

# Inaccessible Justice: Exploring the Barriers to Justice and Fairness for Disabled People Accused of a Crime

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*Abstract: Drawing on in-depth qualitative interviews with 15 people who have learning disabilities, brain injuries, neurodiversity, or mental health conditions accused of a crime in Scotland, this article offers substantive and methodological insights to unpacking perceptions of justice accessibility. We explore barriers to participation in pretrial justice processes for disabled accused people, demonstrating that disabled people are systematically denied a voice and disadvantaged by poor identification and recognition of impairment, insufficient supports or adjustments, and inaccessible information. We discuss participants' accounts of feeling excluded from, and intimidated by, systems and decisions that are not routinely explained in accessible terms, which, in turn, adversely impacts access to justice and perceptions of fairness. Informed by criminology and disability studies, we argue that the failure of criminal justice systems and practices to acknowledge disability as an equality issue creates disabling barriers that serve to further marginalise disabled people within justice settings.*

**Keywords:** criminal justice; disability; justice accessibility; learning disability; vulnerability

People with learning disabilities,<sup>1</sup> autism, and mental health conditions are marginalised and disadvantaged within criminal justice systems. Evidence as to what works, and what does not, in ensuring fair and just outcomes among this group is lacking. Policies that are in place do not directly engage with disability as a protected characteristic; instead, they rely on ambiguous definitions of 'vulnerability' and 'individual capacity'. Without this evidence, it is difficult to assess if disabled people who are accused of a crime are treated fairly, equally, or whether their needs are met in the justice process. There is a growing body of literature about the experiences of

justice-involved disabled people (see Baldry *et al.* 2013; Ben-Moshe 2013; Cadwallader *et al.* 2018; Gormley 2017b, 2019; Kelly 2017; Rodriguez, Ben-Moshe and Rakes 2020; Rogers 2019; Spivakovsky 2014, 2017) but little is known about the pretrial experiences of disabled defendants, or ‘accused persons’, either in Scotland or elsewhere. This article aims to address this gap by bringing a hidden population into view and presenting the accounts of justice-involved people with learning disabilities, autism, and mental health conditions. In doing this, we employ Fineman’s (2008) concept of vulnerability to understand the experiences of a group often absent in criminal justice research.

The UK is a signatory of the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD) 2006 and, under Article 13 of that convention, is compelled to take steps to ensure that disabled people have equal access to justice. In Scotland, as in England and Wales, this access to justice is covered under the Equality Act 2010. This Act places an obligation on the Scottish Courts and Tribunal Service (SCTS) to take an anticipatory duty to make provisions for reasonable adjustments so that disabled people have equal access in court. This duty, and the anticipatory nature, is articulated in the Judicial Institute for Scotland’s (2019) *Equal Treatment Bench Book*:

The SCTS has a duty actively to consider how to improve access for disabled persons: whether premises or other physical features require alteration, whether practices, policies and procedures require adjustment and whether any auxiliary aids and services are required. It is unsatisfactory if it is only when the person with a disability comes to the court that any problem in relation to that person’s convenience becomes apparent to the court staff or the judge. (Judicial Institute for Scotland 2019, ss. 11.4–23)

However, despite penal reform recommendations (Bradley 2009; NICE 2017; Talbot 2008, 2012), there are no standardised or systematic practices of identifying either when an accused person requires additional support to access justice fairly or what form that support should take (Equality and Human Rights Commission 2020a; Law Society of Scotland 2019). Accessible justice is not just about the removal of barriers but also ensuring that disabled people are actively included in the administration of justice. There are no official government records in UK jurisdictions on the prevalence of disabled people’s contact with the justice system as suspects, accused, or convicted persons, nor as victims or witnesses, but it is likely that these figures are significant. It is estimated that around 40% of people held in police custody have mental health conditions (NICE 2017) and that between 5% and 10% of the prison population have learning disabilities (Talbot 2012). While there are no comprehensive statistics or estimates around neurodiversity within justice settings, people with autism are thought to be over-represented but under-diagnosed within prisons (Ashworth 2016; King and Murphy 2014).

Disabled people who are accused of a crime are disadvantaged by a system that neither acknowledges nor understands their needs. In 2020, the Equality and Human Rights Commission (EHRC) published *Inclusive*

*Justice* findings from a broad inquiry exploring whether the criminal justice system treats disabled people fairly at the pretrial stage, arguing that urgent reforms are needed to ensure equal and effective participation for disabled defendants (England and Wales) or accused persons (Scotland). The report emphasised the importance of the pretrial stage as a pivotal moment for identification and making adjustments (Equality and Human Rights Commission 2020a). Likewise, the Law Society of Scotland (2019) has called for equivalence in the treatment of vulnerable accused people in response to recent legislative reforms<sup>2</sup> for vulnerable victims and witnesses. Similar concerns have been raised in England and Wales (Dehaghani 2020; Fairclough 2017, 2019), China (Mou 2020), North America (Ben-Moshe 2013; Rodriguez, Ben-Moshe and Rakes 2020) and Australia (Baldry 2014; Baldry *et al.* 2013, 2015; Spivakovsky 2014).

Building on Gormley's (2017a, 2017b, 2019) earlier work on the experiences of people with learning disabilities in the criminal justice system, this article connects two fields that do not normally speak to one another: criminology and disability studies. We employ disability studies' focus on the barriers disabled people face, together with Fineman's (2008) concept of 'universal vulnerability' to critically interrogate the problematic persistence of biomedical discourse that constructs the disadvantages experienced by disabled people as an individual problem. The criminal justice system locates the 'problem' within the individual rather than the structures that create it which, in turn, shapes definitions of 'vulnerability' (Roulstone and Sadique 2013). In centralising participants' experiences of pretrial criminal justice processes within the Scottish criminal justice system, we draw attention to inaccessible justice and identify the ways in which accused people with learning disabilities, autism and mental health conditions continue to be excluded and disadvantaged in accessing justice. We make visible the structural ways in which this, in turn, creates new forms of vulnerability that punctuates their justice experiences.

### **Disability, Vulnerability and Safeguarding in the Criminal Justice System**

Identifying accused persons' support needs at the earliest possible stage of criminal justice system contact significantly improves justice accessibility and perceptions of fairness (Beqiraj, McNamara and Wicks 2017; Equality and Human Rights Commission 2020a; Law Society of Scotland 2019). Gormley (2017a) found that convicted people with learning disabilities, whose needs are not identified early, are likely to face further and harsher criminal justice penalty due to the lack of support provided to them to understand their sentence. She found that people with community-based sanctions were often recalled to prison for technical non-compliance, and that those in prison often remained there longer than the 'punishment part' of their sentence because the requirements for release under parole are not explained clearly. Similarly, Baldry (2014) argues that justice-involved people with learning disabilities or mental health conditions are systematically and disproportionately criminalised but unlikely to be

afforded additional supports or legal protections which, in turn, further entrenches their exclusion and marginalisation.

A Disability Studies perspective argues that we should focus on the societal barriers that exclude people with impairments (Oliver 1996). Encounters with the criminal justice systems are, as Dowse, Baldry and Snoyman (2009) argue, often disabling and exclusionary. Prison-based research with people with learning disabilities (Gormley 2017a, 2019) and d/Deaf people (Kelly 2019) have pointed to the structural barriers and associated forms of violence, oppression and discrimination disabled people experience because of what Crawley (2005) terms the 'institutional thoughtlessness' of an inaccessible system. Measures that are in place to overcome these exclusionary barriers, such as procedural safeguards, are underpinned by ableist discourses which locate vulnerability within the individual. The focus is on assessing individual capacity and capability rather than the barriers created by the processes that make individuals vulnerable. The vulnerability label can be used by the State to circumvent, rather than augment, disabled people's participation in justice proceedings and, in turn, remove the rights of individuals (Spivakovsky 2014).

Roulstone and Sadique (2013) argue that vulnerability is the dominant frame used to construct disabled people in the criminal justice system. Under this biomedically informed approach, vulnerability is conflated with impairment (MacDonald 2015) and intertwined with notions of powerlessness and susceptibility to harm (Brown 2011). The complexities of vulnerability are reduced to the question of fit within constructions of 'normalcy' (Dowse 2017). When taken for granted, the biomedical approach to vulnerability is itself harmful to disabled people as they are constituted as incapacitated, Other, less than, and in need of help (Oliver 1996). This biomedical gaze is concerned with individual capacity to participate rather than the socio-structural barriers inherent in the inaccessibility of justice systems and processes. Consistent with a clinical governance lens, forensic research suggests that defendants considered vulnerable can be disadvantaged in criminal justice (Clare and Gudjonsson 1993; Murphy and Clare 1998) and their vulnerability can make them 'prone, in certain circumstances, to providing information which is inaccurate, unreliable or misleading' (Gudjonsson 2006, cited in Gudjonsson 2010, p.166). For people with learning disabilities, capacity is questioned in terms of accurate recall or sequencing of events, ability to knowingly enter a plea (Murphy and Clare 1998), or giving testimony as a witness in court (Gudjonsson, Murphy and Clare 2000). Those forensic issues around capacity are also present in literature about neurodiversity, Freckelton (2013) argues that the 'person's symptomatology', including 'inability to apprehend verbal and nonverbal cues, rigidity, naivete, and a propensity to panic and behave impulsively and unpredictably in unfamiliar environments', is likely to have relevance in criminal justice processes (pp.424–5).

Such accounts risk representing individuals in fixed binary notions of 'normal' and 'pathological', with or without capacity, vulnerable or resilient, which, in turn, contribute to wider discourse that devalues disabled people and denotes vulnerability merely as weakness or susceptibility to

harm. Moving away from the dualist interpretation of vulnerability as a weakness, Fineman's (2008, 2010) universal vulnerability approach offers a more nuanced approach to vulnerability, proposing that everyone is vulnerable due to unpredictable external circumstances and environment; our variable access to resources impacts resilience (Fineman 2017). Fineman (2008) argues that those who require additional support are often seen as exceptional and disadvantaged, resulting in differential treatment that risks obscuring our, universal, vulnerability. Dehaghani (2020) suggests that the gap between policy and practice can be reconciled in this area through the incorporation of the universal vulnerability approach, acknowledging the State's responsibility in recognising vulnerability and providing resources (Fineman 2008, 2017).

The universal vulnerability approach is more compatible with evidence that focuses on the systemic and structural issues that prevent equal access to justice (Parsons and Sherwood 2016; Talbot 2010). Gormley (2017a) found that people with learning disabilities lacked support throughout their criminal justice journey which impacted on their understanding of police contact, court proceedings and punishment; information was not explained to them in ways they could understand which impacted arrest, community sanctions, bail conditions and parole eligibility. They were constricted by the paradox of unexplained expectations and felt 'set up to fail' while navigating the complex justice pathway without support (Gormley 2017a, p.211). Inaccessible information and communication in justice settings carries a 'significant risk of disadvantage and the potential for miscarriage of justice' (Jones and Talbot 2010, p.3); although it is the responsibility of the State and criminal justice actors to ensure that information about rights and entitlements are communicated clearly, vulnerable groups inhabit a 'ghost-like' space due to the lack of awareness reported by criminal justice actors (Cooper and Grace 2016; Parsons and Sherwood 2016, p.568). Similarly, the lack of knowledge around neurodiversity among criminal justice professionals can create additional stressors (Chown 2010) as the current system is 'neither equipped nor sufficiently adaptable to accommodate' this group (Browning and Caulfield 2011, p.177).

Statutory safeguards for suspects considered vulnerable, such as the Appropriate Adult scheme which affords support during police interrogation, are let down by variable definitions and inconsistent applications of vulnerability (Dehaghani 2016). Without a single cohesive definition, the identification process is ambiguous and fractured, often relying on individual justice actors' subjective judgment or self-disclosure by individuals (Equality and Human Rights Commission 2020b). A statutory definition of a vulnerable accused person is offered in Section 42 of the Criminal Justice (Scotland) Act 2016 which states:

[W]here ... owing to mental disorder,<sup>3</sup> the person appears to the constable to be unable to (i) understand sufficiently what is happening, or (ii) communicate effectively with the police.

However, this definition is limited in scope and is consistent with a biomedical approach to understanding disability by overtly placing

emphasis on individual capacity to be able to participate to a normative standard. As such, it also sits in contention with Article 13 of the UNCRPD which tasks State parties with ensuring that disabled people have fair and effective access to justice including, for example, having a structured mechanism for early identification (Gulati *et al.* 2020, p.4). This also appears at odds with the Public Sector Equality Duty (PSED) under the Equality Act 2010 which charges public bodies, such as Police Scotland and the Scottish Courts and Tribunal Service, with responsibility to anticipate and plan to make reasonable adjustments to address potential discrimination. The EHRC's *Inclusive Justice* Inquiry reported system-wide failings in this area across England, Wales and Scotland:

The proportion of people coming into the criminal justice system who have a cognitive impairment, mental health condition and/or neuro-diverse conditions is believed to be high, yet we saw no evidence that relevant public authorities are collecting sufficient information about the characteristics of defendants or accused people. (Equality and Human Rights Commission 2020a, p.13)

Early identification of additional support needs affords more effective opportunities for diversion from prosecution (Arstein-Kerslake *et al.* 2017; Baldry *et al.* 2015; Gulati *et al.* 2020). The Appropriate Adult safeguard in Scotland is intended as an early response to assist victims, witnesses and suspects or accused persons who are considered to be vulnerable during police interviews to better understand processes and to facilitate communication between the individual and police (Scottish Government 2018). However, Gormley (2017a) found an inconsistent provision of the Appropriate Adult scheme among 25 adults with learning disabilities reflecting on their lifelong encounters with police in Scotland, with many people not knowing about the safeguard and being confused by the term 'appropriate adult' itself. The problematic title of the scheme 'suggests that the suspect is neither appropriate nor adult' (Dehaghani 2020, p.15; Pearse and Gudjonsson 1996) and upholds a clinical gaze that is both patronising and pathologising in those assumptions (Williams 2000).

In 2018, the Scottish Government held a consultation and sought user-voice, practitioner, and academic evidence to shape a proposed model for a statutory Appropriate Adult service which came into effect in January 2020 under the Criminal Justice (Scotland) Act 2016 (Support for Vulnerable Persons) Regulations 2019 (see Scottish Government 2018, 2020). It is claimed that these new provisions are better informed by equality discourses, as highlighted in the shift in policy wording in line with the PSED under the Equality Act 2010. This places responsibility on a need to anticipate and better identify where individuals might benefit from an Appropriate Adult. This is a step in the right direction, yet this safeguard is only available during police interview in Scotland and no equivalent is available throughout the remainder of the criminal justice journey for accused persons considered to be vulnerable (Keane 2021).

## **The Study**

The data presented in this article were collected in 2019 as part of a study that sought to qualitatively explore the views and experiences of the criminal justice system by disabled people accused of a crime in Scotland. In-depth semi-structured interviews were carried out with 15 people who identified as having autism, learning disabilities, or experiencing mental health conditions and who had recently been accused of a crime. The sample comprised of 14 men and one woman aged between 19 and 60 years. All participants were receiving community-based support from third sector disability advocacy, social care, or mental health and well-being support services; recruitment was facilitated through these organisations. The participants each had unique criminal justice experiences and histories. The offences for which they were accused ranged widely; however this was not the purpose of the research and participants were not asked to disclose this information. Across the cohort, all participants had some experience of attending court prior to the incident discussed in the interview; the majority had been accused or convicted of offences in the past but experiences of attending court as a victim or witness overlapped significantly.

The research was designed to be inclusive (Goodley 2005; Hollomotz 2018; Walmsley 2001) and accessible to people with learning disabilities or other cognitive impairments: all written information was offered in an accessible format and participants were encouraged to choose their preferred format of information; ethical approval was in place to secure verbal consent where written consent was inaccessible; some people had their supporter present in the interview; and some people preferred to have breaks so that the interview sessions were shorter. The interviews ranged in length between 25 and 70 recorded minutes, many with short breaks as requested by the participants and time was spent at either side of the interview to discuss the project fully. All participants were given the option of having a support worker, family member, partner or trusted friend present in the interview; five people requested this and one person opted to have their supporter close by using frequent breaks to discuss things with them in another room.

The focus of the interviews was on participants' experiences of being accused of a crime in Scotland, concerning all that happens at the pre-trial stage of justice proceedings after police charge. All participants were assured that the incident that resulted in their arrest was not the focus of the interviews and that this would not be discussed during the interview. This decision supported the ethos of researching within, or about, 'low-trust' environments such as justice systems (Beyens *et al.* 2015). All interviews were audio recorded with prior consent from all participants and were transcribed verbatim for subsequent thematic analysis following Braun and Clarke's (2006) approach. The research was fully approved by the university's ethics committee and was conducted in accordance with the British Society of Criminology Ethical Guidelines.

## **Inaccessible Justice**

In this section, we discuss three themes that became central in our analysis and understanding of this group's experience of indirect and systemic disability: lacking and fragmented support provision; inaccessible information and communication; and the fear of harm and intimidation felt during, and as a result of, court appearances. Below, we present the key findings from our analysis and which participants identified as central to their perceptions of justice accessibility. While the focus of the interviews was on pretrial hearings and court experiences, participants brought attention to the police interview and interactions with police officers after arrest; this is included in our presentation of the findings. By centralising the voices and experiences of justice-involved disabled people who emphasise the barriers they encountered, an important picture emerges about the need to critically interrogate vulnerability in light of disability models and equalities discourse.

### *Accessing Resources*

The overall perception from participants was that there was not enough support at the pretrial stage for them to engage meaningfully or participate fully in the proceedings. Despite the Judicial Institute for Scotland (2019) guidance, most participants felt that the duty was on them to self-disclose their impairment or mental health condition to access support, otherwise they worried that this would not be identified by criminal justice practitioners at multiple stages of the justice journey. Even when they did self-disclose and ask for the reasonable adjustments they were entitled to, many felt that this was discounted or ignored:

CG: Did you tell the police that you had a learning disability?

Mark: Mhmm. Too many times, too many times I told them. Too many times I told them, but they don't listen.

George: [The police] knew I had Asperger's but they don't, they don't dae anythin' about it.

CG: Does [your lawyer] know about any communication needs that you have and the way that you like to communicate with people?

Jordan: He knows that, but he refuses to mention anythin'. He refused to mention anythin'.

Shane: My lawyer just asks what my disabilities are but he doesn't ask if there's anythin', you know, extra that I need, like, done, so ...

These data extracts depict the ways in which participants felt let down by notifying statutory actors of their support needs and being ignored. We found that participants whose needs were recognised, identified, or appropriately responded to at the earliest point of systems contact were most likely to receive support further downstream. When participants were given an Appropriate Adult to facilitate communication support during the police interview, this did not automatically lead to support at any other stage of the justice journey for the accused person. Some participants felt



that it should not be their responsibility to ensure that each criminal justice agency was aware of their support needs, but that there should be better information sharing to ensure that the support was ongoing:

George: It's yer luck if ye find someone that wants tae help ye. There's no guarantee like the courts an' the prisons don't interlink. So if ye get took intae consideration in one place, ye might no get it in consideration any other place. They knew I had Asperger's but they don't, they don't dae anythin' about it. An' the court system an' the jail, that's what they've got in common. They really don't give a shit.

George felt 'lucky' to eventually receive the support that he was entitled to despite feeling that the odds were stacked against him amidst criminal justice agencies operating in siloes and not sharing information. Other participants echoed this notion of being 'lucky' to receive even a small amount of support:

John: Even wi' the support, it's so – it's still stressful an' scary, really frightenin'. Now, that's with support and I've said this. Can ye imagine for somebody that's in that situation that's got nae support or they might hae a solicitor that doesnae quite – they might – or they might hae a solicitor that doesnae get it. Maybe he doesnae understand the person. I mean, I was lucky because I had somebody that understood me an' really, em – but nae everybody – I can imagine nae everybody's got – able tae get that – is it luxury? (LAUGHS) – maybe luxury.

Those who were already connected with disability or mental health support services in the community were more likely to receive support in court. That support came in the form of formal adjustments, official special measures or additional support provisions, or non-court-sanctioned assistance from existing support workers, family, or friends. Some participants reflected on prior experiences at court when they were not receiving community-based support:

Matthew: At that time, I never had any help at all. No, I was tryin' tae dae it all myself but it never worked.

Dean: But, eh, 20 years ago, I didnae have any o' this [support]. I went through the justice system an' they just treated us like I was just a prisoner. No. No. No. 20 years ago I had nothin', eh. No, I had nothin'. I had no rights cos I didnae ken what ma rights was.

Dean and Matthew contrasted their experiences of being accused while receiving disability support in the community to when they were not connected with any support services, and reflected that they struggled far more with the criminal justice journey as an accused when they 'had nothing' and tried to do it themselves. All participants discussed the positive impact of having informal supporters, such as a family member, friend, or pre-existing support worker present at lawyer's meetings, other appointments, or when attending pretrial court hearings. This was especially the case when formal supports or adjustments were not in place, though not exclusively; participants who felt most supported were those who had formal adjustments as well as non-court-sanctioned, or informal, support.

Despite the recognition that early identification is effective in ensuring fairness and justice, the provisions for supporting disabled accused people in Scotland is fragmented, inconsistent, and, in some cases, absent entirely. These findings mirror those from England and Wales (see Fairclough 2017; Jacobson 2008; Talbot 2008, 2012). The difficulties participants faced with having their needs identified, being acknowledged when they self-disclosed, and consistently accessing supports were compounded by inaccessible information and communication. There were little or no resources available to those accused of an offence beyond the police interview (Keane 2021). Participants were largely reliant on non-court-sanctioned supports, either from 'good' lawyers who took the time to understand their needs, practical and communication support from pre-existing disability and mental health support services, and 'moral support' from informal support networks such as family and friends. Without these crucial forms of support, it was clear that their justice experiences and perceptions of fairness would have suffered significantly.

### *Inaccessible Information*

When information was provided or explained to participants, it was either inaccessible or not given directly to them. Some people felt that when information about their pretrial hearings or court processes were explained, this was done so in a rushed or dismissive way:

CG: Is it quite clear in the way that [the court citation] is explained to you?

George: No. Ye just get it on a pink sheet the next day. They don't go through it all. Like they might say – the custody sergeant does. He says it a' in the wan go but he's just kinda readin' on the computer an' then – right, off ye pop, oot ye go.

Information was generally not offered in a format that participants could understand. The lack of accessible information provision meant that many participants reported that they struggled to make sense of the documents, most of which contained important information about the charge or the hearing:

John: No, it wasny in Easy Read. It wasny very accessible. It was all, like, small writing. The only bit I could really understand was the date I had to appear before the Sheriff. Then it says, then there's a whole list of things about, eh, Sections. You know in a citation? It says 'under Section this, under Section that.' That's- -pff, I can't understand all this Section stuff.

Participants found it difficult to understand what was being said in court due to the language:

Lewis: Just, like the way people speak ... they speak differently. They talk about different words an' stuff, hard tae understand stuff.

Dennis: The way they talk in court, sometimes I cannae pick it up.

No attempt was made to include people in the process or to check if they understood the proceedings. Some participants only learned the outcome

after the hearing, through their lawyer, support worker, or other informal supporters:

Dean: I have tae wait till after tae, eh, figure this a' oot, with ma [support organisation] or, ma [community psychiatric] nurse. That's the only way I can, eh, sort it oot cos I just – eh, most o' the time I just walk out an' just hope that I'm walkin' oot the door. Ken? Instead o' in a van taken away tae [prison]. Ken? I dinnae like that.

Information was not provided or communicated in a way that they could understand and participants were rendered passive in the pretrial processes. They had to rely on other people, or prior criminal justice experiences, in order to make sense of what was happening and what was expected of them. Often, written information – including court citations, hearing schedules, and charge sheets – was issued directly to lawyers, circumventing the accused person entirely. Although some people preferred their lawyer managing all the written information, others found this demeaning and undermining of their assumed (in)capacity. They were often circumvented or written out of interactions with criminal justice agencies and agents, increasing their perceptions of being excluded and likelihood to withdraw their remaining sense of agency from the processes to which they were subject. Removing people with learning disabilities, autism, and mental health conditions from these processes creates vulnerability and further dependency on the safeguards and supports that are not routinely available to them.

### *Intimidation*

Most of the participants felt ignored throughout the pretrial processes and this sense of exclusion led to feelings of fear and intimidation, particularly in court holding cells. Some felt exposed and more vulnerable in the court cells while waiting for the hearing:

Frank: An' a lot of like badder ones in the other cells an' that banging away.

Stanley: I'll be honest wi' ye, if they'd have been considerin' ma mental health problems, they wouldnae have put me in a room wi' twelve other people. They'd have kept me on ma ain away fae that, but they didnae. ... A' treated the same, so ye're a' lumped in tae wan bunch rather than bein' treated as an individual.

Other participants reported the same sense of perceived difference and worried about disablist harassment or victimisation in court cells:

Shane: When I've been in the cell down the stairs, like every time, I've noticed because, because the guards an' stuff, I think they get to know what I'm downstairs – well, what I'm there for – because of the type of offences that I'm there for an' maybe also because I've got disabilities as well, they seem to treat me differently. Like nobody ever really talks to me but like the guards an' stuff talk to other people.

Others were worried that there was someone in the public gallery taking notes on what was happening; they assumed that this was a journalist and became anxious that their case was being reported in the media. Not only

did this distract them from what was being said in the hearing, but it also made them feel unsafe within and beyond the courtroom:

Shane: I don't know if it'd be safe for me to, like, walk out of a court, like, myself because the last time that happened, like the last time I went to court ... I'd walked out an' then somebody shouted somethin' at me an' then I went to walk across the road an' then they walked across after me an' then they ended up assaultin' me. I didn't report it because I thought, I just want this to be over with.

Participants also indicated that the structures and organisation of the courtroom set-up was intimidating to the point that they were distracted from the proceedings. For some people, it was the visual reminder from the court security officer and the symbolism of handcuffs:

John: The one thing that did scare me was when I went up, the security person come up an' sat beside us, stand beside us. It's quite daunting, I mean, if ye've never been in that situation an' ye dinnae ken the – ye dinnae ken the system. It's – I mean, if you've got somebody in a uniform next tae ye, ye're like, oh shit.

Mark: I was scared. Eh, the box was very scary. They people sittin' next tae ye, what dae ye ca' them? [security officers]. I mean, it's kinda, kinda scary. I was like that, handcuffs!

Others were intimidated by the criminal justice actors, referring again to the barriers in understanding legal jargon as well as the formal dress of the Crown and prosecution, though for Dean it was the powerful role of the judge:

Dean: It's scary.

CG: Can you tell me what it is that's scary for you?

Dean: The judge. He doesn't like who – he doesn't – the judge who stands in court, eh, that day doesn't like people re-offendin'. So he, he's gave me that many chances that he's – I'm on the last chance. Cos that judge is scary. Every judge is scary.

Some participants shared that feeling fearful or anxious in court was overwhelming, creating additional tensions. This led participants to withdraw from their surroundings:

Lewis: I just sit – I just sit. I don't even look at anythin'. I just sit wi' ma head down cos it's easier tae sit there an' just – naw think about anythin'.

The uncertainty relating to processes and structures was punctuated by being excluded from, and denied access to, information. We found that this had a damaging cumulative impact on participants' well-being. Participants reported extremely high levels of fear and anxiety because the systems and processes were inaccessible to them, adversely impacting their sense of security, access to justice, and perceptions of fairness. They felt powerless, at the whim of an inaccessible system that fails to acknowledge or respond to disabled people equally. As a result of direct and indirect forms of disablist discrimination, participants regularly did not know what was happening or what was expected of them, which produced and amplified anxiety and intimidation. Together, these exclusionary practices

combined and reinforced each other to create new forms of vulnerability for an already marginalised group.

### **Conclusions**

In this article, we have explored the ways in which disabled people accused of a crime are routinely excluded from, and disadvantaged by, structural processes embedded within, and generated by, the criminal justice system. People with learning disabilities, autism and mental health conditions accused of a crime are left to navigate already complex pretrial justice processes with insufficient support; people struggled to make sense of complex and inaccessible justice processes and found the system to be intimidating. It is these systemic forms of exclusion that create vulnerabilities for disabled people. By failing to frame disability as an equality issue, the criminal justice system is complicit in creating disabling barriers and disadvantaging disabled people's access to justice. Although varied, the participants' experiences of accessing safeguards and special measures for adjustments as accused persons suggest that there is a lack of information around the rights of a disabled person and needs of vulnerable accused. Rather than being routinely applied in accordance with equality legislation, those supports, adjustments and safeguards were perceived to be offered only at the discretion of individual decision makers.

Participants felt that access to justice must be renegotiated with every actor at every stage of the justice pathway. It is demoralising if people have to continually self-disclose impairment or support needs and to locate their own resources for support. These structural, or disabling, barriers and systemic oversights, in turn, adversely impact disabled people's perceptions of fairness and justice when accused of a crime. This is inconsistent with UK equality legislation and incompatible with the UNCRPD international disability rights framework. At its root is a failure to clearly engage with disability models and to explore socio-structural barriers experienced by disabled people. Access to justice is highly individualised, reinforced by the biomedical language about disability. The focus on individual capacity and capability locates the individual as the 'problem' rather than the inaccessible structures and processes (Peay 2012). The failures to adequately represent the rights of disabled people, particularly where there is the likelihood or risk that the individual will be subjected to institutional governance, may be considered a form of systemic or institutional violence (Cadwallader *et al.* 2018). Exploring justice accessibility through disabled people's experiences of discrimination highlights that an already marginalised group continue to face system-wide structural barriers. Based on these accounts, the negligence of the State to routinely anticipate and reduce disabling barriers contributes towards wider debates that serve to politically undermine and devalue disabled people (Watson 2003).

The disconnect between identification of support needs and provision of accessible adjustments for 'vulnerable' accused persons upholds, and is upheld by, the absence of disability-informed policy. This is not helped by the dearth of academic research from the perspective of disabled people in

this area. Fineman's (2008) universal vulnerability approach can steer inclusive penal reform as she acknowledges that the systemic inequalities and injustice experienced by 'individuals caught in systems of disadvantage' are ignored by the state (pp.11–12). She calls for a 'more active and responsive state' (p.17) that takes responsibility for recognising vulnerability and providing access to resources, programmes, and institutions that can 'mediate, compensate, and lessen our vulnerability' (p.31). A more nuanced understanding of vulnerability, such as Fineman's, complements rights-based approaches that incorporate the socio-structural aspects of implicit and explicit disability. These conceptual tools allow us to move away from systems and practices that undermine disabled people and perpetuate their clinical governance through binary constructions of vulnerability. Our findings support Dehaghani's (2020) legal argument for the incorporation of Fineman's universal vulnerability approach to ensure access to justice for suspects and defendants at the earliest point of justice system contact. This needs to be applied not just at initial contact at police interview but embedded throughout the justice journey for an accused person (Keane 2021), with the onus on the State to ensure that systems are in place to identify and support accused people with additional needs (Gulati *et al.* 2020).

The current model of individuals self-identifying and locating their own resources for support is not working; disabled people should have a statutory entitlement to end-to-end support where appropriate. The lack of systematic provision across justice systems and processes creates and reinforces vulnerabilities (Baldry 2014), yet such a provision is required to ensure that justice is achievable and accessible for people with learning disabilities, autism and mental health conditions (Equality and Human Rights Commission 2020b). Fairclough (2019) notes that although legal reforms around special measures for defendants in England and Wales engages with Article 6 of the European Convention on Human Rights 1953, in practice these are limited, fragmented, and remain unsystematic. Armstrong (2018) points out that uncritically transplanting rights-based principles into penal reform can augment administrative power and coercive governance over already marginalised groups. Spivakovsky (2014, 2017) argues that disabled people are increasingly subject to intrusive State control and governance under the guise of safeguarding, and that the pervasive medical gaze over the lives and legal citizenship of disabled people creates vulnerability to coercive State control. This must be considered carefully under equality and human rights models rather than returning to, or relying on, a biomedical approach. Unless and until this is achieved, disabled people will continue to experience inequality and discrimination at the whim of a criminal justice system underpinned by ableism.<sup>4</sup>

## Notes

- 1 We use the term 'learning disabilities' as this is consistent within Scottish policy and with preferred terminology used among self-advocacy organisations in Scotland.

- Equivalent terminology might be 'learning difficulties' in England and Wales, or 'cognitive impairment' or 'intellectual disability' internationally.
- 2 Victims and Witnesses (Scotland) Act 2014 and Vulnerable Witnesses (Criminal Evidence) (Scotland) Act 2019.
  - 3 Section 328 of the Mental Health (Care and Treatment) (Scotland) Act 2003; here, the definition of 'mental disorder' includes mental illness, personality disorder, or learning disability.
  - 4 *Acknowledgements*: We would like to thank the people who shared their stories and experiences with us. We also thank the two anonymous reviewers along with Dr Phillippa Wiseman and Dr Laura Robertson for their helpful comments on this article. This research was commissioned by the Equality and Human Rights Commission as part of their inquiry to understand the experiences of disabled defendants and accused people in the criminal justice system. The views expressed in this article are those of the authors and do not necessarily represent the views of the Commission.

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