Justice Intermediary Starter Kit

MODULE 4

UNDERSTANDING DISABILITY

www.justiceintermediary.org

International Principles and Guidelines on Access to Justice for Persons with Disabilities (UN Special Rapporteur August 2020)

The UN Convention on the Rights of Persons with Disabilities (CRPD, 2006) defines disability as:

"An evolving concept resulting from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation on an equal basis with others."

Principle 1: All persons with disabilities have legal capacity and, therefore, no one shall be denied access to justice on the basis of disability.

Principle 2: Facilities and services must be universally accessible to ensure equal access to justice without discrimination of persons with disabilities.

Principle 3: Persons with disabilities, including children with disabilities, have the right to appropriate procedural accommodations.

Principle 4: Persons with disabilities have the right to access legal notices and information in a timely and accessible manner on an equal basis with others.

Principle 5: Persons with disabilities are entitled to all substantive and procedural safeguards recognized in international law on an equal basis with others, and States must provide the necessary accommodations to guarantee due process.

Principle 6: Persons with disabilities have the right to free or affordable legal assistance.

Principle 7: Persons with disabilities have the right to participate in the administration of justice on an equal basis with others.

Principle 8: Persons with disabilities have the rights to report complaints and initiate legal proceedings concerning human rights violations and crimes, have their complaints investigated and be afforded effective remedies.

Principle 9: Effective and robust monitoring mechanisms play a critical role in supporting access to justice for persons with disabilities.

Principle 10: All those working in the justice system must be provided with awareness-raising and training programmes addressing the rights of persons with disabilities, in particular in the context of access to justice.

Models of disability

There are many different models of disability of which the social model and the medical model predominate. Although this resource does not explain the different models in detail, further information can be found at **Module 11, Resources**.

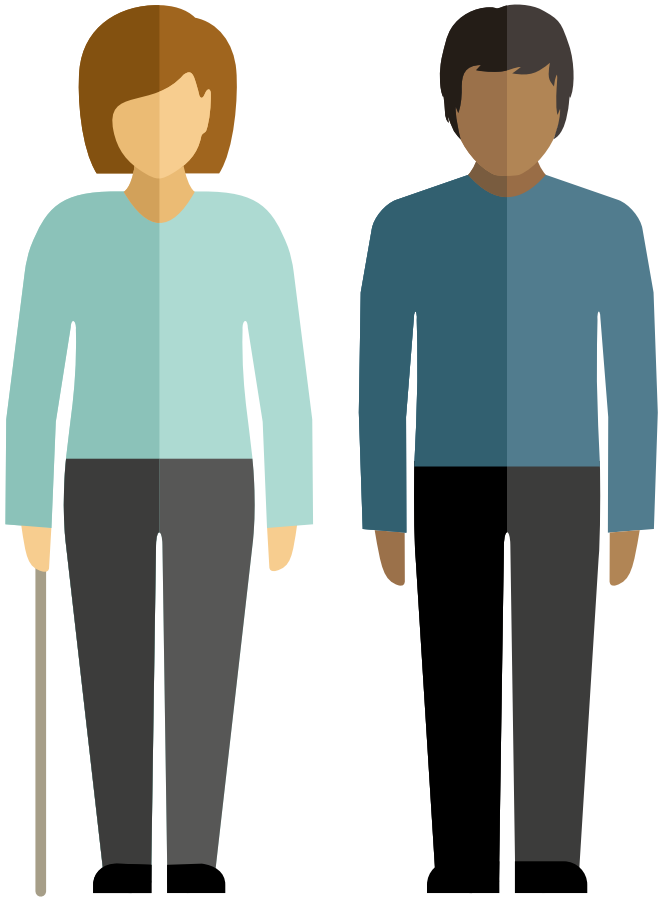
JISK promotes the social model of disability and compliance with the CRPD. We recognise, however, that different jurisdictions, and professional groups within jurisdictions, will vary in their approach to disability. For example, while Disabled Persons Organizations and socially oriented NGOs will be familiar with the social model of disability, legal and judicial offices may still favour and approach disability via the medical model.

The prevailing approach to disability in your jurisdiction is likely to impact the way a JI role is developed. For example:

- **Social model** – where the justice system recognises that accommodations may be necessary to ensure fair access to justice, and ensures such provision is made in consultation with the person with disability
- **Medical model** – where the justice system expects the person with disability to either adapt to the justice system or be excluded from it, and may require a clinical diagnosis to identify and support 'deficits'.

The CRPD has both stimulated and witnessed a shift in how people with disabilities are perceived, and is especially concerned with the inclusion in society of people with disabilities and their legal rights – including within the justice system. Its provisions seek to: **"…promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities and to promote respect for their inherent dignity"** (Article 1).

In developing the role of JI, it is important to adopt a social model approach and work towards CRPD compliance, even if little progress has been made in shifting from the medical to the social model of disability.



A view of disability

In the past, having an impairment, for example a disease or an injury, would likely result in a disability. Over time, some impairments have been ameliorated by new technologies or medical innovation, for example cochlear implants now mean that a deaf person can hear, or a person with epilepsy can control seizures with medication.

The impact of the environment on levels of disability is now recognised. The disability may be caused by the interaction between a person with impairment and an unresponsive environment.

The significance of understanding disability this way is two-fold:

- The impact that the environment has in causing disability may now be considered and adapted to improve communication
- If the external environment is part of the problem, it can also be part of the solution. For example, a ramp can enable a person with reduced mobility to enter a building; sign language can enable communication for a person with a hearing impairment; and accessible text can enable a person with intellectual disability to read and to understand.

Different not disordered

Joanne has a 'high functioning' Autism, sometimes described as Asperger's Syndrome or autism without intellectual disability.

She describes her communication style as 'different rather than disordered', that is different from neuro-typical communicators.

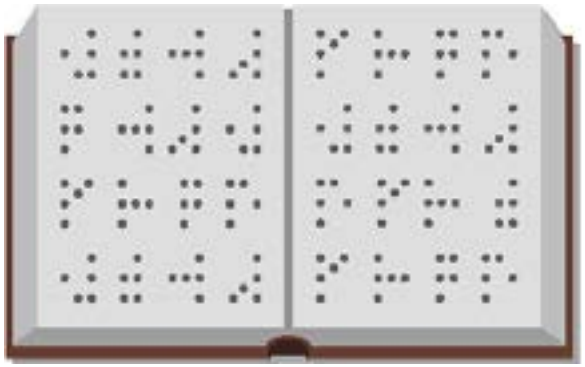
Follow this link to find out more about these ideas.

Autism: personal thoughts, reflections and insights

Who minimises the disability?

The disability may only exist if the necessary accommodations are not made. In other words, the extent to which disability is experienced may be strongly related to how others interact with the person.

For example, a person who has injured their leg and cannot access the first-floor courtroom may be considered temporarily disabled. If the environment is adapted so a ground floor courtroom is allocated, or the person is permitted the use of a lift, the person may now walk into court and is no longer disabled in that environment.



This is similar to a fluctuating mental health condition where the person with disability requires adaptations at specific times.

The impact of some disabilities is less visible. For example, a person with psychosocial disability may fear speaking in front of large numbers of people or people they don't know; in a court room, limiting the number of people in the public gallery or moving to a smaller room may minimise the disability.

For a person with limited verbal comprehension, the disability may be minimised by others taking responsibility for simplifying their communication.

It is everyone's responsibility to adapt, accommodate and change to minimise the impact of disability. The JI plays a central role in advising on the best practices to minimise disability in the legal system.

Does it matter what the label is?

Many people with disabilities have been 'labelled' to describe a cluster of symptoms. For example, Paranoid Schizophrenia, Autistic Spectrum Disorder, Intellectual Disability.

It is important to remember, however, that each person is an individual with different life experiences, strengths and needs. They may experience symptoms to varying degrees. Symptoms change over time and can fluctuate on a daily basis. Many people have more than one disability, which can make accommodations more complex. In addition, labels may change over time either as the person changes, the experts change their opinions or research alters our perspective.

The JI needs to consider each person with disabilities as an individual and, once they have understood their strengths and needs, define how best to accommodate and maximise communication in the context of the justice system. This should be done with the agreement of or in collaboration with the person with disabilities.

How to decide who would benefit from a JI?

There are different ways of identifying the client group requiring a JI.
For example using a medical model:

Lifelong including learning difficulty, dyslexia, IQ below 70, evidence of special educational needs.

Following trauma or event including traumatic brain injury, neurological disorders including stroke, epilepsy, amyotrophic lateral sclerosis, early onset dementia, laryngeal cancer.

Neuro-diverse such as autistic spectrum disorder (ASD), attention deficit hyperactivity disorder (ADHD), foetal alcohol spectrum disorder (FASD).

Psychiatric conditions including personality disorders, schizophrenia, depression, anxiety.

And some of these will overlap too.

Other clues might be from their life story.
For example the person:

- lives in a group home or institution
- attending a specialist day service or sheltered employment
- receiving prescription medicine related to a disability
- receiving support from a carer
- receiving support from a social worker or psychiatric services
- previously or currently attends special education school or college
- has witnessed a traumatic incident
- has a history of self-harming.

And observations that might offer a clue. For example the person:

- readily agrees with what is said
- appears restless/hyperactive
- appears impulsive
- appears inattentive
- avoids communicating
- Doesn't recall meetings or basic information.

Perhaps the way the person is communicating raises concerns. For example, the person:

- finds it difficult to communicate without assistance/interpretation
- uses signs and gestures to communicate
- appears to have some difficulty in understanding questions
- responds inappropriately or inconsistently to questions
- seems to focus on what could be deemed irrelevant small points rather than important issues
- has difficulty in remembering their date of birth, age, address
- has difficulty knowing the day of the week, where they are and who they are talking to

- cannot read or write
- appears to have a short attention span
- appears very eager to please; repeats what is said to them
- appears over-excited/hyperactive; appears uninterested/lethargic
- appears confused by what is said or happening; is physically withdrawn
- expresses strange ideas; does not understand common everyday expressions
- unusual eye contact
- reluctant to engage in an unfamiliar environment.

The JI needs to know their own competencies

In the ideal situation, the JI will work only with disabilities they have specialist knowledge of. This will enable them to understand the likely impact of such disabilities on participating effectively and to advise the justice system accordingly.

For example, Registered Intermediaries in England and Wales who declare their specialist fields, for example Autism and young children, would not take on cases of clients with Dementia

However this may be an issue for the local jurisdiction, and may depend on practicalities such as the availability of specific professions

By recognising their own competencies, JIs should make use of specialist information from related professions eg in the form of expert reports, or by liaising directly

The justice system will want to know how recommendations for accommodations are reached, and the JI will need to be able to provide evidence of their opinion, for example, saying a person needs a break every 30 minutes needs to be based on the JI's experience of communicating with the person, or the advice given by others in relation to his concentration.

Common conditions that may impact on communication

There are a variety of medical conditions that are likely to impact on communication and may suggest to the referring agency that a person may require the assistance of a JI. However, it is vital to understand that each person will experience conditions differently, according to their life experiences, strengths, and needs. For example, no two people with Autism Spectrum Disorder will have the same communication needs. However there are some commonalities worth checking out if they are relevant to that individual.

A general understanding of common conditions will be useful to the JI, either from their experience in previous roles or in the JI training provided.

The JI will assess the specific needs of each person with disability only as it related to their involvement with the justice system. For example, a JI may not need to assess literacy for a complainant who is not going to be required to read during their testimony, nor assess their ability to manage their money when they are not being asked about finances in the case.

Here are some of the most common conditions likely to impact on communication

There are likely to be local associations/organisations that provide further information and support.


Schizophrenia


Bipolar affective disorder


Personality disorders


Depression and anxiety


Post traumatic stress disorder


Dementia


Autistic spectrum condition


Attention deficit hyperactivity disorder


Stroke


Multiple sclerosis/ Motor neurone disorder


Dyslexia


Hearing / visual impairment


Traumatic brain injury


Foetal detachment disorder


Cancer of mouth, larynx or vocal tract


Developmental language delay / disorder

Disabled now… always disabled?

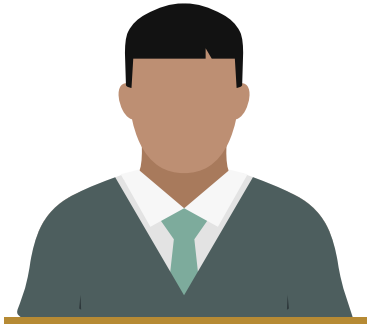
The impact of a disability on a person is likely to fluctuate, perhaps from day to day or in relation to the situation, environment, topic of communication or the other people involved. Each person may also vary depending on their medication regime, level of fatigue or crucial events in their lives. Someone who would be regarded as needing assistance at the investigation stage of a case might be more able at the trial and vice versa. It will be important for the JI to take account of these changes, and there may be a need to be a second assessment arranged to review the communication needs. Here are some examples:

A witness who had a stroke, recovers in the year between first evidence and trial. However during the first week of the trial, witness suffers a subsequent stroke.

A defendant who is unfit to plead initially as a result of severe paranoia and delusions, has appropriate medication prescribed and symptoms reduce so they are then fit to stand trial.

A suspect who has recently been diagnosed with dementia, deteriorates in the 18 months that it takes until the trial is planned. At trial, he is not longer able to participate effectively.

A defendant with severe depression, a history of self-harming, and substance dependency is held on remand, during which time they have no access to illegal substances. At trial, the defendant is lucid and logical.



A witness is prescribed a monthly injection to manage psychiatric diagnosis. Toward the end of each month, witness experiences more ‘voices’, anxiety and agitation. The date of the trial is important.

Combined diagnoses

Clients may have been diagnosed with more than one condition, and the resulting disabilities will be complicated by the interactions between the conditions.

For example, a person who has an intellectual disability and epilepsy is likely to need accommodations that take into account a long-standing relatively static need alongside a fluctuating level of consciousness at the time of a seizure. This may be described as co-morbidity or dual diagnosis.

The diagnosis can only be a signal of possible considerations, and with each client the JI needs to form an opinion of their needs in relation to their involvement with the justice system.

Diagnosis and medication

With many diagnoses, there are typical medications that may be prescribed. It will be important for the JI to understand the impact of these medications, any side effects and the regime.

Medication side effects may impact on client's communication. For example, a drug may cause fatigue, drowsiness or poor concentration. Accommodations may be required to shorten the court day, increase break times, etc.

Medication regimes may also impact on the timing of a trial. A monthly injections may cause the person to be more disabled toward the end of the cycle and thus less able to participate in their trial. Some medications , for example for Attention Deficit Hyperactivity Disorder, may have the side-effect of early morning nausea, and the JI may recommend that court sessions start later in the day.

Some medications are only used 'as and when required', for example, for anxiety. It may be important for the person to have access to this medication during the course of an interview or when giving evidence.

These are just examples. Each client's individual medication will need considering.

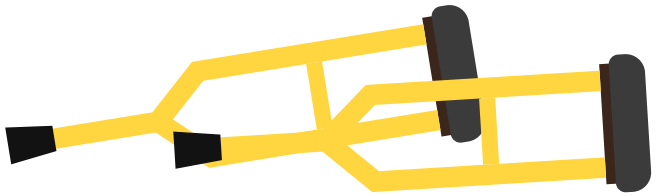
Stigma and disability

In some legal systems, some witnesses are not considered able or competent to give evidence, some defendants are defined as unfit to plead because of society's view of their communication abilities.

Recent principles from the UN Special Rapporteur, outlined at the beginning of this module, challenge these assumptions.

The social stigma of disability, especially intellectual and psycho-social disabilities, is a big factor in the immediate assumptions of persons with disability as unreliable, incoherent or inconsistent.

JIs and appropriate accommodations in courts and police interviews, can also have the impact of dismantling stigma, by presenting the practical ways in which persons with disability can be or become accurate, coherent and competent participants.



Using this knowledge of disability

This module informs **Module 6 on Assessing and Reporting**. During assessment, the specific needs of the individual in participating in the justice system become more clearly defined.

In some JI schemes, the disability has to be diagnosed before the court will accept the JI recommendations.

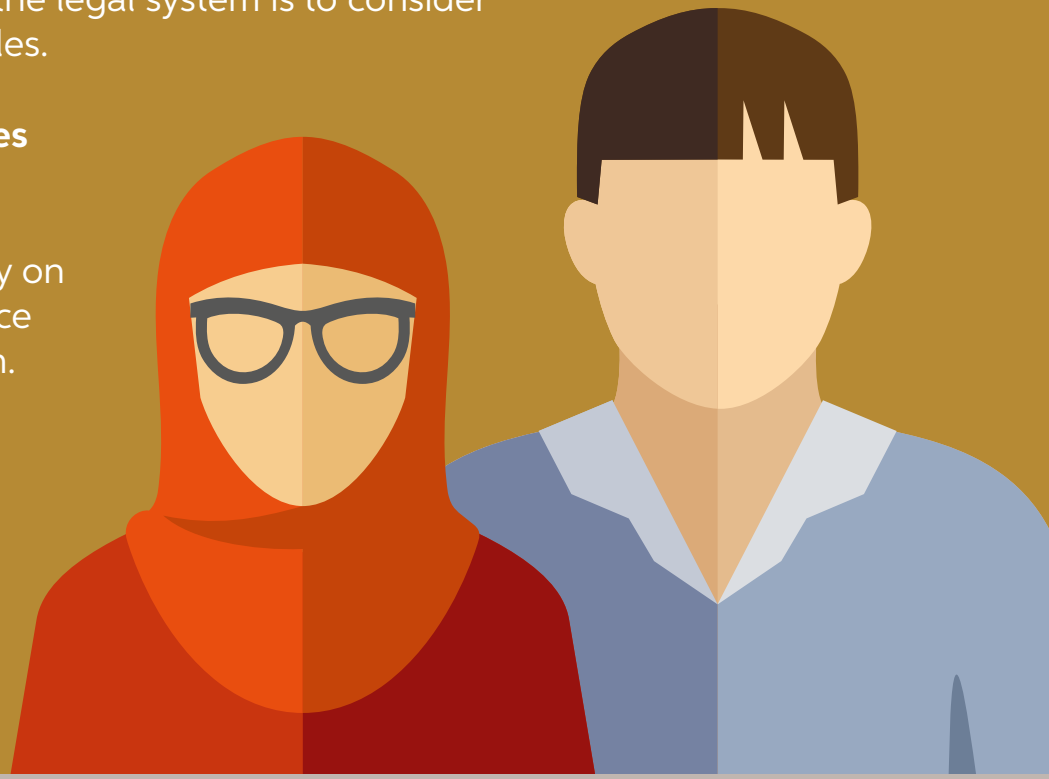
In some JI schemes, the court will not allow the disability to be disclosed to the jury. In others, an expert witness may be called to explain the disability to the jury.

Each JI will need to adapt to their own justice system, whilst recognising that the JI may be the one person who challenges age-old traditions about the impact of a disability for each individual.

Life stories of people with disabilities who have interacted with the legal system

One of the best ways to start to understand the relevance of a JI to the legal system is to consider some actual examples.

Module 5 Life Stories provides examples of the reality of the impact of a disability on a person's experience of the justice system.



In summary

- International Principles and Guidelines on Access to Justice for Persons with Disabilities (UN Special Rapporteur August 2020) have a significant impact on the way disability is viewed in the justice system
- Models of disability may vary, but in many justice systems the medical model is still prominent
- In some but not all JI schemes, a formal disability diagnosis is required to permit the assistance of a JI
- The extent of any disability will be related to the accommodations and response of others
- The JI is interested exclusively in the impact of disability on person's interaction with the legal system
- The JI needs to be aware of their knowledge in assisting particular disabilities and ensure their competency is matched accordingly
- Disability organisations can provide extensive resources outside the remit of this Kit
- Disability can vary over time and the JI may need to assess over time and advise the court of fluctuations
- Medication regimes may be relevant to the accommodations recommended by the JI.

Reflection Tool: Module 4

This is an opportunity for the user to reflect on the content of the module and also assist us with continued improvements and updates.

Please Click here to contribute your reflections.

What is the current legislation locally with regard to persons with disability?

Is there a difference in the legal systems response to physical, intellectual and psych-social disabilities?

Are there any high profile organisations for persons with disability locally that could assist with planning for this project?

How can you ensure persons with disability are involved in the planning of the JI scheme from the start?