Criminal justice responses to learning disabled and autistic victims of sexual violence in the UK.

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Abstract: This chapter focuses on criminal justice responses to learning disabled and autistic victims of sexual violence. Learning disabled and autistic victim-survivors are frequently absent from both feminist and disability discourse on sexual violence (Moras 2021:191). The available research suggests that people with a learning disability or who are autistic, especially women, are more likely to experience sexual violence, less likely to report it and when they do report are less likely to see a charge or conviction. There remains an urgent need to understand why these inequities exist and to develop best practice to improve criminal justice and support service responses.

Introduction

A 'justice gap' for victims of sexual violence in the UK is well documented (e.g. Hohl & Stanko, 2015; McGlynn & Munro, 2010; Temkin & Krahé, 2008; Kelly, Lovett & Regan, 2005). Charities supporting sexual violence survivors have argued that the continued, systematic failures of the criminal justice system have resulted in rape and sexual abuse being, effectively, decriminalised (Centre for Women's Justice, End Violence Against Women coalition, Imkaan, and Rape Crisis England & Wales 2020). Given poor conviction rates for rape/sexual assault and continued limitations of criminal justice responses it is perhaps unsurprising that studies with victims document negative experiences of reporting sexual violence (Brooks-Hay et al., 2019), and experiences of secondary victimisation by the criminal justice process (Kelly, Lovett & Regan, 2005). These criminal justice failures are more pronounced for disabled victims of sexual violence. A recent systematic scoping review (Bach et al 2021) on underserved survivors of sexual assault identified disabled survivors as a group particularly underserved by the criminal justice system. In the UK, two recent government led/funded reviews have acknowledged that disabled women are more vulnerable to being victimised, and experience reduced access to support (HMCPSI, 2019; MoJ, 2021).

Our own research on criminal justice responses to learning disabled and autistic victims of sexual violence adds to existing research studies in the UK exploring gender-based violence against disabled women (eg Hollomotz, 2009; Thiara, Hague, Mullender, 2011, Balderston

2013; Hollomotz et al., 2023). Following these studies, we recognise that the social model of disability offers a useful explanatory framework to explore how criminal justice responses to women with learning disabilities reporting sexual violence reveal systematic barriers to justice. However, we also acknowledge that longstanding critiques of the social model of disability suggest that the social model doesn't always engage sufficiently with embodied experience(s) or account for different experiences of impairment, which has often worked to exclude the experiences of people with learning disabilities (Owens 2015). To navigate these complexities, we find the intersectional approach taken by Balderston et al (2013) and Thiara, Hague and Mullender (2011) helpful. Balderston et al (2013: 40) described their approach as "an intersectional analysis underpinned by the social model of disability and feminisms". While Thiara, Hague and Mullender in their study of disabled women and domestic violence, suggested:

> We argue that an intersectional analysis provides an important framework for looking at and understanding the cross-cutting issues for disabled women affected by domestic violence, including social attitudes, marginality within the domestic violence and disability movements, and responses from service providers. (Thiara, Hague and Mullender 2011:759)

Increased risk of sexual violence

Walker et al (2021) document that the risk of sexual violence against people with learning disabilities was first brought to public attention in the UK 1988 at a conference supported by the Education Unit of the Family Planning Association and the British Institute of Mental Health (Brown & Craft 1989). At this time, claims that people with learning disabilities were at increased risk of sexual violence were reportedly met with skepticism (Walker et al 2021). Today, however, it is accepted that learning disabled and autistic people are disproportionately at risk of sexual victimization (Hollomotz 2009, 2012; Stern Review 2010; Majeed-Aris et al. 2020). It is estimated that the risk is around four times as likely than other demographics (Willott et al., 2020). Wiseman and Watson (2022) suggest that violent victimization of people with learning disabilities often starts in childhood and has become 'routinised' by adulthood. Similarly, Pearson et al. (2022) found that autistic adults expected to be victimized and, in many cases, felt that this was deserved. Evidence from research by Cazalis and colleagues (2022) suggests that around 90% of autistic women have been the victim of a sexual offence

– a much higher rate than neurotypical women – and they argue that autism is a significant risk factor for sexual violence. Rape victim/survivors with disabilities or mental health issues were considerably more likely to have reported previously being a victim of crime than those without (Vik et al., 2020).

Hollomotz (2012) argues that this increased vulnerability to sexual violence is due to several factors including dependent relationships, restricted ability to make personal decisions and broader social inequalities. Willott et al (2020) highlight different understanding(s) of risk and difficulties recognising abuse as key factors in vulnerability to sexual violence. Walker et al (2021) argue that perpetrators specifically target victims from 'vulnerable' groups as they are perceived as less likely to report the violence and less likely to be believed (see also Olsen et al., 2017).

Women with learning disabilities are often constructed as inherently vulnerable, particularly to sexual violence (Fish, 2016) and, are therefore, constructed as in need of protection. Yet, it is argued that vulnerability is not an intrinsic part of having an impairment, rather 'because those who are perceived as different have less power, they are marginalised and targeted' (Hollomotz, 2013:478). Thus, according to the social model of disability, 'vulnerability' is constructed through the social exclusion of individuals who have impairments. Social exclusion is created by inaccessible services, systems, and processes. This works to position disabled people as more vulnerable to sexual violence and simultaneously to construct inadequate policy and practice responses to disabled victims of sexual violence, causing disabled victims of sexual violence to be an underserved and vulnerablised demographic.

Another contributing factor are assumptions and prejudices about learning disabilities and sexuality. People with learning disabilities are often assumed to be fundamentally unsexual and/or unable to understand and form romantic relationships (Fish, 2016). Earlier work by Heyman and Huckle (1995), found that sexuality was perceived by carers as a danger for people with learning disabilities and thus, they were actively discouraged from exploring their sexuality with a partner. Sex is often constructed as 'dirty and inappropriate' (Fitzgerald and Withers, 2011:5) or 'a problem which needs to be managed' (Fish, 2016:643) for this group. Thus, individuals come to be over-protected, infantilized and excluded from sexual discourse (Harflett and Turner, 2016).

Similarly, people with learning disabilities are often precluded from sex education. This can lead to significant gaps in the development of their sexual autonomy which can have consequences for their future relationships (Ferrante and Oak, 2020). A lack of knowledge means limited ability to self-advocate in relationships, understand one's rights in terms of consent, and recognise and report negative sexual experiences if they occur (Hollomotz, 2009; Fish, 2016; Olsen et al, 2017). When sex is presented as dirty or wrong, this can increase self-blame in the event of sexual violence and prevent disclosure. When people with learning disabilities did disclose violence, they felt they were not believed (Wiseman and Watson, 2022; Pearson et al., 2022) or reported reactions which felt infantilising, victim-blaming or stigmatising (Rittmannsberger et al., 2020).

Learning disabled/ autistic people are often omitted from research on this topic. McCarthy and colleagues (2018) found that while women with learning disabilities experience high levels of domestic abuse, within which sexual violence is widespread, they are not sufficiently represented within the research literature. Amborski and colleagues conducted a large-scale meta-analysis on studies of sexual violence perpetrated against people with disabilities. Only a small number of studies included participants with learning disabilities or autism which the authors interpreted as evidence that these individuals are marginalized and may find it difficult to communicate (Amborski et al., 2022). The presence of gatekeepers and a perceived need to protect, means that often people with learning disabilities are denied the opportunity to contribute to research (Williams, 2020). Thus, accurate prevalence and reporting rates are difficult to ascertain. Moreover, a lack of research which incorporates the perceptions, experiences, and opinions of people with learning disabilities means that the barriers to disclosure are unexplored, and therefore, unable to be addressed.

Criminal Justice Responses

It is estimated that less than a fifth of all rapes are reported to police (Ministry of Justice, 2021). Of those that are reported, many will drop out of the criminal justice system at the stage of a police investigation (Hester and Lilly 2017). More cases still drop out when the Crown Prosecution Service decides whether to prosecute (the evidential test) or through a verdict at Court. The high rate of attrition (drop out) of sexual violence cases has been a persistent concern for many years (Gregory and Lees, 1996; Lea et al., 2003; Hohl and Stanko, 2015). Very few cases progress to charge and prosecution and fewer result in a conviction – in

England and Wales the current conviction rate is 1.6% (Ministry of Justice, 2021). Murphy et al (2022: 84) suggest that that "attrition in rape cases in England and Wales is representative of international patterns, has become more severe over time, and represents the most extreme decrease and objective percentage of cases referred to court".

A longstanding critique of criminal justice responses to sexual violence has centred on the prevalence of rape myths in decision making (Temkin and Krahe, 2008) and the privileging of accounts of so called 'real rape' over other accounts of rape (Estrich, 1987). Bohner et al (2009) identified four general types of rape myth. These are myths that blame the victim's behaviour, myths that blame the victim for their rape, express a disbelief in claims of rape and/or or impact of rape, myths that exonerate the perpetrator and myths that suggest only certain groups of people/ social identities can be/ are raped (Bohner et al 2009). Recent research in the UK has indicated that rape myths continue to be prevalent within police and jury responses to reports of rape (Hohl et al., 2022; Shaw et al., 2017, Smith & Skinner 2018). The ability of police officers to use their discretion is also posited as one contributory factor in poor charge and conviction rates (Alderden and Ullman, 2012).

In response to poor charge and conviction rates for sexual violence and high rates of attrition for rape/sexual assault cases, Operation Soteria was commissioned by the Home Office in 2021 to research current practice and to develop a new operating model for police responses to rape/sexual assault. The new operating model was introduced to all 43 police forces in England and Wales in 2023 with a key aim of addressing high attrition rates of rape/ sexual assault cases (Stanko 2022). A key component of the new operating model is a procedural justice approach. Procedural justice involves developing interactions between victims and criminal justice practitioners that incorporate 'voice, dignity and respect, neutrality, and trust' (Hohl, Johnson and Molisso 2022). While this is a potentially a welcome development, Hohl, Johnson and Molisso (2022) acknowledge that it is important to explore further how this approach to victim-survivor engagement might be experienced by different groups of survivors, including learning disabled victim-survivors (Hohl, Johnson and Molisso 2022: 259).

While people with learning disabilities and/or autism are more likely to be victims of sexual violence, they are among the least likely groups to report this to police (Willott, Badger and Evans, 2020; Olsenet al., 2017). When they do report, these reports are more likely to be 'no crimed' or no further action taken by the police (Hester, 2013; Hohl and Stanko, 2015). Research in The Stern Review (2010) highlights the heightened vulnerability to sexual violence of people with learning disabilities and suggests that police are aware of the increased likelihood of repeat victimization and/or grooming of this group. Yet, Vik et al (2020) found that in cases in Norway where the victim had 'vulnerability factors', such as learning or physical disability, mental health conditions or a history of substance misuse, police investigations of rape allegations were less thorough, less prioritized and less likely to result in an arrest. In research in the USA, investigations were hampered by police attitudes towards the victim/survivor. A study by Shaw et al (2017) reported that police officers had noted mental health difficulties or a previous report of rape as justification for no further action.

Thus, cases in which the victim/survivor has a learning disability or is autistic are at increased risk of attrition from police investigations, CPS decision making and court outcomes (Kelly at al., 2005; Hester, 2013; Hohl and Stanko, 2015; Hester and Lilley, 2016). In a large-scale study undertaken by Hohl and Stanko of criminal justice responses to reports of rape by the London Metropolitan Police force, an outcome of no further action by police or CPS was 4.4 times more likely to occur when the victim/survivor had a learning difficulty[1] (Hohl and Stanko, 2015). Hohl and Stanko's study (2015) attribute the higher attrition rates for victims with learning difficulties to police and court decision making rather than alternative explanations such as the victim's withdrawal of a report. Evidence in these studies suggests that there are significant barriers to passing the evidential test in sexual violence cases where the victim/survivor has a learning disability and/or autism and therefore a reduced likelihood of securing a conviction (Hester, 2013; Kelly et al., 2005; Lea et al., 2003).

Balderston's (2013) 5-year user led study revealed "persistent and entrenched barriers to justice experienced by disabled victim-survivors in England". Balderston found "significant

[1] Learning difficulty is the term used by Hohl and Stanko 2015

parts of the criminal justice system to be ineffective in prosecuting disablist hate crimes or supporting disabled or Deaf victims in accessible or culturally sensitive ways". Balderston's work found that "negative attitudes at a macro, societal level disable victims and Survivors individually, and legitimize violence" (2013:46)

Research, undertaken with a local Rape Crisis centre and local police force (Jobe & Williams et al 2020), found that the criminal justice system creates barriers to justice for learning disabled/ autistic victims when reporting sexual violence. Barriers included police officers not recognising learning disabilities/autism or understanding how a learning disability/ autism might impact on evidence, a lack of effective and inclusive communication by agencies, and a lack of appropriate support for victims. From this research, it was evident that practice needs adjustment to develop inclusive support for victims of rape/ sexual assault.

Other research has also indicated that there are multiple explanations for the increased risk of attrition and the disproportionately poor conviction rates for reports of sexual violence from learning disabled/ autistic victims. This includes communication difficulties which affect testimony, assumptions about victim behaviour, and extensive third-party disclosure policies. While special measures exist to support vulnerable witnesses there is often a lack of recognition of when these are needed. Similarly, there are expectations about how victims should respond to traumatic events which do not consider disparate frames of reference, communication differences and the nuances of individual experience. Overall, evidence from people with learning disabilities or autism is often considered less credible than other victims. Credibility is crucial in sexual offence cases which often do not have corroborating evidence and the perception of incredibility can hinder the progress of a case from the outset. This will now be explored in more detail in the following sections.

Being a 'Credible Witness'

Sexual offence cases are often approached by police and the courts differently to cases of other crimes, with heightened scrutiny on victim/survivor behaviour and witness credibility (Hohl and Stanko, 2015; Hohl et al., 2022), creating a hostile environment for victim/survivors. Being perceived as a 'credible witness' is particularly important in sexual offence cases as there is often the absence of corroborating forensic evidence or witnesses who can confirm

the victim's account of events (O'Neal, 2019). The myth that false allegations of sexual violence are prevalent contributes to this climate in which the focus is placed on the victim rather than the perpetrator (Hohl et al., 2022; Kelly et al., 2005). This disproportionately affects people with learning disabilities and/or autism who are often considered fundamentally 'unbelievable' because of their impairments (Williams and Jobe, 2024; Smith, 2018). Police assumptions about the ability of people with learning disabilities/autism to provide reliable evidence were found to result in poor quality investigations from the outset (Sin, 2013 cited in MacDonald et al., 2017). This results in what Thomas (1999) terms 'psycho-emotional disablism' – a cumulative process by which people with learning disabilities/autism are discounted, invalidated and discriminated against. In the context of this chapter, this creates a barrier to access to justice and significant impacts on health and wellbeing (Wiseman and Watson, 2022).

Furthermore, the focus on victim/survivor behaviour is problematic. Evidence suggests that people with learning disabilities and/or autism can have different frames of reference, including different perceptions of risk and difficulty understanding the intentions of others (Evans 2013; Norris et al. 2020). Referring to Garland's (1996) arguments on responsibilsation as a strategy of crime control, Hohl and Stanko (2022) argue that the focus of police investigations on victim credibility rather than perpetrator behaviour means that victim's 'vulnerabilities' including learning, socio- psychological or physical disabilities have become a form of 'victim responsibilisation'.

In our research (Williams and Jobe, 2024) we adopted Fricker's framework of epistemic injustice to explain the testimonial injustice(s) experienced by learning disabled and/ or autistic victims when reporting sexual violence. Fricker states that "a speaker sustains a testimonial injustice if and only if she receives a credibility deficit owing to identity prejudice in the hearer" (Fricker 2007: 28). While we acknowledge that authors such as Tremin (2017) and Leach Scully (2018) have critiqued Fricker's original analysis for failing to consider how epistemic injustice(s) are experienced by disabled people, we believe there is merit in extending Fricker's analysis to testimonial injustice(s) experienced by learning disabled/ autistic victims of sexual violence in the UK criminal justice system. Tremain (2017: 178) argues:

> Certain forms of unequal social power – that is, mechanisms of the apparatus of disability – produce an array of disciplinary norms about proper social behavior and interaction, modes of communication, rationality, emotional self- control, psychological resilience, and so on. These historically- specific forms of unequal power – that is, these "background conditions" – shape the public perceptions and authoritative epistemologies from which the negative social, political, interpersonal, and economic consequences of the sort to which Fricker refers accrue to some people, naturalizing, medicalizing, and depoliticizing these perceptions and epistemologies in ways that conceal their contingent and artefactual character.

Communication

Communication is fundamentally important when it comes to making a statement and giving evidence, but research has found that police are often inflexible and not inclusive when interacting with victim/survivors. This can impact learning disabled/ autistic people whose communication style may be affected by their impairment. Police were often found to be unaware of the ways a disability may create barriers to communication (Jobe and Williams, 2020 and forthcoming) and quick to dismiss evidence as unreliable when difficulties arose. Thus, an inconsistent account, becoming confused, being unable to remember or to answer police questions was considered as indicative of a false allegation (Williams and Jobe, 2024) rather than as a learning disability trait or even, a natural response to traumatic events (Digman, 2021) and/or the frightening and stressful environment of a police interview (Antaki et al., 2020; O'Mahoney, 2010).

People with different communication needs are often constructed as 'difficult' or 'challenging' (Hollomotz, 2013), particularly when they are unable to communicate effectively by adhering to 'specific social communication conventions' (Kearns et al., 2023:141).

Olsen et al (2017) argues that more accessible information and support for victim/survivors with learning disabilities would go some way to mitigating the increased risk of attrition in these cases. McCarthy et al (2017) argue that while awareness and understanding of abuse perpetrated against people with learning disabilities might have increased in recent years, there has not been a concomitant rise in available specialist support. Hohl et al (2022) note a need for further provision of specialist ISVA support for victim/survivors with learning

disabilities, a lack of which renders the criminal justice system even more inaccessible for these victim/survivors.

Special measures

In the UK, children and people with physical or learning disabilities or mental illness are considered vulnerable and it is recognised that this group may face barriers to attending court or giving testimony. Intimidated witnesses cover anyone who is fearful about giving evidence in court and all complainants in sexual offence cases are considered intimidated witnesses (CPS, 2021). The Youth Justice and Criminal Evidence Act 1999 sets out a series of special measures intended to facilitate the gathering of evidence from vulnerable or intimidated witnesses. These include the use of pre-recorded testimony or cross-examination, live-links or screens to prevent contact between the defendant and the witness, the use of communication aids and the provision of intermediaries (YJCEA, 1999). While a number of witnesses may be eligible for special measures, these are not automatically provided in court. The provision is dependent on a prosecutor making an application to the court which then may or may not be granted (CPS, 2021; Charles, 2012).

While the provision of special measures can and does have a positive impact on witness wellbeing (Majeed-Aris et al., 2021), case management (O'Mahoney, 2010) and potential future victimisation (White et al., 2021), these are not always effectively employed. The need for special measures was not always identified in a timely fashion (Jobe and Williams, 2020, forthcoming) and Charles (2012) found that there was poor communication between police and the CPS regarding the implementation of special measures. While O'Mahoney (2010) and Charles (2012) both advocated for increased awareness and training around special measures, more recent research by Majeed-Aris and colleagues (2021) identified disparities between the provision of special measures in policy and in practice suggesting that little progress has been made to address these needs in the last decade. Similarly, Jobe and Williams (2020, forthcoming) found that the role of intermediaries was poorly understood by professionals and was often wrongly assumed to be expensive, inaccessible or unnecessary.

Baverstock (2016) argues that there remain concerns around the effect of special measures on jury perceptions of witnesses during trial, although Ellison and Munro (2014) found that decision-making was not negatively impacted by the use of special measures in their research with mock jurors.

Intermediaries are communication specialists who are employed to facilitate communication between vulnerable witnesses and the criminal justice system. This includes providing an assessment of the specific communication needs of an individual and how best to support these as they give evidence, including how they should be questioned (Majeed-Aris et al., 2012). This is particularly pertinent for victims who have learning disabilities and/or autism and who may struggle to understand the kinds of questions asked when giving evidence and to formulate an appropriate response to what is asked. In a review of special measures carried out in 2012, Charles identified only two cases where an intermediary had been used, despite eleven applications in which the victim was eligible for special measures because of a disability. Yet, the use of an intermediary can be invaluable for a victim/survivor and in our research where intermediaries were used, they were found to be helpful (Jobe and Williams 2020).

Victim Support

In line with the Rape Review Action Plan, in 2023, the Ministry of Justice commissioned four research projects into the support needs of adult survivors of sexual violence. One of these research projects focused on support needs of disabled adult victim-survivors of sexual violence (Hollomotz, Burch and Bashall 2023) and includes specific recommendations developed with victim- survivors of sexual violence.

Hollomotz, Burch and Bashall 2023 research focused on support needs of disabled adult victim-survivors of sexual violence and includes a set of specific recommendations developed with victim-survivors of sexual violence. Overall, the study concluded that:

> Rather than expecting the victim-survivor to manage their impairment effects to become able to fit into a service, the responsibility for ensuring service access lies with the service provider. Disabled victim-survivors wanted to see upfront accessibility information for sexual violence support services to enable them to prepare for their first contact, but also because this can offer reassurance that the service was designed with disability in mind. (Hollomotz, Burch and Bashall 2023: 42).

It is not at the time of writing clear what impact these recommendations will have on criminal justice responses for learning disabled/ autistic victims of sexual violence, but these developments are welcome.

Our own research (Jobe and Williams 2020) in North East England identified some good practice across all support agencies when working with victims with learning disabilities. However, many services, including the Sexual Assault Referral Centre (SARC) reported difficulties in developing inclusive practices due to government cutbacks in resources and the ongoing impact of UK government austerity policies. These services indicated that they would welcome additional resources, specialist expertise and the development of training to identify and work with victims with learning disabilities to address barriers to criminal justice.

While there were local support agencies who offer services to people with learning disabilities when reporting sexual violence, identifying and accessing inclusive support appears difficult. Difficulties with multi-agency relationships and a lack of coordination to current service provision were reported. Some agencies reported that there was a lack of clarity from other agencies about agency roles and a clearer understanding of what each service does and does not provide was needed. These factors are likely to contribute to gaps in support for people with learning disabilities when reporting rape/ sexual assault and when navigating a complex criminal justice system.

Conclusion

This chapter has given an overview of the available academic research on criminal justice responses to learning disabled and autistic victim/ survivors of sexual violence in the UK. In conclusion, we suggest with previous authors (Hollomotz 2009, Thiara, Hague, Mullender 2011, Balderston 2013), that the current assumptions of the criminal justice system render it inherently discriminatory to disabled victims of sexual violence. This can heighten vulnerability to further sexual violence as there is little deterrent for perpetrators, meaning that learning disabled/ autistic survivors are marginalised and vulnerablised by a criminal justice system that is currently not designed to be inclusive or responsive to their needs.

Studies have shown that justice is rarely achieved for victims of sexual violence via the current adversarial criminal justice system in England and Wales. The criminal justice process in England and Wales has been found to re-traumatise victims, rarely result in

conviction and does not currently deliver the justice that victims of rape/ sexual assault want or need (Westmarland, McGlynn & Humphreys 2018). We have argued that this situation is further pronounced for learning disabled/ autistic victim- survivors who are subjected to further testimonial injustice(s) (Williams and Jobe 2024).

There is a lack of research which incorporates the perceptions, experiences, and opinions of learning-disabled victim-survivors, meaning that the barriers to justice for this group are underexplored, and unaddressed. This chapter has focused principally on criminal justice responses to learning disabled/ autistic victim-survivors in the UK context. Research from other contexts e.g., Ireland (Edwards 2014), Norway (Vik et al 2021) and the United States (Moras 2021; Shaw et al 2017) suggest similar patterns of exclusion, with disabled victims identified as underserved by the criminal justice system (Bach et al 2021) and learning disabled victim-survivors largely absent from both feminist and disability discourse (Moras 2021:191). Going forward, what is needed is more research and reform created *by* and/ or *with* learning disabled/ autistic victim-survivors (for example see Jobe and Williams 2024). The participatory principles of democratic participation and inclusion offer a potential challenge to the marginalisation of learning-disabled victim-survivors and to ableist/ disablist criminal justice approaches and systems.

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