

# **Summary of 'Unrestricted access to rights? Victims with a mild intellectual disability and the criminal justice system'**

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## Background

Victims of crime have various rights and are entitled to several types of support depending on the type of crime they are the victim of and the phase of the victim's pathway they are in. In November 2015, EU directive 2012/29/EU will be implemented. This directive sets minimum standards for the rights and the level of support and protection to be afforded to crime victims. Assessment of individual victim's vulnerability will be used to determine whether a victim should receive tailored services and/or extra protection. The directive is intended to help victims exercise their legal rights and protect them from secondary victimization. The vulnerability of victims is determined by various factors including the type of crime they were the victim of and their personal characteristics. One characteristic that can heighten vulnerability is a Mild Intellectual Disability. In this context, the Dutch government's *Research and Documentation Centre* (WODC) commissioned a study to determine:

*how to give victims with a Mild Intellectual Disability the support they need in order to give effect to their rights, and how to protect them from secondary victimization.*

This report distinguishes between 'giving effect to rights' and 'exercising rights'. If someone is well-informed about their rights but makes a well-considered choice not to exercise them, then they have still given effect to their rights. Secondary victimization in this context is understood to mean the ways in which criminal proceedings may exacerbate the victim's suffering or damage. Secondary victimization in the sense of repeat victimization falls outside the scope of this study.

## Mild Intellectual Disability

This study defines a mild intellectual disability as a condition affecting people with an IQ ranging from 50 to 85 in combination with limited adaptive skills and other related problems. People with a mild intellectual disability usually have difficulties with short-term memory, attention and concentration, logic, comprehension and vocabulary, conceptualization, arithmetic and spatial relations. In practice, this translates into problems with communication, self-care, independent living, use of provisions, decision-making, employment, leisure activities, health and safety. Another characteristic of people with a mild intellectual disability is that their socio-emotional development often lags behind their cognitive development.

For people with a mild intellectual disability, skills development is often out of sync (uneven development profile). This is accompanied by a variety of problems and resulting (behavioural) characteristics. Therefore, it is factually incorrect to speak of 'the issues' people with a mild intellectual disability encounter. There are few physical or behavioural characteristics that unambiguously indicate someone has a mild intellectual disability. The lack of clear characteristics in combination with the uneven skills development often results in an underestimation of the problem and hence the placement of excessive demands on people with a mild intellectual disability.

It is difficult to determine how many people have a mild intellectual disability, but estimates range from 350,000 to 1.6 million people in The Netherlands. The number of care recipients is estimated at approximately 100,000. This means a large percentage of people with a mild intellectual disability do not receive any professional help. Considering the heterogeneity of this group, it is impossible to make general statements about the impact of their disability and the support they might need. Professional help is needed when support from within these people's own network is not enough. Moreover, (extra) support is particularly necessary in unclear, stressful situations.

#### Victimization and secondary victimization among people with a mild intellectual disability

The literature does not contain enough information to provide exact statistics on victimization of people with a mild intellectual disability. Estimates vary, but the risk of victimization is estimated to be at least double that of people with average abilities. It is clear that people with a physical or mental disability are victimized more often and from an earlier age. People with a mild intellectual disability may fall victim to crime relatively frequently, but such cases are not necessarily reported to the criminal justice system more often. After all, that depends on people perceiving themselves as victims and then reporting the crime to the police. People with a mild intellectual disability often lack this perception or the willingness to act on it. In the literature, victims with a mild intellectual disability are also generally seen as more vulnerable to secondary victimization.

#### Research design

In this preliminary study the following sub-questions were phrased:

- 1a. How difficult is it for victims with a mild intellectual disability to give effect to their rights as victims?*
- 1b. How suitably does the criminal justice system address victims with a mild intellectual disability in its written communications?*
- 1c. How do the police, Victim Support Services and organizations in the criminal justice system currently identify a mild intellectual disability in victims?*
- 2a. How can knowledge and methods from adjacent domains, inside and outside the justice system, help strengthen the position of victims with a mild intellectual disability?*
- 2b. How can written communications be improved?*
- 2c. How can recognition of a mild intellectual disability be improved so that the available tailored support is actually offered to the people who need it?*
- 3. Does the research uncover other groups of victims with similar problems who would also benefit from recognition and similar support? Is the target group in this study distinct from other vulnerable target groups and does this justify specific attention to the issue of mild intellectual disability in policy pertaining to victims of crime?*

In order to answer these questions a number of steps were taken. First, a search was conducted for literature on victims rights' procedures combined with the characteristics of a mild intellectual disability. Subsequently, 31 interviews were conducted with relevant actors from across the justice system, including police officers, the Public Prosecutor's office, Victim Support Services, lawyers who provide legal assistance to victims, an examining magistrate, a criminal judge, and an employee of the Damages Fund for Violent Crimes (*Schadefonds Geweldsmisdrijven*). These interviews were conducted using visual stimuli (diagrammatic elicitation) in the shape of a flow chart of the criminal

justice process including the victims' rights and moments of choice. These interviews were primarily intended to pinpoint where victims with a mild intellectual disability might have problems.

To be able to provide suggestions for strengthening the position of victims with a mild intellectual disability and improving recognition of this group, the researchers branched out into fields with expertise in mild intellectual disability. They consulted both Dutch and international literature on the subject and interviewed eight professionals with such expertise. These respondents included academics, professionals who work with people with a mild intellectual disability and one person with first-hand experience of a mild intellectual disability.

Analysis of the literature and the interviews resulted in a list of bottlenecks and possible solutions. This list was presented to professionals from the criminal justice system and experts on mild intellectual disability, who were asked to assess the bottlenecks and possible solutions for their recognisability, urgency and feasibility.

Finally, three people with expertise in communicating with people with a mild intellectual disability were presented with several examples of the criminal justice system's written communication (forms, websites, letters) addressed to or intended for victims. These experts were asked to assess how comprehensible these communications were to victims with a mild intellectual disability, and to suggest improvements.

### Bottlenecks

Even without a mild intellectual disability, the victim's pathway is far from easy. Earlier research has identified various bottlenecks for victims in general. Presumably these apply unabated to victims with a mild intellectual disability. Therefore, only those bottlenecks are described that apply to a greater extent or more specifically to victims with a mild intellectual disability.

The description of the bottlenecks identified follows the chronological order of the victim's pathway, i.e. moving from the initial reporting of a crime to the written statement, the criminal investigation, prosecution, trial and finally the enforcement of the sentence. This phase-based description is preceded by a description of three themes that affect victims throughout the entire process, namely: recognition, communication and support.

### *Recognition*

The ability to recognize a mild intellectual disability is essential for choosing the right approach to the victim. In the criminal justice system, like elsewhere, people with a mild intellectual disability are not always recognizable as such. In some cases, professionals may overestimate their personal ability to recognize a mild intellectual disability. As this study revealed, there was no procedure for actively identifying a mild intellectual disability anywhere in the justice system. It is notable that the respondents from the criminal justice system, taken together, named a large number of characteristics of mild intellectual disability, particularly pertaining to observed behaviour, problematic communication and background information about the victim (living conditions, education, independence); individually, however, these respondents usually only named two or three indicators. In some interviews, incorrect assumptions were made about the characteristics associated with a mild intellectual disability; not every respondent had sufficient knowledge of the characteristics and consequences of a mild intellectual disability. In many cases, professionals and

victims spend too little time together for a mild intellectual disability to be identifiable. Although it is fair to say recognition of a mild intellectual disability needs to improve throughout the criminal justice system, not every situation requires the same degree of sensitivity. Sometimes recognizing that a victim has a mild intellectual disability might suffice, while in other cases a more extensive diagnosis might be necessary.

#### *Communication*

The way in which the criminal justice system provides (verbal and written) information does not suit victims with a mild intellectual disability. Often, suitable additional information in the shape of brochures or other materials is lacking. This runs counter to the right to information that should be afforded to victims with a mild intellectual disability, and hence, to their access to other rights. Victims with a mild intellectual disability often do not open their mail. If they do, the contents and vocabulary of the letters they receive are often too difficult for them. The letters usually indicate how the victim can access additional information or explanation, but this requires the victim to take action, which is no easy task for them. When victims with a mild intellectual disability receive correspondence they cannot understand, they become less likely to give effect to their rights, while their stress level increases.

#### *Knowledge*

Considering the heterogeneity of the target group, a protocol-based, standard approach cannot satisfy the requirement to meet the needs and abilities of each individual with a mild intellectual disability. This takes knowledge and an understanding of the consequences of living with such a disability. An overview of the associated problems ought to be included in the professional training curriculum for several fields, but should also be offered as subjects in ongoing education and training courses. Not only does the criminal justice system need to know the basics; the system also needs specialists who can help professionals with more complicated matters such as interrogating people with a mild intellectual disability. In addition, it is important to point out the importance of attitude, which can help lower the threshold to the criminal justice systems for victims with such a disability and may help to reduce the impact of (unconscious) prejudice.

#### *Support*

There is a wide consensus that victims with a mild intellectual disability need support in order to properly give effect to their rights. Current procedures tend to require more independence than can be expected from victims with such a disability. Yet, these victims refuse offers to help relatively often, and when they are willing to accept assistance it turns out to be difficult or impossible to arrange. There is a conflict between the desire to respect the autonomy of victims with a mild intellectual disability and the endeavour to offer them the support they are perceived to need. Victims with such disabilities are not always capable of accessing sources of support on their own. The support the criminal justice system offers them tends to make no allowances for their disability. In addition, there is seldom enough time to properly support them. Regular care givers are usually unfamiliar with the victim's pathway. Moreover, such care givers may not be able to provide sufficient support because of time constraints or conflicts of interest. In practice, victims usually end up dealing with a number of different support givers who do not always coordinate their involvement. In cases where the criminal justice system and care professionals do collaborate well, a

different type of conflict arises: the desire to share information clashes with the victim's privacy. Care professionals and the criminal justice system are not permitted to exchange information without the victim's consent. At the same time, it is imperative to ensure that no one withholds painful or confrontational information from the victim, as care givers might be tempted to do to spare the victim the psychological strain caused by the victim's pathway. An even more complicated issue is what kind of support can be offered during questioning. The potential consequences of various types of support for the reliability of the victim's statement must be weighed on a case by case basis.

#### *Phase I: First report and official crime report*

Prior to the decision to enter the criminal justice system, victims with a mild intellectual disability must negotiate various thresholds. Although these fall outside the scope of this study, they will be briefly touched upon. Once victims have decided to report a crime, various processes begin that reduce the chances of the crime being successfully reported. For example, victims with a mild intellectual disability have difficulty telling a coherent story and greater trouble providing evidence than people with no such disability. They also tend to show more incongruous behaviour which tends to influence the perception of professionals as to the reliability of these victims' statements. This may decrease the police's willingness to take a statement and reduce the odds of the case being investigated once it has been reported. Due to the impressionability of people with a mild intellectual disability, any reluctance to take a statement is more likely to persuade victims to let themselves be turned away. Another factor to consider is that in the current system, in non-emergency cases police only take statements by appointment. This is an extra obstacle for victims with a mild intellectual disability. Once the victim is actually at a police station making a statement, lack of time and space and improper questioning increase the chances that the resulting report will not be sufficient to enter or complete the investigative stage. When a victim who is known or suspected to have a mild intellectual disability reports a less serious crime, it is not standard practice to make use of special support services. In such cases, support from regular care givers may not be desirable, while support from experts may not be feasible. The psychological stress of reporting a crime to the police is great for any victim and even greater for victims with such a disability, in particular when they feel under attack or have the feeling their words are doubted.

#### *Phase II: Criminal investigation and prosecution*

When victims with a mild intellectual disability are questioned a second time, either by the police or an examining magistrate, they are more likely than the average victim to perceive this as proof that the police do not believe their story, seeing as interrogating them once was clearly not enough. This may prompt them to change their statement, which in turn can reduce its (perceived) credibility. Questioning by one or more lawyers before the examining magistrate can be experienced as threatening and confusing; the type of questions usually asked on such occasions is unsuitable for victims with a mild intellectual disability. However, questioning before the examining magistrate is preferable to questioning during trial: there are fewer participants in the process, the focus is squarely on the victim and the setting is less formal. This can help to reduce the perceived power difference and unfamiliarity of the situation. This is regarded as helpful, especially for victims with a mild intellectual disability.

Victims with a mild intellectual disability have more trouble understanding the course and the duration of the process. At the beginning of the process, they might have trouble assessing how

much information they would like to receive over the course of the process. Moreover, people with a mild intellectual disability relatively often find themselves in a position where they *cannot* be updated about the process, as they are more prone to become a victim of someone in their immediate surroundings. This leads to caution within the criminal justice system about informing them out of fear that the perpetrator will get access to sensitive information through the victim. It is difficult for victims with a mild intellectual disability to clearly state their wishes and interests and to list the damage they have suffered. Filling out these (types of) forms is complicated and the reciprocity the Public Prosecutor's office assumes is problematic for these victims. Even in cases where the public prosecutor's office interviews the victim, it may be hard to clearly specify the victim's interests. It also appears that victims with a mild intellectual disability experience more difficulties receiving a copy of their file on the grounds of their perceived lack of reliability.

Cases involving victims with a mild intellectual disability run a greater risk of being dismissed on a presumption of shared culpability because perpetratorhood and victimhood overlap more often and the victims may be perceived to have behaved inadvisably. Irrespective of this, victims with such a disability often have more difficulty understanding why their case has been dropped; they feel it is a reflection on themselves. In the event their case does end up being prosecuted, victims with a mild intellectual disability have more unrealistic notions about the amount of damages they can receive and the severity of the sentence to be demanded than victims without such a disorder, while in fact it seems that the odds are they will receive lower damages and the perpetrators will be treated more leniently than in other cases.

### *Phase III: Trial and punishment*

Victims with a mild intellectual disability have difficulty assessing the advantages and disadvantages of being present at the trial. Attending a trial is usually extra hard for these victims. Several aspects of this can be more taxing for them than for victims without such a disability: their incomprehension about their own limited role and the events and testimonies unfolding around them, their confrontation with the accused, and the refutation of their own story by the defendant's legal counsel. Although most vulnerable victims are usually questioned at the examining magistrate's court, some are not. The criminal justice system is insufficiently aware of how taxing it is for these victims to be cross-examined at trial.

When exercising their right to speak, victims with a mild intellectual disability may find it more difficult to limit themselves to the consequences of the crime. Besides, these victims have a hard time describing their emotions. Yet, the support so crucial in these respects is not always available. Victims with a mild intellectual disability also find it more difficult to understand the judge's verdict and the procedures pertaining to the payment of damages, particularly when these are conveyed in a letter. Although other research has shown that the chances of claims being upheld are greater when the victim has authorized a third party, this will only apply to a minority of the victims with a mild intellectual disability, while the whole group runs the risk of being granted less compensation as a result of their disability. Again there is a conflict between autonomy and protectiveness, which may lead to others deciding on behalf of victims with a mild intellectual disability whether they are to receive information about the enforcement of the sentence, despite the fact that these victims are mentally competent.

### Overarching problems

Three major problems can be extrapolated from the bottlenecks identified:

- (1) Incomprehension about the process and the proceedings;
- (2) Difficulty meeting the requirements and expectations of the system;
- (3) Impact of prejudices concerning mild intellectual disabilities.

These problems should be addressed by improving recognition, knowledge, support and communications. However, additional problems were identified within these solutions, namely:

- (4) Limited recognition of mild intellectual disabilities;
- (5) Insufficient knowledge and understanding of (the consequences) of living with a mild intellectual disability;
- (6) Issues related to accessing and accepting support;
- 7) Communications that are not geared to the victims' reading comprehension level.

Chapter 3.7 provides an extensive explanation of all these problems.

This goes to show that several of the suggested solutions pose further problems and points to deficits in the skills and possibilities in the criminal justice system. The experts consulted appear to prioritize the very same problems. The underlying reasoning seems to be that if these problems were addressed, this would automatically reduce any knock-on effects created by unfair or inappropriate treatment and overly high expectations of victims with a mild intellectual disability in the context of the criminal justice system. Therefore, the experts recommend that attention be focused primarily on communications, recognition, knowledge and attitude.

#### Possible solutions

Based on the interviews with respondents from the criminal justice system and experts in the field of intellectual disabilities, various solutions were suggested. Because of the complexity of the issues, these solutions cannot be linked one-to-one to the bottlenecks identified. However, the solutions have been subdivided into the four priority areas: 'improving recognition', 'improving knowledge, skills and attitude', 'facilitating adequate support' and 'adapting communications'. The various solutions are explained in greater detail in Chapter 3.7.

The experts consulted strongly emphasized the importance of recognizing the disability and its attending problems and the need for appropriate communications. At the same time, they acknowledged that this would require improved expertise. The interviewees also expressed the opinion that many procedural matters cannot be adapted to the target group. For this reason, they felt it would be equally important for victims with a mild intellectual disability to receive support – preferably in the shape of a case manager – in both major and minor crime cases.

#### Similar groups, similar issues?

Respondents named various other groups of victims they regard as vulnerable. A number of respondents stressed that, depending on the victim's personality and the context, all victims are actually vulnerable. Respondents mentioned foreign language speakers, victims from another culture or religion, children, teenagers, seniors and people with dementia, illegal immigrants, homeless people, victims with psychiatric disorders, autism, physical disabilities, addiction problems, little or

no education; as well as illiterate and socially disadvantaged victims. Although respondents saw large discrepancies between these groups, most recognized them as particularly vulnerable. Especially people with a developmental or psychiatric disorder and dyslectics were thought to share many of the same issues as victims with a mild intellectual disability. The experts expressed a fear that a situation would arise where professionals on the job would need a rolodex of fact sheets or flash cards to identify the different groups of vulnerable victims. Therefore, the experts recommended providing more general tools aimed at identifying the issues many of these vulnerable groups share, for example: a lack of assertiveness, comprehension or the ability to oversee a situation. At the same time, they recognised the importance of not losing sight of the specific issues associated with a mild intellectual disability; even where generic solutions are possible, these might need fine-tuning to address the specific needs of people with a mild intellectual disability.

#### In conclusion

The research results described above provide answers to the research questions. At least some Dutch victims with a mild intellectual disability experience additional problems when reporting a crime to the criminal justice system. The research findings also confirm that a mild intellectual disability may lead to an increased risk of secondary victimization. A wide variety of possible solutions are suggested. The reason these are referred to as 'possible solutions' rather than solutions is that this study did not result in concrete prescriptions for how various actors should act in specific situations. It is now up to the different fields involved with victims with mild intellectual disabilities to use the bottlenecks and possible solutions identified, and to be inspired by the many examples the respondents named, to implement policy that will translate the suggested solutions into action that fits in with the current procedures and limits operative in the relevant professional fields. While this study has its limitations, the research design has generated a wealth of information that will certainly provide ample material with which professional fields can develop practical tools.