



# PERSONS WITH DISABILITIES AND BARRIERS TO EQUAL ACCESS TO JUSTICE IN

# ZAMBIA

A RESEARCH STUDY OF THE CRIMINAL JUSTICE SYSTEM

# POSITION PAPER

## BACKGROUND AND INTRODUCTION

On 2 February 2010, the Government of Zambia 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 creates a duty upon state parties to provide accommodations to overcome the numerous barriers to accessing justice faced by persons with disabilities. In very simple terms, access to justice refers to the ability to effectively access the 'systems, procedures, information, and locations used in the administration of justice'.<sup>1</sup> The need for a substantive right of access to justice in the CRPD arose from the lived experience of persons with disabilities who continuously faced numerous barriers to accessing justice on an equal basis with others.<sup>2</sup>

In 2018, the African Union adopted an African disability-specific human rights instrument, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa,<sup>3</sup> which seeks to contextualise the experiences of persons with disabilities in Africa.<sup>4</sup> It retained the right to access justice, which is also enshrined in its article 13, indicating that persons with disabilities in Africa continue to face numerous barriers to accessing justice on an equal basis

with others. It is therefore, imperative for states parties to know and understand the various barriers to accessing justice faced by persons with disabilities in order for them to discharge their treaty obligations to ensure equal access to justice for all persons with disabilities. To that end, a research study was conducted in Zambia to map out the various barriers to accessing justice faced by persons with disabilities who are either complainants or accused persons in the criminal justice system.<sup>5</sup> Using the social model of disability as the conceptual framework and the provisions in article 13 of the CRPD and article 13 of the African Disability Protocol as a standard, this research report outlines the findings from the research study on the barriers to accessing justice faced by persons with disabilities in Zambia.



The Supreme Court in Lusaka, Zambia.

## **ENHANCING ACCESS TO JUSTICE FOR PERSONS WITH DISABILITY THROUGH THE PROVISION OF ACCOMMODATIONS**

Both the CRPD and the African Disability Protocol espouse the social model of disability which understands disability as the result of the interaction between a person with impairment and attitudinal and environmental barriers. This understanding acknowledges that having an impairment alone does not make one disabled.<sup>6</sup> Instead, it is An environment that takes little or no account of people with impairments that contributes to disabling people.<sup>7</sup> This is distinct from the medical model, which locates the disability in the individual and responds by attempting to cure or rehabilitate the individual. The CRPD states that disability results from the ‘interaction between persons with impairments and attitudinal and environmental barriers that hinder their full and effective participation in society’.<sup>8</sup> Similarly, the



African Disability Protocol identifies persons with disabilities as those who have physical, mental, psycho-social, intellectual, neurological, developmental or other sensory impairments which in interaction with environmental, attitudinal, or other barriers hinder their full and effective participation in society on an equal basis with others.<sup>9</sup>

The social model of disability favours interventions intended to make changes to the external environment in response to the innate needs of the person with impairment.<sup>10</sup> An example of such an intervention in the context of access to justice is the provision of accommodations. It is therefore, not surprising that one of the interventions mandated in both instruments in relation to access to justice is the provision of accommodations. Article 13(1) of the CRPD and article 13(1) of the African Disability Protocol both create a duty for states to provide procedural, age-appropriate and gender appropriate accommodations to ensure that persons with disabilities access justice on an equal basis with others. The provision of accommodations is a duty as exemplified by the fact that the denial of reasonable accommodations constitutes disability discrimination.<sup>11</sup>

The concept of accommodations typifies a social model response to disability that recognises the importance of the interaction between factors internal to the person (the impairment) and factors external to the person (such as attitudinal and environmental barriers). Accommodations are defined as

necessary and appropriate modification and adjustment ... where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.<sup>12</sup>

In very simple terms an accommodation is 'any modification to usual practice'.<sup>13</sup> For instance, the practice in court is that witnesses give their testimony in open court. A witness with an intellectual disability, for example, may find it difficult to communicate in open court and in response, the court may order that the trial takes place 'in camera' with only the necessary court personnel present. By making such an order, the court is modifying the usual practice and is therefore accommodating the witness. The modification is taking place in the external environment. This is not to say that the individual's impairment is irrelevant. The decision as to which of the many accommodations are to be provided to a particular witness is made by considering the specific needs of that witness arising from their impairment. Accommodations are therefore, interventions made to the external environment in response to the individual's internal needs and this reflects the interactional process that is central to the social model of disability.

## RESEARCH FINDINGS

### FINDINGS FROM KEY INFORMANT INTERVIEWS AND QUESTIONNAIRES

The main findings from the interviews are as follows:

- 1 Although persons with different types of disabilities participate in the criminal justice system, persons with hearing and speech impairments make up the highest number.
- 2 Although persons with disabilities interacted with the criminal justice system both as accused persons and as complainants, the majority of the cases reported by respondents involved accused persons with disabilities.
- 3 Most accused persons and complainants with disabilities were involved in serious offences such as murder and sexual offences.
- 4 The respondents reported encountering a number of barriers when handling cases involving persons with disabilities, with the majority encountering communication barriers.
- 5 There was no uniform/coordinated response to the challenges/barriers; there was a range of responses including appropriate and inappropriate ones.

### FINDINGS FROM LEGISLATIVE REVIEW

A legislative review was also conducted to determine if there are any legislative provisions that constitute barriers for persons with disabilities. A number of procedural and substantive barriers were identified. They include:

- 1 The assessment of testimonial competence;
- 2 The assessment of fitness to plead and detention at the President's pleasure;
- 3 The procedure for issuing summons;
- 4 The narrow interpretation of the word 'language';
- 5 The practice of observing and recording demeanour;
- 6 The requirement to give oral evidence in person and in open court; and
- 7 The failure to recognise the legal capacity of persons with intellectual and psychosocial disabilities.



## CONCLUSION AND RECOMMENDATIONS

Both the CRPD and the African Disability Protocol create a duty for states to provide accommodations for the purpose of ensuring equal access to justice for all persons with disabilities.<sup>14</sup> The failure to provide accommodations is so grave that it constitutes disability discrimination.<sup>15</sup> This research sought to provide data on the nature of interactions that persons with disabilities have with the criminal justice system and to understand the nature of the barriers they face. Based on the research findings, the report provides a number of recommendations as follows:

- 1 Provide procedural and age-appropriate accommodations tailored to meet the needs of persons with different types of disabilities.
- 2 Accommodations need to be provided to all persons with disabilities interacting with the criminal justice system, including as complainants, accused persons or as witnesses. The fact that persons with disabilities are usually involved in serious cases heightens the need to provide effective accommodations throughout the criminal justice process.
- 3 Train all criminal justice personnel on disability rights and appropriate accommodations.
- 4 Revise the assessments of testimonial competence and align them with the social model of disability.
- 5 Revise the assessments of fitness to plead.
- 6 Include a requirement to issue summons in accessible formats.
- 7 Include sign language and other non-spoken languages within the definition of the term 'language'.
- 8 Either abolish the practice of observing and recording demeanour or exempt persons with disabilities from this practice.
- 9 Provide an exception for persons with disabilities from the requirement to give oral evidence in person and in open court.
- 10 Recognise that all persons with disabilities have the right to enjoy legal capacity.



## Notes

- 1 S Ortoleva 'Inaccessible justice: Human rights, persons with disabilities, and the legal system' (2011) 17 *ILSA Journal of International and Comparative Law* 281 at 284.
- 2 F Mégret 'The Disabilities Convention: Human rights of persons with disabilities or disability rights?' (2008) 30 *Human Rights Quarterly* 494 at 512.
- 3 Protocol to the African Charter on Human and People's Rights on the Rights of Persons with Disabilities in Africa (African Disability Protocol) adopted by the thirtieth ordinary session of the Assembly, held in Addis Ababa, Ethiopia on 29 January 2018.
- 4 See for example the reference in the Preamble to the maiming or killing of persons with albinism on the continent.
- 5 This research study is part of a larger research project on the barriers to accessing justice in two other countries, namely, Botswana and South Africa. The findings from the studies in South Africa and Botswana are contained in separate reports. The research project also includes training of criminal justice personnel on how to accommodate persons with disabilities in Zambia, South Africa and Botswana.
- 6 Union of the Physically Impaired against Segregation *Fundamental principles of disability* (1976) 14.
- 7 As above.
- 8 Preamble para e of the CRPD
- 9 Art 1 of the African Disability Protocol.
- 10 C Barnes, G Mercer & T Shakespeare 'The social model of disability' in A Giddens & P Sutton (eds) *Sociology: Introductory readings* (2010) 163.
- 11 Art 2 of the CRPD and art 1 of the African Disability Protocol.
- 12 Art 2 of the CRPD. See also art 1 of the African Disability Protocol for a similar definition.
- 13 R White & D Msipa 'Implementing article 13 of the Convention on the Rights of Persons with Disabilities in South Africa: Reasonable accommodations for persons with communication disabilities' (2018) 6 *African Disability Rights Yearbook* 99 at 103.
- 14 Art 13(1) of the CRPD and art 13(1) of the African Disability Protocol.
- 15 Art 2 of the CRPD and art 1 of the African Disability Protocol.

