



PERSONS WITH DISABILITIES AND BARRIERS TO EQUAL ACCESS TO JUSTICE IN

BOTSWANA

A RESEARCH STUDY OF THE CRIMINAL JUSTICE SYSTEM

POSITION PAPER

BACKGROUND AND CONTEXT

Botswana acceded to the Convention on the Rights of Persons with Disabilities (CRPD)¹ in August 2021,² therefore indicating its commitment to realize the rights of persons with disabilities. Since Botswana is a dualist state, the CRPD shall require domestication,³ which involves its adoption as an act of parliament.⁴ The Convention enshrines a wealth of rights for persons with disabilities, including the right to access to justice on an equal basis with others under article 13. Article 13 creates a duty upon state parties to provide accommodations to overcome the numerous barriers to accessing justice faced by persons with disabilities. In very simple terms, access to justice refers to the ability to effectively access the 'systems, procedures, information, and locations used in the administration of justice'.⁵ The need for a substantive right of access to justice in the CRPD arose from the lived experience of persons with disabilities who continuously faced numerous barriers to accessing justice on an equal basis with others.⁶

In 2018, the African Union adopted an African disability-specific human rights instrument, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa,⁷ which seeks to contextualise the experiences of persons with disabilities in Africa.⁸ It retained the right to access

justice, which is also enshrined in its article 13, indicating that persons with disabilities in Africa continue to face numerous barriers to accessing justice on an equal basis with others. It is therefore, imperative for states parties to know and understand the various barriers to accessing justice faced by persons with disabilities in order for them to discharge their treaty obligations to ensure equal access to justice for all persons with disabilities. To that end, a research study was conducted in Botswana to map out the various barriers to accessing justice faced by persons with disabilities who are either complainants or accused persons in the criminal justice system.⁹ Using the social model of disability as the conceptual framework and the provisions in article 13 of the CRPD and article 13 of the African Disability Protocol as a standard, the research report outlines the findings from the research study on the barriers to accessing justice faced by persons with disabilities in Botswana.



The Botswana High Court in Gaborone, Botswana.

FINDINGS OF THE STUDY¹⁰

The findings of the study, which were also corroborated by participants during a validation workshop, are as follows:

1. Some Disabled Persons Organizations (DPOs) receive requests and support for sign language interpretation by the Courts in criminal matters that involve deaf persons.
2. Some persons with disabilities report criminal-related complaints to DPOs due to lack of knowledge on the operations of the criminal justice system, or due to lack of confidence in the Botswana police service.
3. There is limited or no effort by the police service to expedite matters that involve persons with disabilities.



4. The justice system infrastructure, including the Courts, are not accessible for persons with disabilities.
5. The justice sector personnel, including those in the criminal justice system, are not trained on accommodating persons with disabilities.
6. There is lack of a specific national legal framework on the rights of persons with disabilities, including on the right to access to justice.
7. There is lack of accessible and effective legal aid programs targeting persons with disabilities.
8. There is a hesitancy among persons with disabilities to report criminal-related complaints due to negative attitude by justice sector personnel.
9. The DPOs lack capacity and resources to engage internal legal officers.
10. There are disjointed efforts between CSOs, development partners, government, and persons with disabilities in advocating for criminal law reforms for persons with disabilities.

RECOMMENDATIONS

Based on the above research findings, the report provides a number of recommendations as follows:

- 1 Provide procedural and age-appropriate accommodations tailored to meet the needs of persons with different types of disabilities.
- 2 Accommodations need to be provided to all persons with disabilities interacting with the criminal justice system, including as complainants, accused persons or as witnesses. The fact that persons with disabilities are usually involved in serious cases heightens the need to provide effective accommodations throughout the criminal justice process.
- 3 Train all criminal justice personnel on disability rights and appropriate accommodations.
- 4 Revise the assessments of testimonial competence and align them with the social model of disability.
- 5 Revise the assessments of fitness to plead.
- 6 Include a requirement to issue summons in accessible formats.
- 7 Provide an exception for persons with disabilities from the requirement to give oral evidence in person and in open court.
- 8 Recognise that all persons with disabilities have the right to enjoy legal capacity.
- 9 Domesticate the CRPD, and adopt national legislation that recognises the rights of persons with disabilities, including the right to access to justice.
- 10 Ensure the accessibility of the justice sector infrastructure.

Notes

- 1 A/RES/61/106 <https://www.refworld.org/docid/45f973632.html> (accessed 7 February 2022)
- 2 <https://www.southernafricalitigationcentre.org/2021/08/16/ratification-of-the-convention-on-the-rights-of-persons-with-disabilities-in-botswana> (accessed 7 February 2022)
- 3 Sections 86 and 87 of the Constitution of Botswana
- 4 Section 87 of the Constitution See also <https://www.parliament.gov.bw/index.php/learn-more/98-acts-and-bills> (accessed 10 February 2022).
- 5 S Ortoleva 'Inaccessible justice: Human rights, persons with disabilities, and the legal system' (2011) 17 *ILSA Journal of International and Comparative Law* 281 at 284.
- 6 F Mégret 'The Disabilities Convention: Human rights of persons with disabilities or disability rights?' (2008) 30 *Human Rights Quarterly* 494 at 512.
- 7 Protocol to the African Charter on Human and People's Rights on the Rights of Persons with Disabilities in Africa (African Disability Protocol) adopted by the thirtieth ordinary session of the Assembly, held in Addis Ababa, Ethiopia on 29 January 2018.
- 8 See for example the reference in the Preamble to the maiming or killing of persons with albinism on the continent.
- 9 This research study is part of a larger research project on the barriers to accessing justice in two other countries, namely, Zambia and South Africa. The findings from the studies in South Africa and Zambia are contained in separate reports. The research project also includes training of criminal justice personnel on how to accommodate persons with disabilities in Zambia, South Africa and Botswana.
- 10 See page 23 of the Legislative and Quantitative study.

