, particularly because it does not seek to identify the 'problem' in the first place. The programme is limited to defendants who already have an FASD diagnosis, and where appropriate FASD justice workers produce an assessment report, which forms the basis of the sentencing decision.[120]

Another key distinguishing factor between the FASD Justice Programme and comparable programmes mentioned above is that it does have a specific focus on making the procedures more suited to the needs of defendants with special needs. The information sheet published by the Manitoba court service states that it is one of the objectives of the programme to is to provide quieter court environment, bearing in mind that individuals with FASD are more prone to be distracted, and are more likely to find aspects of court proceedings challenging. Lawyers are, for example, encouraged to refrain from whispering, using their mobile phones, and coming in and out of the courtroom

[118] Manitoba Courts, 'FASD Informational Sheet' http://www.manitobacourts.mb.ca/site/assets/files/1175/fasd_informational_sheet_march_2019.pdf
[119] Manitoba Courts, 'Mental Health Court' (2019) http://www.manitobacourts.mb.ca/provincial-court/problem-solving-courts/mental-health-court/
[120] *Ibid.*

unnecessarily whilst hearings are taking place, and they are encouraged to wait outside the courtroom when other hearings are taking place.[121]

The most unique aspect of the FASD Justice Programme, however, is that it focuses on one particular medical condition. No doubt, the proponents of this scheme rightly recognised the need to address the significant overrepresentation of individuals with FASD in the criminal justice system. However, the merits of limiting the scope of the programme to a rather narrowly defined group, whilst excluding other who might face similar challenges in the criminal justice system on account of comparable conditions can be questioned. On the other hand, the narrow remit of the FASD Justice programme could also be its greatest strength, enabling it to become highly specialised in accommodating the needs of a particular group.

[121] *Ibid.*