
**FROM SILENCE TO JUSTICE:
IMPLICATIONS FOR PERSONS WITH LITTLE OR NO
FUNCTIONAL SPEECH ACCESSING THE CRIMINAL JUSTICE SYSTEM**

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ABSTRACT

Accessing the criminal justice system is a basic human right protected internationally by the Convention on Rights of Persons with Disabilities (CRPD). However, one group within the broader disability sphere who finds accessing the criminal justice system particularly challenging is those with little or no functional speech (LNFS), as they cannot rely on spoken language to meet their needs. The aim of this research was to identify the factors that assist persons with LNFS, who had been victims of sexual crime, to access the criminal justice system in accordance with the contextual factors listed in the International Classification of Functioning, Disability and Health (ICF). Twenty-five participants took part in the research. A qualitative research design was used and three semi-structured in-depth interviews and three focus groups were conducted. A conventional qualitative analysis was used to identify themes. The findings suggested that although persons with LNFS are particularly vulnerable victims of sexual crime, personal and environmental factors can be facilitated to successfully access the criminal justice system. Our research suggests the development of a Disability Resource Toolkit to be used as a guideline and best practice model to ensure equal access to the criminal justice system for persons with LNFS.
Keywords: access; factors; crime; criminal justice system; person with little or no functional speech; victims.

INTRODUCTION

Accessing the criminal justice system is a basic human right that is protected internationally by the Convention on Rights of Persons with Disabilities (CRPD) (United Nations, 2006: 1-31). South Africa ratified this Convention in 2007. Article 13 in the CRPD specifically addresses access to justice for persons with disabilities, and contains two components that all signatory states should adhere to: i) ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages; ii) promote appropriate training for those working in the field of administration of justice, including police and prison staff (United Nations (UN), 2006: 1-31).

In South Africa, the Bill of Rights in the Constitution, as well as specific laws, such as the Criminal Law (Sexual Offences and Related Matters) Amendment Act, No. 32 of 2007 (SOA) gives persons with disabilities the capacity to claim rights and equal access to the criminal justice system (Department of Justice and Constitutional Development, 2016:12-14). Numerous disability rights groups actively advocate for these rights (e.g. through Lawyers for Human Rights) and in the courts, persons with disabilities have had successful outcomes, e.g. *R v Ranikolo 1954 (3) SA*

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255 (0). However, there is one group within the broader sphere of disability who finds accessing the criminal justice system particularly challenging, due to the fact that they cannot rely on spoken language to meet their basic communication needs. This group of individuals are often referred to as those who are non-speaking (Glennen & DeCoste, 1997:395); have complex communication needs (Beukelman & Mirenda, 2013:4), or who have little or no functional speech (LNFS) (Cantwell & Baker, 1985:526). The latter is the preferred term in this article.

The most recently published world-wide disability prevalence figure was recently calculated to be approximately 15 per cent (World Health Organization, 2011:27), which is equivalent to an overwhelming one billion people worldwide. The World Health Organization (WHO, 2011) further estimates that 2.2 per cent to 3.8 per cent of these individuals have little or no functional speech (LNFS), which implies that they are unable to rely on their natural speech to meet their daily communication needs. Within South Africa, 300 000 individuals have a communication disability that affects their daily functioning (Statistics South Africa, 2011:8). Furthermore, research has shown that persons with disabilities are at high risk of falling victim to crime, and those with LNFS are at even greater risk (White, Bornman & Johnson, 2015:1).

A chain of at least six pertinent events contribute to persons with LNFS becoming increasingly vulnerable as victims of crime: i) There is the risk of persons with LNFS being unable to call or shout for help and to fight back to protect themselves from the criminal attack (Bryen & Wickman, 2011); ii) There is the myth that persons with LNFS do not have the required language skills to understand (receptively) and communicate (expressively), which may seem appealing to potential perpetrators (Bornman, 2014:54). Since police officers may fear that they will not be able to gather complete information from the victim with LNFS, the successful apprehension and prosecution of these perpetrators could be compromised (Hughes, Curry, Oschwald, Child, Lund, Sullivan & Powers, 2011); iii) Persons with LNFS are considered unable to communicate their victimisation, due to their communication difficulties (Larcher, 2014:140); iv) When these persons do communicate their victimisation, they are less likely to be believed because they may not be understood clearly due to their communication disability (Ziv, 2007); v) Persons with disability might experience feelings of shame or self-blame and be hampered by a lack of knowledge about the criminal justice system (Du Plessis, Kagee & Maw, 2009:275); vi) There is the misperception that persons with LNFS are unable to testify in court as competent and reliable witnesses (White et al, 2015:2).

One of the possible reasons for these misperceptions could be the fact that social workers, police officers, lawyers, advocates and presiding officers, who all form part of the criminal justice system, often have limited knowledge of how to assist a person with LNFS and, therefore, find the whole process too daunting (Bornman, White, Johnson & Bryen, 2016:4).

The Department of Justice and Constitutional Development (2016:12) suggests that individuals who have been the victim of a sexual offence should go to the nearest police station or Thuthuzela Care Centre (TCC); give a statement to the police; be prepared for court and be able to testify in court. Persons with LNFS find these steps overwhelming because they feel they will not be offered the support to fulfil these steps.

As mentioned above, the first step is to immediately go to the nearest police station to report the crime and give a preliminary statement (Department of Justice and Constitutional Development, 2016:12). This is followed by the police opening a docket and investigating the crime, before sending the docket to court. The National Instruction on Sexual Offences provides meticulous information to police officers regarding how to assist a victim of crime (Criminal Law [Sexual Offences and Related Matters] Amendment Act 32 of 2007). It states that, while taking statements from the victims and their families, the police officers must be professional and

sensitive towards to the emotional state of the victim and family (Combrinck & Meer, 2013:7). The police officer must listen patiently while the victim of crime explains what happened during the crime and additionally, should not be judgmental towards the victim of crime (Combrinck & Meer, 2013:7). The Criminal Law [Sexual Offences and Related Matters] Amendment Act 32 of 2007 also states that if the police officer encounters any form of difficulty when dealing with a person with a communication disability, it should be discussed with legal services as the procedure may demand an urgent application to the High Court (Combrinck & Meer, 2013:8;). However, despite the Criminal Law [Sexual Offences and Related Matters] Amendment Act 32 of 2007 guidelines, police officers are known to feel that they are not equipped with the necessary skills to take a statement from a person with LNFS and, therefore, may not provide them with the correct service and support they need to provide a statement (Hesselink-Louw, Booyens & Neethling, 2003:105; Keilty & Connelly, 2001:289). Furthermore, research has also shown that some police officers view a person with LNFS as unreliable to provide an adequate statement and, therefore, see no need to allow them to give one (Bornman, 2014:55; Combrinck & Meer, 2013:7). The truth is that; if a person with LNFS is questioned in a specific way about the crime, he/she can produce accurate reports and facts of the event and go on to testify in court (Pillay, 2012:320).

The next step is to refer the victim to the local social worker. Social workers play a vital role in the process of finding justice for the victim, particularly for victims with disability (Western Cape Forum for Intellectual Disability, 2014:5). In South Africa, when a sexual crime has been reported, it is the social worker's duty to assist in keeping the victim safe, to report the crime to the Sexual Offences court, to refer the victim and family to appropriate services and, most importantly, to prepare the victim for the court case (Western Cape Forum for Intellectual Disability, 2014:7). This procedure also applies to persons with LNFS who have been victims of crime. Even though the Department of Justice and Constitutional Development offers training services for social workers, the latter often feel inadequately equipped to deal with victims with LNFS or they do not have the necessary resources (e.g. specific vocabulary on communication boards) to assist the person with LNFS with court preparation (White et al, 2015:10). One potential remedy could be to develop a programme to teach and guide social workers on how to use pictorial support during court preparation of the victim with LNFS (Bornman et al, 2016:13).

Once the court receives the complete police docket, the prosecutor decides to prosecute (in which the case goes to court for charge) or not (because there is either not enough evidence, or more police investigation is needed). If the case proceeds to court, the next step is to identify how persons with LNFS can be assisted to have physical access to the criminal justice system (e.g. ramps if they are in wheelchairs) and to provide someone to support them in making the process as effortless and supportive as it is for their able-bodied peers. The use of an intermediary is regarded as best practice internationally for persons with LNFS. The intermediary's right to access the criminal justice system should be acknowledged and every attempt must be made to allow them to give their statement to the police and to give evidence in court – rather than to focus on why they should not be permitted to testify in court. The intermediary is an impartial person who is experienced at conveying questions from court to the victim in an understandable manner (Department of Justice and Constitutional Development, 2016:13). The intermediary can facilitate communication between the prosecution (who represents the victim), the defence and the magistrate, and must intervene when necessary (i.e. if complex questions are asked) (O'Mahony, 2009:239). In terms of the Sexual Offences Act of 2007 the prosecution should apply to court for the victim with LNFS to testify in a private testifying room, with the assistance of the intermediary (Department of Justice and Constitutional Development, 2016:13). Nonetheless, many

intermediaries feel ill-equipped to assist a victim with LNFS in court and have urged for further training in how to communicate with a person with LNFS (Larcher, 2014:147).

Extensive research has shown that professionals in the South African criminal justice system still need to be sensitised, educated and trained to understand disability features. They should be equipped with the necessary skills to handle challenges arising from disability-related aspects, as a lack of awareness and training negatively affects the process that a victim with LNFS must follow (Bornman et al, 2016:13; Viljoen, Bornman, Wiles & Tönsing, 2016:144). However, rather than dwelling on the barriers and potential barriers, it is important to explore factors that may facilitate the access of persons with LNFS to the criminal justice system.

The main aim of this research was, therefore, to identify those facilitating factors that could assist persons with LNFS, who had been victims of crime, to access the criminal justice system.

METHOD

A qualitative research design was used and three semi-structured in-depth interviews as well as three focus group discussions were employed.

Participants

In total, 25 participants consented to participate. First, three expert witnesses were interviewed, followed by three focus group discussions with six members in the Gauteng group, eight members in the KwaZulu-Natal group and eight members the Western Cape group. The descriptive information of the participants is depicted in Table 1.

Table 1: Participant Description (N=25)

	Interviews (n=3)	Gauteng Focus Group (n=6)	KwaZulu-Natal Focus Group (n=8)	Western Cape Focus Group (n=8)	Total Frequency (%)
Age					
20-29			2	1	3 (12%)
30-39		3	3	3	9 (36%)
40-49	2	3	3	2	10 (40%)
50-59				2	2 (8%)
60 +	1				1 (4%)
Gender					
Female	2	6	7	8	23 (92%)
Male	1		1		2 (8%)
First language					
English	2	1	3	5	11 (44%)
Afrikaans	1	1	4	3	9 (36%)
isiZulu		3			3 (12%)
isiXhosa			1		1 (4%)
Sesotho		1			1 (4%)

Qualifications					
Certificate/Diploma		3	1		3 (16%)
Degree	2	3	5	6	16 (64%)
Honours Degree			1		1 (4%)
Master's Degree	1		1	2	4 (16%)
Occupation					
Social Worker		1	4	6	11 (44%)
Social Auxiliary Worker		3	2		5 (20%)
Speech Therapist			1		1 (4%)
Forensic Nurse	1				1 (4%)
Manager/Director	2	2	1	2	7 (28%)
Experience with victims of crime testifying in court (in years)					
1 – 3 years		3	4	2	9 (36%)
4 - 6 years	1		2	2	5 (20%)
7 - 9 years		2	1	3	6 (24%)
10 years +	2	1	1	1	5 (20%)
Experience with persons with disabilities who were victims of crime (in years)					
1 – 3 years		1	1	2	4 (16%)
4 – 6 years		3	2	2	7 (28%)
7 – 9 years		1	4	3	8 (32%)
10 years +	3	1	1	1	6 (24%)

The ages of the participants ranged from 26 to 63 ($M=38.52$) with the majority being female (92%). Although almost half of the participants spoke English as their first language (44%), the mixture of first languages was an indication of the variety of cultures in this study. All participants were in possession of a professional qualification, ranging from a certificate or diploma to a relevant Masters degree, which attests to the high educational level of the participants. Social workers (44%) and Social Auxiliary Workers (20%) (i.e. an assistant to a social worker who is under the social worker's supervision and provides support services) (South African Council for Social Service Professionals, 2014) had the largest representation from any of the disciplines involved. Social workers play a crucial role in court preparation of the victim of crime (Department of Social Development, 2014: np). The majority (56%) of the participants had one to six years' experience with victims of crime testifying in court and 56 per cent of the participants had seven or more years' experience with persons with disabilities who had been victims of crime.

Procedures

Before participant recruitment commenced, ethics approval was obtained from the relevant authorities. Participation was voluntary, and no-one was pressured into participation. Individuals were also assured that they could withdraw from the study at any time, without any negative consequences. They were provided with adequate written information about the purpose and nature of the research, thereby allowing them to make informed decisions regarding participation before providing informed consent. The prospective participants were also informed that their participation posed neither risk nor benefit. Confidentiality was ensured by not releasing any identifiable information on any of the participants.

Regarding the three semi-structured in-depth interviews, all participants were asked 11 questions by the first author who carefully adhered to a custom-designed interview guide to increase procedural integrity. The questions revolved around legal terminology, court cases that involved victims of crime with disabilities, and possible facilitating factors, to ensure access to the criminal justice system for these individuals (of which the latter constitute the focus of this article). The interviewer also took notes, in addition to the audio recording, since this helped to place the interview and legitimise the writing of insights. The third author made verbatim transcriptions of each of the interviews, which were checked by the first author. An agreement of 98 per cent was obtained. Each interview lasted between 60 and 90 minutes.

Regarding the focus groups, the same question was asked in all three focus group discussions, namely What may facilitate the process of an illiterate individual who can't speak to access the criminal justice system, e.g. to testify in court? A scripted guide was developed for the focus groups to ensure procedural reliability and comparability between the three groups. Participants were encouraged to respond honestly, based on their own experiences in the field. Rapport was established quickly as all participants knew each other. During the focus group discussions, the first author acted as the moderator, while the third author was the scribe who typed all comments on a laptop. These comments were projected onto a wall to enable the participants to check and jointly revise the formulation of their statements. The participants confirmed that the statements were true representations of their experiences and added more information where applicable (member checking). Where applicable, duplications were removed. This type of member checking increased the reliability of the data.

Data analysis

Results for the interviews and focus group discussions were combined and conventional qualitative analysis was used to identify themes that emerged from the question – What may facilitate the process of an illiterate individual who can't speak to access the criminal justice system, e.g. to testify in court? In the current study, the combined statements were entered on a spreadsheet and divided into 'meaning units'. Reductions were made by removing duplications and combining units that had a similar meaning.

Thereafter, all three authors worked together to identify the various types of facilitating factors according to the contextual factors (including personal and environmental factors) listed in the ICF (World Health Organisation, 2001:1-322).

Environmental factors make up the physical, social and attitudinal environment in which people live. In the ICF, the environmental factors are organised into five chapters, each dealing with different and mutually exclusive aspects of the environment, namely:

- e1) Products and technology: this relates to products, instruments, equipment or technology adapted or specially designed for improving the functioning of persons with disability.
 - e2) Natural environment and human-made changes to the environment: this relates to animate and inanimate elements of the physical or natural environment and components of that environment that have been modified by people.
 - e3) Support and relationships: this relates to people or animals that provide practical, physical or emotional support, nurturing, protecting and assisting as well as relationships to other persons in all aspects of daily living, but excludes the attitudes of the person(s) who are providing the support.
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- e4) Attitudes: this relates to the attitudes that are observable through consequences of customs, practices, ideologies, values, norms, factual beliefs and religious beliefs, and relates to those attitudes of the person(s) external to the person with disability, not of the persons with disability themselves.
- e5) Services, systems and policies: services that relate to structured programmes, public, private or voluntary services established at local, community, regional, national or international level in order to meet the needs of persons with disabilities. Systems and policies respectively relate to administrative control and monitoring mechanism and rules, regulations and standards established at the different levels mentioned above, in various sectors of society.

The ICF describes personal factors as internal factors, which may include gender, age, coping styles, social background, education, profession, past and current experience, overall behaviour patterns, character and other factors that influence how disability is experienced by the individual (WHO, 2001: 11). However, personal factors are not yet classified in the ICF, as some authors argue that these factors could be used to stigmatise, label, or otherwise blame a person and that data privacy protection would be breached (Grotkamp, Cibis, Nüchtern, Von Mittelstaedt & Seger, 2012:5). However, to neglect personal factors as part of contextual factors would mean losing sight of the person with disability and hence it was decided to include personal factors, regardless of the fact that they have not yet been formal classified (as is the case with environmental codes). In this article, we define personal factors as all features that are related to the person with LNFS that can have an impact on any aspect of their functioning.

RESULTS

The results related to factors that would facilitate access to the criminal justice system for persons with LNFS are presented according to the two contextual factors listed in the ICF (WHO, 2001). First the facilitating personal factors are shown (Table 2), followed by the facilitating environmental factors (Table 3).

Table 2: Coding themes, sub-themes and examples of facilitating personal factors

Themes	Sub-themes	Verbatim examples provided by participants
Coping	Feel supported	<ul style="list-style-type: none"> • They have got to know that someone is standing by them
	Feel at ease	<ul style="list-style-type: none"> • They are comfortable in that environment • They must obviously feel that they have been trusted

From Table 2 it is evident that two different sub-themes emerged as personal facilitating factors that would assist persons with LNFS to cope in the criminal justice system. Each of the five facilitating environmental factors will be described next.

Table 3: Coding themes, sub-themes and examples of facilitating environmental factors

Themes	Sub-themes	Verbatim examples provided by participants
Products and Technology (e1)	Need for assistive communication kit	<ul style="list-style-type: none"> • Just having an interpreter there is not enough – you need a kit, ready and available – it should be in every court. It should already be there and you should not have to wait for it.
	Need for low-technology communication aids	<ul style="list-style-type: none"> • Introducing communication boards and training the people in the sector – from therapists to prosecutors, magistrates, etc.
Natural environment and human-made changes to the environment (e2)	Consider alternative court context	<ul style="list-style-type: none"> • Allowing people with disability to testify in children’s court, not in criminal court. • Avoid open court as it is clearly not the right place for these people to testify. • There is a difference between child friendly and disability friendly – it is not really the same. To make an environment disability friendly is a separate thing.
	Prioritise cases that involve people with disability	<ul style="list-style-type: none"> • The whole process takes too long for people with disability before the case gets to court. • People with disability should be fast-tracked to court.
	Allow appropriate questioning strategies	<ul style="list-style-type: none"> • It has a lot to do with the defence attorney and the prosecutors depending on the questions they ask.
	Accept different communication modes	<ul style="list-style-type: none"> • Once they understand that, they can communicate in their own language. • (Intermediaries) should speak on the level of the individual. • Prosecutors should also have to speak to the individuals on their level. • You learn their language. It is helpful if a person who knows them can interpret what they are saying. • Once sign language becomes the next official language, it will facilitate the process.
	Adapt physical court environment	<ul style="list-style-type: none"> • The court needs to make the environment seem to have a space for disability as well.
Support and relationships (e3)	Provide comprehensive support	<ul style="list-style-type: none"> • Therapeutic support, family support, family belief in the victim’s story should all be provided.

	Ensure that a person with disability feels supported and at ease	<ul style="list-style-type: none"> • I had, for instance, a defence attorney that would go to the individual all the time and say: <i>I am going to ask you these questions, and it is not because I want to put you on the spot, but we need to get to the truth.</i> • A trained person that is warm and compassionate. • If there is a trusting relationship, it is easier to relate and then disclose the crime.
	Differentiate between a sign language interpreter and an intermediary	<ul style="list-style-type: none"> • There are legal challenges around this (sign language interpreters for persons who are deaf and interpreters for other languages), because, you know, multiple roles, you can't be interpreting and be an intermediary.
Attitudes (e4)	Dispel myths around sexuality and disability	<ul style="list-style-type: none"> • There are myths around people with disability that they are hyper-sexual.
	Address stigma around cognitive disability	<ul style="list-style-type: none"> • There is a whole lot of stigma around cognitive impairment. • Attitude that they (people with disabilities) are lesser than, so what they say is not reliable, not credible. They are more likely to lie and make things up.
	Change negative attitudes with training	<ul style="list-style-type: none"> • The attitude that they (people with disabilities) are stupid, rather than the fact that they cannot communicate. • Doing basic sensitisation (regarding disability sensitivity). • Every person should be trained in disability.
Services, systems and policies (e5)	Services: Training on disability and communication across different levels in the criminal justice system to ensure effective service delivery	<ul style="list-style-type: none"> • Training in particular when there is some form of communication impairment. • Some people have certificates, but don't know how to work with these children. • We need people who know how to work with people with disabilities. • We need to capacitate people with disabilities – on their rights – for example, the Victims Charter. • Introducing communication boards and training the people in the sector from the therapists, to the prosecutors to the magistrates. • I think the first problem is the statement: Police need training.

Services, systems and policies (e5)	Services: Training on disability and communication across different levels in the criminal justice system to ensure effective service delivery	<ul style="list-style-type: none"> • Even the presiding officer.... some, they (are) very lenient, but then you get others that are very strict. • Magistrates work entirely on their own – the training should be at all levels.
	Services: Court preparation (pre- and post-court appearance)	<ul style="list-style-type: none"> • They need to meet them first before people with disability will disclose. • Court preparation is important, currently there is no specialised counselling – it is important in preparing them for court.
	Services: Use of an intermediary	<ul style="list-style-type: none"> • It must obviously be an intermediary that can understand them, understand their level, understand how they communicate and understand their language. It cannot just be anybody. • Usually the individual has an intermediary – a trained person. • Intermediaries are such an advantage to the individual.
	Systems: Collaboration in criminal justice system	<ul style="list-style-type: none"> • More collaboration is needed – it is not a Department of Social Development issue, or a justice issue; everybody should be working together. • We have a broken telephone scenario – evidence can go through such a long line of people: the intermediary, the sign language interpreter, the prosecutor. The system needs to be streamlined.
	Policies: Reform legislation	<ul style="list-style-type: none"> • But even then, if good information is put in front of them (presiding officers), if they find on a matter the person is not guilty, the state can only appeal on a matter of law and not on a matter of fact. And the law is the problem, so there is a need for legislative reform along with the strategic litigation (or your impact litigation, as they call it).

All five environmental factors of the ICF were mentioned in the data, albeit to different degrees as shown in Table 3.

DISCUSSION

The key research findings from this study highlight that both personal (Table 2) and environmental (Table 3) facilitating factors could assist persons with LNFS to access the South African criminal justice system. The main personal facilitating factors were the victim's ability to feel supported and at ease. The main environmental facilitating factors reported, to mention a few, were the need for assistive communication kits, the option to choose an alternative court context, comprehensive support offered by family and professionals, dispelling myths about sexuality and disability and lastly, training on disability and communication across different levels in the criminal justice system to ensure effective service delivery.

The results from this study, which focuses on persons with disability, is, therefore, in agreement with other research done with minors which has suggested that for the victims to cope, feel safe and comfortable when testifying in court, court preparation is vital (Thoman, 2014:263). Going to court is for anybody a stressful experience – more so for persons with LNFS. It is the duty of social workers or court preparation officers to train the person with LNFS in court proceedings and assist in preparing him/her to provide a consistent and accurate testimony (Department of Social Development, 2014: np; Townsend, Waterhouse & Nomdo, 2014:81). Police officers, social workers and prosecutors must take the time and effort to build a trusting and supportive relationship with the victim of crime in which they feel at ease to share all the necessary information needed to prepare for the court case (White et al, 2015:9).

The South African Law Commission in 2001 made a submission that "... all witnesses be regarded as competent to testify if they can understand the questions put to them and can in return give answers that the court can understand" (Jonker & Swanzen, 2007: 2). This would greatly assist a person with LNFS when testifying in court, irrespective of whether a low-technology system (such as a communication board) or a high-technology system (such as a speech-generating device) is used. The current study highlights suggestions to improve communication by developing and making a Disability Resource Toolkit that is available in all courts where victims with disabilities and LNFS testify (BenZeev, Lerver & Klein, 2014:129). In Israel, toolkits have successfully been used during the investigation and testimony in court (BenZeev et al, 2014:129). These toolkits include approximately 1000 picture symbols, different kinds of letter cards, a user manual and a portable computer with alternative and augmentative communication software.

Reasonable accommodations should be made within the South African criminal justice system for children and persons with disabilities (including LNFS) who are regarded as vulnerable individuals. The Children's Act, Act 38 of 2005, acknowledges that children under the age of 18 have a legal right to be placed in a child-friendly and separate room when testifying in court; similarly, for all persons with LNFS, irrespective of whether they are younger than 18. The legal team can request that they be considered as vulnerable individuals and placed in a separate room when testifying in court (Dickman, 2013). It is stated in the Criminal Law [Sexual Offences and Related Matters] Amendment Act 32 of 2007 that a person with severe communication disability under the age of 18 can testify outside the court with the assistance of a person who acts as an intermediary. These reasonable accommodation measures should be followed consistently and be made a legal priority for a victim with LNFS.

It is important to prioritise cases that involve victims with disabilities, as time is a vital aspect to consider with a victim of crime with a disability and LNFS. The cases of persons with LNFS should be fast-tracked and prioritised due to the memory difficulties that they experience (BenZeev et al, 2014:130). Regrettably, for various reasons it often takes too long for victims with disabilities and LNFS to go to court to testify.

Results indicate that the negative attitudes of professionals and the myths around disability are mammoth barriers for a person with LNFS when accessing justice. For example, police officers feel that a person with LNFS cannot be a competent witness and, therefore, they do not even take a statement from the victim. This attitude was confirmed in other studies, which noted that police officers believed that persons with a communication disability cannot explain their experiences in a clear and simple language and, therefore, they are not credible and reliable witnesses (Hughes et al, 2011:185; Viljoen et al, 2016:145). Relevant education and training of professionals at all levels of the criminal justice system could address such attitudinal barriers. In 2016 it was reported that 55 Thuthuzela Care Centres in South Africa assisted and supported children – and specifically children with disabilities – with court preparation (Department of Justice and Constitutional Development, 2016:12). These centres have been made accessible and have trained staff readily available, although there are still many staff members who need specific training in disability.

Since various professionals working in the criminal justice system could be involved with persons with disabilities (including LNFS) by either taking statements or preparing victims for court, the training of such professionals in disability knowledge and skills is of utmost importance (Seedat, Van Niekerk, Jewkes, Suffla & Ratele, 2009:1619; Viljoen et al, 2016:145). Training should be conducted on a continuum – from the police officer(s) involved at the statement-taking process who must know how to take a statement from a person with LNFS to ensure that the statement meets the credibility test to proceed to prosecution, to the court process where prosecutors and presiding officers have to be educated on disability and the means and methods used by a person with LNFS to communicate. Training professionals on how to implement for example a communication board with specific vocabulary needed by a victim to testify in court could assist both the victim and the professionals in the criminal justice system in having a better understanding of how to communicate when the victim has LNFS (White, 2014:123).

Research has also shown that the use of an intermediary has reduced the trauma experienced by persons with severe communication disabilities (Larcher, 2014:154; O'Mahony, 2009:232). In terms of South African law, a qualified intermediary can be used to eliminate further trauma and allows the victim to give a credible testimony that has improved quality of evidence (Pillay, 2012:312). The intermediary can also assist in using language that is understood by the victim with LNFS. In the United Kingdom, research has shown that the use of intermediaries helped witnesses with disabilities to cope with the stress of testifying in court (Larcher, 2014:154). Mostly, social workers act as intermediaries and, as indicated earlier, the intermediary should prepare the witness for the court appearance, explain the court structural layout and translate questions posed by the defence attorney, prosecutor and judge into a basic language that the victim with LNFS will understand, without changing the general gist or importance of the question (Jonker & Swanzen, 2007:100). Concern has been expressed about the lack of on-going training and support for intermediaries in South Africa and, therefore, the criminal justice system must realise and prioritise the importance of the role of intermediaries and put in place appropriate measures (Jonker & Swanzen, 2007:100; Seedat et al, 2009:1019) for adequate training. Furthermore, it is important that different individuals should act as interpreters and intermediaries. The post-trial trauma and counselling debriefing services that the court preparation officer will provide (Department of Justice and Constitutional Development, 2016:13) are essential to help victims with LNFS deal with their trauma.

RECOMMENDATIONS

It is recommended that a Disability Resource toolkit (products and technology) should be developed as a guideline and best practice model to ensure equal access to the criminal justice system for persons with LNFS. This toolkit could assist the criminal justice system in fulfilling their aim of being fast, effective, sensitive and responsive to the needs of victims with LNFS (Department of Justice and Constitutional Development, 2016: 12-14). This toolkit should be made readily available to persons with LNFS and their support network to ensure their rightful access both to justice and to the professionals involved in the criminal justice system. Only then will silence be turned into justice when these vulnerable individuals with LNFS access the criminal justice system.

CONCLUSION

The most important clinical finding of this study is that although persons with LNFS are particularly vulnerable as victims of crime, and although they are not always given fair access to justice due to their restricted communication skills (receptively and expressively), a number of facilitating factors exist that can be used effectively to ensure access to justice for these individuals. Some of these involve personal factors (e.g. coping strategies) while others involve environmental factors (ranging from products and technology to attitudes and services, systems and policies). The South African law acknowledges that a person with LNFS has the capacity to testify (Department of Justice and Constitutional Development, 2016: 13), but it is the communication that poses a challenge. Hence, communication should be addressed, not the legal capacity of the person with LNFS. The facilitating factors identified in this study should be attended to, so as to assist individuals with LNFS to access the criminal justice system, thereby ensuring that they receive the equality they so rightly deserve.

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ENDNOTES

1. Little or no functional speech refers to individuals who are unable to produce intelligible speech or who are only able to produce 15 or less intelligible words (Cantwell & Baker, 1985: 526).
2. A communication board can be defined as a low technology communication device that displays graphic symbols. For example: Picture Communication Symbols or Blissymbols and/or pictures and/or letters of the alphabet (Lloyd, Fuller & Arvidson, 1997: 526)