

June 2023



TOOLKIT ON JUSTICE ACCOMMODATIONS FOR PERSONS WITH INTELLECTUAL AND PSYCHOSOCIAL DISABILITIES IN SOUTHERN AFRICA



**Centre for
Human Rights**
UNIVERSITY OF PRETORIA



OSISA
Open Society Initiative
for Southern Africa

Cover Illustration by Nicci Nathanson

Toolkit on Justice
Accommodations for Persons
with Intellectual and Psychosocial
Disabilities in Southern Africa ©
2023 Centre for Human Rights,
University of Pretoria



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The Centre for Human Rights, Faculty of Law, University of Pretoria, is an internationally recognised university-based institution combining academic excellence and effective activism to advance human rights, particularly in Africa. It aims to contribute to advancing human rights, through education, research and advocacy.

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Acknowledgements

The Centre for Human Rights is grateful to the Open Society Initiative for Southern Africa (OSISA) whose generous support made this toolkit possible. The Centre also thanks the authors of the toolkit, Dr Robyn White and Ms Dianah Msipa.

Abbreviations & Acronyms

AAC	Augmentative and Alternative Communication
CJS	Criminal Justice System
CPO	Court Preparation Officer
CRPD	Convention on the Rights of Persons with Disabilities
NPA	National Prosecuting Authority

Executive summary

Throughout the southern African region, persons with intellectual and psychosocial disabilities experience numerous barriers to accessing the criminal justice system on an equal basis with others. Chief amongst these is the communication barrier resulting from the lack of accommodations to enable this population sub-group to participate effectively in criminal justice systems in the sub-region. This toolkit provides a range of examples of accommodations that can be provided to overcome this barrier and enable witnesses and accused persons with intellectual and psychosocial disabilities to participate effectively in criminal justice systems in southern Africa. The toolkit simultaneously highlights the importance of procedural justice and demonstrates how different accommodations align with the four principles of procedural justice namely, voice, respect, neutrality and understanding (and trust). The various accommodations are organised in accordance with these four principles of procedural justice as follows:

1. Accommodations that help with voice include:
 - a. the use of picture and alphabet communication boards
 - b. the use of anatomically correct dolls; and
 - c. the use of intermediaries
2. Accommodations that help with respect include:
 - a. the use of a support person; and
 - b. conducting court/witness preparation
3. Accommodations that help with neutrality include:
 - a. the use of expert witnesses
4. Accommodations that help with understanding and trust include:
 - a. adopting appropriate questioning strategies
 - b. making existing court materials accessible to persons with intellectual and psychosocial disabilities

Providing appropriate accommodations to persons with intellectual and psychosocial disabilities therefore serves a two-fold purpose. First, to overcome the communication barrier and enable persons with intellectual and psychosocial disabilities to participate effectively in criminal justice systems. Second, to ensure that persons with intellectual and psychosocial disabilities obtain procedural justice thereby building their trust and confidence in the criminal justice systems. Therefore, the provision of accommodations ensures that persons with intellectual and psychosocial disabilities in southern Africa will not only be more inclined to want to participate in the criminal justice systems but that when they do, they do so effectively. Ultimately, the cumulative effect of providing accommodations is to ensure that persons with intellectual and psychosocial disabilities in southern Africa access justice on an equal basis with others.

1. Introduction

The Convention on the Rights of Persons with Disabilities (CRPD) and the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Persons with Disabilities in Africa (African Disability Protocol) provide for the right of persons with disabilities to access justice on an equal basis with others (CRPD, art 13 and African Disability Protocol, art 13). Broadly speaking, access to justice refers to peoples’ effective access to the ‘systems, procedures, information, and locations used in the administration of justice’ (Ortoleva, 2011). Both the CRPD and the African Disability Protocol emphasise that participation by persons with disabilities in the justice system must be effective in order for them to access justice on an equal basis with others. However, persons with intellectual and psychosocial disabilities face numerous barriers to equal access to justice including access barriers, attitudinal barriers, law and policy barriers, knowledge and skill barriers, as well as practice barriers.

Figure 1 below summarises some of these barriers.

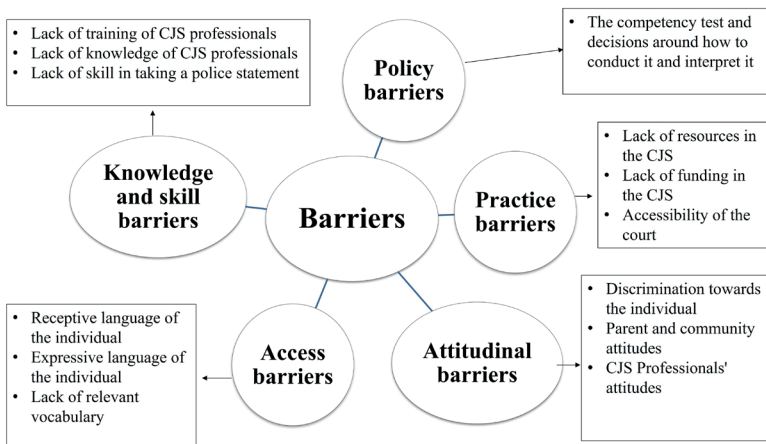


Figure 1: Barriers that persons with disabilities face when trying to access the Criminal Justice System (CJS) (Backstrom, 2016; Benedet & Grant, 2012; Bornman, 2017; Bornman et al, 2016; Cremin, 2016; Gooding et al, 2017; Modell & Cropp, 2007; White, 2021) experience many access and opportunity barriers in the criminal justice system. The aim of this research was to identify the barriers experienced by this population in the South

African Criminal Justice System as perceived by experts in the field. A qualitative research method, with 56 expert professionals in the criminal justice system divided into two different sequential data sources, was employed. The first data source included in-depth, semi-structured interviews (n=3).

The CRPD and the African Disability Protocol require the provision of procedural, age and gender-appropriate accommodations to overcome the numerous barriers to accessing justice on an equal basis with others. Although it is important to address each of these barriers, this toolkit will focus primarily on overcoming communication barriers that limit effective participation in the justice system. This toolkit provides practical recommendations for justice personnel on how to accommodate persons with intellectual and psychosocial disabilities and ensure that they participate effectively in the justice systems in southern Africa. Focusing specifically on the criminal justice system, this toolkit outlines examples of accommodations that can be provided to witnesses and accused persons with intellectual and psychosocial disabilities. The toolkit does not seek to provide an exhaustive list of accommodations, but only to provide examples. Many other additional accommodations may be provided to meet an individual's specific needs. The accommodations

DEFINITIONS

- **A person with an intellectual disability** can be defined as an individual with a disability characterised by significant limitations in both intellectual functioning and adaptive behaviour (The American Association on Intellectual and Developmental Disabilities, 2022).
- **An individual with a psychosocial disability** can be defined as an individual who has received a mental health diagnosis, and who has experienced negative social factors including stigma and discrimination, and exclusion (Drew et al, 2011).
- **The term 'accommodations'** refers to 'necessary and appropriate modification and adjustments ... 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.' (Article 2 CRPD).
- **Procedural justice** is the idea that legal processes must be fair.

are divided into four categories in accordance with the four procedural justice principles. (Bowen & LaGratta, 2014; Tyler, 2008; White et al, 2021). In order for procedural justice to be achieved, each of the following principles must be present:

1. **Voice** - the individual must be given the opportunity to be heard and to communicate their version of events
2. **Respect** – the individual must be treated with respect and dignity by all criminal justice personnel
3. **Neutrality** – the individual should feel that decisions were made in an unbiased and transparent manner; and
4. **Trust and understanding** - the individual should feel the criminal justice personnel are being sincere and fair in their decision-making. Furthermore, the individual should understand the language and the processes being followed in the proceedings.

International legal framework on access to justice

There are two important International Human Rights instruments that constitute the legal framework on access to justice for persons with disabilities. At the global level, the Convention on the Rights of Persons with Disabilities (CRPD) provides for the rights of persons with disabilities. To date, the CRPD has been signed and ratified by 182 countries, including 49 of the 55 African states. (https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?Treaty=CRPD).

At the regional level, the Protocol to the African Charter on Human and People’s Rights on the Rights of Persons with Disabilities in Africa (African Disability Protocol) provides for the rights of persons with disabilities. At the date of writing, 8 African countries have ratified the African Disability Protocol. Because it has not received the required 15 ratifications, the African Disability Protocol is not yet in force. (<https://au.int/en/treaties/protocol-african-charter-human-and-peoples-rights-rights-persons-disabilities-africa>). Nevertheless, it remains part of the African Union human rights architecture and once in force, is likely to become the most important human rights instrument for persons with disabilities on the continent.

2. Accommodations that can help with communication (Voice)

The first principle of procedural justice involves giving an individual the opportunity to effectively communicate their version of events and to be heard. Research indicates that persons with intellectual and psychosocial disabilities may have limited communication skills (Oyaro & Msipa, 2022) making it difficult for them to participate effectively in the justice system. Although intellectual and psychosocial disabilities are distinct types of disabilities, persons with intellectual disabilities as well as persons with psychosocial disabilities may experience communication difficulties that, in the absence of appropriate accommodations, would make it difficult for them to participate effectively in the criminal justice system. For example, persons with intellectual disabilities may need more time to process and respond to questions, may find it difficult to concentrate for long periods of time and remember events in the correct order.

Similarly, persons with psychosocial disabilities may find it difficult to manage new and stressful situations and environments such as the court room environment or the environment in a police station. They may also find it difficult to concentrate for long periods of time and require longer to process information. A number of accommodations may assist persons with intellectual and psychosocial disabilities to communicate effectively at all stages in the criminal justice system.

2.1 Augmentative and Alternative Communication

Augmentative and Alternative Communication (AAC) refers to strategies and technologies that can assist individuals who have difficulty communicating effectively through speech, including persons with intellectual and psychosocial disabilities (Beukelman & Light, 2020). AAC strategies and technologies can be divided into two systems, unaided AAC systems and aided AAC systems as outlined in table 1 below.

Unaided AAC systems are those which simply make use of a person's

body parts and do not require any external equipment. For example, an individual with intellectual or psychosocial disabilities may augment their verbal communication with signs and gestures in order to communicate more effectively. Sign language is an example of an unaided AAC system because it simply requires the use of the sign language interpreter's hands, gestures and expressions.

In contrast, aided AAC systems involve the use of external equipment or aids to either augment verbal communication for individuals with limited communication skills or as a form of communication that is alternative to verbal communication for individuals who are unable to communicate verbally. Aided AAC systems need not be complex and can involve the use of simple systems such as having the person with an intellectual or psychosocial disability write down their version of events or draw something on a piece of paper.

Other examples of aided AAC systems include the following:

2.1.1 Communication boards

Communication boards, in the form of picture boards or alphabet boards, can be used to assist an individual who is struggling to communicate in order to narrate their version of events. Communication boards can either be produced from communication software or from pictures or photographs. Typically, the images and text on a communication board are organised in terms of the 'four "W's" and one "H", that is who, where, when, what and how. A communication board, in the form of a picture board, such as the ones depicted in figures 2 and 3 below, can assist an individual to testify in court about a sexual assault. A witness with limited verbal communication skills can augment their verbal communication by pointing at pictures on the board to explain who the perpetrator is, where the event occurred and what time the event occurred. Picture boards are useful for children and individuals who are illiterate and cannot write or spell.

Figure 2: Communication Board made with communication software called Widget©

* Copyright White, Bormman & Johnson (2015). Centre for Augmentative and Alternative Communication, The University of Pretoria, South Africa. This board can be accessed for free at <https://www.up.ac.za/centre-for-augmentative-alternative-communication>.

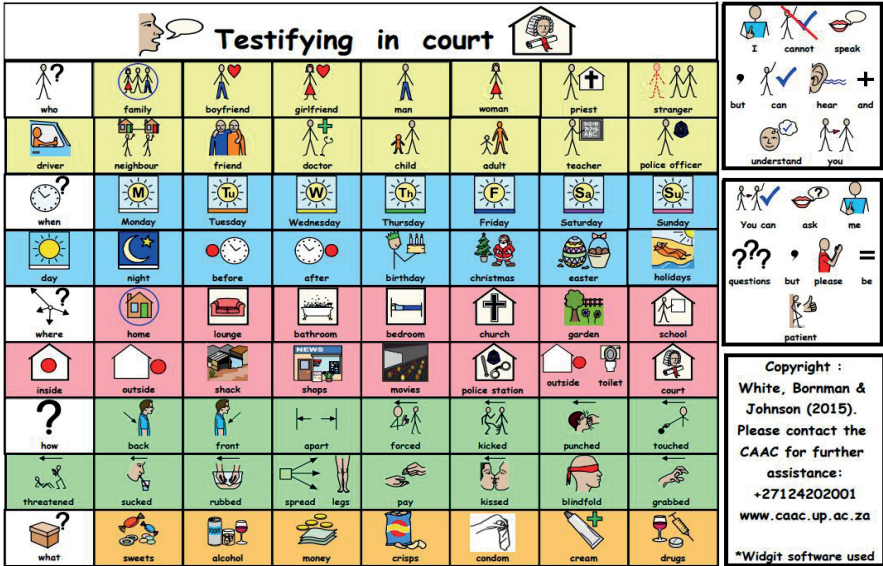
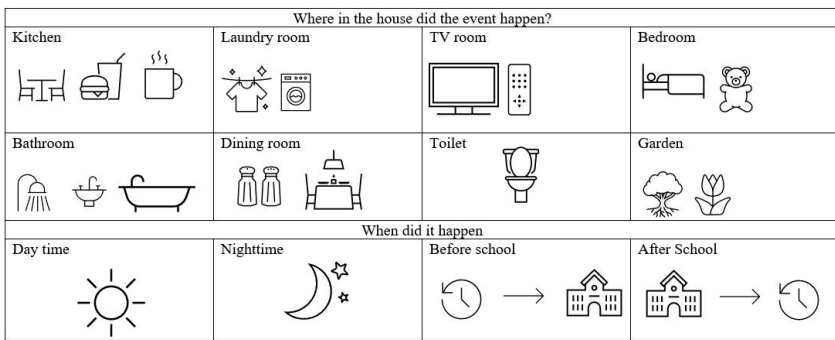


Figure 3: Communication Board made with Microsoft Windows 365©



Good Practice

In 2020, a young woman with cerebral palsy who could not communicate using speech was allowed to testify in a South African court using an AAC device and pictures. This was the first case of its kind and set the precedent for future legal cases that may include witnesses with intellectual or psychosocial disabilities (https://www.up.ac.za/centre-for-augmentative-alternative-communication/news/post_2911330-aac-supported-testimony-leads-to-conviction-of-sexual-offender).

An alphabet board, such as the one depicted in figure 4 below, is a useful option for individuals who are struggling to communicate but who are literate and can spell. The individual can use the alphabet board to spell out their response to a question. The board also includes a male and female figure and a witness can point to various body parts in response to questions such as ‘where did he/she touch you?’

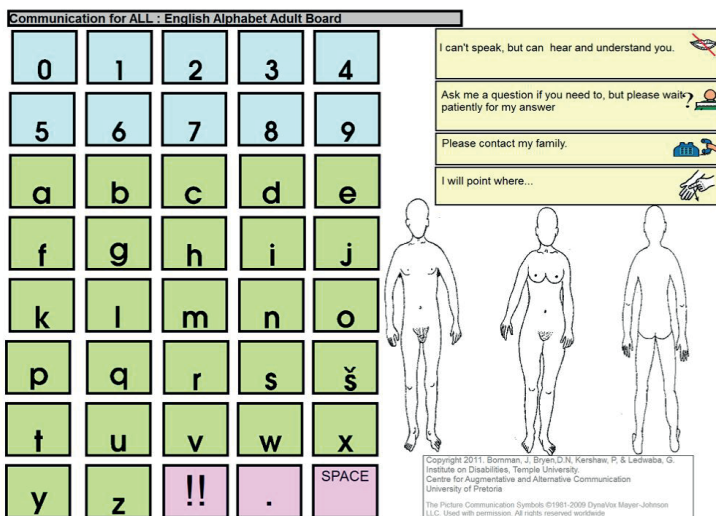


Figure 4: Copyright (Bornman, Nelson Bryen, Kershaw & Ledwaba, 2011) have a heightened risk of becoming victims of crime, abuse, and neglect. This study looked at the vocabulary needed to disclose or report crime or abuse in South Africa, and also focussed on the development of communication boards for this purpose, in four of the 11 official South African languages (Afrikaans, English, Sepedi, and isiZulu). Centre for Augmentative and Alternative Communication, The University of Pretoria. South Africa. This board can be accessed for free at <https://www.up.ac.za/centre-for-augmentative-alternative-communication>.

There are many other communication applications that can be downloaded onto mobile phones, tablets and iPads/iPhones that can help individuals to communicate verbally such as Minspeak, Tobii Dynavox Picture Communication Symbols, Boardmaker and Widget etc. An organisation called CALL Scotland at the University of Edinburgh, Scotland has a valuable website that consists of numerous resources and free downloads for individuals who have communication support needs (<https://www.callscotland.org.uk/>).

2.1.2 Anatomically correct dolls

Anatomically correct dolls can also be used to augment communication for persons with limited language skills. An anatomically correct doll is a doll that has all the correct parts of the male and female anatomy. A male doll has all the parts of the male anatomy. Similarly, a female doll has all the parts of the female anatomy. Persons with intellectual or psychosocial disabilities can use these dolls to demonstrate what happened.

Table 1 below summarises aided and unaided AAC systems.

Unaided AAC systems	Aided AAC systems
Do not require any external equipment or technology, for example, sign language, eye blinking (for yes or no), vocalisations and gestures.	Do require external equipment or technology for example communication boards or drawing pictures, writing on paper, and computer-based speech-generating technologies and devices, including mobile phones and tablets with AAC apps.

Table 1: Aided and Unaided AAC systems (Beukelman & Light, 2020). Together, these AAC systems and strategies can assist individuals with intellectual and psychosocial disabilities who are struggling to communicate to tell their version of events and participate in criminal proceedings (for example, by testifying in court).

2.2 Intermediaries

An important accommodation that can be used to help persons with intellectual and psychosocial disabilities to communicate in the justice system and have voice is the use of intermediaries. Intermediaries are communication specialists who support a witness during police interviews and in court to effectively communicate and give their best evidence (Plotnikoff & Woolfson, 2015). Most countries in southern Africa that provide for the use of an intermediary in justice proceedings, limit their function to assisting child witnesses below the age of 18 years and for the purpose of limiting the risk of secondary victimisation. However, this toolkit proposes intermediaries with a broader mandate of facilitating communication for all persons with disabilities that have communication needs, regardless of their age, as is the case in England and Wales as well as in Israel. These intermediaries play the important role of facilitating communication between justice personnel and a person with an intellectual or psychosocial disability. For example, the intermediary can re-phrase complex questions in a more accessible manner to help the witness understand and respond appropriately to questioning (Benedet & Grant, 2012; White, 2021).

3. Accommodations that can help the individual feel respected (Respect)

The second principle of procedural justice is that an individual is entitled to be treated with respect and dignity throughout the criminal justice process. A number of accommodations can be provided to ensure that a person with an intellectual or psychosocial disability feels respected and this in turn helps the individual to participate effectively in the process.

3.1 Having a support person present

Having a support person present throughout the proceedings can help the person feel respected and better able to participate effectively in the criminal justice process. The role of the support person is to provide emotional and moral support to the individual taking part in the criminal proceedings. The support person cannot testify or address the court, and is only allowed to accompany the witness to the police station or to court (Benedet & Grant, 2012). Support persons can be family members, friends or professionals working with the individual, such as social workers or teachers. The support person must be chosen by the individual with a disability and cannot be imposed on them.

3.2 Court/witness preparation

Court/witness preparation can also help the person with a disability to feel respected and better able to participate in the proceedings. Typically, this process involves court preparation officers (CPOs) or prosecutors explaining the process and familiarising witnesses with the layout of the court room. In some cases, CPOs or prosecutors can suggest coping strategies to witnesses and refer them for counselling, where necessary. This skilled and practical intervention is prosecutor guided and aims to empower witnesses to effectively give evidence in court by reducing the level of anxiety associated with having to testify in unfamiliar environments (White et al, 2020). Court/witness preparation also seeks to prepare and empower witnesses with disabilities (and their families) to participate and testify effectively in court (Tewson, 2017).



Ke Bona Lesedi **"I See The Light"** Court Preparation Programme

Figure 5: South Africa, for example, has a court preparation programme (Ke Bona Lesedi Court Preparation) offered by the National Prosecuting Authority at most courts dealing with sexual offences.

CPOs and intermediaries, play a crucial role in the court process as they can identify the specific accommodations that the witness with an intellectual or psychosocial disability requires prior to them testifying and can ensure that the necessary accommodations are arranged timeously (White et al, 2020).

3.3 More 'respect' accommodations

Further recommendations for persons with intellectual and psychosocial disabilities to feel respected in the justice proceedings include the following (White, Bornman, Johnson & Msipa, 2020):

- 1) Allowing the individual to have frequent breaks, possibly in a quiet area or room
- 2) Being respectful and watching for signs of distress or fatigue (Cooper et al, 2018). In most cases, there will be a report from the intermediary/expert professional/court preparation officer, so it is the prosecutor's/attorney's role to be aware and familiar of the witnesses' individual vulnerabilities or characteristics
- 3) Allowing other court room adaptations including permitting the individual to testify behind a screen or via live video/television link and allowing the individual to testify in the magistrate/judge's chambers
- 4) Allowing the individual to have a support toy or animal. Support toys such as stress balls or 'squishy' toys can help the individual feel less stressed. Some courts also allow support animals and court 'facility' dogs that help the individual feel more at ease to be able to participate and testify in court (Jacobson & Cooper, 2020)

4. Accommodations that can help the individual feel that decisions are being made without bias (Neutrality)

The third principle of procedural justice is ensuring the decisions are made without bias and in a transparent manner. There are accommodations that can be provided to persons with intellectual and psychosocial disabilities to enable them to feel that the court officials are acting neutrally and without bias.

4.1 Involvement of an expert witness

Expert witnesses enhance the accuracy of the fact-finding role of the judge, by assisting them to understand complex matters that are outside the court's expertise (Berryessa, 2017). For example, intermediaries may appear as expert witnesses giving their expert opinion of the communication needs and accommodations that individuals with intellectual or psychosocial disabilities may require. The expert witness may also assist the attorneys and the prosecutors to adapt their questions appropriately. (Berryessa, 2017). Furthermore, the expert who has assessed and evaluated the individual with the intellectual or psychosocial disability can testify about the results and findings of their evaluation (Johnson et al, 2017). If expert evidence is allowed in court by the magistrate/judge, the expert's role is achieved by giving verbal testimony or submitting written reports to the court (Berryessa, 2017).

5. Accommodations that can help the individual with understanding and trust

The fourth and final principle of procedural justice involves the person with a disability understanding and trusting the process. The elements of understanding and trust are interrelated in that understanding cultivates trust. It is easier to trust what one understands and more difficult to trust a process which one does not understand. A number of accommodations can be provided to ensure that persons with intellectual and psychosocial disabilities understand and trust the process.

5.1 Adopting appropriate questioning strategies

Adopting appropriate questioning strategies is crucial for ensuring the persons with intellectual and psychosocial disabilities understand the process and ultimately, trust it. Some examples of appropriate questions for persons with intellectual and psychosocial disabilities are outlined below (Cooper et al, 2018; Advocates Gateway, 2015):

- 1 Avoid complex and long questions
- 2 Avoid ‘why’ questions. Instead ask what happened and try to simplify the question to get the most accurate answer
- 3 Do not ask ‘tag’ questions. Tag questions can often be complex and suggestive and difficult for individuals with intellectual psychosocial disabilities to understand. For example, instead of asking, ‘You wanted the packet of chips, didn’t you?’ you could ask, ‘Did you like the chips?’; or ‘Were you hungry?’
- 4 Avoid compound questions. Persons with intellectual and psychosocial disabilities struggle at most times to answer complex and long questions, so do not ask questions like: ‘You and Dave went to the cinema and ate popcorn and drank soda and held hands, didn’t you?’; instead break the question up: ‘Did you and Dave go to the cinema?’; ‘Did you and Dave eat popcorn and drink soda?’; and ‘Did anything happen afterwards?’

- 5 Ask short and direct questions: ‘Did you go to the cinema with Dave?’; and ‘Who else was with you?’
- 6 Avoid leading questions and always start a question with ‘what’, ‘where’, ‘when’ and ‘who’

5.2 Making existing court materials accessible

An important accommodation that aids understanding is editing court materials to make them accessible to persons with intellectual and psychosocial disabilities. For example, court materials can be translated into easy-to-read format or Plain Language format as exemplified in figures 6 and 7 below.





Figure 6: South Africa's National Prosecuting Authority has translated its brochure titled, 'Understanding the criminal justice system' (The National Prosecuting Authority of South Africa, 2008) which details the court process, what is expected of the witness and the witness's rights into plain and easy language. The brochure can be downloaded using this link: <https://www.saferspaces.org.za/resources/entry/understanding-the-criminal-justice-system>

What happens in court?

Who will be in court?

- Presiding officer
- Assessor
- Witness
- Clerk of the Court
- Court Orderly
- Prosecutor
- Legal Representative /Lawyer
- Interpreter
- Accused
- Public

The interpreter

The trial will be in English or Afrikaans. If you need it, an interpreter (translator) will help you.

1. The State's case

During the trial, the prosecutor calls the witness to give evidence. The prosecutor gives the witness guidance so that he or she does not leave out anything important. A witness can be:

- The victim
- Anyone else who knows what happened or who knows something about the crime
- The police officer, **forensic** expert or other experts

pleads saying "guilty" or "not guilty" to charges in a criminal case, also stating your defence in a civil action

forensic a scientific way of solving a crime

Figure 7: An example from the South African National Prosecuting Authority's (NPA) brochure on court/witness preparation. (The National Prosecuting Authority of South Africa, 2008).

Resources like these are useful tools for helping individuals with intellectual or psychosocial disability understand the process.

6. Conclusion

This toolkit outlined some examples of accommodations that may be provided to persons with intellectual and psychosocial disabilities at different stages of the criminal justice process. The toolkit highlighted the importance of procedural justice and demonstrated how providing accommodations can fulfil the four principles of procedural justice. By enabling a better understanding of the processes in the criminal justice systems, accommodations can foster trust for the criminal justice system, and encourage persons with intellectual and psychosocial disabilities to approach it for redress. Moreover, each of the accommodations outlined in the toolkit is integral for ensuring that persons with intellectual and psychosocial disabilities overcome all communication barriers and participate effectively in the criminal justice systems in the southern African region. With the right individually-tailored accommodations, persons with intellectual and psychosocial disabilities can participate effectively in criminal justice processes in the sub-region.

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Appendix 1: Useful websites, resources and toolkits

<p>1) The Advocates Gateway</p> <p>https://www.theadvocatesgateway.org/toolkits-1-1-1</p>	<p>The Advocate’s Gateway (TAG) is a UK based website and provides free access to practical, evidence-based guidance and toolkits on communicating with vulnerable witnesses and defendants.</p>
<p>2) Communication Disabilities Access Canada (CDAC)</p> <p>https://www.cdacanada.com/</p>	<p>Communication Disabilities Access Canada (CDAC) is a Canadian, disability, non-profit organisation. It also provides free resources and downloads for persons with disabilities who may need accommodations and support when wanting to access the justice system.</p>
<p>3) The Centre for Augmentative and Alternative Communication, The University of Pretoria</p> <p>https://www.up.ac.za/centre-for-augmentative-alternative-communication</p>	<p>The Centre for Augmentative and Alternative Communication is a postgraduate educational entity at the University of Pretoria in South Africa, while also maintaining the status of a non-profit organisation, owing to various community projects and commitments. The CAAC has produced research reports and articles on access to justice for persons with communication disabilities. The staff also has work experience in terms of court accommodations and support for persons with disabilities when wanting to access the justice system.</p>

4) International Principles and Guidelines on access to justice for persons with disabilities

<https://www.ohchr.org/en/special-procedures/sr-disability/international-principles-and-guidelines-access-justice-persons-disabilities>

The International Principles and Guidelines on Access to Justice for Persons with Disabilities (PDF) are a practical tool to support prosecutors, attorneys and all court officials in designing and implementing justice systems that provide equal access to justice for persons with disabilities, in line with international human rights standards.



www.chr.up.ac.za