



Benchmark

best practice-best evidence with vulnerable people

Responsive practice with adults with Intellectual Disability

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1. Introduction

Disclaimer: The material provided in this guideline is not legal advice and should not be treated as such. The information is intended as a guide only and should not be relied upon as the definitive authority on the law regarding communication with, or representation of, people with intellectual disability. No liability is accepted for any adverse

consequences of reliance upon it. Further disclaimer information is provided here [[link](#)].

1.1 This guideline has been developed to assist legal and justice professionals, including police, lawyers, and judges, to work effectively with adults with an intellectual disability who are involved in the legal system.

1.2 In New Zealand, the term "intellectual disability" is commonly used in the contexts of diagnosis and funding allocation, however the term "intellectual disability" is increasingly being used interchangeably with "learning disability". "Learning disability is the term preferred by people with such disabilities themselves."¹

1.3 People with an intellectual disability have the right to be active participants in legal issues and processes as expressed by articles 12 and 13 of the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD) (for more detailed information refer to the [UNCRPD guideline](#)). However, they are often denied this right due to an inability on the part of legal professionals to identify their disability, and/or to recognise and appropriately respond to their communication needs. They can also be disadvantaged by negative assumptions about their competence.

1.4 While people with an intellectual disability should not automatically be assumed to be vulnerable, the factors outlined above can combine to create significant vulnerability when they are engaged in the legal system.

1.5 This guideline includes general information about intellectual disability, and more specific instruction relating to case and client management when working with people with an intellectual disability.

2. What is Intellectual Disability?

2.1 Intellectual disability can be described as a life-long cognitive impairment, which could be genetic in origin, or the result of a brain injury experienced before, during, soon after birth, or during childhood.²

2.2 Although people with an intellectual disability may take relatively longer to understand new information or learn new skills, they continue to learn new concepts and skills throughout their lives.

2.3 Some people will need intermittent and/or low levels of assistance relating to specific aspects of daily life (for example budget advice or help to develop literacy skills). Other people may require higher levels of

support from disability services across all areas of life (for example 24-hour support within residential services).

3. How is a formal diagnosis of intellectual disability made?

3.1 An intellectual disability involves both impaired intellectual functioning and impaired adaptive functioning known to have occurred before the age of 18.³ All of these factors are relevant in determining whether the impairment is present and its degree.

3.2 Impaired intellectual functioning includes difficulty in reasoning, problem solving, planning, judgment and abstract thinking. Intellectual functioning is often measured using IQ testing. Current best practice recognises that IQ testing alone is insufficient in diagnosing intellectual disability,⁴ however in general terms an IQ score of less than 70 meets the diagnostic criteria for intellectual (intellectual) disability. This impairment has been described as a spectrum of degrees.

(a) **borderline** (IQ ranging between 70-75)

(b) **mild** (IQ ranging between 50-70)

(c) **moderate** (IQ ranging between 35-50)

(d) **severe** (IQ ranging from 20-35)

(e) **profound** (IQ below 20)⁵

3.3 Adaptive functioning refers to a person's ability to understand and demonstrate conceptual skills (for example, language and literacy); social skills (for example, communication and interpersonal skills); and practical skills (for example, independent activities of daily living across multiple environments).

3.4 Although the diagnostic criteria for intellectual disability requires that it was present before the age of 18, it is not uncommon for an assessment and confirmation of an intellectual disability to occur when the person is older than 18.⁶

3.5 Importantly, intellectual disability often occurs in combination with other neurodevelopmental disabilities such as Attention Deficit/Hyperactivity Disorder and Autism Spectrum Disorder, and mental distress related to depression and anxiety.⁷ These conditions also need to be taken into account when working with the person. [Refer to relevant guidelines for additional information and strategies].

4. Identifying intellectual disability

4.1 In a legal context, it is important to identify a possible intellectual disability as quickly as possible so that formal assessments can be carried out and appropriate support and accommodations put in place.⁸

4.2 As noted above, some people may not have been identified as having an intellectual disability prior to their appearance in court.⁹ When a person's adaptive functioning is similar to her or his peers, intellectual disability may not be obvious (e.g., when a person has a mild intellectual disability). Further, the person's presentation, the particular legal context, and/or the level of knowledge held by police and lawyers can make intellectual disability difficult to identify.

4.3 Intellectual disability occurs in various forms and degrees of impairment. Therefore, it is impossible to rely on a single factor or indicator. That means that in a practical sense, people with an intellectual disability will possess individual strengths and skills but the nature of their impairment means that they are also likely to experience a combination of the following traits or characteristics including:

- (a) Difficulty understanding straightforward questions;
- (b) Being slow to answer, or experiencing confusion when responding to questions;
- (c) Speech difficulties or reliance on alternative means of communication;
- (d) Limited expressive language, language comprehension and/or lower than expected reading ability;
- (e) Difficulty remembering personal details or events;
- (f) Impaired reasoning;
- (g) Difficulty expressing feelings;
- (h) Difficulty with planning and problem solving;
- (i) Poor concentration;
- (j) Poor interpersonal skills, for example difficulty maintaining eye contact or initiating conversation, or unanticipated responses to certain social situations;
- (k) Difficulty understanding time;

- (l) Difficulty understanding their legal rights and/or legal processes;
- (m) A desire to please when responding to questions;
- (n) A tendency to be suggestible, or to acquiesce (agree to scenarios or questions posed to them);
- (o) Fear of authority;
- (p) A tendency to disguise their disability and associated difficulties.

4.4 If intellectual disability is suspected, the following questions may assist in establishing whether a more comprehensive assessment might be appropriate.¹⁰

- (a) Are some things harder for you than for other people? [If yes] What's harder for you?
- (b) How easy is it for you to read?
- (c) What kinds of things do you like to read?
- (d) Do you fill out forms yourself? Do you sometimes get other people to help you?
- (e) How was school for you?
- (f) What school did you go to?
- (g) Did you get extra help at school?
- (h) What do you do for work?
- (i) What do you do for fun?
- (j) Where do you live? Who do you live with?
- (k) Do you get help from someone to look after your home? Does someone help you with things like cooking, cleaning and shopping?
- (l) Are you on a benefit? Can you tell me what the benefit is called?

5. Intellectual disability in the legal context

5.1 International research suggests that people with an intellectual disability are over represented in the criminal justice system, both as victims and as offenders,¹¹ and that they experience disadvantage in the legal system at all stages.¹²

5.2 Due to the nature of their impairment, people with an intellectual disability can experience reduced memory retention, which may affect their ability to recall an event. Others may have limited understanding of their legal rights and court processes. Some people may experience difficulty with language comprehension or expression, be more suggestible to misleading information, or easily confused in the witness box.¹³ All these issues can be addressed through responsive practice.¹⁴

5.3 People with an intellectual disability have identified four key elements integral to quality legal representation: **communication; a good relationship; trust; and openness**. They expressed that lawyers who showed care and concern for their clients were more effective in meeting their legal needs.¹⁵

6. The Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003 (IDCCR Act)

Important: The IDCCR Act only applies when people with an intellectual disability have been charged with or convicted of an imprisonable offence. The IDCCR Act is designed for narrow criminal circumstances, not for civil matters.¹⁶

6.1 The Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003 (IDCCR Act) was specifically designed to provide a disposition pathway for defendants who have been formally diagnosed with an intellectual disability. The Act provides for specialist disability services for individuals with an intellectual disability who have been charged with, or convicted of, an offence that would ordinarily result in a person being sentenced to prison. If the person qualifies, she or he may be directed to specialist disability services for compulsory care and rehabilitation. Section 7(1) explains the meaning of intellectual disability for purposes of the IDCCR Act¹⁷ and s 7(2) provides for how this must be assessed.¹⁸

6.2 **Please note**, these guidelines have an emphasis on effective communication with potentially vulnerable people and are not intended to comprehensively cover the criteria or procedures for: the IDCCR Act 2003; mental defences to crime (such as the insanity defence); and fitness to stand trial. For further detail regarding the interface of the IDCCR Act 2003, MH(CAT) Act 1992 and CP(MIP) Act 2003, see standard texts on criminal law or specialist texts.¹⁹ For a brief overview of the pathway to the IDCCR Act click [here](#).

7. Case and client management with people with intellectual disability

7.1 Participation in legal proceedings can be difficult and stressful for everyone but can be particularly challenging for people with an intellectual disability. However, despite assumptions to the contrary, research has shown that people with intellectual disability are able to give credible evidence when they are given adequate support.²⁰

7.2 This section of the guideline covers practical suggestions for police, lawyers and judges working with people with intellectual disabilities in the context of criminal or other proceedings.

7.3 It is important to understand that different people will need different kinds of assistance at different stages in the legal process. Some people will require a lot of support to participate meaningfully, while others will only need small accommodations or adjustments to legal processes and/or practice.

8. Interviewing when a person has an intellectual disability

8.1 Preparation for interviewing a person with an intellectual disability is important. This increases the person's ability to more fully participate in the proceedings and to give the most complete and accurate evidence that they can. Good practice may mean having to alter or revise customary interviewing practices.

8.2 Where communication and/or comprehension is an issue, you can obtain a specialist Communication Assistant ("CA") to assist in client interviews, witness interviews and suspect interviews. CAs are funded by the Ministry for Courts and/or Legal Aid (to find out more visit the [Communication Assistance Guideline](#)).

Get advice beforehand

8.3 If you are already aware there may be an issue, it is important to find out about the person's communication abilities and needs before the interview. Most importantly, ask people what kinds of support would assist them during the interview.

8.4 Other potential sources of support and advice include:

(a) *Whānau/family*: Speak to the person's whānau/family (with client permission) to ensure appropriate supports are available, and to discover how to increase the person's ability to participate.

(b) *Other support people*: Support workers, advocates or other disability professionals may have more recent or relevant understandings of the person than their whānau/family.

(c) *Communication Assistance*: While some people with intellectual disability will be skilled communicators, in other cases it will be important to have a specialist Communication Assessment Report before the interview. [See the [Communication Assistance Guideline](#)].

(d) *Court Liaison Nurses* (in the context of criminal proceedings). CLNs help with assessment in the court setting. They facilitate referral to appropriate services and give the Court advice on the person's needs.

Build rapport

8.6 Building rapport can put people at ease and make them feel less anxious about giving evidence in formal situations.²¹ Try to develop rapport by asking people non-threatening questions unrelated to the legal proceedings, for example about their hobbies, work and social life.²² Keep in mind that the voice tone and demeanour of the interviewer is also crucial to developing rapport.

Timing and breaks

8.7 Some people with an intellectual disability find it easier to concentrate at certain times of the day: ask the person and those who know them well about when they think the most effective time to conduct an interview would be.

8.8 It is also common for people with an intellectual disability to only be able to concentrate for short periods of time, and to tire easily if they are forced to concentrate for long periods. Several short interviews, or building in regular breaks throughout a longer interview, may be necessary when working with people with intellectual disability.²³ Some people may require a brief break after each question.

8.9 It is important not to rely on the person to tell you when they need a break as they may be too embarrassed to do so. Instead, make a point of asking whether they require a break at regular intervals, or make it your practice to insert regular breaks into the interview.

8.10 Do not delay if the person does ask for a break: a person with an intellectual disability may only ask when he or she is already overwhelmed. Continuing with an interview when the person has specifically asked for a break may result in them being less effective in communicating their evidence.

Plan for extra time

8.11 Communicating with someone who has an intellectual disability requires more time than you may typically allow. In order to ensure active participation, proceed at a slow pace; incorporate frequent breaks; and explain legal matters and processes as you go.

Plain language explanations

8.12 People with an intellectual disability often require more explanations of concepts and legal processes (e.g., the roles of lawyer, judge and witness). Explain in straightforward, plain language, even if they have been involved in the legal system before. For more advice see Section 13 below.

Give reminders

8.13 Repeat and remind the person about the information they have been given as they may find it hard to retain complex information, or to process large amounts of information at once. Be aware that people may need regular reminders about previously discussed concepts or information.

Check comprehension regularly

8.14 Ask the person to explain what is happening or what you have just said in their own words on a regular basis throughout any interview or discussion.²⁴ Their saying that they understand, nodding, or saying “yes” may not mean they actually do. At the end of the interview ask them if they can provide a brief summary of what they have understood.

Written material

8.15 Many people with intellectual disabilities have difficulty reading and writing so do not rely on written material as a means of communication. Provide any written information in plain language or with images and always explain it verbally as well.

Visual aids

8.16 It may be helpful to use visual aids for explanation (such as photos, pictures of room layouts, time-lines or body diagrams) and visual aids for communication (answer cards or stress “traffic light cards”) (see s. 9.12 below).

Complete questioning with closure

8.17 In the final stage of an interview it is best practice to summarise what has been said and to make it clear to the interviewee that if anything in the summary is wrong then it is ok to correct it. This is also a good opportunity to make the person feel as comfortable and relaxed as possible, especially if they have described upsetting events.²⁵

9. Pre-trial directions

9.1 Effective participation in court for a person with an intellectual disability depends on good pre-trial planning, including obtaining the right trial accommodations and good preparation for questioning.

9.2 A range of measures may be needed, along with additional strategies if the person also has another condition, such as autism or a sensory impairment. These measures apply to adults as well as children.

9.3 For defendants and civil parties, seek accommodations for pre-trial appearances as well as for trial or substantive hearings. See [Pre-trial Case Management Guideline](#) for detailed advice as to the mechanics of applications.

Timing applications

Early applications preferred

9.4 Early pre-trial applications for special directions are important:

(a) Some measures, such as expert evidence and a Communication Assessment Report, take time to organise;

(b) Defendants or parties with an intellectual disability will need accommodations during the pre-trial stage as well as during trial/substantive hearing appearances.

Directions for witnesses

9.5 The following pre-trial directions may assist a person with an intellectual disability who is involved in the legal system. If a CA is appointed, his or her report recommendations should guide the court as to pre-trial directions specific to the person's needs.

9.6 See [Pre-trial Case Management Guide](#) for more specific information.

Alternate modes of testifying:

9.7 To reduce distractions, stress and memory deterioration, it may be appropriate to apply for:

- (a) CCTV or screens;
- (b) EVIs as evidence in chief;
- (c) Remote participation;
- (d) Pre-recorded cross-examination.

Communication Assistance:

9.8 Because people with an intellectual disability may have specific difficulties with communication, applying for a CA can be important to assist defendants to understand legal advice, give instructions and participate in court appearances, and to facilitate witnesses to give evidence as fully and accurately as possible. Refer to the [Communication Assistance Guideline](#).

Language directions

9.9 If the person has communication or language difficulties, the Court can be asked for pre-trial directions restricting the language and questions that can be used in examination in chief and cross-examination. See "Language Directions" in the [Pre-Trial Case Management Guideline](#).

9.10 Where a CA has been appointed, his or her report will guide the language directions.

9.11 Otherwise, see "Questioning a Witness with an intellectual Disability" below for a range of accommodations, which may be useful for witnesses and defendants with an intellectual disability while they give their evidence.

Visual aids:

9.12 It may be easier for a person with an intellectual disability to understand information presented visually rather than verbally and to communicate through visual media.²⁶ Permission could be sought for a range of visual aids including:

- (a) Aids to explaining or understanding questions. Options include:
 - Written timelines,
 - Pictures of key places or people,²⁷

- A visual timeline of events, or body outline diagram; or
- Vocabulary charts for key concepts or points.²⁸

(b) Aids to support the witness to communicate. Options include:

- Yes/no/unsure answer cards;²⁹
- Stress scales and break cards, including the “traffic light” system of red/orange/green signs.
- Permission (and/or assistance) to write or type answers to all or certain questions (i.e. to write or type answers on distressing topics);

(c) Aids to following proceedings such as:

- A CA maintaining a visual record to help the person follow the evidence,³⁰ or
- A running translation/account of questions/procedure in simple written language.³¹

(d) Task-oriented supports such as visual “rules of court” reminders and cards to indicate stress levels or need for a break.

(e) Reading assistance: a CA may also help a person to read,³² including by preparing “easy read” versions of documents or simple written translations.³³

Assistance with exhibits:

9.13 While courts often direct a Registrar to assist the witness to find exhibits in photo books, it can be useful to seek a direction. A CA could perform that function also.³⁴

Support persons:

9.14 Under s 79 of the Evidence Act 2006, witnesses can have one or more³⁵ support people – including people well-known to them³⁶ – whilst testifying.

9.15 Defendants can also have support people (whether whānau, support workers or professionals such as a CA or CLN) throughout the hearing or trial.³⁷

9.16 It is also possible to have a professional (nurse or psychologist) monitor how the person is coping periodically, although that person is not a “support person” per se.³⁸ See “Support Persons” in the [Pre-trial Case Management Guideline](#).

Comfort objects:

9.17 Having calming activities and/or comfort objects available in court may be an important stress reduction measure for some people. These include:

- (a) A personally meaningful item;
- (b) Fidget object³⁹ or pens and paper for drawing or colouring;⁴⁰
- (c) Support animals are also a possibility.⁴¹

Court Scheduling:

Consider seeking directions for:

- (a) A priority for the trial as delay can be detrimental to memory;
- (b) A specific and definite start time for giving testimony so the witness is not kept waiting at court;⁴²
- (c) A smaller and quieter or closed court or close the public gallery when the person gives evidence, if the court will not already be closed automatically due to the nature of the evidence;⁴³
- (d) Sitting at times of the day (i.e., mornings only) where the person is more able to concentrate (check with the person, the person's whānau or support worker as to what times are best).⁴⁴

Breaks during appearances:

9.18 Seek directions for:

- More frequent breaks,⁴⁵ either pre-scheduled (without asking the witness) or whenever the witness becomes distressed⁴⁶ or as requested by the CA;⁴⁷
- Longer breaks⁴⁸ or short in-court "mini" breaks (or a mixture);⁴⁹
- Agreement that if an additional break is requested (by the witness or by a CA) it be given without delay;
- A limit to questioning duration per day.⁵⁰

Reduced formality:

9.19 Minimise stimuli and distraction, for example, by removing gowns⁵¹ or not using formal titles.

Good practice example:

“[C]ross-examination of a 16 year old girl with learning disabilities was conducted for two periods of 20 minutes each in the morning, over a period of five days.” Lexicon Limited Planning to question someone with a learning disability (Lexicon Limited, United Kingdom, 2014) at para.3.7.

Meeting judge and counsel

9.20 If the person is willing, introduce him or her to the judge and counsel beforehand to reduce anxiety and find out more about the person’s communication style.⁵²

Ground Rules Hearing

9.21 Ask the Court to timetable a Ground Rules Hearing a week or two before trial with the allocated trial judge and counsel.

9.22 A Ground Rules Hearing is an additional final callover to seek detailed directions fine-tuning any previously-ordered special measures, such as the practicalities of CA’s involvement (where to sit and how to intervene) and/or any language restrictions or restrictions on putting the case, or to ensure the smooth use of any visual aids (i.e. directions might be given for the CA or support person or a Registrar to alert the court to the person’s use of a “stress” card or to read aloud any typed/written answers, and to have a CCTV room camera positioned so that the aids are clearly visible).

9.23 Ground Rules hearings are very useful in any case involving a vulnerable witness or defendant but essential in any case involving a CA.

10. Extra directions for defendants

10.1 In addition to the above, defendants with an intellectual disability may need directions for:

(a) Preparation:

- A courtroom orientation visit for defendants as well as witnesses,⁵³ including any CA in the visit;
- Extra preparation sessions with counsel and any CA (useful for Legal Aid).⁵⁴

(b) Remote participation via audio visual link (AVL) including pre-trials and the whole trial;⁵⁵

(c) Communication assistance in pre-trials and throughout the trial;⁵⁶

(d) Language directions covering all the defendant's court appearances, not just their examination, to enable them to follow proceedings;⁵⁷

(e) Scheduling: Seek directions for:

- Shorter or variable sitting times throughout trial or sitting only at times of the day when the person is most able to concentrate;⁵⁸
- Pre-trials and trials may need to be in smaller or closed courts or ask for pre-trial hearings to be scheduled at quieter times of day or to be listed alone.⁵⁹

(f) Breaks: In addition to taking more breaks while giving evidence (see above), people may need more breaks during the hearing/trial for legal advice and instructions⁶⁰ as well as rest.⁶¹ People may need permission to remain out of court after a break/attend only part of hearings (where counsel can represent them).⁶²

(g) Support at Court: People are able to have one or more support people throughout hearings and trial, including whānau or caregivers or professionals. See "Support Persons" in the [Pre-trial Guideline](#). Professionals such as CLN or a CA are not support people but may also assist and monitor how the defendant is coping during trial.⁶³

(h) Seating arrangements:

- Seek directions as to where and with whom the person sits during trial (e.g.: at a table in easy reach of counsel;⁶⁴ beside counsel or beside counsel and a caregiver or whānau during trial/substantive hearings⁶⁵ or with whānau/caregiver in the public gallery for short appearances)⁶⁶ and while giving evidence (e.g.: beside counsel⁶⁷ or using an alternative mode).⁶⁸

10.2 Judge-alone trials may be fairer and better for some defendants. Judge-alone trials can:

- Reduce distractions and stress;
- Be fairer to defendants whose demeanor (e.g.: lack of emotional response, facial expression etc., or outbursts during questioning) may be perceived negatively by a jury;
- A judge sitting alone may cope better with the necessity for multiple adjournments than would a jury.⁶⁹

Restrictions on co-defendants' cross-examination:

10.3 Where co-defendants will examine a witness, they can be directed to agree which counsel cross-examines on shared areas of concern, avoiding repetition and longer questioning times.⁷⁰

11. Expert advice and evidence

11.1 Input from experts may be important in cases involving a person with an intellectual disability.

Specialist Communication Advice

11.2 Before trial, an expert's advice may be important to help plan communication strategies and appropriate accommodations for interviews and court appearances. A Communication Assistant Assessment Report can provide this advice and the CA can then assist at trial. (Refer to the [Communication Assistance Guideline](#)).

Expert Evidence

(a) Section 38 Report: A s 38 report is key to any application regarding fitness to plead, and even a report that finds a person fit to plead may highlight issues hindering fitness to be tried, prompting applications for directions and/or a full Communication Assessment;⁷¹

(b) At trial, expert evidence can be important to assist the factfinders to interpret the person's behaviours appropriately and give the person's evidence and/or case proper consideration. This applies both in relation to the charges and also to assessing unusual or unanticipated demeanor while the person is in court and under examination or during police interviews;

(c) At sentence, expert evidence may be important to determining mitigating factors and to deciding the appropriate sanction.⁷²

(d) Expert evidence is typically provided by a psychologist or psychiatrist with specialist knowledge of intellectual disability and its specific impact(s) on the person.

(e) Forward planning is important both to find an appropriate, available expert and obtain legal aid or Crown law funding.

12. Preparing a person with an intellectual disability for court

Briefing:

- (a) Allow extra time for briefing a person with an intellectual disability;
- (b) Get expert advice as to how best to communicate;
- (c) Arrange to have support for the person at the briefing if appropriate;
- (d) Some lawyers limit their briefing out of concern that it may become coaching. However, it is appropriate to explain cross-examination in detail, especially that the lawyer may try to suggest answers to them, that it is likely to be challenging and that the lawyer may suggest they are lying or mistaken. People with an intellectual disability are likely to find such challenges particularly difficult. It can be helpful to explain this is not personal but just part of the lawyer's job.
- (e) You should tell people what areas of their evidence are likely to be challenged, but not practise answering challenges on those topics.⁷³
- (f) It is also appropriate to practise cross-examination-type questions on neutral topics, including practicing what to do when they do not know, how to deal with questions suggesting incorrect information or with challenging questions⁷⁴ and how to ask for clarification or a break, and also including practice with any visual aids (answer cards etc.). Research with adults without an intellectual disability suggests that such training improved their ability to seek clarification and resist suggestion.⁷⁵

"Passing": The Importance of Cross-examination Training

In order to avoid social stigma and embarrassment, people with an intellectual disability often learn to disguise or downplay their difficulties. This strategy is sometimes known as "passing". One way of "passing" is to agree with a questioner's suggestions, or to guess at answers. It is important to make sure that people with intellectual disabilities know they can say "I don't know" if they are unsure how to answer a question, rather than guessing or giving the answer that they think the questioner wants.

Courtroom education:

12.1 Have a courtroom orientation visit, including for defendants and including practicing with any CCTV equipment.

Logistical support:

(a) The person may need you to arrange help getting to court (including getting back from breaks) and navigating at court.

(b) It may be helpful for the person to have a supporter who can be there throughout the day to assist them (as well as their s 79 support person for giving evidence).

(c) Ensure people with an intellectual disability are not left sitting in court for long periods before giving evidence. Negotiate a set time for their appearance with the Court and if there is any doubt about timing, arrange with support people to wait for a text or message in a more comfortable, less-threatening location (a local café, a park).

(d) You may need to arrange calming measures: ask the person and/or whānau/ support workers what helps them to stay calm or reduce anxiety (e.g. a comforting object or activity) and arrange for those things during the hearing.

13. Supporting a person with intellectual disability at court

Explanations and advice:

(a) Allow for extra time for explanations and legal advice during the appearance;

(b) Seek adjournments or pauses in proceedings as necessary;

(c) Explain what is happening and signpost any coming changes in process (adjournments, objections), so the person knows where he or she will be taken, why, and what to expect;

(d) You may have to remind people of earlier advice and what they learned during the court familiarisation visit.

(e) Remind them (or have their support person remind them) to use any calming tools or activities previously arranged.

(f) Check in regularly with the person and/or the supporter as to how the person is coping.

Seek a debriefing adjournment

13.1 After people have completed their evidence/appearances, seek a short adjournment to accompany them from court and explain what has happened. See “Post-trial” below.

14. Courtroom questioning

14.1 Understanding the communication style of a person with an intellectual disability is critical for gaining quality evidence.⁷⁶ The method of questioning can have a significant impact on the accuracy and the amount of information they provide.⁷⁷

14.2 The following advice is generally applicable to people with intellectual disability but it is important to ascertain each individual’s communication style and needs. A CA will have specific advice.

Preliminary questions⁷⁸

14.3 Use the person’s preferred name.⁷⁹

14.4 A few questions on neutral topics at the outset of questioning can reduce a person’s anxiety and improve his or her ability to answer questions.⁸⁰

Remind the person of the “rules of questioning”

14.5 Unless the judge has gone through the basics with the witness quite recently, make it clear that:

- (a) “I don’t know” is an acceptable answer;
- (b) You want them to correct you if you get it wrong;
- (c) You want them to tell you if they do not understand a question or want a break.
- (d) However, do not expect the person to be able to follow the “rules” (e.g., to ask for clarification or breaks), and remain alert for signs that they may be tiring or becoming confused.

Tone

14.6 Use a calm and non-adversarial tone and manner: Aggressive or sceptical cross-examination may increase distress and confusion.⁸¹

Get their attention

14.7 Ensure the witness knows you are questioning them:

- (a) Look at the person;
- (b) Use their name often;
- (c) Ask questions, not statements (“Dad didn’t hit you?” may not be understood as a question).

Counsel “shuffled his papers and looked at the jury, avoiding eye contact with an adult witness with learning disabilities, who was confused as to whether she was meant to respond to his questions.”
Lexicon Limited Planning to question someone with a learning disability (Lexicon Limited, United Kingdom, 2014) at para.3.9.

Signpost topics

14.8 Explain what you are going to ask about (“I want to ask you about what happened in the shop first.”)⁸²

14.9 Signpost changes in topic: (“That’s all I want to ask about the shop. Now I want to talk about what happened in the park.”)⁸³

14.10 Signpost changes in process (“That is all I wanted to ask you. Now Ms Heta will ask you some questions.”).

Pace

(a) Speak slowly and slow the pace of questioning;⁸⁴

(b) Allow much more time for the person to process questions and to answer them before you conclude they are not answering;⁸⁵

(c) If they still do not answer, rephrase your question (a CA may help with this);

(d) While the person is giving his or her answer do not interrupt;⁸⁶

(e) Allow extra time for the person to locate and assess exhibits, photo books etc. Ask a Registrar to locate photos etc.⁸⁷

Language tips

14.11 For further advice on how to simplify language see any CA appointed and/or the Questioning Children Guideline may also be useful for adults with communication/comprehension impairments.

Use plain language

14.12 Use simple, ⁸⁸ plain language. ⁸⁹

14.13 Avoid any legal terms or jargon, such as “charges” “committal”, “your evidence”, “the defendant” and legalese such as “I put it to you” or “my learned friend”;

14.14 Check that people understand the legal terms or more sophisticated vocabulary you do use by asking them to explain it in their own words;

14.15 Learn the person’s own words for specific things, such as body parts, and people (e.g., which name the person uses for their paternal grandmother versus their maternal grandmother), remembering that words could be culturally based. Ideally, make inquiries before trial and then check the word is right when they are on the stand; ⁹⁰

14.16 Be consistent in your use of words (e.g., use the same words to refer to objects, people, places). Once you know the witness understands a term, stick with it and avoid synonyms (i.e., if they say “cross” don’t say “angry”). ⁹¹

14.17 **Use concrete language: Avoid metaphor and idiom:** Avoid metaphor, idiom and other figurative language as people with an intellectual disability can often misinterpret them. ⁹²

“Q: ‘Nothing stood out then?’

A: ‘I were sitting down’ (asked of a 16 year old with moderate intellectual disabilities).”

Lexicon Learning Disabilities Toolkit para.4.4.

Real-life Examples of Lawyer’s Bad Figurative Speech

‘Bear with me’, ‘Set me straight’, ‘Not in any way, shape or form’, ‘I’m going to jog your memory’ or ‘Draw your own conclusions’. . . . ‘Did you kick yourself when you found out?’ ‘Were you and Jane close?’ ‘Who

would you say wears the trousers in your house?' 'Do you remember falling out with your boyfriend?'
Lexicon Autism Toolkit para.4.3

Use proper nouns and full descriptions:

(a) Use proper names and nouns rather than pronouns (him, her, it), to avoid ambiguity. For example, "Where was Fred when you shot him?" is clearer than "Where was he when you did it?".⁹³

One thought one question

14.18 Use short, one-topic questions,⁹⁴ one question at a time, not composite or roll-up questions.⁹⁵

"Did you tell the police about what is in that statement about the matter, about the touching of the boobs?" (asked of an 11 year-old). This can cause comprehension problems even for adults. Better options include: 'You said Jim touched your boobs. Did you tell the police?'"
Lexicon Limited Planning to question someone with a learning disability
(Lexicon Limited, United Kingdom, 2014) at para.4.6.

Avoid negatives

14.19 Negative sentences are harder to process and can be more difficult to respond to. Phrase things positively wherever possible: "Were you in the shop?" is better than "You were not in the shop, were you?".⁹⁶

Be Precise

14.20 Ask precise questions that identify the topic exactly ("Where were you on your 21st birthday?" not "Where were you on your birthday?").⁹⁷

Avoid the passive voice

14.21 Use the active, not passive voice: e.g., "Mr Jones asked you some questions" not "You were asked some questions by Mr. Jones". "The dog bit you" not "you were bitten by the dog."⁹⁸

Take care with “Do you remember?”

14.22 “Do you remember?” questions can sometimes be confusing,⁹⁹ for example when someone is asked to recall something they said earlier, such as something said in an EVI interview.¹⁰⁰

14.23 It can sometimes be unclear whether the question is about the act of remembering or the actual event, and so answers can also become unclear. A “yes” to “Do you remember if it was raining?” could mean “yes, I do remember whether or not it was raining” or “yes, it was raining”. It would be better to ask “what was the weather like?”

Use a chronological, logical sequence

14.24 Questions should follow a logical order, and the chronological order of the events in question, wherever possible.¹⁰¹ Asking questions randomly or out of sequence can be confusing for people with an intellectual disability.¹⁰²

Leading questions: avoiding coercion and suggestion

14.25 People with an intellectual disability may be more suggestible during questioning than people without an intellectual disability. This may render people with intellectual disability relatively more susceptible to intimidation and coercion.¹⁰³

Use open-ended, free-recall questions:

14.26 Open ended, free-recall questions (“Tell me everything you remember about going shopping with Sue”) are easiest for people with an intellectual disability to understand and generate the most accurate and complete information. People with an intellectual disability have been found to respond to free-recall, open-ended questions as accurately as the general population.¹⁰⁴ The more specific the questions become, the *less accurate the response elicited may be*.¹⁰⁵

Avoid leading questions:

14.27 Leading questions contain and imply the suggested or preferred answer. People with an intellectual disability may be more likely to comply with the suggestion.¹⁰⁶

14.28 Courts have recognised the dangers of leading questions to vulnerable people,¹⁰⁷ and are particularly conscious of “tagged” questions (i.e.: statements turned into questions by a reinforcing “tag” such as “didn’t you?”).¹⁰⁸ Some judges have directed counsel to use open questions in cross-examining vulnerable witnesses,¹⁰⁹ and have restricted

interruptions to allow witnesses to give evidence in a more free-recall, narrative form.¹¹⁰

Avoid yes/no questions:¹¹¹

(a) Closed questions which require a “yes” or “no” answer only (“Was the man wearing a black jacket?”) are less effective in eliciting accurate, detailed information because witnesses may merely accept or reject the information that is offered.¹¹² They are also likely to elicit a compliant response from witnesses with an intellectual disability.¹¹³

(b) Yes/no questions are likely to become more and more suggestive when asked in a strong manner or in sequences (i.e.: several consecutive questions with a “yes” answer can encourage witnesses to continue to say “yes” to subsequent questions).¹¹⁴

Avoid forced choice questions¹¹⁵

14.29 With forced choice questions (“Was the car red or green?”), some people with intellectual disabilities may feel obliged to choose an option and be deterred from explaining that neither is correct.

Avoid statement-questions¹¹⁶

14.30 Statements posed as questions (“The red car hit the green car?”) may not be understood as needing a response and can be hard for people with an intellectual disability to resist or deny.

Repeat with care:

14.31 Avoid repetitive questioning.¹¹⁷ Repeating a question may be necessary to help people understand BUT it can be very suggestive if people interpret this as meaning that their earlier response was wrong.

14.32 If you have to repeat a question, it can be helpful to ask the same question in a different way and explain why you are doing so (e.g. to check that you understand what they are saying).¹¹⁸

14.33 If your original question was potentially confusing, acknowledge that possibility, so that the person understands why you are asking the same thing again in a different way.

Avoid allegations of lying or mistake:

14.34 Suggesting (whether in words, tone or facial expression) that they are lying or mistaken can be very distressing for people with an intellectual disability and can disrupt their concentration.¹¹⁹

14.35 If such allegations must be made, keep questions short and restrict them to the end to avoid causing distraction during the bulk of their questioning.¹²⁰

Putting the case:

14.36 Courts have ruled it is not necessary for witnesses to answer questions putting the case where the risk of becoming overwhelmed and/or compliant is too great. Courts have also said that witnesses do not need to be asked questions they are unable to answer (such as on peripheral details). They have said that answers to such questions may legitimately be disregarded as unreliable.¹²¹ See the [Pre-trial Guideline](#) "Language restrictions: Putting the case" for the procedural safeguards used when the duty to put the case is restricted.

14.37 Note that questioning on third-party material such as medical records can also cause witnesses great distress, without being necessary (as questions could be asked of the clinician. Such questions may also be better avoided.¹²²

Check Understanding:

(a) People with an intellectual disability are more likely to agree with questions that they do not understand, making it doubly important to check their comprehension.¹²³

(b) Actively check the person's understanding of potentially difficult terms or confusing language (i.e. by asking them to repeat it back in their own words);¹²⁴

(c) A nod or "yes" response to "do you understand?" is not sufficient proof of understanding;

(d) Double check any retractions or confessions during examination;

(e) When you are checking, it may be better to use "is that true?" or "is that correct?" rather than "is that right?" which may carry more weight because of its additional meaning of "morally right".¹²⁵

[greybox]

How not to examine:

Prosecutor: 'If you do not understand a word I use, please can you indicate it?'

Defendant: 'Yes'

Prosecutor: 'If you don't indicate it, I am going to assume you understood the word; do you follow?'

Defendant: 'Yes'

Intermediary: 'Your Honour, Miss X may not even understand the word "indicate"'. [. . .]

Prosecutor: 'Do you understand the word "indicate"?'

Defendant: "No."

O'Mahony (2012) cited in Lexicon Limited Planning to question someone with a intellectual disability (Lexicon Limited, United Kingdom, 2014) at para.4.12.

The Experience of Being Cross-examined

"Person with an intellectual disability: I was getting very stressed out, cause I wanted let go, because he was just going and going and going and half of it was all lies.

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

Person with an intellectual disability: Yeah, well I didn't have anyone beside me. And I didn't have anyone you know to talk to. Too hard, cause I was up there by myself.

Interviewer: If you had somebody with you to explain it would that have been easier?

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

Participant with an intellectual disability quoted in Mirfin-Veitch, Gates, Diesfeld, & Henaghan, 2014, 18.

15. Post-trial support

Witnesses need counsel or an agent to:

- (a) Explain the outcome of the case in plain language;
- (b) Check whether the person has or needs ongoing support relating to the case;
- (c) Advise on entitlements such as compensation for expenses;
- (d) Where there is a guilty verdict, if a complainant elects to make a Victim Impact Statement (VIS), prosecutors must assist complainants to prepare an appropriate statement and to deliver the same so the Judge can take it into account at sentencing.¹²⁶

Defendants need counsel to:

- (a) Explain the outcome of the case in plain language;
- (b) Check whether the person has or needs ongoing support relating to the case;
- (c) Explain rights of appeal if necessary;
- (d) Be aware that expert evidence is relevant to sentencing a person with an intellectual disability both in terms of mitigation and in terms of the appropriate penalty.
- (e) If the outcome includes other processes under the CPMIP Act (such as s 35 assessments) then link them in with the FCS(ID) service (see section 6).
- (f) If necessary, have a CA or support person assist during these post-trial stages.

16. Acknowledgements

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Information on copyright is provided here [[link](#)].

17. References

[1] Ngā Tangata Tuatahi – People First New Zealand, a national Disabled Person’s Organisation (DPO) express a clear preference for the term learning disability.

[2] American Psychiatric Association *Diagnostic and Statistical Manual of Mental Disorders* (5th ed, American Psychiatric Association, Arlington, 2013) at 38.

[3] American Psychiatric Association, above n [2](#), at 33.

[4] American Psychiatric Association, above n [2](#), at 37.

[5] American Psychiatric Association *Diagnostic and Statistical Manual of Mental Disorders* (4th ed, American Psychiatric Association, Washington, 2005) at 40.

[6] Although the Diagnostic and Statistical Manual V (DSMV) is the most current edition of this guideline for assessment, the previous edition (DSM IV) continues to have relevance for people with intellectual disability in New Zealand. The DSM IV intellectual disability diagnostic criteria requires an individual to have an (i) IQ of less than 70 (ii) impairments in adaptive functioning and (iii) the onset of these impairments to have occurred before the age of 18. The DSM IV definition is reflected in New Zealand’s more detailed definition within the Intellectual Disability (Compulsory Assessment and Treatment) Act (2003) (section 7), which applies to a narrow category of people with intellectual disability who have committed a criminal offence. (Refer to section 6 of this guideline for information about intellectual disability specific legislation).

[7] American Psychiatric Association, above n [2](#), at 40.

[8] Brigit Mirfin-Veitch, Kate Diesfeld, Sue Gates, and Mark Henaghan *Developing a more responsive legal system for people with intellectual disability in New Zealand* (Donald Beasley Institute, Dunedin, 2014) at 47.

[9] Gisli Gudjonsson and Theresa Joyce “Interviewing adults with intellectual disabilities” (2011) 5 *Advances in Mental Health and Intellectual Disabilities* 16 at 17; Voula Marinos

and others "Victims and Witnesses with intellectual disabilities in the Criminal Justice System" (2014) 61 *Criminal Law Quarterly* 517 at 520.

[10] Foundation for People with Learning Disabilities "How to spot signs that a person has a learning disability" < https://www.mentalhealth.org.uk/sites/default/files/cjs-spot-signs_0.pdf>; For more detailed information see Faculty of Forensic and Legal Medicine "Assessment of People with Learning Difficulties and Disabilities in Police Custody" (Oct 2017) < <https://fflm.ac.uk/wp-content/uploads/2015/10/Assessment-of-People-with-Intellectual-Difficulties-and-Disabilities-in-Police-Custody.pdf>>

[11] Celine Mercier and Anne Crocker "The first critical steps through the criminal justice system for persons with intellectual disabilities: Critical steps through the criminal justice system for intellectual disabilities" (2010) 39 *British Journal of Learning Disabilities* 130 at 131.

[12] Marie Henshaw, Benjamin Spivak and Stuart Thomas "Striking the right balance: Police experience, perceptions and use of independent support persons during interviews involving people with intellectual disability" 31 (2016) *Journal of Applied Research in Intellectual Disabilities* 201 at 201; Voula Marinos, above n 8, at 517.

[13] Department of Attorney-General "Equality before the Law Benchbook" (2009) Perth, Western Australia < https://www.supremecourt.wa.gov.au/files/equality_before_the_law_benchbook.pdf> at 4.2.13.

[14] The Disability Rights Commission (UK) noted that when working with offenders with intellectual disabilities the focus should be less on "vulnerability, risk and dependency" and more on "choice, control, and participation." < www.ohrn.nhs.uk/resource/policy/NoOneKnowPrevalence.pdf> at 41.

[15] Mirfin-Veitch and others, above n 8, at 14.

[16] John Dawson "The Legal Framework for Forensic Care" in Peter Skegg and Ron Paterson (eds) *Health Law* (Thomson Reuters, Wellington, 2015), 487.

[17] According to S 7(1) of the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003 a person has an intellectual disability if the person has a permanent impairment that—

- (a) Results in significantly sub-average general intelligence; and
- (b) Results in significant deficits in adaptive functioning, as measured by tests generally used by Clinicians, in at least 2 of the skills listed in sub-section (4); and
- (c) Became apparent during the developmental period of the person.

[18] S 7(2) IDCCR Act provides that "wherever practicable, a person's general intelligence must be assessed by applying standard psychometric tests generally used by clinicians". Therefore, when representing someone under the IDCCR Act, this should be arranged.

[19] Examples include:

- Brookbanks, W. (2013) Further reforms to fitness to stand trial. In J. Dawson and K. Gledhill (Eds) *New Zealand's Mental Health Law in Practice*. Wellington: Victoria University Press.
- Dawson, J. (2015) The legal framework for forensic care. In P.D.G. Skegg and R. Paterson (Eds) *Health Law in New Zealand*. Wellington: Thomson Reuters. (481-514).
- Mackay, R & Brookbanks, WJ, (eds) *Fitness to Plead: International and Comparative Perspectives* (Oxford University Press, Oxford, 2018).
- Bell, S & Brookbanks, WJ, (2017) *Mental Health Law in New Zealand* (Thomson Reuters, Wellington, 2017).

[20] Peter Bowles and Stefanie J Sharman "A Review of the Impact of Different Types of Leading Interview Questions on Child and Adult Witnesses with Intellectual Disabilities" 21 (2014) *Psychiatry, Psychology and Law* 205 at 206; Ilana Hepner, Mary Woodward, and Jeanette Stewart "giving the Vulnerable a Voice in the Criminal Justice System: The Use of Intermediaries with Intellectual Disability" (2015) 22 *Psychiatry, Psychology and Law* 453 at 455.

[21] Advocacy Training Council of the Bar of England & Wales *Raising the bar* (Advocacy Training Council of the Bar of England & Wales, 2011) at 55.

[22] Ray Bull "The investigative interviewing of children and other vulnerable witnesses: Psychological research and working/professional practice" 15 (2010) *Legal and Criminological Psychology* 5 at 9.

[23] Ministry of Justice *Achieving best evidence in criminal proceedings* (Ministry of Justice, United Kingdom, 2011) at 33.

[24] Lexicon Limited *Planning to question someone with a intellectual disability* (Lexicon Limited, United Kingdom, 2014) at 7.

[25] Gudjonsson and Joyce, above n [9](#), at 19 and 20.

[26] Department of Health "Positive practice positive outcomes: A handbook for professionals in the criminal justice system working with offenders with intellectual disabilities" (2011) <<http://www.gov.uk/government/publications/positive-practice-positive-outcomes-a-handbook-for-professionals-in-the-criminal-justice-system-working-with-offenders-with-a-intellectual-disability>> at 32.

[27] *R v IA and others* [2013] EWCA Crim 1308 at [17]; *R v Aitchison* [2017] NZHC 3222 at [17].

[28] *Dixon v R* [2013] EWCA Crim 465 at [94]; *Hemi v Police* [2017] NZHC 714 at [17].

[29] *R v Aitchison*, above n [27](#), at [37]; Joyce Plotnikoff and Richard Woolfson *Intermediaries in the Criminal Justice System* (Bristol University Press, 2015) at 152-153.

[30] *Dixon v R*, above n [28](#), at [94]; *R v Hemi*, above n [28](#), at [17].

[31] *Dixon v R*, above n [28](#), at [94]; CA helps VD follow evidence and read documents; *R v Beards and Beards* [2016] EW Misc B14 at [7].

[32] [R v Beards and Beards](#), above n [31](#), at [7]. [Dixon v R](#), above n [28](#), at [94].

[33] [R v Hemi](#), above n [28](#), at [17].

[34] [R v Poutawa](#) [2009] NZCA 482 at [11].

[35] [D’Ath v Police](#) [2015] NZHC 2605 at [4] ; [R v AGR](#) [2017] NZHC at [13 – 14].

[36] [D’Ath v Police](#), above n [36](#), at [4] ; [R v AGR](#), above n [36](#), at [13 – 14]; [H v R](#) [2016] NZCA 360 at [18 – 19]; [R v E](#) [2007] NZCA 404 at [42]; [Smith v R](#) [2015] NZCA 217 at [28 – 34].

[37] [Ruka v R](#) [2011] NZCA 404 at [84-85]; [R v Beards and Beards](#), above n [31](#), at [7]; [Burling v Police](#) [2015] NZHC 2526 at [29]; [R v Sutherland](#) [2012] ACTSC 62 at [98]; [R v Hamberger](#) [2017] EWCA Crim 273 at [44]; [R v Kaukasi](#) High Court, Akld T 014047 4 July 2002.; [Stanley v Police](#) [2017] NZHC 790 [7].

[38] [R v Monaghan \(No.2\)](#) [2011] ACTSC 62; [R v Kaukasi](#), above n [37](#).

[39] [R v BL](#) [2016] ACTSC at [131]; [R v Beards and Beards](#), above n [31](#), at [7].

[40] See generally Plotnikoff and Woolfson, above n [29](#).

[41] Support dogs are now available in some NZ courts: <http://www.lawsociety.org.nz/lawtalk/lawtalk-archives/issue-898/louie-the-courthouse-dog>. People may also use their own animals: [R v BL](#), above n [40](#), at [28], [89-90] [94] (10 year old witness with ASD was allowed to have her assistance dog with her while she gave evidence to help reduce anxiety); [Forest v Queensland Health](#) [2007] FCA 936; (2007) 161 FCR 152 at 181; [113].

[42] E.g.: Children are usually best in the morning only. Scheduling them for the second day of trial, even if they are complainants, ensures they go on early. An expert witness can be called on the first day instead: Experts often prefer that firm time slot. This is routine practice in the Child Witness and Serious Sexual Offences Pilot courts.

[43] [R v Ruka](#), above in [37](#), at [84-85].

[44] [R v Hetherington](#) [2015] NZCA 248 at [27]; [Jones v R](#) [2015] NZCA 601 at [49]; [Monk v R](#) [2015] NZCA 113 at [22]; [R v Beards and Beards](#), above n [31](#), at [8] (the Court sat for two two hour slots: 10.30am-12.30pm; 1.30pm-3pm).

[45] [R v Hetherington](#), above n [44](#), at [27]; [R v Beards and Beards](#), above n [31](#), at [8] (breaks every 30 minutes); [R v Hamberger](#), above n [37](#), at [44]; [R v JPA](#) [2014] NZHC 1534 at [52] (breaks every 45 minutes); [R v Willeman](#) [2008] NZAR 644 (only one hour of questioning a day) at [5]; [G v R](#) [2015] NZCA 327 at [18], [54] (breaks every hour); [Jones v R](#), above n [44](#), at [49]; [Police v HJ](#) [2016] NZYC 168 at [17]; [Stanley v police](#), above n [37](#), at [7]; [Wiltshire Council v A](#) [2013] EWHC 3502 (Fam) at [51]; [R v Grant-Murray](#) [2017] EWCA Crim 1228 at [205] (every hour).

[46] [Burling v Police](#), above n [38](#), at [29].

[47] [R v Aitchison](#), above n [27](#), at [22].

[48] *R v Beards and Beards*, above n 31, at [8] (30 minutes); *Te Wini v R* [2011] NZCA 405 at [19] (30 minutes); *R v Grant-Murray*, above n 45, at [205] (20 minutes).

[49] Where everyone remains in place in court but the VW has a few minutes' privacy in the CCTV room (only the judge's camera remains on).

[50] *R v Lubemba* [2014] EWCA Crim 2064 (45 minutes for a 10 yr old: [32], [43], [52]); *R v Hamberger*, above n 37, at [44]; *R v Willeman*, above n 46, at [5] (one hour of questioning per day); *R v W & M* [2010] EWCA Crim 1926 (8 yr old complainant cross-examined for 45 minutes in the morning and one 45 and one 15 minute slot in the afternoon).

[51] *R v Kaukasi*, above n 38, at [19].

[52] *R v Lubemba*, above n 50, at [43]. See also recommended practice in Judicial College (UK), Equal Treatment Benchbook <<https://www.judiciary.uk/wp-content/uploads/2018/02/equal-treatment-bench-book-february2018-v5-02mar18.pdf>> at 2-17 [56]. Meetings are held in the Sexual Offences Pilot Courts but are not always appropriate: *R v Aitchison*, above n 27, at [19].

[53] *Te Wini v R*, above n 48, at [19]; *R v Grant-Murray*, above n 45, at [109-10].

[54] *R v Monaghan (No.2)*, above n 38; *R v Sutherland*, above n 37, at [98]; *Te Wini v R*, above n 48, at [19]; *Titford v R* [2017] NZCA 331 at [51-52].

[55] *State of Western Australia v Mack* [2012] WASC 127 at [47].

[56] *Re D* (No.3) [2016] EWFC 1; *Re R* [2014] EWCC B41 Fam; *Re C* [2014] EWCA Civ 128; *Wiltshire Council v A*, above n 45; *R v Rashid* [2017] EWCA Crim 2.

[57] *R v Cox* [2012] EWCA 549; *R v Monaghan*, above n 38; *Barton v R* [2012] NZCA 295 at [34].

[58] *R v Hetherington*, above n 44, at [27]; *Jones v R*, above n 44, at [49]; *Monk v R*, above n 44, at [22]; *R v Beards and Beards*, above n 31, at [8] (the Court sat for two two hour slots: 10.30am-12.30pm; 1.30pm-3pm).

[59] *R v Ruka*, above n 37, at [84-85].

[60] Increased breaks to consult counsel during trial *Police v HJ*, above n 45, at [17]; *Stanley v Police*, above n 37, at [7]; *R v Ruka*, above n 37, at [84]; *R v Monaghan*, above n 38; *R v Sutherland*, above n 37, at [98]; *Hemopo v R* [2016] NZCA 398 at [13] and before court during trial *Titford v R*, above n 54, at [51-52].

[61] *R v JPA*, above n 45, at [52].

[62] *R v JPA*, above n 46.

[63] *R v Monaghan*, above n 39; *R v Kaukasi*, above n 38.

[64] *R v Kaukasi*, above n 37 (cited in *Te Wini v R* [2011] NZCA 405 at [19]) (young defendants sitting at special table in well of court with counsel & support person able to join for periods); *Titford v R*, above n 54, at [52] (paranoid adult defendant sat at table

close to counsel with materials to write notes); [R v Grant-Murray](#) [109-10] (easy access to counsel at all times).

[65] [Ruka v R](#), above n [37](#), at [84-85]; [R v Beards and Beards](#), above n [31](#), at [7].

[66] [Ruka v R](#), above n [37](#), at [84-85]. See also [Burling v Police](#), above n [37](#), at [29]; [R v Sutherland](#), above n [37](#), at [98]; [R v Hamberger](#), above n [37](#), at [44]; [R v Kaukasi](#), above n [37](#).

[67] [R v Beards and Beards](#), above n [31](#), at [7].

[68] [Te Wini v R](#), above n [47](#), at [26]; [R v Kaukasi](#), above n [37](#); [R v Hamberger](#), above n [37](#), at [44].

[69] [State of Western Australia v Mack](#), above n [55](#), at [43].

[70] [R v Jonas \[2015\] EWCA 562](#). See also [R v Butt \[2005\] EWCA Criminal 805](#) for the general rule on the avoidance of repetitious and prolix questioning. In practice this means defence counsel consult each other prior to the GRH and decide who covers what topic.

[71] [Jones v R](#), above n [44](#); [New Zealand Police v VT \[2015\] NZYC 819](#); [Burling v Police](#), above n [37](#); [Police v HJ](#), above n [45](#); [Stanley v Police](#), above n [37](#).

[72] [Ellery v New Zealand Police \[2015\] NZHC 480](#); [Burling v Police](#), above n [37](#); [R v Walls \[2011\] EWCA Crim 443](#); [Dixon v R](#), above n [28](#); [R v Monaghan](#), above n [38](#); [R v Tuigamala \[2007\] NSWSC 493 ACTSC 62](#).

[73] [R v Momodou & Limani \[2005\] EWCA Crim 177](#) at [48]-[49].

[74] Bull, above n [22](#), at 9.

[75] Jacqueline Wheatcroft and Louise Ellison "Evidence in Court: Witness Preparation and Cross-Examination Style Effects on Adult Witness Accuracy" (2012) 30 *Behavioral Sciences & the Law* 821 at 834 – 835.

[76] Gudjonsson and Joyce, above n [9](#), at 19.

[77] Mark Kebbell, Christopher Hatton and Shane Johnson "Witnesses with intellectual disabilities in court: what questions are asked and what influence do they have?" (2004) 9 *Legal and Criminological Psychology* 23 at 24.

[78] Bull, above n [22](#), at 9.

[79] Lexicon Limited, above n [24](#), at 5.

[80] Henshaw and others, above n [12](#), at 53.

[81] Mirfin-Veitch and others, above n [8](#), at 17.

[82] [R v Edwards \[2011\] EWCA 3028](#) [25]; Judicial College (UK), above n [52](#), at 2.30 [137].

[83] [R v Edwards](#), above n [82](#), at [25]; Judicial College (UK), above n [52](#), at 2.30 [137].

[84] Gudjonsson and Joyce, above n [9](#), at 18; *Burling v Police*, above n [37](#), at [29]; *R v Monaghan*, above n [38](#), at [31]; *Barton v R*, above n [57](#), at [19].

[85] *R v Tuigamala*, above n [72](#), at [22].

[86] *R v Monaghan*, above n [38](#), at [31] (this case involved a defendant with an intellectual disability).

[87] *R v Poutawa*, above n [34](#), at [11].

[88] *Burling v Police*, above n [37](#), at [29]; *R v Poutawa*, above n [34](#).

[89] Section 85 [Evidence Act 2006](#) judges may disallow questions “expressed in language that is too complicated for the witness to understand”; *R v Barker* [2010] EWCA 1 at [42]; *R v Lubemba*, above n [50](#), at [52]; *Burling v Police*, above n [37](#), at [29]; *Ward v R* [2017] VSCA 37 at [11], [122], 125 [33]; Department of Health (UK), above n [26](#), at 32.

[90] Gudjonsson and Joyce, above n [9](#), at 18.

[91] Gudjonsson and Joyce, above n [9](#), at 18.

[92] Judicial College (UK), above n [52](#), at 2.31-32 [139].

[93] Lexicon Limited, above n [24](#), at 6.

[94] *Police v HJ*, above n [45](#); *R v W & M*, above n [50](#); *R v Lubemba*, above n [50](#), at [52]; *R v Monaghan*, above n [38](#), at [31]; *Barton v R*, above n [57](#), at [19]; *R v Beards and Beards*, above n [31](#), at [10].

[95] See *R v Barker*, above n [89](#); *R v W & M*, above n [51](#); *R v Beards and Beards*, above n [31](#), at [10]; *Ward v R*, above n [89](#).

[96] Lexicon Limited, above n [24](#), at 9.

[97] Department of Health, above n [26](#), at 32.

[98] Department of Attorney-General, above n [13](#), at [4.4.6].

[99] Lexicon Intellectual Disabled Toolkit para.5.6; Lexicon Autism Toolkit para.5.5. English Equal Treatment Benchbook 2.31-32 [139].

[100] Lexicon Limited, above n [24](#), at 8.

[101] Judicial College, above n [52](#), at 2.30 [138].

[102] Mark Kebbell, Chris Hatton, and Shane Johnson “Witnesses with learning disabilities in court: full report of research activities and results: final report to the Economic and Social Research Council” (Birmingham: University of Birmingham, 2000).

[103] Celine Mercier and Anne Crocker, above n [10](#), at 131; Gudjonsson and Joyce, above n [9](#), at 17.

[104] Rooy Cederborg and M Lamb "Repeated interviews with children who have intellectual disabilities" (2008) 21 *British Institute of Learning Disabilities* 103 at 104; Bull, above n [22](#), at 15; Bowles and Sharman, above n [20](#), at 206 – 207.

[105] Kebell and others, above n [77](#), at 24.

[106] Kebell and others, above n [77](#), at 24.

[107] Section 85 Evidence Act: judges may disallow "unfair" or "misleading" questions. Cases on the risk of compliance: *R v W & M*, above n [50](#), at [30-31]; *R v Edwards*, above n [82](#); *R v Lubemba*, above n [50](#), [52]; *R v Grant-Murray*, above n [45](#); *McGill and Hewitt* [2017] EWCA Crim 1228 at [114]; *R v Beards and Beards*, above n [31](#), at [10]; *Ward v R*, above n [89](#); *Jones v R*, above n [44](#), at [35-36], [49]. Cases in which courts have rejected leading questions: *R v Edwards*, above n [82](#); *R v Wills* [2011] EWCA 1938; *Barton v R*, above n [57](#), at [33]; *Metu v R* [2016] NZCA 124. See also Judicial College (UK), above n [52](#), at 2.30 [138], where the advice is "no leading questions".

[108] Department of Health, above n [26](#), at 32; cases criticizing tagged questions: *R v Wills*, above n [108](#), at [30]; *R v Edwards*, above n [82](#); *W & M v R*, above n [50](#), at [30-31]; *R v Lubemba*, above n [50](#), at [52]; *R v Grant-Murray*, above n [45](#), at [114]; *R v Beards and Beards*, above n [31](#), at 10; *Ward v R*, above n [89](#), *Metu v R*, above n [107](#).

[109] Courts have directed counsel to prefer open questions, even in cross-examination: *Barton v R*, above n [57](#), at [33]; *Jones v R*, above n [44](#), at [49]; *R v Edwards*, above n [82](#); *R v W & M*, above n [50](#); Judicial College (UK), above n [52](#), at 2.31-32 [139]; *Metu v R*, above n [107](#) (no blanket bans).

[110] *R v Monaghan*, above n [38](#), at [31].

[111] Judicial College (UK), above n [52](#), at 2.31-32 [139].

[112] Lexicon Limited, above n [24](#), at 8.

[113] Kebell and others, above n [77](#), at 24.

[114] Lexicon Limited, above n [24](#), at 9.

[115] Judicial College (UK), above n [52](#), at 2.31-32 [139].

[116] Judicial College (UK), above n [52](#), at 2.31-32 [139].

[117] Judicial College (UK), above n [52](#), at 2.30 [138]; *R v Jonas*, above n [34](#). See also *R v Butt*, above n [70](#), for the general rule on the avoidance of repetitious and prolix questioning.

[118] Keith Bowden, Fergus Douds, and Yasmin Simpson "People with Learning Disabilities and the Criminal Justice System" (2011) Copfs
< http://www.copfs.gov.uk/images/Documents/Victims_and_Witnesses/People%20with%20Learning%20Disabilities%20and%20the%20Scottish%20Criminal%20Justice%20System.pdf > at 23.

[119] Lexicon Limited, above n [24](#), at 9.

[120] Lexicon Limited, above n [24](#), at 9.

[121] Section 92 Evidence Act states witnesses need only be asked about matters on which they can reasonably be expected to answer. Courts have referenced the dangers of putting allegations which are confusing or overly distressing a number of times: [R v Pipe \[2014\] EWCA Crim 2570](#) at [20, 22]; [R v Edwards](#), above n [82](#), at [28]. On putting the case to vulnerable people generally see *R v Barker*, above n [89](#), at [42]; [R v Lubemba](#), above n [50](#), at [40], [45]. In *Lubemba* the Court endorsed the advice that “when the witness is young or otherwise vulnerable, the court may dispense with the normal practice and impose restrictions on the advocate 'putting his case' where there is a risk of a young or otherwise vulnerable witness failing to understand, becoming distressed or acquiescing to leading questions.” [40]; Judicial College (UK), above n [52](#), at 2.31-32 [139].

[122] Judicial College (UK), above n [52](#), at 2.32 [140-41].

[123] *Kebell and others*, above n [77](#), at 24.

[124] *R v Monaghan*, above n [38](#), at [31]; *Barton v R*, above n [57](#), at [34] (including having him repeat in own words “everything said in court”); *Police v HJ*, above n [45](#), at [17].

[125] Lexicon Limited, above n [24](#), at 6.

[126] Sections 17 & 18 [Victims’ Rights Act 2002](#). The VIS is often best done initially relatively early in the process (especially as some court processes can last for years) and the police support this process. The statement can be expanded on over time and updated after a guilty verdict.