



**Submission to The Royal Commission of Inquiry into  
Abuse in Care: Access to Justice for People with  
Intellectual Disability**

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## 1. Key points and recommendations

IHC welcomes the opportunity to provide a submission on how people with intellectual disability have sought redress in the legal system for abuse they have suffered in care. IHC will make an additional submission in 2020 on the broader historical and social policy issues related to the vulnerability of intellectually disabled people to abuse.

New Zealand is at a pivotal moment by publicly recognising that caring for vulnerable people has been woefully inadequate and redress is needed. Institutionalised people have lived diminished lives and need to be compensated and acknowledged.

IHC strongly suggests that the following recommendations for structural and systemic change are included and referenced in the Royal Commissions final report to Government:

1. Review the role and functions of the Health and Disability Commission to assess whether current resourcing levels are enough to respond in a timely way to the volume and complexity of complaints received. The review to also assess whether the underpinning legislation requires broadening and strengthening to ensure investigation of abuses of disabled people in all settings can be carried out.
2. Establish an Office of the Public Advocate, empowered by law and fully funded by government, to investigate and resolve complaints as well as promote and safeguard the rights and interests of people in vulnerable situations, including disabled people, in community settings.
3. Urgently increase the legal aid funding for lawyers that work with clients with disability to ensure that lawyers are adequately compensated for the additional time required to work effectively with disabled clients.
4. Ensure that professional bodies develop and mandate effective professional training for the range of professions responsible for identifying and responding to the abuse and neglect of disabled people including those with intellectual disability.
5. Prioritise the development and implementation of court processes that are less adversarial and more friendly for people with intellectual disability. Government recognition is needed that implementation of these processes reflects a breach of obligations in respect of Article 12 and 13 of the United Nations Convention on the Rights of Persons with Disabilities (CRPD) which provides people with disabilities the right to accommodations to ensure their access to justice.

6. Fund and develop strategies that respond to the difficulties outlined in IHC's submission related to the recognition of and response to the abuse experienced by people with intellectual disability including the development of appropriate services for victims.
7. Provide free counselling to all individuals with disability who lived in institutions and or have experienced abuse
8. Provide funding to up-skill counselling services to increase the capacity of counsellors to respond to people with intellectual disability.
9. Provide fully funded advocacy services for disabled people in recognition that advocacy is critically linked to access to justice.
10. Establish a redress scheme for people who have experienced abuse in care in New Zealand. Ensure that the scheme includes the reasonable accommodations required for people with intellectual disability to access justice and redress.
11. Ensure that government procurement arrangements include the requirement that all social service and disability provider organisations have appropriate redress procedures and policies.
12. Establish a national standard for the resolution of complaints within the disability sector to ensure that complaints mechanisms are accessible and responsive to people with intellectual disabilities and their families.
13. Ensure that a monitoring body that audits disability support providers makes certain that providers have a specific focus on abuse and redress policies and evidence of their effectiveness.

## **2. About IHC**

IHC advocates for the rights, inclusion and welfare of all people with intellectual disabilities and supports them to live satisfying lives in the community. We believe that people with an intellectual disability have the right to be to be part of a family, to be treated with respect and dignity, to have a say in their own lives, to live, learn, work and enjoy life as part of the community, and to have support that meets their goals and aspirations.

IHC was founded in 1949 by a group of parents who wanted equal treatment from the education, health and social service systems for their children with intellectual disability. Today IHC is still striving for these same outcomes and is committed to advocating for the rights, welfare and inclusion of all people with an intellectual disability throughout their lives.

IHC is New Zealand's largest provider of services to people with intellectual disabilities and their families. IHC supports 1500 families with children who have an intellectual disability, provides support and training for 4000 adults in work places and helps more than 3500 people with disabilities to live in IHC houses and flats.

### 3. The Silence

A critical issue with the questions provided by the Royal Commission of Inquiry into Abuse in Care (the Commission) about access to justice for people that have experienced abuse in care, is the assumptions made underlying these questions. The questions assume that the individual has had experience of normal and healthy relationships, had some sort of sex education, can understand that abuse has happened to them, and is able to communicate details of the abuse to others.

One of the greatest barriers to the reporting of abuse by disabled people is that they may not understand what has happened to them and are not willing to report abuse until they are sure that it is abuse (Curry:434). Disabled people often experience abuse in 'the silence'. 'The silence' reflects the reality for disabled people that recognising and reporting abuse is difficult and fraught with a raft of issues that non- disabled people do not have to grapple with.

Some factors that contribute to this silence are:

- A lack of examples of healthy relationships and behaviour– historically intellectually disabled people were institutionalised as very young children or babies (highlighted in the case study that is included in this submission). This means they were unlikely to experience a normal loving family environment, see good examples of healthy emotional, physical and sexual relationships, or understand their right to bodily autonomy. This is supported by research:

*“participants who developed a disability in adulthood appeared to be better positioned to identify acts as abusive and be more willing to make a complaint...having experienced the inherent rights of the able-bodied” (Roguski: 21)*

- Feeling that the abuse was deserved – intellectually disabled people have often stated that they felt that any abuse that was meted out to them was deserved as they had behavioural difficulties, or because the person abusing them was in a position of power so this meant that the abuse was something that should happen.

*“All I knew was that I was bad and the man touching me was there to take care of me and must be allowed to do what he was doing” (Mirfin-Veitch, 2017: 34)*

- Normalisation of abuse – intellectually disabled people who have lived in institutions have experienced so much abuse that it becomes normalised. Intellectually disabled people are also more likely to be frequently touched by non-family and because of this may find it more difficult to differentiate or object to inappropriate touching. Intellectually disabled people who have high support needs will have adults carrying out personal hygiene tasks and this can also disguise abuse (Llewellyn, 2016: 6).
- Pressure to not report – many intellectually disabled people experience pressure from the staff and other peers to not report abuse whilst it is happening. They may also fear retribution, or that they won't be believed due to experiences of a lack of a serious response to complaints made in the past.

*“Despite being able to ‘point him out’, there was no indication from Alison’s story that the perpetrator was punished, kept away from her, or that she experienced any psychological support for the sexual violence she experienced” (Mirfin-Veitch, 2017: 32)*

- A lack of trust for officials and staff and shameful feelings of intellectual inadequacy. Intellectually disabled people, especially those that have been institutionalised, have learnt to distrust people in positions of authority. They also have concerns about being believed or being put into another institution, or treated badly, should they make a complaint.

#### **4. Disability and Abuse**

Having a disability is often considered a risk factor that contributes to the likelihood of experiencing abuse (Llewellyn: 36). The rate of abuse suffered by disabled people is high, much higher than for the non-disabled. For disabled women the likelihood of experiencing sexual abuse is four times higher than for non-disabled women (Roguski: 4).

Intellectually disabled people are generally ‘othered’, considered second class citizens by society. Practices that would be considered abuse in other circumstances, such as forced sterilisation, can be considered acceptable for disabled people (Llewellyn: 34).

Societal influences, values and attitudes towards disabled people are inextricably linked to how their needs, rights and interests are responded to by families, communities and the State.

In the past, institutions captured and catered for the whole of life needs of residents, many who had intellectual disabilities. They had their dental care, health care, work, housing, recreation and leisure all provided for on one site.

For many this sacrificed choice, autonomy, independence, and in many cases their basic human right to be treated with dignity and respect. While the view was this was a sheltered and protective environment the reality is beginning to emerge in the individual stories of personal and systemic abuse.

It is of critical importance to recognise the range and types of abuse that intellectually disability people have survived. It does not consist of only sexual or physical abuse. Intellectually disabled people experience neglect, abuse and control in a way that would not be socially acceptable for other groups.

Intellectually disabled people die at much younger ages – around 50 as opposed to 81 for the general population (Reppermund:4). They are frequently denied the opportunities that people in the general population would take for granted, opportunities to learn, to work, to love people, even decisions about when to go to sleep, where to sit and when to go to the toilet.

Intellectually disabled people also do not experience the freedoms that others their chronological age enjoy. They are assumed to remain childlike, and unable to exercise personal agency or decision-making powers long into their old age. Intellectually disabled people are our most vulnerable population and they are commonly disrespected, neglected, abused and forgotten.

## **5. Case Study: Mr M**

An effective way to demonstrate the problems that intellectually disabled people have when trying to access justice is to explore a case study where IHC supported an individual, Mr M, to bring a civil claim against the government.

Before IHC became involved in the development of the civil claim, M had tried unsuccessfully for years to have the government investigate the abuse and neglect he experienced in an institution, the life opportunities he had missed, and provide him compensation. M started his formal claim against the state in 1997 and it was finally settled in 2003.

### **5.1 Mr M's Early Life**

In 1928, at two months old, M's family placed him into the care of the Home of Compassion at Island Bay, Wellington, to be adopted. At six years old, M had not been adopted, so was sent to Templeton Hospital, as he was diagnosed as being of low intelligence. The recorded evidence for the diagnosis of low intelligence, was that at six years old he did not know his surname, could not add two plus two and could not spell the word cat.

M believed that he was going to attend school, as this is what he desperately wanted to do, but he received no schooling at Templeton. He did undertake physical labour at Templeton and was promised wages for this work, which he decided to bank until his discharge. M stayed at Templeton Farm until he was

19 years old. He was discharged with no money, no literacy skills and not a day of schooling.

M then moved to an isolated West Coast farm to work. He left this farm after four months due to ill-treatment. Police picked him up and sent him to Seaview Hospital. Once Seaview staff cared for M for a short time, they assessed him as not having an intellectual disability and he was sent to work as a porter and orderly in a hospital. He spent the next 40 years working at hospitals in New Zealand and abroad.

## 5.2 M's Search for Information

After leaving his job at Hutt Hospital in 1991, due to a workplace injury, M began to grapple with his institutionalisation as a child. Up until this point, M had not made an issue about his treatment and the harm done to him whilst in the care of the state, as he felt unworthy of being treated well due to thinking there was something wrong with him.

In 1995 he began to contact health agencies to ask for information about the salary he was promised for the work he completed at Templeton. In 1942 M had taken up a paid position at Templeton as an orderly and was meant to be paid five shillings a week. As there was no money paid to him on his discharge, he began to request access to records about this lost salary.

In 1996 and 1997, through some personal contacts, M reached out to IHC, and with our assistance, continued his quest for information about his past. He wrote to various places asking for his personal information. His search for lost wages led to the organisation responsible for managing the files advising him that they held nothing from before 1980 and were unable to identify the money owing to him and could not pay him. M asked for an ex-gratia payment of the money that was owed to him, but this was denied.

M wrote to, and engaged with, various politicians in the 90's when seeking redress. He wrote to the Hon's Paul Swain, Jenny Shipley, Bill English, and Katherine O'Regan. Politicians were unwilling to investigate his treatment or consider his request for the salary that was owed to him, or compensation for the abuse he suffered.

Responses from organisations that M contacted for his personal information were also confusing and contradictory and many records that he was seeking had been destroyed or were never kept. One health organisation advised M to ask Sunnyside directly for some of his records. Sunnyside then told him that they had no record of a file at their hospital with his name. M was also still looking for information that explained his admittance to Templeton but was unable to find any information relating to his diagnosis of an intellectual disability when he was admitted to Templeton.



M also sought access to the organisational files that governed the institutions he lived in. The Ministry of Health were unable to find files relating to the management of these institutions.

### **5.3 M's Claim for Redress**

As politicians appeared not interested in resolving M's claim, M engaged a solicitor around 1997. At this time a psychologist's report was compiled about the abuse that M suffered and the trauma it had caused. After this report was completed, M's lawyer served a statement of claim on the Ministry of Health and the Home of Compassion in 1999.

M's claim was that he experienced a loss of opportunity and was deprived of an education. This deprivation led to significant losses. The opportunities denied to M were hard to quantify. M did not receive any schooling, he did not receive money for the work he undertook at Templeton, and he was physically and sexually abused at Templeton and Seaview.

M was beaten by peers and caregivers. He was sexually abused by peers and a caregiver. The trauma that remained after this abuse meant he was never able to have a long-term romantic relationship and remained alone his entire life. M also never experienced any of the family rituals that most of us take for granted. Until M was 14 years old, he did not know that birthdays were something that people celebrated.

The Crown received M's statement of claim and indicated that his allegations would need to be corroborated before they would consider settling his claim.

At this time, M started working directly with the IHC Advocacy team and changed his legal representation. M had already used a significant amount of his legal aid funding to get to this point, and his case was just beginning. He needed a team of people to volunteer their time and skill to support him and continue his case and this was organised and financed by IHC.

IHC worked hard to identify potential witnesses to substantiate M's accounts of abuse. Two witnesses were discovered and specialist IHC staff with experience in interviewing intellectually disabled people interviewed these witnesses. M's new solicitor gathered these witness statements into a brief of evidence and engaged a barrister to represent M in court. M's barrister made an application for a settlement conference at the end of 2001.

As M's case was gathering momentum, the Crown continued to obfuscate. In 2002 the Crown asked for a specialist report to be compiled by a psychiatrist that would explain why it had taken M so long to make a claim. Legal Aid funding was obtained to pay for this costly report (the report cost over two thousand dollars in today's money) and this report was provided to the Crown in October 2002.

The report theorised that the abuse that M claimed to have suffered seemed very real and had caused him to be significantly psychologically disabled. The

psychiatrist said that M found it extremely distressing to describe the trauma he had suffered, in particular, the sexual abuse.

The report also stated that M had not come forward until he had ceased working, as he invested a large part of his personal esteem in his career and he was worried that if his colleagues knew he had been institutionalised and abused they would lose respect for him, or he would lose his job.

In June 2003, eight years after he first requested the Crown investigate and resolve his claim, after two lawyers and thousands of legal aid dollars and significant advocacy work by IHC, the Crown made a financial settlement with the 74-year-old M and provided him an apology. M passed away in 2006.

## **6. Learnings from M's Case**

### **6.1 Barriers**

There is a lot to unpack from M's life experience. M had a great deal of courage, and was able to articulate himself very well, but he was stifled at every turn when seeking redress for the abuse he suffered. M's diagnosis as someone with an intellectual disability was later withdrawn. For an individual with an intellectual disability, it is without question that they would experience even greater barriers to seeking redress for abuse suffered in care.

### **6.2 Substantiating the facts**

One of the most difficult things for M to do was to find people who could corroborate his claim, as he did not know where the witnesses were located.

The Ministry of Health was often not able to locate people who were in institutions and not be able to pass on personal information about these people to M in case it would breach their privacy. M needed the skills and resources of IHC to locate these people.

Even with corroborated evidence, testimony from people with intellectual disability is often not believed in adversarial trials (Mirfin-Veitch, 2014: 21).

### **6.3 Specialist resources**

Once witnesses were found, specialist knowledge was needed to work with these people to gain their trust, and to hear and record their stories. All the witnesses that M needed were people with intellectual disabilities. They had different ways of communicating, and their time in institutions meant they were often distrustful of strangers.

Recording these stories took time and would have cost a significant amount if IHC had not resourced staff time. Some witnesses did not want to provide their stories. There is little incentive to re-live painful and traumatic memories in order to further someone else's legal claim. Some witnesses had been cruel to M in the past and some witnesses felt that M had been cruel to them. The institutions that M lived in did not allow strong friendships to grow and the people in the institution would feel that peers were their enemies.

#### **6.4 Accessing personal information**

M had great difficulty finding personal information about himself from this time. Finding institutional information or management and policy documents was even more difficult. At one stage, M's solicitor served the statement of claim on the wrong legal entity, as religious entities are often structured in confusing ways.

#### **6.5 Capacity**

M only had limited capacity to deal with officialdom and bureaucracy. Over the years, M taught himself to read and write, but he always felt inadequate due to this lack of formal education and his inability to attain any formal qualifications. He was concerned about his lack of education and thought that if he interacted with officials, they would judge him mentally unfit and dismiss him as irrelevant or commit him to a mental institution. He was also wary of officials considering the way he had been treated throughout his time living in institutions.

#### **6.6 Ageing and disability**

As M was in his 70s before he started to act, he was at risk of passing away before any compensation could be paid and this weighed on him. At some points, M felt as though he was being stalled in his quest so that he could pass away without the State ever needing to provide him redress. As he aged, and his peers aged, the ability for them to correctly recall their experiences diminished. This had the possibility of undermining any testimony given by them.

During the settlement proceedings, M occasionally missed important meetings. Some of this was due to illness, or due to new medication that he was taking that made him confused at times. The process of making and settling a claim requires a perfect complainant, who is never ill or confused, who can communicate easily and has the confidence to make a claim for their rights.

#### **6.7 Finances**

M had little savings, due to being in entry-level jobs his whole life, this meant he did not have the funds to pursue costly legal battles. If he did not have IHC supporting him, it is unlikely that he would have reached a settlement with the Crown on the funding provided by Legal Aid.

#### **6.8 Summary**

This submission highlights the failure by successive governments in providing access to justice for vulnerable people who have experienced abuse in state care. For M, the government obfuscated his search for justice. The government needs to urgently engage in a constructive relationship with providers and advocacy groups, and work towards safeguarding people with intellectual disability. Safeguarding involves identification and monitoring of issues that led people with intellectual disability to become vulnerable.

It would be incorrect to think that M's treatment was historical, and that people with intellectual disability no longer experience while in care. IHC has contemporary examples of people with intellectual disability experiencing abuse and neglect in community setting while having no access to justice.

## **7. Current Status and Future Improvements**

While M was formalising his claim, New Zealand enacted the Health and Disability Commissioner Act (and the Code of Health and Disability Services Consumers' Rights) in 1994, which established the position of the Health and Disability Commissioner (HDC) in order to resolve complaints about health and disability providers. Unfortunately, the HDC is only empowered to investigate organisations that are covered by the Code, which means that complaints about organisations prior to 1996 are not able to be heard by the HDC.

Consideration should be given to HDC having expanded jurisdiction and funding, so that it can address complaints and claims from before the establishment of the Code in 1996. In the absence of this course of action a non-adversarial redress scheme needs to be put in place to handle and finalise complaints from those that experienced historical abuse in care. IHC supports the work of the Royal Commission on this regard and recommends that ongoing opportunities for investigation and redress to be established.

Changes to international and domestic law have occurred since M's claim was settled, and some of them have opened up new avenues for access to justice and redress.

Most significantly, NZ became a signatory to the CRPD in 2009. The CRPD is a human rights instrument that radically shifts the view of people with disability as "objects" that require charity and social protection to people with agency who can claim their rights and make decisions. The CPRD importantly outlines obligations on countries to progressively implement all articles with the Convention.

Articles 12 and 13 are particularly relevant to the topic of this submission. Article 12 of the CRPD requires the New Zealand government to ensure that all disabled people are equal in New Zealand law, and have the support they need to make their own decisions. Article 13 requires provision of procedural accommodations to allow people with disabilities to engage directly and indirectly in all legal proceedings. It also requires promotion and provision of appropriate training for people working in the administration of justice – judges, lawyers, prison staff and police.

It is arguable as to whether any of the work required by the CRPD is being progressively implemented, however the obligation to do so is clear. New Zealand is also a signatory to the Optional Protocol of this Convention. The Optional Protocol allows individuals to take complaints directly to the United Nations Committee on the Rights of Persons with Disabilities when all domestic remedies have been exhausted. If the government does not put

mechanisms in place for redress for people with disability, they can utilise the Optional Protocol.

IHC strongly recommends a national complaint handling standard for complaints about disability issues, and that government procurement arrangements include the requirement that all social service and disability provider organisations have appropriate redress procedures and policies

Issues about the inadequacy of legal aid funding for people with intellectual disability have been raised repeatedly and loudly. Working with clients with intellectual disability takes significant time and specialist knowledge. Clients may often have communication difficulties, be mistrustful towards strangers, may also need reassurance that their lawyer is working for them and in addition it is also harder for the lawyer to ensure that the client understands them. Lawyers who work with intellectually disabled clients are not compensated for the extra time and knowledge and sensitivities required and this reduces the pool of lawyers who are willing to do this work. Increased legal aid funding for intellectually disabled clients is a necessity if access to justice for intellectually disabled people is to be achieved.

Further training and professional development of lawyers, judges, doctors, and police is critical for intellectually disabled people who seek to engage in legal processes. Training and development need to be mandatory and frequent. Development of a specialisation in intellectual disability law, for judges and lawyers, should also be considered.

Court processes need to make reasonable accommodations for those with disability. A less adversarial and formal process should be available. Use of communication assistants and devices should be normalised, and judgments should be written in plain language. Litigation guardians should be used for proceedings that involve vulnerable people. Social interpreters need to be available, free of charge, for intellectually disabled people to use during proceedings so that people with disability can make their wishes known. New Zealand needs a robust and fully funded advocacy system, so that justice is accessed by all.

Despite how welcoming and easy to use the legal system may become, this will not assist intellectually disabled people who are not supported to recognise and disclose abuse they have experienced. Survivors must be sought out, supported, believed, respected and empowered. Then they will need flexible, clear support and treatment for the abuse they have experienced and any stress that disclosing it has caused. Much more pro-active work needs to be done to highlight abuse that intellectually disabled people have suffered in institutions and ensure they are given appropriate redress. This could include compensation and an apology on behalf of the State.

New Zealand must do better by ensuring that intellectually disabled people are not continuing to be “left behind” in accessing justice and seeking redress.

## 8. References

Curry, M. Renker, P. Robinson-Whelen, S. Hughes, R. Swank, P. Oschwald, M. Powers, L. 2011. 'Facilitators and barriers to disclosing abuse among women with disabilities', *Violence and Victims*, vol. 26, no. 4, pp. 430-442.

Llewellyn, G. Wayland, S. Hindmarsh, G. 2016. *Disability and child sexual abuse in institutional contexts*, available from [https://www.researchgate.net/publication/309728772\\_Disability\\_and\\_child\\_sexual\\_abuse\\_in\\_institutional\\_contexts\\_Royal\\_Commission\\_into\\_Institutional\\_Responses\\_to\\_Child\\_Sexual\\_Abuse/](https://www.researchgate.net/publication/309728772_Disability_and_child_sexual_abuse_in_institutional_contexts_Royal_Commission_into_Institutional_Responses_to_Child_Sexual_Abuse/)

Mirfin-Veitch, B. & Conder, J. 2017, *Institutions are places of abuse: The experiences of disabled children and adults in State care*, available from <http://www.donaldbeasley.org.nz/resources/publications/abuse/>

Mirfin-Veitch, B. Diesfeld, K. Gates, S. Henaghan, M. 2014. *Developing a more responsive legal system for people with intellectual disability in New Zealand* available from <http://www.donaldbeasley.org.nz/resources/publications/law/>

Reppermund, S. Srasuebku, P. Dean, K. Trollor, J. 2019. *Factors associated with death in people with intellectual disability*, available from <https://onlinelibrary.wiley.com/doi/10.1111/jar.12684>

Roguski, M. 2013. *The hidden abuse of disabled people residing in the community: an exploratory study*, available from <http://www.communityresearch.org.nz/research/the-hidden-abuse-of-disabled-people-residing-in-the-community-an-exploratory-study/>