

SOUTH AFRICA

PERSONS WITH DISABILITIES AND BARRIERS TO EQUAL ACCESS TO JUSTICE IN SOUTH AFRICA

A research study of the
criminal justice system





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ABOUT THE CENTRE FOR HUMAN RIGHTS

Recognised internationally for excellence in human rights law in Africa, the Centre for Human Rights (the Centre) at the University of Pretoria is uniquely positioned as both an academic department and a non-governmental organisation. The Centre is a leader in human rights education in Africa and works towards greater awareness of human rights, the wide dissemination of publications on human rights in Africa, and the improvement of the rights of women, persons with disabilities, children, indigenous peoples, sexual minorities and other disadvantaged or marginalised persons or groups across the continent.

The Centre's website is available at: <https://www.chr.up.ac.za/>

ABOUT THE DISABILITY RIGHTS UNIT

The Disability Rights Unit at the Centre for Human Rights is committed to finding evidence-based ways of addressing the rights of persons with disabilities on the African continent. This includes conducting research on international disability rights standards and instruments, building capacity among governments, national human rights institutions, academia, civil society and communities, and engaging with judicial, quasi-judicial and non-judicial redress mechanisms.

For more information, see: <https://www.chr.up.ac.za/units/disability-rights-unit>

ACRONYMS AND ABBREVIATIONS



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EXECUTIVE SUMMARY

On 3 November 2007, South Africa ratified the Convention on the Rights of Persons with Disabilities (CRPD), thereby indicating its willingness to be bound by and adhere to its norms and standards. 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 mandates state parties to provide accommodations to overcome the numerous barriers to accessing justice faced by persons with disabilities. In order to fulfil this duty, it is imperative that state parties understand the nature of the barriers/challenges, and the possible ways of eliminating them. To this end, a research study was conducted to establish the specific barriers to accessing the criminal justice system faced by persons with disabilities in South Africa. The study involved interviews with various stakeholders in the South African criminal justice system as well as a desktop research. The main barriers identified from the study are as follows:

- Barriers arising from negative societal and institutional attitudes.
- Barriers arising from the denial of legal capacity.
- Barriers arising from complex and inaccessible legal procedures.
- Barriers arising from economic hardships.
- Barriers arising from lack of or inadequate access to legal representation.
- Barriers arising from lack of or limited access to information, education and communication materials and systems.
- Barriers arising from physically inaccessible institutions and spaces.

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

- Provide procedural and age-appropriate accommodations tailored to meet the needs of persons with different types of disabilities.
- Accommodations need to be provided to all persons with disabilities interacting with the criminal justice system, including as complainants, accused persons or witnesses.
- Train all criminal justice personnel on disability rights and appropriate accommodations.
- Revise the assessments of testimonial competence and align them with the social model of disability.
- Revise the assessments of fitness to plead.
- Include a requirement to issue summons in accessible formats.
- Include sign language and other non-spoken languages within the definition of the term 'language'.
- Recognise that all persons with disabilities have the right to enjoy legal capacity.



INTRODUCTION

BACKGROUND TO THE STUDY

Studies show that persons with disabilities participate in the criminal justice system in various capacities, including as complainants and as accused persons. Research also shows that persons with disabilities encounter numerous barriers to accessing justice on an equal basis with others. Furthermore, the implementation of the right to access justice, found in article 13 of the United Nations Convention on the Rights of Persons with Disabilities (CRPD),¹ remains weak in many countries on the continent. The ineffective participation by persons with disabilities in the criminal justice system can partly be attributed to inadequate research into the specific barriers, which hinder their effective participation, and how those barriers can be overcome. The Centre for Human Rights, University of Pretoria, is conducting a comprehensive study on the barriers to persons with disabilities accessing justice on an equal basis with others, either as complainants or as accused persons in the criminal justice system.

OBJECTIVES AND METHODOLOGY OF STUDY

The objective of this research study is to identify access to justice barriers experienced by persons with disabilities in South Africa. This research study will contribute towards

¹ UN General Assembly, Convention on the Rights of Persons with Disabilities: resolution/adopted by the General Assembly, 24 January 2007, A/RES/61/106.

breaking down barriers to access to justice for persons with disabilities in South Africa by:

- Identifying the barriers which persons with disabilities face in accessing justice; and
- Disseminating the findings to relevant authorities including the Ministry of Justice in order to make the state aware of the gaps and need for reform.

The study is a qualitative study imploring desktop research relating to access to justice in the South African context and standardised open-ended interviews with key stakeholders as follows:²

- Persons with disabilities and organisations of persons with disabilities.
- Police officers.
- Members of the judiciary, ie magistrates and judges.
- Lawyers in private practice.

The desktop research reviewed laws, reports and scholarly articles on access to justice for persons with disabilities in South Africa. This data informed the development of the first part of this report.

The second part of this report reflects the experiences of persons with disabilities, their representative organisations as well as individuals and institutions active in the criminal justice sector with experience in working with persons with disabilities. The persons with disabilities were identified through the Disabled Persons' Organisations (DPOs) and partners of the Disability Rights Unit, Centre for Human Rights, University of Pretoria. The rest of the participants were identified by the consultant through internet searches of representative DPOs focusing on the various types of disabilities.

Ethical approval for this research study was obtained from the Faculty of Law Research Ethics Committee at the University of Pretoria under Protocol Number L007/21. Attached to this report is the list of participants who participated in this research study, marked Annexure 1. The names of the respondents have been anonymised to guarantee confidentiality. Due to the high prevalence of COVID-19 at the time of conducting the study, the interviews were conducted virtually via Zoom. The interviews were then transcribed and analysed. The findings from the field research were then incorporated in the second draft report, which was subjected to comments by the staff at the University of Pretoria and a third draft report was prepared. This report was presented for validation at a validation workshop held at the Hotel Verde in Cape Town on 22 March 2022. A final draft report was prepared

2 Annexed to this report is the list of the participants of the field research and their contact details.

incorporating feedback from the stakeholders who participated in the validation workshop. From this report a position paper was developed.

STRUCTURE OF THIS REPORT

This report is divided into six sections. The first section is the introductory section which discusses the background to the study, objectives and methodology employed, and the structure of the report. The second section discusses the concepts of 'access to justice' and 'disability'. This sets the context for examining experiences of persons with disabilities in accessing justice in South Africa. The third section presents findings from the desktop research. It briefly analyses legal and regulatory frameworks on access to justice in South Africa to ascertain the extent to which they are inclusive of persons with disabilities and to lay the foundation for establishing the extent to which such frameworks are accessible to persons with disabilities. Section four discusses the barriers to access to justice by persons with disabilities followed by section five, which presents findings from interviews with stakeholders. It firstly analyses the findings from the desktop research and then the findings from the interviews with stakeholders. The last section draws conclusions from the findings and makes recommendations for enhancing access to justice for persons with disabilities in South Africa.



CONCEPTUALISING ACCESS TO JUSTICE FOR PERSONS WITH DISABILITIES

There is no standard definition of ‘access to justice’. It is however commonplace to discuss the concept of access to justice through its constituent elements. To set the context in which access to justice is discussed in this report, this section explores some conceptualisations of ‘access to justice’ and uses these to identify constituent elements, which will form the basis for identifying barriers to access to justice for persons with disabilities in South Africa. The CRPD guarantees the right to access to justice to persons with disabilities.³ Although it does not define access to justice, it sets the normative framework for the right to access to justice for persons with disabilities. Therefore, the CRPD will form a key basis for identifying barriers experienced by persons with disabilities in South Africa, and for making recommendations for addressing these barriers. To also be clear about whom this report is focusing on, this section will discuss the understanding of persons with disabilities to demonstrate the diversity of this group of people as well as their unique and collective positions in the criminal justice system of South Africa. The section commences with a discussion on the concept of access to justice. Then it discusses the concept in relation to persons with disabilities, and it ends with a discussion on the CRPD standard for access to justice for persons with disabilities.

3 Article 13 of the CRPD.

THE CONCEPT OF ACCESS TO JUSTICE

'Access to justice' is a human right albeit seldom expressly guaranteed as a standalone right.⁴ Most international human rights instruments incorporate the right to access to justice within the right to equal protection of the law.⁵ As stated earlier, several conceptualisations of 'access to justice' have been offered by various authors and schools of thought. According to the United Nations (UN),

access to justice is a basic principle of the rule of law. In the absence of access to justice, people are unable to have their voice heard, exercise their rights, challenge discrimination or hold decision-makers accountable.⁶

Maregere, defines access to justice as 'the ability of people to seek and obtain a remedy through formal or informal institutions of justice in conformity with human rights standards'.⁷

Carolyn Logan conceptualises access to justice as occurring when citizens are able to seek and obtain redress for rights violations as well as prevent rights abuses from occurring.⁸ Logan further argues that access to justice can be attained through certain pre-conditions including the existence of a conducive legal framework for protection of citizens' rights, knowledge by citizens of such a legal framework, the existence of affordable court costs, the availability and affordability of legal services and citizens' belief in an impartial justice system.⁹ This conceptualisation of access to justice focuses on the legal system and its users' ability to use such system for dispute resolution and protection of rights and interests, making it a narrow approach to access to justice.¹⁰ Nyenti considers the broadest approach to conceptualising access to justice as one that 'sees the law as only one means of achieving justice'.¹¹ He cites

4 With the exception of the CRPD.

5 TP Maregere 'Justice in transition and the complexities of access' (2017) 2 *Conflict Trends* <https://www.accord.org.za/conflict-trends/justice-transition-complexities-access/> (accessed 17 June 2021).

6 United Nations and the Rule of Law 'Access to justice' <https://www.un.org/ruleoflaw/thematic-areas/access-to-justice-and-rule-of-law-institutions/access-to-justice/> (accessed 18 June 2021).

7 Maregere (n 5)

8 C Logan 'Ambitious SDG goal confronts realities: Access to justice is still elusive for many Africans' Afrobarometer Policy Paper 39 (March 2017) https://media.africaportal.org/documents/ab_r6_policypaperno39_access_to_justice_in_africa_eng.pdf <https://afrobarometer.org> (accessed 18 June 2020).

9 As above.

10 M Nyenti 'Access to justice in the South African social security system: Towards a conceptual approach' (2013) 46 *De Jure Law Journal* 901 <http://www.scielo.org.za/scielo.php> (accessed 18 June 2021).

11 As above.

Parker to illustrate this conceptualisation of access to justice, who suggests that:¹²

A variety of other means of doing justice including alternative dispute resolution, participation in social movement politics, democratic representation and civic education for the respect of rights must proliferate.

This conceptualisation of access to justice considers a variety of factors outside the justice system that impact on one's ability to, proactively and reactively, claim and defend their rights and interests. The social and economic status of users and prospective users of the justice system are therefore just as relevant to the concept of access to justice as laws, legal systems and procedures. David McQuoid-Masson puts it succinctly by stating that:¹³

Access to justice in a wide sense refers to social justice, such as the fair distribution of health, housing, welfare, education and legal resources in society, including to disadvantaged members of the community, and is concerned with the 'needs' rather than the 'wants' of society ... access to justice in the narrow sense focuses on access to legal advice and legal services and other methods of dispute resolution, before independent and impartial courts, tribunals or forums or through consensual mechanisms such as negotiation or mediation.

The different approaches to access to justice influence various goals and outcomes. In some contexts, the narrow focus of access to justice is relevant as this may be the area that needs interventions for guaranteeing equal protection of the law. In other contexts, the broader focus is necessary for the same reason. In this report, the approach to access to justice will be guided by different elements identified in both the narrow and broad understanding of access to justice. These include access to:¹⁴

- A conducive and adequate regulatory framework, which protects fundamental rights and freedoms.
- Appropriate legal information and education, which enhances legal knowledge.
- Legal services including access to qualified and competent providers of legal advice and representation.
- Justice institutions that are serviced by qualified, competent and impartial officers.
- Fair, non-discriminatory and user-friendly legal procedures.

12 Parker *Just lawyers: Regulation and access to justice* (1999) 56.

13 D McQuoid-Mason 'Access to justice in South Africa: Are there enough lawyers?' (2013) 3 *Oñati Socio-legal Series* 561 <http://ssrn.com/abstract=2272640> (accessed 12 June 2021).

14 C Nkhata, J Jasson & A Raw 'Beyond symbolism and rhetoric: The role of the legal community in advancing access to justice and development for persons with disabilities' (2016) Goal 16 of Sustainable Development Goals at 31-42.

- Adequate and enforceable solutions.
- Legal and non-legal support mechanisms and resources.
- User-friendly environment for promotion and protection of fundamental rights and freedoms.

The standard of access to justice that will be relied on is that articulated by article 13 of the CRPD discussed in section 2.4 below, as it is specific to serving the rights, needs and interests of persons with disabilities. The next subsection discusses persons with disabilities, examining their unique and collective positions of enjoying equal access to justice.

THE HETEROGENEITY OF PERSONS WITH DISABILITIES AND ACCESS JUSTICE NEEDS

Persons with disabilities are a heterogeneous group of people. They have varying types of impairments, with differences even among persons with the same type of impairment. They also have varying socio-economic, socio-political and socio-cultural status and thus varying barriers and enablers within their contexts. It is therefore cardinal to ensure that all programmes and activities targeting persons with disabilities are inclusive and all-embracing. To achieve this, it is important to have a common understanding of the heterogeneity of 'persons with disabilities' and guard against the common misconception that the agreed conceptualisation of 'disability' implies the existence of a homogeneous group of persons with disabilities. According to the social model of disability, disability is a form of social oppression imposed on people with impairments, which is caused by social and environmental barriers that exclude them from participating in society and which is entirely distinguished from their individual impairment.¹⁵

The influence of the CRPD in this conceptualisation is evident.

Although the CRPD does not define 'disabilities', nor does it provide an exhaustive definition of 'persons with disabilities', it provides a working description of persons who are envisaged in the Treaty. It states that 'persons with disabilities' include

those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.¹⁶

15 K Kazou 'Analysing the definition of disability in the UN Convention on the Rights of Persons with Disabilities: Is it really based on a "social model" approach?' (2017) 23 *International Journal of Mental Health and Capacity Law* 25.

16 Article 1 of the CRPD.

Thus, a person with a short-term or temporary impairment is not envisaged under the CRPD. However, the CRPD's definition only sets a minimum criterion for identifying persons with disabilities. National or regional normative frameworks could provide a more expansive definition of persons with disabilities.¹⁷ Under such expansive definitions, persons with disabilities could include those with short-term or temporary impairments.

Another relevant element in understanding a 'person with a disability' is that the barriers they experience must negatively impact on their ability to fully and effectively participate in society on an equal basis with persons without disabilities. Such barriers could include environmental barriers as well as attitudinal barriers.¹⁸ It is evident from the foregoing discussion that a person with disabilities may be considered as such in one context but not in another within one jurisdiction and even across jurisdictions. This is because disability is seen as 'the result of the interaction between a person and his or her environment'.¹⁹ The United Nations states the following about the concept of disability:²⁰

This Convention recognizes that disability is an evolving concept and that legislation may adapt to reflect positive changes within society. Disability resides in the Society not in the person ... In a society where corrective lenses are available for someone with extreme myopia (near sightedness), this person would not be considered to have a disability, however someone with the same condition in a society where corrective lenses were not available would be considered to have a disability, especially if the level of vision prevented the person from performing tasks expected of this person such as shepherding, sewing or farming.

The CRPD conceptualisation of disability must thus be considered as a social construct as opposed to an individual's attributes. It is distinct from the medical construct that views disability 'as the result of individual impairment which requires medical care, rehabilitation and individual adjustment'.²¹ It is equally different from the religious model, which views disability as an act of God, punishment for sin or a test of faith.²² It is also distinct from the charity model, which treats persons with disabilities as 'victims of circumstance who should be pitied'.²³ The CRPD has used the social model of disability to conceptualise a rights-based approach, which respects the dignity of persons with impairments, proscribes their discrimination and enables

17 United Nations Enable 'Frequently asked questions' www.un.org (accessed 23 June 2021).

18 As above.

19 As above.

20 As above.

21 Kazou (n 15) 27.

22 M Retief & RS Letsosa 'Models of disability: A brief overview' (2018) 74 *HTS Theologies Studies/Theological Studies* 1.

23 As above.

them to enjoy their fundamental rights and freedoms on an equal basis as those without impairments. It allows for experiences of persons with disabilities to inform programmes, policies and laws aimed at addressing historical inequality in all spheres of life.

GLOBAL AND REGIONAL HUMAN RIGHTS INSTRUMENTS ON ACCESS TO JUSTICE

The legal framework for the protection of the right to access justice for persons with disabilities in South Africa consists of global and regional human rights instruments as well as national laws. At the global and regional level, the following legal instruments ratified by South Africa are directly relevant:

- The International Covenant on Civil and Political Rights ratified on 12 January 1996.²⁴
- The United Nations Convention on the Rights of the Child ratified on 16 June 1995.²⁵
- The United Nations Convention on the Elimination of All Forms of Discrimination Against Women, ratified on 15 December 1995.²⁶
- The United Nations Convention on the Rights of Persons with Disabilities ratified in November 2007.²⁷
- The African Charter on Human and Peoples' Rights, acceded on 9 July 1996.²⁸
- The African Charter on the Rights and Welfare of the Child, ratified on 7 January 2000.²⁹

24 Full citation please, can't open link <https://www.hrw.org^sareport> accessed on 1st June 2021.

25 Parliament of the Republic of South Africa <https://www.parliament.gov.za> (accessed 1 June 2021).

26 'South African Shadow Report on the Implementation of the Convention on the Elimination of All Forms of Discrimination against Women: Submitted to the CEDAW Committee's 48th Session 17th January-4th February 2011' at 8 https://www2.ohchr.org/english/bodies/cedaw/docs/ngos/Joint_NGO_Report_for_the_session_SouthAfrica.pdf (accessed 1 June 2021).

27 Source, link https://www.gov.za^gcis_document (accessed 1 June 2021).

28 The DoJ&CD 'Policy documents' https://www.justice.gov.za/policy/policy_list.html (accessed 1 June 2021).

29 A Miamingi 'South Africa's reporting to AU body is an opportunity to advance children's rights: Statement on South Africa's second report submitted under the African Charter on the Rights and Welfare of the Child' (19 November 2018) <https://www.chr.up.ac.za/latest-news/83-news-chr/1102-south-africa-s-reporting-to-au-body-is-an-opportunity-to-advance-children-s-rights-statement-on-south-africa-s-second-report-submitted-under-the-african-charter-on-the-rights-and-welfare-of-the-child> (accessed 1 June 2021); 'Ratification Table – ACERWC' <https://www.acerwc.africa/ratifications-table/> (accessed 1 June 2021).

- The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, ratified in 1996.³⁰

All these legal instruments provide substantive and procedural guarantees on the right to access to justice mostly by guaranteeing various aspects of access to justice including protection of fundamental rights to liberty, freedom from discrimination, freedom from violence and abuse, equal protection of the law and fair trial and due process. The Access to Justice Disability Toolkit states in this regard that:³¹

The Universal Declaration of Human Rights recognizes that 'everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law'. The right to access to justice is also codified in United Nations core human rights treaties, including the International Covenant on Civil and Political Rights, which provides that persons whose rights or freedoms have been violated are to have an effective remedy, and that 'all persons shall be equal before the courts and tribunals'. In the context of criminal proceedings, the ICCPR sets out a range of procedural due process rights. At regional level, the African (Banjul) Charter on Human and Peoples Rights (African Charter) entitles every individual in a ratifying state to have her or his cause heard, and to be tried within a reasonable time by an impartial court or tribunal.

The CRPD is the only international human rights instrument that expressly guarantees the right to access to justice as a right.

THE CONCEPT OF ACCESS TO JUSTICE UNDER THE CRPD

Article 13 of the CRPD guarantees the right to access to justice to all persons with disabilities. It is the first international human rights treaty to guarantee 'access to justice' as an explicit right. Article 13 states as follows:³²

States Parties shall 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.

In order to help to ensure effective access to justice for persons with disabilities, States

30 Available at <https://www.achpr.org/legalinstruments/detail?id=37> (accessed 1 June 2021).

31 United Nations Division for Social Policy Development and Department of Economic and Social Affairs 'Toolkit on Disability For Africa: Access to justice for persons with disabilities' (18 November 2016) 4 <https://www.un.org/development/desa/dspd/2016/11/toolkit-on-disability-for-africa-2/> (accessed 1 June 2021).

32 Article 13 of CRPD.

Parties shall promote appropriate training for those working in the field of administration of justice, including police and prison staff.

Article 13 is unique in that it recognises the need for states parties to guarantee effective access to justice to persons with disabilities. It does not define what effective access to justice is, since this may vary in different contexts.

Arlene S Kanter avers in this regard that article 13 does not simply guarantee the same treatment to all persons with disabilities as this does not ensure their equal enjoyment of access to justice. Instead, it goes beyond this to require consideration of a person's impairment and ensure that necessary modifications or accommodations are put in place to guarantee equal access to a justice system.³³ Article 13 mandates states parties to ensure that legal proceedings are accessible to all persons with disabilities and that they are amenable to procedural and age-appropriate modifications to ensure such access. Flynn argues that article 13 entitles persons with disabilities to participate in legal proceedings both directly and indirectly thereby guaranteeing equal and meaningful participation of persons with disabilities in all aspects of the justice system.³⁴ Article 13 also requires that those involved in the administration of justice should be trained adequately in order to meet the justice needs of persons with disabilities.

It is clear from the reading of article 13 that the CRPD envisages a situation where persons with disabilities, who have been excluded in many justice systems of the world, are not only entitled to the right to access justice but are also directly and indirectly empowered to do so. This provision should also be read together with other articles, including articles 5(3), 9, and 12. Article 5(3) provides for the right to promote equality and eliminate discrimination,³⁵ while article 9 relates to access, on an equal basis with others, 'to the physical environment, to transportation, to information and communications, including information and communications technologies and systems, and to other facilities and services open or provided to the public, both in urban and in rural areas.' These facilities include police stations, courts, detention centres, and other facilities in the criminal justice system. Article 12 relates to the recognition of the legal capacity of persons with disabilities. All together, these provisions are illustrative of the nature and extent of interventions that should be put in place for ensuring inclusive access to justice for persons with disabilities. These are also illustrative of the extent of possible barriers persons with disabilities may

33 AS Kanter *The development of disability rights under international law: From charity to human rights* (2015) 221.

34 E Flynn *Disabled justice? Access to justice and the UN Convention on the Rights of Persons with Disabilities* (2015) 40-41.

35 See arts 5(3), 2 and 9 of the CRPD.

encounter in accessing justice institutions and legal systems and procedures.

The fact that persons with disabilities experience unique barriers mostly due to deliberate or inadvertent marginalisation justifies the need to eliminate discrimination as envisaged in article 5(3) and to put in place measures for mitigating such exclusion. It also justifies the need for ensuring accessibility to the extent elaborated in article 9. In commenting on the relevance of article 9 to access to justice, the Committee on the Rights of Persons with Disabilities stated that effective access to justice cannot be guaranteed if buildings and services of law enforcement agencies and the judiciary are not physically accessible, or in a format that meets information and communication needs of persons with disabilities.³⁶ Further, on the relevance of article 5(3) and (9) to the right to access to justice, Kanter acknowledges that making reasonable accommodation for persons with disabilities is a necessary precondition for eliminating discrimination and promoting equality in the enjoyment of the right to access justice. Reasonable accommodation allows persons with disabilities to enjoy their right to access justice on the same footing as persons without disabilities.³⁷

It is evident from the foregoing discussion that the CRPD not only sets a new standard for the right to access to justice but sets a standard that requires that no person is left behind in the enjoyment of their right to accessing justice on account of their disability. It also recognises that persons with disabilities may participate in the justice system in various capacities and they must be enabled in each of these functions to participate on an equal basis as persons without disabilities. Article 13 as read together with other provisions of the CRPD sets a unique regulatory framework for guaranteeing the right to access to justice for persons with disabilities. It sets the standard by which we should assess the extent to which persons with disabilities in South Africa enjoy their right to access to justice.

36 CRPD Committee General Comment 2: Article 9: Accessibility (2014) UN Doc CRPD/C/GC/2 dated 22 May 2014, para 33.

37 Kanter (n 33) 222.



LEGAL AND CONSTITUTIONAL FRAMEWORK FOR ADVANCING THE RIGHT TO ACCESS TO JUSTICE FOR PERSONS WITH DISABILITIES IN SOUTH AFRICA

NATIONAL LEGAL INSTRUMENTS

The Constitution of the Republic of South Africa, 1996 guarantees access to justice, including criminal justice, primarily through the promotion and protection of fundamental rights and freedoms,³⁸ the provision of courts and the administration of justice³⁹ and the provision of state institutions supporting constitutional democracy.⁴⁰

PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS

Although all human rights are interdependent and relevant to the enjoyment of the right to access justice, the following rights and freedoms guaranteed in the South African Constitution are particularly relevant in the criminal justice system. The right to equality, which includes the right to equality before the law and equal protection and benefit of the law; full and equal enjoyment of all rights and freedoms guaranteed in procedural, formal and substantive forms of equality; freedom from direct and

38 See the Bill of Rights contained in Chapter 2 of the Constitution of the Republic of South Africa, 1996.

39 See Chap 8 of the Constitution.

40 See Chap 9 of the Constitution.

indirect discrimination on account of disability, among others; and promotion and protection of affirmative action to rectify historic discrimination. These rights are relevant and cardinal for ensuring that persons with disabilities who interact with or seek to interact with the criminal justice system in South Africa are accorded opportunities to do so on an equal basis with other persons without disabilities.

All interventions to facilitate the inclusion of persons with disabilities must be transformative to ensure effective access to justice as envisaged in the CRPD. Making the criminal justice system inclusive and transformative will address historical exclusion of persons with disabilities from the criminal justice system.⁴¹ It will also ensure that the human dignity of persons with disabilities is respected and protected in all circumstances and without any exceptions or derogations.⁴²

The African Charter on Human and Peoples' Rights describes respect for one's dignity as inclusive of the recognition of their legal status.⁴³ In discussing the importance of the right to dignity, the Constitutional Court in *Dawood v Minister of Home Affairs*⁴⁴ held that human dignity informs constitutional adjudication in many ways. It informs the interpretation of other rights and is central in analysing justifiable limitations on rights. As a means of demonstrating respect for the dignity of persons with disabilities, the criminal justice system and all actors must treat persons with disabilities as entitled to and capable of enjoying their fundamental rights and freedoms on an equal basis with others. As argued by Chipo Mushota Nkhata:⁴⁵

[R]ather than making assumptions of a person's capabilities based on their disability, laws, policies and practice must create an environment where the agency of persons with disabilities is respected, promoted and protected. Persons with disabilities must be accorded the dignity of living full adult lives on an equal basis as others as well as provided with the support they require to make decisions that support their will and preferences.

The protection of the dignity of persons with disabilities is paramount to the fulfilment of article 13 of the CRPD and even more so in criminal justice where individual liberties are at stake.

The rights of arrested, detained and accused persons as guaranteed in section 35 of the Constitution specially ensures that persons in conflict with the law or those

41 C Albertyn 'Contested substantive equality in the South African Constitution: Beyond social inclusion towards systemic justice' (2018) 34 *South African Journal on Human Rights* 441.

42 Section 10 of the Constitution.

43 Article 5 of the Organisation of African Unity (OAU), African Charter on Human and Peoples' Rights (Banjul Charter), 27 June 1981, CAB/LEG/67/3 rev 5, 21 ILM 58 (1982).

44 2000 (3) SA 936 (CC).

45 MN Chipo 'Failure of stakeholders to recognise and protect legal capacity of persons with mental disabilities: Assessing views and approaches of women, men and public institutions in Zambia' (2021) Unpublished.

deemed to be in conflict with the law are safeguarded from human rights violations within the criminal justice system. Section 35 provides an elaborate list of rights of an accused person including the right to:

- remain silent, not to be compelled to make a confession or admission that could be used as evidence against the accused;
- have a legal practitioner assigned to them at the state's expense to advance substantial justice;
- conditions of detention that are consistent with human dignity;
- fair trial including access to a legal representative of their choice, right to adduce evidence, right to be tried in a language that they understand and to have proceedings interpreted in that language; and
- receive information in a language that they understand.

Section 35 ensures the promotion and protection of the rights of persons with disabilities in the criminal justice system. The requirement for attainment of equality, dignity, reasonable accommodation and accessibility, among others, in the CRPD may be relied on to reinforce section 35 and guarantee substantive and procedural justice to persons with disabilities in South Africa on an equal basis with others.

PROVISION OF COURTS AND THE ADMINISTRATION OF JUSTICE

Chapter 8 of the Constitution guarantees the right to just administration of justice. One of the tenets of access to justice is the existence or availability of justice institutions. The judiciary, being the arm of government that resolves disputes and interprets the law, and ensures the delivery of justice, is cardinal for guaranteeing access to justice. Chapter 8 of Constitution is thus a relevant part of the legal and constitutional framework for access to justice for persons with disabilities in South Africa.

The Constitution provides for the establishment of various courts with unique and broad mandates.⁴⁶ It also provides for the appointment of judicial officers,⁴⁷ however it requires that such a person should be a 'fit and proper person'. It does not provide guidance on what this means. Chapter 8 is also relevant as it provides for the National Prosecuting Authority.⁴⁸ Persons with disabilities may have opportunities to make presentations for consideration by the Director of Public Prosecutions (DPP) on the decision to prosecute or not prosecute a matter as provided in section 179(5)

46 Chapter 8 of the Constitution.

47 Section 174 of the Constitution.

48 Section 179 of the Constitution.

(d) of the Constitution. Such presentation can be made in capacity as an accused person, a complaint or any person deemed relevant to the case by the National Director. The Constitution also empowers the legislature to pass national legislation concerning the authority to prosecute a case.⁴⁹ Furthermore, section 180 provides for matters concerning the administration of justice that are not specifically regulated in the Constitution. It requires that national legislation is passed to address such issues including issues relating to training of judicial officers, procedures for dealing with complaints about judicial officers and participation of people other than judicial officers in court decisions. This provision can be very useful for addressing exclusion of persons with disabilities from the criminal justice system as it is a non-exhaustive provision.

PROVISION OF STATE INSTITUTIONS SUPPORTING CONSTITUTIONAL DEMOCRACY

Chapter 9 of the Constitution deals with state institutions established to support constitutional democracy in South Africa, including the Public Protector, the South African Human Rights Commission and the Commission for Gender Equality. The Public Protector has power to inter alia, investigate any conduct of public officials, except decisions of adjudicators in deciding cases. The Public Protector is also mandated to report on conduct of public officials that it investigates as well as take remedial actions.

Institutions supporting constitutional democracy in South Africa provide an opportunity for persons with disabilities to seek protection of their rights and redress for human rights violations they may experience in addition to their right to litigate or defend cases in a court of law. However, amidst the aforementioned progressive national legislative and constitutional provisions, exist laws, policies and practice which act as barriers to the enjoyment of the right to access to justice for persons with disabilities in the criminal justice system. The next section examines some of the barriers to access to justice experienced by persons with disabilities in South Africa's criminal justice system.

49 Section 179(7) of the Constitution.



DESKTOP RESEARCH FINDINGS: BARRIERS TO ACCESS TO JUSTICE FOR PERSONS WITH DISABILITIES IN SOUTH AFRICA

BARRIERS ARISING FROM NEGATIVE SOCIETAL AND INSTITUTIONAL ATTITUDES

Persons with disabilities experience various type of stigma and discrimination arising from negative societal and institutional attitudes. These negative social and institutional attitudes vary from disability to disability and from person to person among those with similar types of disabilities. Michael Perlin argues that the lack of legal protection and abusive treatment experienced by persons with disabilities is caused by societal negative attitudes of what he calls ‘sanism’ and ‘pretextuality’. He states to this effect that:⁵⁰

Sanism is an irrational prejudice of the same quality and character of other irrational prejudices that cause (and are reflected in) prevailing social attitudes of racism, sexism, homophobia and ethnic bigotry; that infect jurisprudence and lawyering practices; that are largely invisible and largely socially acceptable; that are based predominantly on stereotype, myth, superstition and deindividualization; and are sustained and perpetuated by our use of false ‘ordinary common sense’ and heuristic reasoning in an unconscious response to events both in everyday life and in the legal process. Pretextuality refers to the ways in which courts accept-either implicitly or explicitly testimonial dishonesty and engage similarly in dishonest

50 ML Perlin *International human rights and mental disability law: When the silenced are heard* (2012) 5.

and frequently meretricious decision-making, specifically where witnesses, especially expert witnesses, show a high propensity to purposely distort their testimony in order to achieve desired ends.

Negative attitudes of sanism and pretextuality have driven the exclusion of persons with disabilities from participating in the criminal justice system as they are considered incapable of performing legal acts, including asserting their rights. The Zambian case of *Gordon Maddox Mwewa v The Attorney-General*,⁵¹ is illustrative of how pre-textuality can present itself. This case challenged among others, the powers of detention and forced treatment of persons with psychosocial disabilities granted to police and health institutions respectively by the then Mental Disorders Act of Zambia. Kalunga and Nkhata have criticised the decision on this basis.⁵²

Negative societal and institutional attitudes, if not attended to, will violate the rights of persons with disabilities with little or no recourse to justice institutions. For instance, the practice of investigators or the requirement for adjudicators to consider a witness' demeanour during reporting, investigation and trial, as the case may be, lends itself to misrepresentation and bias towards persons with disabilities. This is particularly true for women and girls who have the double-burden of societal/cultural expectations of how they must carry themselves in public as well as perceptions of one's disability which may present a misnomer against a particular standard of behaviour considered as 'normal' in society. If their impairment and/or other behaviour affects their ability to fit into the 'acceptable societal standard of behaviour', then they are misjudged or even pitied thereby treating them in a manner that does not foster substantive equality as envisaged in section 9 of the South African Constitution and the CRPD. Negative societal and institutional attitudes permeate all levels of the criminal justice process including

when reporting a crime, in terms of whether one can serve as a witness or in making legal decisions, seeking remedies for alleged violations of their rights, or otherwise participating in legal proceedings.⁵³

These present different barriers to different persons with disabilities.

51 2017/HP/204 (unreported).

52 FK Kalunga & CM Nkhata 'Protection of the rights of persons with mental disabilities to liberty and informed consent to treatment: A critique of *Gordon Maddox Mwewa & others v Attorney-General & another*' (2018) 6 *African Disability Rights Yearbook* 79.

53 Toolkit on Disability For Africa (n 31) 6.

BARRIERS ARISING FROM THE DENIAL OF LEGAL CAPACITY

Many persons with cognitive and psychosocial disabilities are deemed not to have the legal capacity to assert their rights and pursue their justice needs. Although some of the motives for denying persons with mental disabilities their legal capacity are seemingly good, they nonetheless have negative effects on persons with disabilities. Laws, policies and practice that deny persons with mental disabilities their right to legal capacity claim to do so in their best interest and substitute decisions and actions of such persons with those of people or institutions deemed to be better placed to make the decisions or take actions.⁵⁴ Courts and other actors in the criminal justice system tend to rely on medical evidence to determine whether a person with a mental disability is entitled to enjoy their right to legal capacity based on their mental capacity. Oosthuizen et al state to this effect that:⁵⁵

Mental illness or insanity has a dramatic influence on a person's legal status. A person's status determines his or her competencies such as legal capacity, capacity to act, accountability and capacity to litigate. A mentally ill person is incapable of performing juristic acts; he or she is not capable of becoming a party to legal proceedings; is virtually incapable of committing crime or being liable for a delict; etc. however, not all mentally ill persons are precluded from performing legal acts or, for that matter, giving valid consent to medical treatment. The reason being that status is factually determined according to the degree to which the mental illness is present at the time when the mentally ill person participates in the legal traffic. The measure of capacity depends on the patient's intellectual and volitional capacities that will decide whether the patient can validly contract, litigate or consent to medical treatment.

It is evident from the above that persons with mental disabilities are denied their legal capacity in varying degrees and those with severe impairments are being disproportionately affected.

BARRIERS ARISING FROM COMPLEX AND INACCESSIBLE LEGAL PROCEDURES

Persons with disabilities may experience exclusion from the criminal justice system through inadequate or lack of protective laws, thereby blatantly violating their right to access justice. Unconducive legislative frameworks could affect substantive rights as well as procedural rights. A legal framework can be unconducive for the protection

54 Chipso (n 45).

55 H Oosthuizen, G Fick & C Els 'Legal status of the mentally disabled person in South African law' (1995) 14 *PMID* 601.

of the right to access to justice for persons with disabilities if it does not adequately protect their rights and if it does not guarantee effective remedies to persons with disabilities for rights violations that they experience.

In the criminal justice sector, uncondusive legal frameworks present themselves in the form of proscribing exclusive crimes, enactment of rules pertaining to one's fitness to stand trial or competence to testify, as well as in assessments to determine criminal responsibility among others. These procedures exclude persons with disabilities from participating as accused persons, victims and witnesses. An adequate legal framework is one that provides to persons with disabilities avenues for enjoying access to justice rights including effective legal remedies, fair legal procedures and access to legal representation and services. These are discussed in detail below, examining the role of law in promoting and protecting the rights of persons with disabilities and the extent to which this is attained in the South African context.

LAWS AFFECTING ACCESS TO EFFECTIVE LEGAL REMEDIES

If legal provisions allow for violation of fundamental rights and freedoms of persons with disabilities, this denies persons with disabilities effective remedies. The lack of protective laws is thus evidence of the lack of effective legal remedies. Criminal laws must be informed by experiences of persons with disabilities if they are to be protective of their rights. For example, if research shows that women and girls with intellectual disabilities are disproportionately susceptible to sexual abuse and exploitation,⁵⁶ or that persons with albinism are vulnerable to ritual killings and other forms of murder,⁵⁷ then criminal laws must ensure that they are protective of these groups in a way that guarantees substantive equality with persons without disabilities.

If protective laws exist for the protection of the rights of persons with disabilities, access to effective remedies would be attained by ensuring multiple avenues for seeking redress as well as a broad range of remedies, including individual and public interest remedies.⁵⁸ Flynn et al state, regarding the right to an effective remedy, that it 'refers to any kind of redress and reparation, which can include compensation, restitution, rehabilitation, non-repetition and satisfaction'.⁵⁹ Thus, effective remedies must avert discrimination, repetition of violations for the individual complaint as well

56 D Msipa 'Survivors of sexual assault with intellectual disabilities: Accommodating difference in the courtroom' (2013) LLM thesis submitted to McGill University.

57 Amnesty International 'Malawi: The criminal justice system is failing persons with albinism' www.amnesty.org (accessed 3 June 2021).

58 E Flynn et al 'Final report: Access to justice of persons with disabilities' NUI Galway Centre for Disability Law and Policy and Institute for Lifecourse and Society (2019) 32.

59 Flynn et al (n 58) 43.

as any person in their position. Further, for a remedy to be effective, it must take into account individual needs and experiences. Furthermore, complaints mechanisms and criminal justice institutions must be well placed and well trained to respond to the needs of complainants with disabilities, and where they are not, systems must be revised and capacities built to ensure effective response to the justice needs of persons with disabilities.⁶⁰

LEGAL ASSESSMENTS ON FITNESS TO STAND TRIAL AND COMPETENCE TO TESTIFY AS A WITNESS

The requirement to determine one's fitness to stand trial in criminal proceedings poses a threat to the enjoyment of the right to access to justice for persons with disabilities mostly because it is discriminatory at least on two fronts. First, it deems persons with disabilities unfit to stand trial solely or mainly on account of their disability. Secondly, it does indiscriminately ignore the requirements for designing a criminal justice system that meets the fair trial needs of persons with disabilities. Section 77 of the South African Criminal Procedure Act⁶¹ contributes to the social exclusion of persons with mental disabilities from the criminal justice system. It provides that:⁶²

If it appears to the court at any stage of criminal proceedings that the accused is by reason of mental illness or mental defect not capable of understanding the proceedings so as to make a proper defence, the court shall direct that the matter be enquired into and be reported on in accordance with provisions of section 79.

This provision prejudices against persons with mental disabilities in that an accused person who had a defence to the criminal charge or one against whom the state had a weak case did not have the opportunity to defend themselves in a fair trial on an equal basis as others.⁶³

Section 3(b) of the Criminal Matters Amendment Act⁶⁴ sought to address this prejudice by empowering the court to assess the state's evidence against the accused with the view of determining whether or not the accused person committed the act. This assessment does not seek to determine the guilt of an accused person, but only to establish one component of proving a crime, that is *actus reus* (the guilty act). By the provisions of the Criminal Matters Amendment Act such an assessment

60 Flynn et al (n 58) 31-32.

61 Act 51 of 1977.

62 Section 77 of the Criminal Procedure Act.

63 M Swanepoel 'Legal aspects with regard to mentally ill offenders in South Africa' (2015) 18 *PELJ* 1.

64 Act 68 of 1998.

can be made at the request of the prosecution, the accused person or the court on its own volition.⁶⁵ The court makes the determination of fitness to stand trial based on medical evidence and 'must be satisfied that there is a reasonable suspicion that the accused lacks the capacity to appreciate the nature of the trial proceedings or to conduct a proper defence'.⁶⁶ In *De Vos NO v Minister of Justice and Constitutional Development*,⁶⁷ the Constitutional Court was invited to determine the constitutionality of detaining in prison or a psychiatric institution an accused person who was adjudged unfit to stand trial to the exclusion of other more protective remedies. The court considered the accused person's freedom and security of person as guaranteed in the Constitution. It found that parts of section 77 of the South African Criminal Procedure Act that limited its powers to grant an order that suits the circumstances and needs of an accused person were unconstitutional, thereby prompting legislative amendments to this provision.⁶⁸

The orders that a court is mandated to make under section 77, following a determination of an accused person's unfitness to stand trial resulted initially only in their detention in a prison or psychiatric institution, but were subsequently expanded to include other remedies including unconditional release following the amendments introduced by the Criminal Procedure Amendment Act 4 of 2017. In the case of *S v Kato*⁶⁹ the Constitutional Court stated that only persons with intellectual impairments that are induced by intoxication or drug use or like substances are envisaged under the provision and not persons with limited mental capacity.⁷⁰ Msipa however argues, concerning the impact of this provision, that:⁷¹

Only witnesses who are regarded as competent to testify may give evidence before the court. However, testimonial evidence of witnesses with intellectual disabilities is frequently challenged because of a misconception that their disability makes them incompetent and unreliable witnesses. A finding of incompetence means that the complainant does not get to testify or that the court does not accept her testimony, without which the chances of a successful prosecution may be seriously compromised ... Even though section 194 does not per se apply to persons with intellectual disabilities [on the basis of the decision in *Kato*], it may create an additional requirement that affects the equality of persons with intellectual

65 Swanepoel (n 63) 1.

66 As above.

67 2015 (2) SACR 217 (CC).

68 L Pienaar 'The unfit accused in the South African Criminal Justice System: From automatic detention to unconditional release' (2018) 1 *SACJ* 58.

69 2005 (1) SACR 522 (SCR).

70 D Msipa 'How assessments of testimonial competence perpetuate inequality and discrimination for persons with intellectual disabilities: An analysis of the approach taken by South Africa and Zimbabwe' (2015) 3 *African Disability Rights Yearbook* 67.

71 Msipa (n 70) 68.

disabilities. This is particularly because of the requirement it creates for the court to conduct an inquiry into the cause of 'imbecility'. In holding that the trial court's ruling in *Katoo* was an irregularity and a miscarriage of justice, Jafta AJA reiterated the duty of the trial court to conduct an inquiry in order to decide on the issue of competence.

It is evident from the foregoing that, similar to an assessment to stand trial, an assessment of competence to testify has the same effect of denying a person with a mental disability their equal participation in the criminal justice system. This is exacerbated in cases for women and girls who are the majority survivors in sexual offences, which often happens in secret both inside and outside the homes and with little to no external protection.

Although the South African courts have made attempts to improve the criminal procedure affecting persons with disabilities, it should be noted that these fall short of the CRPD standard. It is not sufficient or desirable to make piecemeal procedural modifications to incorporate the needs of persons with disabilities in the criminal justice system, but rather to overhaul the system to ensure their effective inclusion on an equal basis with others.⁷² As attempts to explore solutions for persons with mental disabilities who are in conflict with the criminal laws are being made, adherence to the CRPD standards must be upheld. As aptly put by Beqiraj et al:⁷³

The integrity of criminal trial and arguably the criminal law itself would be prejudiced if the defendant does not have the ability to understand and participate in a meaningful way. To eliminate assessments of fitness to stand trial without implementing adequate procedural safeguards would thus likely expose persons with disabilities to breaches of their right to a fair trial as guaranteed under Articles 12 and 13 of the CRPD.

It is evident from the above that in order for criminal procedures and laws to be protective of access to justice rights of persons with disabilities, legal assessments for fitness to stand trial must be abolished. However, such abolition must not leave persons with disabilities more vulnerable to rights abuses. States must explore 'procedural accommodations and support ...in all stages of the criminal proceedings, including investigative stages'⁷⁴ and 'move from adaptation to specialised design models towards equality and universalism'⁷⁵ that allow persons with disabilities to access laws that facilitate their enjoyment of rights in the criminal justice system.

72 United Nations Office of the High Commissioner of Human Rights, 'Statement on article 14 of Convention on the Rights of Persons with Disabilities' (2014) www.bit.ly/2sl6PdF (accessed 13 June 2021) 148.

73 J Beqiraj, L McNamara & V Wicks 'Access to justice for persons with disabilities: From international principles to practice' (2017) *International Bar Association* 34.

74 United Nations Office of the High Commissioner of Human Rights (n 72) 458.

75 Beqiraj, McNamara & Wicks (n 73) 33.

LEGAL ASSESSMENTS FOR DETERMINING CRIMINAL RESPONSIBILITY

The Criminal Procedure Act sets the test for determining criminal responsibility of an accused person who raises the defence of insanity. It reads:⁷⁶

A person who commits an act which constitutes an offence and who at the time of such commission suffers from a mental illness or mental defect which makes him incapable-

- a) Of appreciating the wrongfulness of his act; or
- b) Of acting in accordance with an appreciation of the wrongfulness of his act, shall not be criminally responsible for such act.

Assessments for determining criminal liability often arise after an accused person raises the defence of insanity alleging that they were not in control of their mental faculties as to understand the nature of the offence or that it was wrong. While such assessments may seem progressive for attainment of justice for persons with disabilities, they are often susceptible to further violating fundamental human rights of the persons involved. This is because

they can lead to deprivation of liberty of persons with disabilities in a discriminatory way. That is, instead of being fully acquitted, not criminally responsible assessments may allow a review board or presiding judge to order a defendant with disabilities to detention at a hospital or psychiatric facility.⁷⁷

BARRIERS ARISING FROM ECONOMIC HARDSHIPS

Many persons with disabilities are unable to assert their right to access to justice due to the huge costs involved. It is a global reality that many persons with disabilities constitute the poorest of the poor due to their social marginalisation which prevents them from participating in economic and other social activities on an equal basis with persons without disabilities. Expenses for pursuing justice are incurred right from inception when a violation of legal or human rights occurs. If justice institutions are far from places of residence of victims of crime with disabilities, such victims are unlikely to report the case. The high cost of transport to access a justice institution is as much a barrier as the negative attitudes they may experience in the justice institutions. Similarly, long periods of time away from work in pursuit of justice may discourage persons with disabilities from access justice institutions.

76 Section 78(1) of the Criminal Procedure Act.

77 Beqiraj, McNamara & Wicks (n 73) 34-35.

The cost of participating in lengthy criminal justice processes as victims, witnesses and even as accused persons presents financial burdens to persons with disabilities involved. Expenses involved in asserting one's rights vary from person to person depending on their circumstances. Sometimes, the victim is a child and depends on the parents to cover all their expenses. If the parents are unemployed or do not earn a decent wage, they are unable to meet the transport and other costs for pursuing justice for their child. Sometimes the victim is a woman with a disability whose livelihood depends on selling vegetables by the roadside of her house or in a makeshift store. Closing shop in order to pursue her justice needs may not be a top priority particularly if the process is lengthy (as most legal processes tend to be) and will most likely demand more time away from her work. Sometimes victims of crime may be paid-off by perpetrators who take advantage of the socio-economic situation of victims with disabilities thereby exposing them to abuse and rights violations. Due to high poverty levels, persons with disabilities cannot afford legal representation to defend themselves if accused of committing a crime. They also cannot afford to meet the expenses of bringing witnesses to court even when they are granted a lawyer at State expense.

BARRIERS ARISING FROM LACK OF OR INADEQUATE ACCESS TO LEGAL REPRESENTATION

According to Ortoleva:⁷⁸

[T]he expense of obtaining the services of legal counsel and legal processes often discourages those who cannot afford them from seeking just remedies. Availability, affordability, and adequacy are the three major challenges to obtaining legal assistance faced by marginalized groups. A fourth barrier for persons with disabilities is the lack of knowledge by legal professionals of how to work with clients with disabilities, and a lack of knowledge of the legal concerns faced by persons with disabilities.⁷⁹

As discussed in the preceding section, economic hardships experienced by persons with disabilities negatively impact on their ability to engage lawyers to defend them. Although access to legal representation for civil matters seems to be mitigated by use of trained paralegals, there are very limited parallel efforts for using paralegals in the criminal justice system. This presents a problem for persons with disabilities to access legal information and representation for asserting their right to justice. Indigent

78 S Ortoleva 'Inaccessible justice: Human rights, persons with disabilities and the legal system' (2011)17 *ILSA J INT'L & COMP L* 281.

79 As above.

persons with disabilities, like many other classes of indigent South Africans, mostly rely on Legal Aid South Africa (LASA) for legal representation, and in some cases, on other sources of legal services other than lawyers for legal information.⁸⁰

However, even when lawyers are provided at state expense or when persons with disabilities are able to afford legal representation, they may still experience a challenge in that their lawyers may not be conversant with disability law and may be ignorant of the experiences of persons with disabilities. In this case access to appropriate legal representation will be compromised by inadequately trained lawyers who may not know how to respond to the needs of persons with disabilities.

BARRIERS ARISING FROM LACK OF OR LIMITED ACCESS TO INFORMATION, EDUCATION AND COMMUNICATION MATERIALS AND SYSTEMS

Access to information, education and communication materials and systems are cardinal to facilitate access to justice for persons with disabilities, not only because they facilitate their communication needs, but also because they empower them with knowledge of their rights. Increasing the knowledge of persons with disabilities on their rights empowers them to know their position in the law, the options that are available to them, and to give instructions to their counsels from an informed perspective. Building knowledge of disability rights helps persons with disabilities to not only seek remedies after rights violations, but to prevent legal and human rights violations from occurring. Access to this information is thus cardinal for ensuring the overall enjoyment of rights by persons with disabilities on an equal basis as others.

The information must be packaged in formats that are accessible to persons with disabilities, including Braille, audio, sign language, and easy to read formats as the case may be. The development of progressive communication devices for persons with communication difficulties can also prove useful for sharing legal information. Moreover, legal awareness programmes for persons with disabilities carried out by organisations of persons with disabilities or justice institutions could enhance access to legal information to persons with disabilities.

Barriers arising from lack of or limited access to information do not only refer to legal information, they also extend to lack of or limited information on the experiences of persons with disabilities. As discussed earlier, laws, policies and practice must be informed by lived experiences of persons with disabilities. Legal information cannot therefore be devoid of such lived experiences. Because

80 McQuoid-Mason (n 13).

guaranteeing access to justice to persons with disabilities is a multi-faceted, multi-disciplinary task, access to information must relate to multi-disciplinary information that empowers both persons with disabilities and rights holders and others as duty-bearers or support persons. It is also necessary to utilise various structures in society outside the formal justice institutions to increase legal awareness and knowledge. For example, amending school curricula and university modules to teach disability rights to students could be beneficial to both students and persons with disabilities. Law students, social workers, psychology students, and medical students will be able to access relevant information to meet the justice needs of persons with disabilities. This would be even more empowering if some of these students and teachers are persons with disabilities who traditionally do not have a chance to participate in formal education systems where they share their experiences with peers, learners and others in that space with the view of building a critical mass that is knowledgeable about disability rights as well as the role of professionals in realising such rights. Another example could be the use of community safe spaces, political arenas and other dialogue fora where focus group discussions and public discussions targeting actors in the criminal justice system, members of the public as well as persons with disabilities are invited to share legal and other information on disability rights. These could be facilitated by DPOs, persons with disabilities, academics or other like-minded organisations.

BARRIERS ARISING FROM PHYSICALLY INACCESSIBLE INSTITUTIONS AND SPACES

Many countries include some requirements for the physical accessibility of public buildings such as police stations and court buildings in their legislation. However, this is often confined to new buildings or for visitor or public spaces with few references to accessible detention facilities or accessibility for staff members such as police officers, members of the judiciary or lawyers.⁸¹

Persons with physical disabilities and those with sensory disabilities may experience challenges physically accessing justice institutions. If a person using a wheelchair, for instance, wants to report a crime, but the relevant institution is on the third floor of a building that is only accessible through a staircase, it means that the individual is unable to report the crime. Similarly, when a person who is visually impaired or deaf is made to use doors or elevators in a courthouse that are not designed to suit their needs, they would encounter difficulties physically navigating

81 Flynn et al (n 58).

this space. As a result, persons with disabilities rely on persons without disabilities to access justice institutions. The distance of the justice institutions may also pose a challenge, especially when public transport is not accessible.

Women and children with disabilities may also experience challenges physically accessing justice institutions. As earlier alluded to, children are often dependant on adults whose care they are under to help them report crimes that they experience. If the adult is not available or is unwilling to report the crime then the child has little to no chance of physically accessing a justice institution to lodge a complaint. If children eventually access a justice institution, they may have challenges there as the spaces or staff may not be child-friendly, discouraging them from going back for further legal services. For women with disabilities, physical access to a justice institution may be challenging particularly if they have competing family and/or work responsibilities. A woman with a disability who has to look after her children, cook, wash or provide healthcare to a sick family member cannot stay away from her home too long in pursuit of her justice needs.

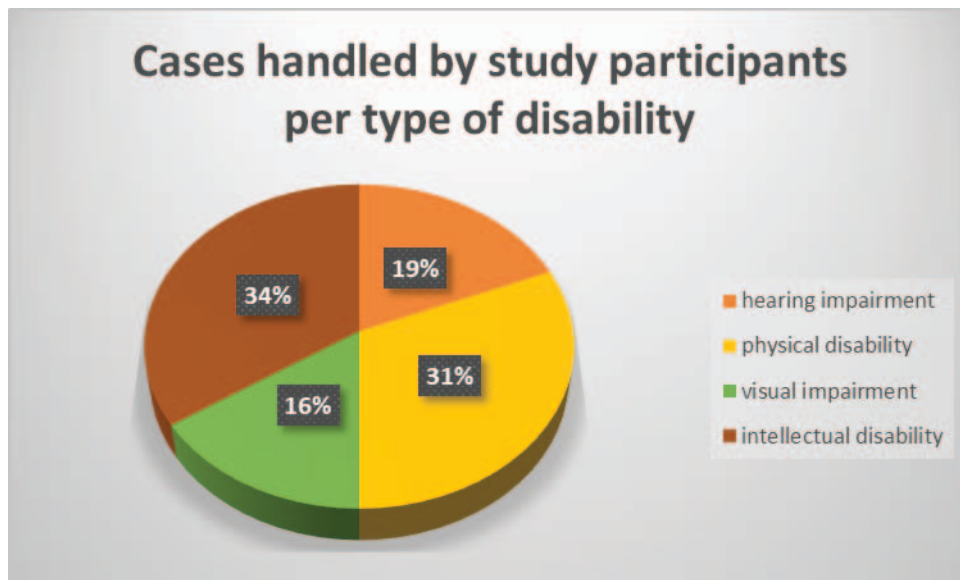
Similarly, persons with disabilities who are employed may also find it difficult to stay away from work for long periods of time in pursuit of their right to justice. Safe houses for survivors of sexual violence or state witnesses with disabilities, and correctional or penal facilities that are not disability-friendly may also present barriers for accessing legal and related services that affected persons may need. Institutional barriers may also limit physical access to justice institutions.

Persons with disabilities who are detained in prison facilities on account of discriminatory laws and procedures and those in conflict with the law will continue experiencing challenges of physical access to justice institutions if no deliberate interventions are put in place to enact protective laws and procedures, and curtail their social exclusion from the criminal justice system. Physical and spatial access to justice institutions also affect justice actors with disabilities such as police officers, defence lawyers, prosecutors and adjudicators. This negatively impacts on access to justice for persons with disabilities as it may affect the quality and efficiency of investigations as well as negatively impact on effective representation as justice actors have to negotiate their way through justice and other social institutions.

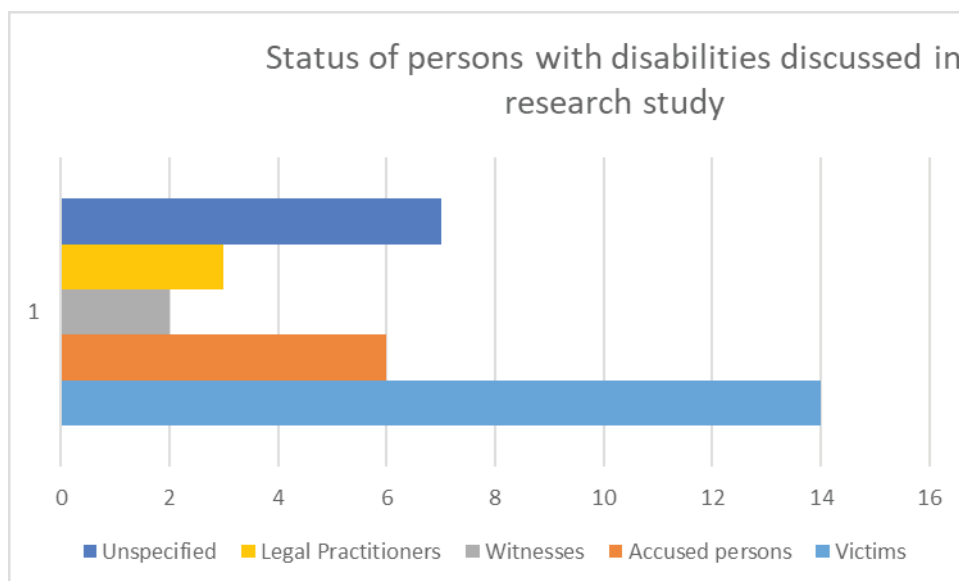


RESEARCH FINDINGS: INTERVIEWS WITH STAKEHOLDERS AND INPUT FROM VALIDATION MEETING

Stakeholders were asked questions about their experiences in the criminal justice system. One question sought to understand whether respondents had handled or received any complaints of a criminal nature involving a person with a disability. Respondents indicated that they had dealt with and/or heard of numerous cases involving persons with disabilities in the criminal justice system. Many respondents indicated that these cases were too numerous to mention but furnished information on some of the cases they handled. A total of 33 cases were discussed in the study. Thirty-four (34) per cent of these involved persons with intellectual disabilities, 31 per cent involved persons with physical disabilities, 19 per cent of cases handled involved persons with hearing impairments and 16 per cent of respondents indicated having handled cases involving persons with visual impairments as indicated in the tables below.



From the cases discussed, 14 of the persons with disabilities were victims, six were accused persons, two were witnesses, three were legal practitioners and seven were not assigned specific roles.



The cases ranged from rape to murder, death by police officer, domestic violence, causing death by road traffic accident, assault and burglary. The majority of the cases reported were rape and sexual offences. Whereas some respondents discussed specific cases, others spoke more generally on the work they were doing in promoting access to criminal justice for persons with disabilities in South Africa. Respondents identified a myriad of barriers experienced by persons with disabilities in the criminal justice system as discussed below.

Fifty-eight (58) per cent of respondents narrated how persons with disabilities were denied access to effective remedies. In one instance, a 12-year-old boy with Down Syndrome was raped in school in 2019 by a known perpetrator. The boy was subjected to medical examination but to date the perpetrator has not been charged on account of the boy being an unreliable witness.⁸² In another case, a lady with visual impairment was raped. She reported the matter to the police but they refused to open a case file because she would not be able to identify the perpetrator.⁸³ Another visually impaired rape survivor was asked to identify the person who raped her through an identification parade. She stated that she could only identify him if she heard his voice or got in close proximity with him, but the police refused to provide this accommodation, stating that it was against the protocols of identification parades and the matter was closed for lack of evidence.⁸⁴ A person using a wheelchair who was a victim of a burglary felt that the police disregarded the report by the victim because they were physically disabled.⁸⁵

Another respondent narrated how persons they work with who use wheelchairs always complain that they do not get assisted by police when they lodge complaints. The police often ask persons with physical disabilities who call in to report cases and who are in need of immediate interventions to go to a police station to formally lodge the complaint. This leaves complainants vulnerable to crime and rights violations and inadequate access to an effective remedy as they are discouraged from seeking police interventions.⁸⁶ Further, a respondent stated that survivors of domestic violence who successfully obtain protection orders from the courts often cannot enforce them or if they do, they remain isolated from their caregivers who most often are their abusers.⁸⁷ This demonstrates the challenges that arise from the use of purely legalistic tools such as protective orders. The need for multi-sectoral interventions can help to ensure protective orders are supported thereby guaranteeing their effectiveness as a remedy for domestic violence.

At the validation meeting for this research study, a participant with a disability observed that many persons with disabilities were denied effective remedies in the justice sector mostly on account of their disabilities. They narrated how they were unfairly dismissed from work in the pretext of the negative impact of COVID-19 on the employer when in fact they were targeted as a result of their disability. The office of the labour commissioner and several lawyers approached were all not willing

82 Participant KR 1

83 Participant KR 2

84 Participant KR 4.

85 Participant KR 5.

86 Participant KR 13.

87 As above.

to take up the matter on the belief that the participant did not have a legal cause. The participant finally managed to get the assistance of a legal practitioner who appreciated the nature of the complaint only because they too have close family members with disabilities and could relate the participant's plight. The participant attributed the behaviour of the labour office and legal practitioners to their negative attitudes towards persons with disabilities and demonstrated how this has negatively impacted their access to legal remedies. Another participant at the validation meeting stated that most crimes involving persons with disabilities are not treated with the same agency as those involving persons without disabilities due to negative social and institutional barriers. This too negates access to effective remedies for persons with disabilities. From all of these cases it is evident that persons with disabilities are denied effective remedies for the injustices they suffer. An effective legal system would seek to ensure that groups of people who have traditionally been excluded from the criminal justice system, such as persons with disabilities, are expressly granted a right to effective remedy and equal protection of the law and that regulations are developed that create legally protected pathways for enjoyment of these rights.

As stated by one of the participants at the validation workshop, the denial to record, refusal to investigate and respond to calls relating to victims of crime with disabilities and other such cases cited above prove the effect that negative attitudes, stigma and discrimination have on enjoyment of the right to justice. Even without the requirement to carry out a formal assessment of competence of a witness, stigma and discrimination against a person with a disability may render them an incompetent witness from whom sufficient evidence cannot be obtained. Deeming a witness non-credible because of their disability is not only discriminatory, but it denies them equal enjoyment of the right to access justice. One respondent stated that many persons with disabilities experience attitudinal barriers in the criminal justice system, citing negative attitudes from police officers as a major barrier to reporting cases.⁸⁸ This point was reinforced by another respondent who narrated the experience of a child with an intellectual disability who was a survivor of a sexual assault:⁸⁹

Exactly, [police] didn't believe [the child when the child identified the perpetrator of the rape]. You know, we even enlisted the services of Section 27 of South Africa, and they were also not very successful. So this mum [who reported the case on behalf of the mother] really feels, let down by the justice system in that you know, it didn't even come to the point of where the you know the person was arrested, there was some form of formal investigation, she has never received any visit, formal visit by the police or the department of Education to inquire as to the incident at the school.

88 Participant KR 12.

89 Participant KR 1.

Stigma and discrimination against persons with disabilities perpetuate their exclusion from the criminal justice system. As evidenced from the above, a semblance of an investigation was done, but the police did not bother to visit or question the victim or their guardian to establish what happened.

Participants in the legal profession also shared their experiences on the effects of negative attitudes against persons with disabilities in the criminal justice system in South Africa. A candidate attorney with a visual impairment explained how security guards, fellow legal practitioners and court officials made it difficult for them to attend court by themselves.⁹⁰ They stated legal practitioners had a tendency of exchanging regular court documents at court and required on-the-spot approvals, which the candidate attorney could not give due to the inaccessible format of the documents. Following a complaint to their principal, the principal opted to deal with the matter internally as opposed to taking it up with the South African Law Society and asked them to always attend court in the company of other candidate attorneys. The negative attitudes of the principal and other legal practitioners towards the respondent compromised their learning experience and their effectiveness as the job of one person had to be done by two or more people. The respondent felt that the principal, being a senior legal practitioner and person of influence in the Law Society should have been more forthright with other legal practitioners and formally engaged the Law Society in order to remove the barriers experienced by attorneys with disabilities.

Participants also cited ill-treatment from the police as a result of negative attitude towards persons with disabilities.⁹¹ A participant who was survivor of a gang rape explained the difficulties she encountered at investigation and trial stages through the actions and inactions of police and the judge in charge of her case.⁹² She wondered what quality of investigations the police undertook as they rushed the investigations, they never questioned her about the rape incident nor did they access the full medical report from the doctor who treated her:⁹³

The police they didn't get there in time, when they came at the hospital, they just ... they didn't ask questions they just ... talked to the doctor but the doctor said he didn't even give them the full report they were so quick to come and go.

With regards to her court experience, the social worker that offered support during the interview translated the respondent's narration which was in Afrikaans as follows:⁹⁴

90 Participant KR 11.

91 Participant KR 6.

92 Participant KR 7.

93 As above.

94 As above.

[T]he whole staff or people at the court made her feel like she's crazy or like she's not normal. And the way they treated her it's like they didn't trust what she was saying and especially in court when she had to go by the people there even the judge kept asking her the same question over and over and over as if she wasn't saying it right the first time. And then the social worker, they also assisted to help to answer some of the questions when she couldn't answer the question or didn't feel because she also became a little uncomfortable and frustrated, but then the guys will still force her to answer the question herself. So, she was just feeling like they treated her as if she didn't know what she was saying but the social worker already confirmed that she does know what she's saying, she understands what she was able to answer the questions.

The criminal justice system must not be divorced from the medical and psychological needs of a participant with a disability as this affects their sense of justice. Participant KR 7 attested to this when she stated that even though her assailants were convicted and given heavy sentences, her experience in the criminal justice system was terrible due to the way she was made to feel throughout the process. The participant was concerned by the fact that at no point did the judge ask her how she was feeling or doing, nor did the judge order a protection order even after she testified that she had been threatened by one of the assailants. The negative attitudes shown to persons with disabilities amounts to discrimination, which tends to exclude them from accessing justice because they either are or feel intimidated, frustrated or sidelined. Many participants attested to the fact that negative attitudes against persons with disabilities, which in some cases was driven by ignorance on the part of justice actors negatively affected experiences of persons with disabilities who interacted with the criminal justice system. Some respondents indicated that persons with disabilities were often not believed or were pitied by police, prosecutors, defence counsel, judges and magistrates among others.⁹⁵ Other respondents opined that negative attitudes towards persons with disabilities made them invisible, misjudged and subjected to degrading treatment.⁹⁶ Participant KR 8 stated that a further consequence of negative attitudes shown to persons with disabilities is that in addition to being denied access to justice, victims of injustice are susceptible to repeated victimisation.⁹⁷ One participant recommended that progressive policies that exist in justice institutions such as correctional facilities must be used to meet the needs of those who interact with the justice system and that justice actors must be properly trained to ensure appropriate treatment of persons with disabilities.⁹⁸

95 Participants KR 1, KR 4 and KR 7.

96 Participants KR 1, KR 7 and KR 8.

97 Participant KR 8.

98 Participant KR 6.

Some respondents discussed the challenges that the legal requirement for assessing fitness to stand trial posed to access to justice for persons with disabilities. One participant stated that this requirement negatively impacted on access to justice for persons with Down Syndrome. They stated that section 76 of the Criminal Procedure Act was found unconstitutional in a court case that challenged its constitutionality on account of denying the accused an opportunity to give evidence of the incident as they were deemed mentally incapable of understanding the proceedings with no means to accommodate their disability.⁹⁹ Another participant showed that this requirement also affected accused persons who were deemed fit to stand trial when in fact they are not.¹⁰⁰

The respondent argued that the court found a person with a severe intellectual disability fit to stand trial and relied on the certification of a psychiatrist as opposed to that of a psychologist who was better placed to explain a person's functioning. The respondent, a trained social worker, who had known and provided support to the accused for a long time opined that the court erroneously deemed as fit a person who had an intellectual disability that negatively impacted their ability to understand their actions nor to recall any aspect of the crime they were accused of and were thus incapable of properly defending themselves.¹⁰¹ Whereas it was not disputed that the accused committed the crime, the approach of the criminal justice system in deeming the accused fit to stand trial denied the accused a fair trial and an appropriate response to the accused person's actions.

Limited protection for accused persons subjects them to injustice and continued exclusion from the criminal justice system. One respondent demonstrated this by citing a case of a convicted person with an intellectual disability whose condition did not come up throughout trial but only at sentencing stage when it became evident.¹⁰² The respondent stated that their services were sought to mitigate the court's sentencing of the client. The lawyer representing the client noticed prior to commencement of trial that the client was 'slow' but did not think they had an intellectual disability until sentencing. No assessments were done to ascertain this early enough. The respondent opined that lawyers do not know how to get accommodations for clients with intellectual disabilities thereby compromising the fairness of the criminal justice system in holding such persons accountable for their actions.¹⁰³ Another respondent narrated how limited protections for accused persons with disabilities make them susceptible to imputation of criminal responsibility for

99 Participant KR 1.

100 Participant KR 10.

101 As above.

102 As above.

103 As above.

offences they have not committed.¹⁰⁴ The respondent narrated how an accused person with hearing impairment admitted to a rape charge they did not commit and was sentenced, with their co-accused to a prison term. After nine years with the help of a pro bono advocate who identified irregularities in their case record, the conviction was overturned. In discussing this case, the respondent identified communication difficulties as a key fact that made the accused vulnerable to the injustice he suffered:¹⁰⁵

So, it's not only communicating in court it's communicating with police officers, so if a police officer goes to arrest the deaf person, deaf people for the most part, have been conditioned when they communicate with hearing people to just say yes, you understand when they in reality don't understand at all ... That is a big challenge you can't read them their rights, they can't hear you so, they don't understand and that frequently leads to being found guilty of crimes they're actually innocent of.

Complex and inaccessible legal procedures also add to the barriers experienced by persons with disabilities.¹⁰⁶ One respondent explained how an accused with an intellectual disability did not understand the seriousness of the charge against them or even the court processes they were undergoing.¹⁰⁷ Another respondent stated that:¹⁰⁸

There are a hundred, two hundred, procedures or steps, from the beginning of a criminal matter, until the final result, and everywhere in between, there are preliminary applications. Sometimes you need to refer a person for observation, for example, and then those facilities must cater for my client with a disability. After conviction, now I have a situation where I need a pre-sentence report, so I need to now engage with the Department of Correctional Services, to get a probation officer's report and a correctional officer's report. Are they equipped to deal with people with disabilities? No, they are not. They definitely not.

Numerous and complex legal procedures are particularly problematic if there is no flexibility in their application. In one case a social worker was not allowed to offer support to a person with a disability in court due to the restrictions on numbers of people allowed in court to control the spread of COVID-19.¹⁰⁹ In another case, a person with a severe physical disability was denied their day in court as procedure required them to make a physical and not virtual appearance. The man had a physical

104 Participant KR 3.

105 As above.

106 Participant KR 9.

107 As above.

108 Participant KI 3.

109 Participant KR 9.

disability by which he could not sit or stand upright.¹¹⁰ He was evicted from his house and had not been making court appearances due to his condition. A warrant of arrest had been issued against him because he did not make his court appearance to challenge the matter. His situation was compounded by economic hardship where he could not afford to hire a suitable vehicle to transport him to the courthouse. An application to the court to allow for audio recording of his side of the story was rejected by the court as it was not part of court procedure.¹¹¹

In another case, the court was unable to exercise leniency to make accommodations for the person with disability despite the existing procedure. A respondent narrated how courts in South Africa rely only on court-accredited sworn-in interpreters to provide interpretation services to those in need. The respondent was faced with a case in which the victim was non-verbal, with a hearing impairment and had not been to a formal school to learn communication skills. Communication could only be done by someone close to them. In order to accommodate this victim, the court had to involve both the prosecutor and the defence advocate to determine the suitability of the family member to offer interpretation services. This accommodation is not supported by law and was done at the discretion of the adjudicator, which means it is not universally applicable, it subject to challenge and a person with disability cannot claim it as of right.¹¹²

Another example of a rigid legal procedure cited by another respondent was the detention, and one may add imprisonment of accused or convicted persons with disabilities. A respondent narrated how a 24-year-old person with an intellectual age of 8 years was detained in a correctional facility awaiting their trial.¹¹³ The respondent's client was falsely accused of sexually assaulting a minor and detained in the general population of the correctional facility with no regard for his intellectual age and how this would negatively impact him. The situation was exacerbated by the prevalence of COVID-19, where correctional facilities proscribed inmates from receiving visitors and so their client was locked up in the general population of a correctional facility with no access to any familiar person causing long-lasting trauma to the client. Although procedures exist in the systems regulating correctional facilities in South Africa for moving a person such as the respondent's client to a special facility or health institution, such procedures are onerous. In the case of the respondent's client, they had to subject him to medical examinations in a public hospital as his family did not have the means to pay for medical tests in a private hospital.

110 Participant KI 4.

111 As above.

112 Participant KI 2.

113 Participant KR 9.

Public hospitals have limited specialists and long lists of persons awaiting tests.¹¹⁴ This poses delays in ascertaining a person's intellectual condition, which informs the justification for removing them from the general population of a correctional facility. The respondent successfully engaged the public hospital, a longstanding partner of theirs, to fast-track the medical examinations. This intervention mitigated the damage suffered by the client who had already spent a lengthy period of time in the general population, with severe consequences to their health.¹¹⁵ Even after they were acquitted of the crime, the damage to their health had been already done leaving them with no sense of justice. Legal procedures must thus be flexible enough to serve the ends of justice to all parties while ensuring that they take into account the needs of actors in the criminal justice system that are susceptible to rights violations and social exclusion such as persons with disabilities.

Access to legal representation is another barrier experienced by persons with disabilities. As noted earlier, lack of legal representation in legal matters affected by one's disability such as making a plea or defence or mitigation of sentence negatively affects dispensation of justice to accused persons with disabilities. Similarly, victims of violence face challenges in seeking justice when they do not have legal representation. Further, those trained as legal practitioners encounter challenges working in the criminal justice system. These challenges negatively impact on the quality of legal services offered to their clients. A visually impaired respondent narrated how he struggled as a candidate attorney to access court rooms and court procedures due to infrastructure barriers and attitudinal barriers. The respondent specifically mentioned the inaccessible infrastructure at North Gauteng High Court and the Magistrates Court in Pretoria. No reasonable accommodations were made to ensure effective law practice by the respondent.¹¹⁶

One participant recognised the role legal practitioners play in helping persons with disabilities overcome some of the barriers they encounter in the criminal justice system.¹¹⁷ However, similar to the views taken by at least 38 per cent of respondents, such assistance is perceived from the charity model where a person with a disability is dependent on the goodwill or compassion of a legal practitioner or other justice actor to facilitate access to justice. One participant stated in this regard that:¹¹⁸

I will typically, instead of expecting my client to be at court Friday morning, 9 o'clock or 10 o'clock, in the high court for his divorce, I will go and pick him up at his house myself. I will take him to court, because then I know I have my client in time at court, he knows where to

114 As above.

115 As above.

116 Participant KR 11.

117 KI 1.

118 KI 3.

be because I will be next to him. I will guide him to where he must be, at what time, and I will tell him specifically what to do, and how to go about doing it. It's not from a cost perspective, um, a financial perspective of a legal practice. It doesn't make sense, because I've wasted two hours to assist my client to get to where he should have been in the first instance. But I do it nonetheless because I've got sympathy with my client's situation. I know the process at the court building and the accusatorial system is not going to accommodate him. So, therefore in order to protect my client's interest to the best of my ability, and also because I need, I want, that client to come back to me at one stage, because this might not be the only matter that he will have in future. I want him back ... to come back to me. I will bend over to try and accommodate him. And the same happens in court, obviously a judge will see this person cannot understand the proceedings because of his disability, and the judge will then go over and above his ordinary duties, to try facilitate, to accommodate that person.

It is imperative for justice sector actors to take measures in order to ensure the effective inclusion of persons with disabilities from a rights-based perspective as opposed to the charity model. The concept of reasonable accommodation must never be equated to adjustments made to accommodate a person with a disability through the charity approach.

While it is acknowledged that legal knowledge is cardinal to access to justice, it is important to underscore that such knowledge is not the preserve of lawyers. As recommended by many respondents, persons with disabilities must be equipped with legal information and knowledge of both substantive and procedural law to enable them to participate actively and effectively as in the criminal justice system on an equal basis as others. Limited access to legal practitioners often entails limited legal know-how thus justice sector actors must work collaboratively to ensure provision of legal information to persons with disabilities at every stage of the criminal justice system.¹¹⁹ One participant noted that although access to lawyers is critical for ensuring access to justice for persons with disabilities who interact with the criminal justice system, lawyers should not work in isolation, as it often the case.¹²⁰ Lawyers (both defence counsel and prosecutors) tend to quickly dispose of cases involving persons with disabilities without seeking adequate support.¹²¹ They need to work with DPOs in order to ensure that the right support is given to persons with disabilities in the criminal justice system. The lack of coordination among justice actors fails persons with disabilities as most of the time lack of knowledge of the law and of the different types of disabilities leave persons with disabilities without the right support to prosecute or defend a criminal matter.¹²²

119 Participants KI 1, KI 3, KI 4, KI 5 and KI 6.

120 Participant KR 10.

121 As above.

122 As above.

Approximately 90 per cent of the respondents identified communication and physical barriers as the key barriers to access to justice for persons with disabilities. With regards to communication barriers, one respondent lamented the difficulty of reporting violations experienced by children with intellectual disabilities attributable to the communication difficulties they experience. This coupled with the fact that the majority of their caregivers are not aware of their rights and are often the violators of rights makes it difficult to ensure cases are report, investigated and remedied.¹²³ Similarly, non-verbal persons as well as persons with visual and hearing impairment experience challenges in communicating with justice actors. One respondent narrated how a 16-year-old boy with down syndrome was shot dead by the police in 2020 due to miscommunication with the police who did not understand his language.¹²⁴

Another respondent stated that persons with hearing impairments face communication challenges because there is no accessible language within the courts.¹²⁵ This is exacerbated by the fact that sign language interpretation in South Africa is not a regulated profession and there are no guidelines on what a sign language interpreter must be capable of or the qualifications and experience they must have thereby risking the quality of the interpretation they offer.¹²⁶ In many cases, persons with hearing impairments have no language proficiency, which leads to cases being thrown out of court for want of ability to follow proceedings.¹²⁷ Such cases happen when the person involved has not had any formal training on South African sign language and uses basic forms of communication that cannot be used to discuss a whole trial.¹²⁸ Furthermore, two of the respondents lamented on the accuracy of translated information¹²⁹ and one was wary of how much information was lost in translation and ultimately negatively impacted the outcome of a case.¹³⁰

With regards to communication barriers experienced by persons with hearing impairments, one respondent demonstrated how court practice can be disadvantageous:¹³¹

Uhm, in court, what they do when they want you to come in, they call you three times. So and so, so and so, you know ... and they call you. Imagine you are deaf, and this person standing by the door is calling you and there is nobody to interpret to you. You are sitting right there, but the person calls three times then goes back and says, 'the person is not around'. Um so, so that's one area.

123 Participant KR 1.

124 As above.

125 Participant KR 3.

126 As above.

127 As above.

128 As above.

129 Participants KR 3 and KI 1.

130 Participant KI 1.

131 Participant KR 4.

With regards to physical barriers, many respondents alluded to the inaccessible buildings in the justice sector from institutions set up to receive reports of crime, to institutions responsible for investigations, prosecution, incarceration and treatment and rehabilitation. One respondent stated that 'most police stations, most court buildings are not physically accessible to those with physical disabilities'.¹³² Another respondent said:¹³³

[P]eople with serious physical disabilities ... Of course, that presented no difficulty in evidence, but you always just feel very sorry for when you get that person in court, because most of the court buildings they say that they, they rebuilt and they put those facilities. I don't see that, I don't see that and you know the difficulty is when they are in wheelchairs, it's many times difficult to know when to help, and when not to help, because some of them want to be on their own. They want to do their own thing and they feel if you help, then you intrude. But what I found is that the facilities are just not, not there, you know.

Another respondent said that:¹³⁴

When it comes to access in terms of directional signage, for example, for persons with intellectual disabilities, that's not there, ok. You've got the, for persons with hearing disabilities, you know, the current way people call a case, in a criminal case, will be state versus whoever, state versus whoever, come forward. That person is not hearing that call, ok. Such a matter will be contempt. Uh, where the case is being held, all of those are barriers currently, and there's no procedure whatsoever regarding that.

Traditional forms of court practice for allocation of courtrooms and calling up of cases poses barriers to accessing justice institutions by persons with sensory impairments and intellectual disabilities.¹³⁵ Artificial modifications to existing buildings do not make them psychically accessible. A respondent observed that:¹³⁶

You've got the Department of Public works that manages access, in terms of physical access of all buildings, and whichever way you look at it, despite the fact that we have norms and standards, you know, for accessibility of buildings, etc, physically, our buildings are not accessible ... especially, we tried to wait to bring about phase one, where we've got a ramp and a toilet, a disability toilet on the 1st floor, but that is as far as we go, in terms of access is concerned.

132 Participant KR 2.

133 Participant KI 1.

134 Participant KI 4.

135 Participant KR 4.

136 Participant KI 4.

Another respondent shared their experience of barriers to physical documents as follows:¹³⁷

Um, I had an example where I had a blind client, he was charged, I think, with assault with intent to do grievous bodily harm, and there was the issue with the J88 medical report. So, the court wanted to confront him with the content of the report, and he said 'but listen, I cannot see it. I cannot admit, and in terms of section 220, make formal admissions, if I can't understand what is actually the contents of that document'. Because that document in itself is obviously of such a nature that if you assent to it, or if you consent to it, it is considered as being proven by the state.

The respondent opined that the J88 document is a cardinal piece of evidence, which amounts to admission of guilt of an offence. If an accused does not know what is contained in the document but accepts the contents of the document as true, they risk confessing to an offence, which they did not comment. Being able to read and understand the contents of the document is cardinal for one's enjoyment of the right to justice.¹³⁸

A respondent demonstrated the negative effect of inaccessible procedures on advocates with disabilities as follows:¹³⁹

Last week, Judge President Dunstan Mlambo, issued a new practice directive. Everything these days ... must be on computer and it must be distributed, nothing in hardcopy anymore. Ok, that's good, it's wonderful to be a green, environmentally friendly society. But what about our practitioners with disabilities? Yeah, some of them have their own Braille computers, but the judges don't have it. Is there a link ... is there interaction between that computer and the translation that happens in court? Do we have a running record that immediately translate it into Braille? No, we don't. What about the transcripts that need to go on appeal, those institutions that's responsible for the record to be typed? It's only one or two companies in the country every year that gets the tender. Are they equipped to type it into braille for a client as well? They should be, but they're not. And those one or two that is equipped to do it, can you imagine the expenses involved with it?

Another barrier to accessing justice for persons with disabilities is limited to no access to information. A respondent stated: 'I mean the other challenge is that we are not all lawyers, so we don't know law properly'.¹⁴⁰ Another respondent attributed the low numbers of reports of criminal offences experienced by persons with intellectual disabilities to lack of information on their right to report cases and the lack of

137 Participant KI 3.

138 As above.

139 As above.

140 Participant KR 4.

information on the importance of reporting violations that they experience.¹⁴¹

Over 60 per cent of the participants identified the need to sensitise persons with disabilities on their rights and legal procedures as well as actors in the justice system on how to meet justice needs of persons with disabilities, highlighting specific forms of accommodations that must be put in place to ensure equal access to justice with persons without disabilities. Some respondents demonstrated how they are working with police stations to raise awareness on disability rights to justice and build capacities of police officers to offer better services to persons with disabilities.¹⁴² Many participants in the study identified interventions for addressing the barriers discussed above. These are discussed in the next section.

141 Participant KR 1.

142 Participant KR 12 and Participant KR 13.



CONCLUSION AND RECOMMENDATIONS

Findings from the research study prove that even though South Africa has many favourable legal provisions that contribute to the attainment of access to justice for persons with disabilities who find themselves in the criminal justice system, such laws are inadequate to guarantee effective access to justice. This is attributable to myriad reasons including poor implementation of laws such as the South African Language Practitioners' Act 8 of 2014 that guarantees access to qualified sign language interpreters; inadequate regulations to support the implementation of laws; limited response to the diverse and unique needs of the different types of disabilities; and failure to adequately recognise the heterogeneity of persons with disabilities and their unique challenges in the criminal justice system, including those arising from their disability and socioeconomic circumstances.

Other factors that hinder the effective realisation of the right to access justice for persons with disabilities in South Africa include negative attitudes, stigma and discrimination of members of the public as well as various service providers in the justice sector; preference for the charity model rather than the rights-based model to practical interventions for ensuring access to justice; the establishment of procedurally unfair and inaccessible systems that do not take into account persons with disabilities; the establishment of rigid evidentiary rules that disadvantage the attainment of justice for persons with disabilities; failure to make reasonable accommodations for ensuring their access to justice and failure to budget to systems and services that ensure the attainment of justice on

an equal basis with other persons without disabilities in South Africa's criminal justice system.

In view of these barriers to access to justice, stakeholders in the criminal justice system recommended several interventions including ensuring that existing laws and policies are implemented including the White Paper on the rights of persons with disabilities which was drafted in 2016. Participants at the Validation meeting also recommended that the South African Government must be lobbied to ratify the African Disability Protocol in order to foster better protection of access to justice rights of persons with disabilities and create an environment for the better development of jurisprudence in this area. It was also felt that there was need to explore localised mechanisms for guaranteeing access to justice in South Africa, taking into account the great dependence on customary justice systems and high demand for legal aid.

Some stakeholders recommended the need for systemic as well as ad hoc adjustments to the criminal justice system that would ensure that the system holistically responds to the needs of persons with disabilities generally as well as their unique, individual needs when they interact with the criminal justice system. Systemic changes should include fast-tracking preliminary and other processes such as mental assessments, introduction of identification aids for court rooms and court cases, strengthening of coordination among justice service providers involved in criminal cases from inception to completion of case, flexibility in processes such as identification parades to allow for a system that responds to the needs of a person with a disability. It was also recommended that actors in the criminal justice system of South Africa should learn some best practices from the region and beyond, particularly countries like Kenya and Israel, which have made remarkable progress in facilitating access to justice for persons with disabilities. Some participants at the validation meeting also referred to the need to explore how fast tracking matters involving persons with disabilities can help ensure access to legal remedies among others. While it was acknowledged that there are systemic problems in the criminal justice system of South Africa, which impact both persons with and without disabilities, fast-tracking such cases may or may not be feasibility and/or desirable. However, a full study in this regard must be undertaken to ascertain the feasibility and desirability of using the fast-track method.

Some stakeholders also recommended that all actors in the criminal justice system be trained on how to work with persons with disabilities in their respective portfolios. Some stakeholders stated that although the changing of negative attitudes towards persons with disabilities take a long time to be realised, training and awareness raising are necessary tools for addressing this barrier. Training was also recommended for persons with disabilities to know their rights and empower them to claim such rights. Awareness-raising programmes which show-case successful

interventions such as use of augmentative and alternative communication systems were also recommended for all actors in the criminal justice system to encourage uptake and scale up of such interventions. A participant at the validation meeting also emphasised the importance of ensuring inclusion of person with disabilities at a very young age and in all areas of life. She demonstrated how failure to ensure literacy of children with disabilities negatively impacted on their access to justice through communication barriers and other barriers such as failure to acquire legal literacy. She emphasised that the integration of various issues affecting persons with disabilities can help address some of the access to justice barriers they experience and help make coordination among different actors in the justice sector more efficient. Some stakeholders also recommended the need to strengthen monitoring systems to track the extent to which persons with disabilities access the criminal justice system.



ANNEXURE

List of Participants for the Study Research on Access to Justice for Persons with Disabilities in South Africa

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