

## IMPLEMENTING ARTICLE 13 OF THE CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES IN SOUTH AFRICA: REASONABLE ACCOMMODATIONS FOR PERSONS WITH COMMUNICATION DISABILITIES

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### Summary

*Research has revealed that persons with communication disabilities are at high risk of becoming victims of crime and are often repeat victims. Most people who are victims of crime turn to the criminal justice system for recourse by reporting the crime to the police and testifying in a criminal trial against the accused perpetrator. However, persons with communication disabilities may find accessing and participating effectively in the criminal justice system difficult. This is because participation in the criminal justice system is predominantly through oral testimony and, more often than not, people with communication difficulties are not offered the correct support to enable them to participate effectively in the criminal justice system. Article 13 of the Convention on the Rights of Persons with Disabilities guarantees the right of persons with disabilities to access justice on an equal basis with others through the provision of 'procedural and age-appropriate accommodations'. With South Africa as the jurisdictional focus, this chapter will use the human rights model for disability to demonstrate that all persons with communication disabilities can and should participate in the criminal justice system on an equal basis with others. The article will proceed to suggest specific accommodations which may be made in South African courts to give effect to South Africa's obligations under article 13 of the CRPD to ensure effective access to justice for persons with communication disabilities.*

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# 1 Introduction

Research has revealed that persons with disabilities are particularly at high risk of experiencing various forms of violence and are often repeat victims.<sup>1</sup> Two studies funded by the World Health Organisation (WHO) recently confirmed the prevalence and risk of violence against adults and children with disabilities.<sup>2</sup> Data extrapolated from 21 557 adults with disabilities shows that 33.3 per cent had reported that they had experienced violence in the 12 months prior to participating in the study.<sup>3</sup> Of these people, 24 per cent had psychosocial disabilities; 6.1 per cent had intellectual disabilities; and 3.2 per cent did not disclose the type of disability they have.<sup>4</sup> In another study, data obtained from 18 000 children with disabilities demonstrated that 20 per cent of these children, which is a staggering one in five children with disabilities, experienced physical violence, and 14 per cent had been sexually abused.<sup>5</sup> People who experience crime often turn to the criminal justice system for redress. In most countries, including South Africa, this ability to turn to the law for protection and redress is a right protected and guaranteed by law. The Constitution of the Republic of South Africa, (the Constitution) guarantees to every citizen the right to equality before the law.<sup>6</sup> It states that everyone is 'equal before the law and has the right to equal protection and benefit of the law'.<sup>7</sup> Furthermore, section 9(3) provides that the state may not unfairly discriminate directly or indirectly against anyone on one or more of the listed grounds, including disability.<sup>8</sup> By implication, therefore, persons with disabilities are entitled to the protection and full benefit of the law on an equal basis with others, at least in theory. However, in practice this is not the case. Persons with disabilities face numerous barriers to accessing justice, such as environmental barriers, attitudinal barriers, communication barriers and legal barriers.<sup>9</sup> Persons with communication disabilities, in particular, have difficulty accessing justice on an equal basis with others. This is because adversarial criminal justice systems, such as

1 R White, J Bornman & E Johnson 'Testifying in court as a victim of crime for persons with little or no functional speech: Vocabulary implications' (2015) 16 *Child Abuse Research: A South African Journal (CARSA)* 1.

2 K Hughes et al 'Prevalence and risk of violence against adults with disabilities: A systematic review and meta-analysis of observational studies' (2012) *Lancet* doi: 10.1016/SO410-6736(11)61851-5.

3 As above.

4 As above.

5 L Jones et al 'Prevalence and risk of violence against children with disabilities: A systematic review and meta-analysis of observational studies' (2012) *Lancet*. doi: 10.1016/SO140-6736(12)60692-8.

6 Constitution of the Republic of South Africa, 1996 (as set out in sec 9(1).

7 As above.

8 See also I Grobbelaar-Du Plessis & S van Eck 'Protection of disabled employees in South Africa: An analysis of the Constitution and labour legislation' in I Grobbelaar-Du Plessis & T van Reenen (eds) *Aspects of disability law in Africa* (2011) 231.

9 J Bornman et al 'Identifying barriers in the South African criminal justice system: Implications for individuals with severe communication disability' (2016) *Acta Criminologica: Southern African Journal of Criminology* 291.

that in South Africa, require witnesses to appear in court in person and give oral testimony in front of the accused perpetrator.<sup>10</sup> The South African Criminal Procedure Act requires witnesses to testify *viva voce* in court, meaning that they are required to testify orally.<sup>11</sup> This requirement presents difficulties for persons with communication disabilities because, as the term suggests, persons with communication disabilities have difficulties communicating orally.

Communication disabilities, sometimes known as speech, language and communication needs, or communication difficulties, refer to persons who experience difficulty with one or more aspects of communication.<sup>12</sup> Persons with communication disabilities have difficulties with speech, language or the ability to understand or all three.<sup>13</sup> Communication disabilities may be present from birth, arising from a type of disability, such as intellectual disability.<sup>14</sup> These disabilities may also develop at any stage during a person's life, due to, for example, a person suffering a stroke.<sup>15</sup> They may be short-term or lifelong.<sup>16</sup> Persons with communication disabilities can experience difficulties such as fully understanding what is being said to them, expressing themselves through speech, concentrating for long periods of time and remembering information they have been given, to mention a few.<sup>17</sup> As a result of these difficulties, persons with communication disabilities may have difficulty participating effectively in the criminal justice system, and if they are not properly supported, they may fail to access justice on an equal basis with others.

Access to justice is a right protected under international law. Article 13 of the Convention on the Rights of Persons with Disabilities (CRPD) provides for the right of access to justice.<sup>18</sup> It requires states parties to 'ensure effective access to justice for persons with disabilities on an equal basis with others'.<sup>19</sup> Although the CRPD is recognised as the first international human rights instrument containing a substantive right of access to justice, the right existed prior to the coming into force of the

10 PM Bekker et al *Criminal procedure handbook* (1994) 14.

11 Criminal Procedure Act 51 of 1977, sec 161.

12 P McConnell & J Talbot *Mental health and learning disabilities in the criminal courts: Information for magistrates, district judges and court staff* (2013) 20.

13 As above.

14 As above.

15 As above.

16 As above.

17 J Talbot 'Effective communication' (2017) unpublished conference paper 3.

18 The Convention on the Rights of Persons with Disabilities entered into force on 3 May 2008. The CRPD is an international disability treaty and strengthened legal framework that was inspired by international laws in recognising the rights of persons with disabilities (United Nations, 2006). The CRPD is also quoted as the highest international standard to promote and protect the human rights of persons with disabilities. However, the purpose of this Convention is not merely to promote and protect but also to ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities. The CRPD has been signed and ratified by 46 African states, South Africa being one of these.

19 Art 13(1) CRPD.

CRPD in 2008.<sup>20</sup> In international human rights law the right is usually termed as the right to an effective remedy.<sup>21</sup> However, it was included in the CRPD as a substantive right because it was a response to the 'specific rights experience of persons with disabilities', that is, it was a recognition of the fact that persons with disabilities face numerous barriers to accessing justice.<sup>22</sup> However, the significance of the CRPD goes beyond the mere fact that it provides for the right to access justice. It is also significant as it contains a paradigm shift from the medical model of disability where disability was seen as innate in the individual, and persons with disabilities were viewed as objects of charity<sup>23</sup> to the human rights model, according to which persons with disabilities are recognised as the holders of rights.<sup>24</sup> Robinson puts it succinctly when she states that 'disability is a rights issue first and a medical matter second'.<sup>25</sup> The human rights model is important because of its emphasis on the fact that persons with disabilities are holders of rights and that impairment is not to be used as a justification for a denial or restriction of rights.<sup>26</sup> In other words, persons with communication disabilities have a right to access justice on an equal basis with others, and the fact that they may have difficulty communicating in what might be called the 'conventional' way does not mean that they cannot or should not participate in the criminal justice process.

The next logical question then is how persons with communication disabilities can access justice on an equal basis with others. The answer is found in article 13 of the CRPD. In order to ensure access to justice by all persons with disabilities, the CRPD requires the provision of procedural and age-appropriate accommodations as well as the training of those working in the field of administration of justice.<sup>27</sup> There are laws in the South African legal framework that provide for various accommodations, such as the Criminal Procedure Act 51 of 1977; the Children's Act 38 of 2005; and the Child Justice Act 75 of 2008; to mention but a few.<sup>28</sup> However, it is argued that these Acts are inadequate in ensuring effective access to justice for persons with communication disabilities due to three limitations. The first is a limitation relating to the type of accommodations

20 S Ortoleva 'Inaccessible justice: Human rights, persons with disabilities and the legal system' (2010-2011) 17 *Comparative and International Law Journal of Southern Africa* 281 at 292.

21 See eg International Covenant on Civil and Political Rights, 19 December 1966, 999 UNTS 171, art 2(3)(a) (entered into force 23 March 1976) (ICCPR).

22 F Mégret 'The Disabilities Convention: Human rights of persons with disabilities or disability rights?' (2008) 30 *Human Rights Quarterly* 494 at 512.

23 MH Rioux & F Valentine 'Does theory matter? Exploring the nexus between disability, human rights, and public policy' in D Pothier & R Devlin (eds) *Critical disability theory: Essays in philosophy, politics, policy and law* (2006) 267.

24 T Degener 'Disability in a human rights context' (2016) 5 *Laws* 35.

25 M Robinson 'Foreword' in SS Herr et al (eds) *The human rights of persons with intellectual disabilities: Different but equal* (2003) vii.

26 Degener (n 24).

27 Arts 13(1) & (2) CRPD.

28 The accommodations provided for in these laws are discussed in detail in sec 3 of this chapter.

provided for in these laws; the second is a limitation in relation to the people who may take advantage of the accommodations provided for in the legislation. The third and final limitation is the failure to provide for the training of criminal justice personnel. The failure to adequately accommodate persons with communication disabilities in the criminal justice system amounts to a denial or, at the very least, a restriction of the right of persons with communication disabilities to access justice on an equal basis with others.

This chapter will be divided into three parts. The first part deals with the concept of accommodation. The second part demonstrates the inadequacy of the South African legal framework in providing for accommodations which would enable persons with communication disabilities to effectively participate in the criminal justice process. The third part provides recommendations for ways in which persons with communication disabilities can be properly accommodated in the South African criminal justice system.

## **2 Right not privilege: The duty to reasonably accommodate**

In the criminal justice context, the provision of accommodations is a right for persons with disabilities and a duty for criminal justice personnel.<sup>29</sup> This is in line with the human rights model of disability.<sup>30</sup> Article 13 of the CRPD states that equal access to justice for persons with disabilities is to be achieved through the provision of 'procedural and age-appropriate accommodations'.<sup>31</sup> The concept of accommodations appears in the CRPD much earlier than article 13. It appears in article 2 of the CRPD which contains a definition for the term 'reasonable accommodation.' The CRPD defines reasonable accommodation as:

necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden 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>32</sup>

Put simply, the term 'accommodations' refers to any modification to usual practice. There is a requirement in article 2 of the CRPD for accommodations to be reasonable in the sense that the provision of the accommodations should not impose an undue or disproportionate burden.

29 Arts 13(1) & (2) CRPD.

30 Degener (n 24).

31 The term 'accommodations' is used throughout this chapter to refer to 'procedural and age-appropriate accommodations.' According to art 13 of the CRPD, equal access to justice is also to be achieved through the training of all personnel involved in the administration of criminal justice.

32 Art 2 CRPD.

The principle of reasonable accommodations existed before the entry into force of the CRPD in 2008.<sup>33</sup> In the *Hamilton v Jamaica* decision, the Human Rights Committee made use of the concept of reasonable accommodations prior to the entry into effect of the CRPD.<sup>34</sup> The Committee held that Jamaica's failure to detain a prisoner with paralyzed legs in premises that were adapted to meet his needs arising from the disability was a breach of the prohibition in the International Covenant on Civil and Political Rights (ICCPR) against the inhumane treatment of detainees.<sup>35</sup> The European Court of Human Rights in *Price v UK*<sup>36</sup> also recognised the duty on states to provide reasonable accommodations when they held that the detention of the applicant, who was four limb-deficient, in premises not adapted to meet her needs amounted to degrading treatment in contravention of the European Convention on Human Rights (European Convention).<sup>37</sup> The concept of reasonable accommodations was borrowed from labour law jurisprudence and 'indicates a form of relaxation aimed at combating discrimination caused by the strict application of a norm'.<sup>38</sup>

Reasonable accommodations are aimed at ensuring that persons with disabilities can participate in all aspects of society, including in the criminal justice process on an equal basis with others.<sup>39</sup> The purpose of providing accommodations to persons with communication disabilities in the criminal justice system is to 'facilitate their effective role as direct and indirect participants'.<sup>40</sup> In the criminal justice context, accommodations are intended to equalise participation as opposed to relaxing the rules of criminal procedure and evidence.<sup>41</sup> Primor and Lerner put it aptly when they summarised it as 'accommodation not alleviation'.<sup>42</sup> They go on to state that

[t]he object of making proceedings accessible is not to ease the process for persons with disabilities nor improve his or her well-being during the police inquiry or trial. Rather, it is to enable him/her to participate fully in these proceedings without having restrictions or limitations placed due to the disability.<sup>43</sup>

33 See eg the Americans with Disabilities Act of 1990 (as amended).

34 *Hamilton v Jamaica* Communication 616/1995, views adopted by the Committee on 28 July 1999 (CCPR/C/66/D/616/1995).

35 Art 10 ICCPR (n 10).

36 *Price v UK* App 33394/96 (2001) 34 EHRR 1285.

37 European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols 11 and 14, 4 November 1950, ETS 5 (entered into force 3 September 1953) art 3.

38 G Bouchard & C Taylor 'Building the future: A time for reconciliation abridged report' (Gouvernement du Quebec) 23.

39 Art 2 CRPD.

40 Art 13(1) CRPD.

41 S Primor & N Lerner 'The rights of persons with intellectual, psychosocial and communication disabilities to access to justice: Accommodations in the criminal process' *Bizchut, The Israel Human Rights Centre for People with Disabilities* 7.

42 As above.

43 As above.

The provision of reasonable accommodations is a duty. This is demonstrated by the fact that the CRPD regards the denial of reasonable accommodations as discrimination.<sup>44</sup> In other words, if one fails to accommodate a person with a disability, they will have effectively discriminated against that person on the basis of disability. Furthermore, article 5(3) of the CRPD requires states to provide reasonable accommodation. It states that parties 'shall take all appropriate steps to ensure that reasonable accommodation is provided'.<sup>45</sup>

Despite the provision of reasonable accommodation being a duty on states and a right of persons with communication disabilities, this duty is not without limits, hence the term 'reasonable' accommodation. State parties are only required to provide accommodations where doing so does not cause a 'disproportionate or undue burden'.<sup>46</sup> Kallehaug is of the view that the question of whether a burden is disproportionate or undue turns upon who the holder of the duty is.<sup>47</sup> For example, if it is the government or a public authority which bears the duty to accommodate, then 'the burden will have to be extremely heavy before it can be considered disproportionate or undue'.<sup>48</sup> Reasonable accommodation is important as it affects the enjoyment of other rights, as illustrated by the following extract:<sup>49</sup>

The right to education ... would be meaningless for children with sensory impairments, such as blindness or deafness, without some provision for information and communication to be made accessible to them ... The right to work would be effectively nullified for many disabled people if employers were entitled to treat them in exactly the same way as their non-disabled colleagues without any obligation to consider adapting timetables, physical features or equipment to accommodate their needs.

In the context of the criminal justice system, an opportunity to testify in court would not mean as much to a person with communication disabilities in the absence of accommodations to enable them to effectively communicate. Even though persons with communication disabilities need to be accommodated in the criminal justice system, such accommodations 'cannot be at the expense of the essential rights of the other parties to the proceedings'.<sup>50</sup> Primor and Lerner go on to explain this point as follows

Thus if a rule or procedure might prevent a person with disabilities from efficiently participating in the process, then that aspect of the procedure

44 Art 2 CRPD.

45 Art 5(3) CRPD.

46 Art 2 CRPD.

47 H Kallehaug 'General themes relevant to the implementation of the UN Disability Convention into domestic law: Who is responsible for the implementation and how should it be performed?' in OM Arnardottir & G Quinn (eds) *The UN Convention on the Rights of Persons with Disabilities: European and Scandinavian perspectives* (2009) 3 at 211.

48 As above.

49 A Lawson *Disability and equality law in Britain: The role of reasonable adjustment* (2008) 24.

50 Primor & Lerner (n 41) 7.

should be made accessible, but the substantial rule of law and the delicate balance between the interests of both parties therein remain unchanged. For example, cross-examination of a witness by the defense attorney cannot normally be waived ...

Furthermore, the spectrum of communication disabilities is broad and different individuals will need different types of support.<sup>51</sup> Therefore, it is important that the support or accommodations be provided on a case-by-case basis based on the needs of a particular individual.<sup>52</sup> Accommodations in the criminal justice system should also be independent and should not be made on behalf of the defence or the prosecution and should normally be provided at each stage of the proceedings, that is, at both the investigation and trial stages.<sup>53</sup>

### 3 Legal framework in South Africa regarding accommodations: Limitations

There are laws in South Africa which make provision for accommodations. It is important to highlight right from the outset that the accommodations provided for in South African law are not specifically aimed at persons with disabilities, with the exception of three provisions. The first is section 42(8)(d) of the Children's Act,<sup>54</sup> which requires proceedings involving children to be held in a room that is 'accessible to disabled persons and persons with special needs'.<sup>55</sup> This provision may benefit a child with a communication disability who needs to be accommodated, depending on how it is interpreted. However, since the provision makes reference to accessibility, it may be of more benefit to persons with physical disabilities who have difficulties accessing inaccessible buildings. The second provision dealing specifically with disability is section 161(2) of the Criminal Procedure Act.<sup>56</sup> This provision requires witnesses to testify *viva voce* (orally). It states that *viva voce* shall in the case of a 'deaf and dumb' witness 'be deemed to include gesture'.<sup>57</sup> The third provision is found in the Children's Act which provides for appropriate questioning techniques for 'children with intellectual or psychiatric difficulties or with hearing or other physical disabilities which complicate communication'.<sup>58</sup> Apart from these three provisions, the rest of the provisions in South African law are not specifically intended for persons with disabilities. These provisions have the following limitations.

51 Primor & Lerner (n 41) 8.

52 As above.

53 As above.

54 Children's Act 38 of 2005.

55 As above.

56 Criminal Procedure Act 51 of 1977.

57 Sec 161 (2) Criminal Procedure Act.

58 Sec 52 (2) (a) (ii) Children's Act.

### 3.1 Limitation in relation to the type of accommodations that may be provided

There are many accommodations that can be made for persons with disabilities in the context of the criminal justice system. These accommodations fall into two main types, namely, accommodations involving the environment and accommodations to do with communication.<sup>59</sup>

#### 3.1.1 Accommodations involving the environment

The environment in which a person gives their testimony is very important as it can either negatively or positively affect 'testimony-related anxiety'.<sup>60</sup> Testifying in court has been proved to have the potential to cause 'psychological stress and traumatisation', particularly for complainants or victim witnesses.<sup>61</sup> An intimidating setup or environment may serve to increase the anxiety that a witness with communication disabilities might experience and, in turn, affect the way in which they narrate their account. Conversely, a comfortable, friendly environment may make a witness less anxious and better able to narrate their account. Accommodations, therefore, should be made to the environment in which the witness gives their account. There are several accommodations which may be made to the environment. These include:

- conducting interviews outside the police station and without uniforms.<sup>62</sup>
- having a support person present during interview or trial. A trusted person such as a friend or a family member may accompany the witness to provide him or her with moral support. This person does not say anything or play any part in the proceedings. Their role is simply to provide moral and emotional support to the witness.<sup>63</sup>
- conducting witness preparation before the court date. Witness preparation is normally carried out by the prosecutor in the criminal matter and involves measures such as visiting the court in advance in order to ensure that the witness becomes familiar with the setting in the courtroom, and reminding the witness of the account they gave at the police station during the recording of their statement by the police. Witness preparation is carried out in order to ensure that a witness becomes as familiar as possible

59 D Msipa 'Manual on accommodations' (unpublished).

60 T Menaker & RJ Cramer 'The victim as witness: Strategies for increasing credibility among rape victim-witnesses in court' (2012) 20 *Journal of Forensic Psychology Practice* 424 at 427.

61 Menaker & Cramer (n 60) 426.

62 In 2005 Israel enacted an Act dealing specifically with the provision of accommodations in the justice system. It is instructive to look at some of the provisions in this Act. See Investigation and Testimony Procedural Act (Accommodations for Persons with Mental or Intellectual Disabilities) 2005 (Israeli Act) sec 22(4).

63 See eg the Israeli Act (n 62) sec 22(8).

with the setting and procedures in court before testifying. This can reduce the amount of anxiety of the witness on the day of the trial.<sup>64</sup>

- giving evidence via closed-circuit television. Usually this is used for witnesses who may be traumatised by giving evidence in front of the accused person. Therefore, the accommodation that would be made for such a person is allowing them to testify in a separate room via closed-circuit television cameras. The accused person would still have the opportunity to watch and hear the witness testify.
- taking extra breaks - Some people may tire easily and may not be able to concentrate for long periods of time. The accommodation that would be needed for such a witness is simply allowing them to take extra breaks so that they can refresh themselves.
- describing the room, introducing the people in the room and describing the process which the witness will go through in court.
- having as few disturbances as possible.
- changing the seating arrangement in court by having everyone sit in a circle, for example.

### 3.1.2 *Accommodations to do with communication*

These are accommodations to the language the witness uses and, unlike accommodations to the environment, they touch on the actual content of the witness's evidence. In other words, they have to do with the manner in which a person understands the questions put to them and how they convey their account. Section 22(7) of the Israeli Act provides for this when it makes provision for the use of Augmentative and Alternative Communication (AAC), which includes people's assistance, 'computerised aids, communication panels, photos, symbols, letters or words'.<sup>65</sup> The Israeli Act also provides for the use of a special advisor to give advice on such things as phrasing, simplifying questions, and giving warnings concerning potential harm to the witness.<sup>66</sup> Persons with communication disabilities usually need accommodations in order to participate effectively in criminal proceedings. Specific categories of persons who may require support in order to communicate include persons with intellectual disabilities, persons with physical disabilities and persons with neurological conditions or persons who are deaf. The following accommodations to do with communication may be made:

- Witnesses who have difficulties relating the time when an event occurred may be accommodated by asking questions that help the court to understand time in the same way that the witness understands time. For example, a woman who lived in an institution for most of her life was raped by one of the staff members at six o'clock in the morning. During

64 Menaker & Cramer (n 62) 425.

65 AAC is discussed in detail in sec 4 below.

66 Sec 22(9) Israeli Act.

her testimony, she said that the incident occurred at six o'clock in the evening. The court accommodated her by attempting to understand how her time was ordered in the institution. A series of appropriate questions revealed that the witness ordered her time according to the staff shifts. The night shift began at night but ended at six o'clock in the morning. It was discovered that what she meant by six o'clock at night was six o'clock in the morning but during the night shift. Therefore, there were no inconsistencies in her testimony in relation to time.<sup>67</sup>

- Witnesses who have difficulties with the concept of dates can be accommodated by asking questions which use temporal milestones which the witness can understand and which can also be verified by others.<sup>68</sup> For example, the court might ask whether the incident occurred before or after a public holiday or the person's birthday, or some other temporal milestone.
- Witnesses who have difficulty explaining where an event took place can be asked to go to the place where it occurred and to point out exactly where the incident occurred. Questions such as 'where was the table in relation to where you were standing' may not be helpful for persons with communication disabilities.<sup>69</sup>
- Witnesses with limited language skills may be accommodated through the use of anatomically correct dolls.<sup>70</sup>
- Witnesses may also be accommodated through the use of pictures;<sup>71</sup> and through the use of the alphabet on a letter board.<sup>72</sup>

Reasonable accommodations should be provided on a case-by-case basis.<sup>73</sup> The types of accommodations that are made for a particular witness depend on the support needs of the person. It is possible for one witness to require more than one accommodation. It is also possible for the same witness to require both types of accommodations in order to ensure effective participation in the proceedings. For example, despite the fact that a person with an intellectual disability may communicate verbally, they may find it easier and be more competent in demonstrating what happened, using tools such as dolls, figures, drawings, and so forth. In other words, they can communicate by using a combination of speech, gestures, and Augmentative and Alternative Communication (AAC). Those who do not communicate verbally at all may use AAC, including symbols, communication boards, charts, and so forth.<sup>74</sup>

67 Primor & Lerner (n 41) 10.

68 As above.

69 As above.

70 As above.

71 See eg the Israeli Act, sec 22(7).

72 As above.

73 Primor & Lerner (n 41) 5.

74 See sec 4 below for a discussion on AAC.

### 3.1.3 Demonstrating the limitation in South African legislation

Legislation in South Africa generally makes provision for accommodations to the environment with the exception of one provision which deals with an accommodation to do with communication. This focus on accommodations involving the environment may be problematic for persons with communication disabilities who may need more accommodations to do with communication in order for them to participate effectively in the criminal justice process. The following are the accommodations to the environment found in South African legislation:

The Child Justice Act provides that the ‘assessment of a child may take place in any suitable place identified by the probation officer, which may include a room at a police station, a magistrates’ court, the offices of the Department of Social Development or a One-Stop Child Justice Centre’.<sup>75</sup> The Child Justice Act also requires the place chosen to be as ‘conducive to privacy’ as possible.<sup>76</sup> The Children’s Act requires proceedings involving children to be held in a room which is:

- ‘furnished and designed in a manner aimed at putting children at ease’;<sup>77</sup>
- ‘conducive to the informality of the proceedings and the active participation of all persons involved in the proceedings without compromising the prestige of the court’.<sup>78</sup>

Section 56 of the Children’s Act requires the proceedings to take place *in camera* as opposed to open court. There is also a requirement that proceedings be conducted in an informal manner.<sup>79</sup> The Children’s Act also requires that children be questioned through an intermediary.<sup>80</sup>

The Criminal Procedure Act also contains accommodations to the environment. The Act requires the proceedings to be held *in camera*, that is, not in open court, in circumstances where the court considers that harm may result to any person who is not the accused.<sup>81</sup> The Criminal Procedure Act also makes provision for holding proceedings via closed-circuit television.<sup>82</sup> The Act also provides for the giving of evidence through intermediaries.<sup>83</sup> This accommodation, however, is only available to witnesses under the biological or mental age of 18 years.<sup>84</sup> Section 170A(3)(a) states that where the court appoints an intermediary, the proceedings may take place in a venue which is ‘informally arranged to set

75 Child Justice Act 75 of 2008, sec 37(1).

76 Sec 37(2) Child Justice Act.

77 Sec 42(8)(a) Children’s Act 38 of 2005.

78 Sec 42(8)(b) Children’s Act.

79 Sec 60(3) Children’s Act.

80 Sec 61(2) Children’s Act.

81 Sec 153(2) Criminal Procedure Act 51 of 1977.

82 Sec 158(2)(a) Criminal Procedure Act.

83 Sec 170A Criminal Procedure Act.

84 Sec 170A(1) Criminal Procedure Act.

that witness at ease' or which is 'so situated that any person whose presence may upset that witness is outside the sight and hearing of that witness'.<sup>85</sup> Furthermore, the Act requires proceedings to take place in a venue 'which enables the court and any person whose presence is necessary at the relevant proceedings to see and hear, either directly or through the medium of any electronic or other devices ... during his or her testimony'.<sup>86</sup>

The Children's Act is the only Act containing an accommodation to do with communication. The Act permits the making of 'necessary changes required by the context' to the rules.<sup>87</sup> These rules 'must be designed to avoid adversarial procedures' and include rules concerning appropriate questioning techniques for 'children with intellectual or psychiatric difficulties or with hearing or other physical disabilities which complicate communication'.<sup>88</sup>

With the exception of the provision in the Children's Act dealing with accommodations to do with communication, all the other accommodations provided for in South African legislation are accommodations involving the environment. This means that the South African legislative framework may not adequately cater for persons with communication disabilities as they are particularly in need of accommodation to do with communication in order for them to participate effectively in the criminal justice system.

### **3.2 Limitation in relation to the people who may take advantage of the accommodations contained in South African legislation**

The accommodations provided for in South African legislation are also limited in terms of the people who may take advantage of them. All the accommodations contained in the Child Justice Act and the Children's Act may only be used by children, not adults. This means that adults with disabilities are unable to take advantage of the accommodations contained in these Acts. The Criminal Procedure Act is not an act intended to apply to a certain age group. However, it does limit the people who can make use of intermediaries by age. Only those people who have the mental or biological age of 18 years and below can make use of intermediaries. The rest of the accommodations contained in the Criminal Procedure Act may be used by persons of all ages. Nevertheless, persons with communication disabilities will remain inadequately accommodated as the other accommodations relate to the environment.

85 Sec 170A(3)(b) Criminal Procedure Act.

86 Sec 170A(3)(c) Criminal Procedure Act.

87 Sec 52(1) Children's Act.

88 Sec 52(2)(a)(ii) Children's Act.

### 3.3 Failure to make provision for the training of personnel responsible for the administration of justice

The provision of accommodations is not the only way in which persons with communication disabilities can be empowered to access justice on an equal basis with others. In addition to the provision of accommodations, the CRPD requires that personnel working in the administration of justice, including police officers, prosecutors, magistrates, prison officers, and so forth, be provided with appropriate training in disability issues.<sup>89</sup> The CRPD states that in order to help ensure effective access to justice for persons with disabilities, states parties shall promote appropriate training for those working in the field of administration of justice, including police and prison staff.<sup>90</sup> One might ask why the training of judicial officers is important to ensure that persons with disabilities can effectively participate in the criminal justice system. The importance of such training is evident when one considers the manner in which the credibility of witnesses is assessed in the adversarial criminal justice process. A witness's credibility is assessed by closely observing the witness's demeanour while in the witness stand.<sup>91</sup> Presiding officers pay attention to the witness's verbal and non-verbal communication.<sup>92</sup> However, the demeanour of some persons with communication disabilities should not be interpreted in the same manner that one would interpret the demeanour of non-disabled witnesses.<sup>93</sup> For example, a lack of eye contact usually is viewed as a sign that the witness is dishonest and is hiding something, but for witnesses with disabilities, avoiding someone's gaze may be associated with the disability and, therefore, cannot be interpreted in the same way. Therefore, it is very important to train judicial personnel because through training, there will be an acknowledgment that access to justice concerns a relationship between people, the witness and the judicial officers.<sup>94</sup> The relationship is not on par since the person in a position of power (the judicial officer) also needs to be considered. Attitudinal barriers and perceptions on the part of judicial officers may jeopardise the witness's effective interaction with the criminal justice system.<sup>95</sup> The thematic study on Violence against Women and Girls with Disabilities expressed concern that there were no systematic programmes in place to train judges, lawyers and law enforcement officials on the rights of women and girls with

89 Art 13(2) CRPD.

90 As above.

91 N Ziv 'Witnesses with mental disabilities: Accommodations and the search for truth' (2007) 27 *Disability Studies Quarterly*, <http://www.ds-q.org/article/view/51/51> (accessed August 2017).

92 As above.

93 As above.

94 S Stefan 'Silencing the different voice: Competence, feminist theory and law' (1992-1993) 47 *University of Miami Law Review* 763 at 788.

95 As above.

disabilities and effective ways to communicate with them.<sup>96</sup> The South African legislative framework currently contains no provision for such training, and this is another factor which may negatively impact on the right of persons with communication disabilities to access justice.

## **4 Mapping the way forward for South Africa: Recommendations for accommodations which may be made**

For persons with communication disabilities to be properly accommodated in the criminal justice system in South Africa, a combination of accommodations needs to be made available to them. This section provides suggestions for the accommodations that may be made in South Africa to ensure that persons with communication disabilities access justice on an equal basis with others.

### **4.1 Reasonable accommodation and Augmentative and Alternative Communication**

Augmentative and Alternative Communication (AAC) involves the use of other means of communication beyond the use of verbal communication alone to enable persons with significant communication difficulties, for example individuals with autism spectrum disorder (ASD), cerebral palsy and motor neuron disease (MND), amongst others, to successfully share information.<sup>97</sup> The goal of AAC is to enable persons with communication disabilities to effectively engage in a variety of interactions and to participate in activities of their choice. Sharing information, as is done during testimony in court, is one of the purposes of communication interactions.<sup>98</sup> AAC can furthermore be divided into two categories of unaided and aided communication.

#### **4.1.1 Unaided communication**

Unaided systems require persons to use only their bodies to convey their messages, such as using a formal sign language, such as the South African Sign Language (SASL), natural gestures, facial expressions and vocalisations.<sup>99</sup> These systems can be divided into systems that have linguistic features, such as SASL, and systems with non-linguistic features,

96 Report of the UN High Commissioner for Human Rights *Thematic Study on the Issue of Violence Against Women and Girls and Disability* UNGAOR, 20th sess, Supp 2 and 3, UN Doc A/HRC/20/5 (2012) para 43.

97 DR Beukelman & P Mirenda *Augmentative and alternative communication: Supporting children and adults with complex communication needs* (2013).

98 As above.

99 As above.

such as vocalisations and common gestures.<sup>100</sup> It is important to note that in South African courts, persons with communication disabilities have been allowed to use communication strategies such as informal signs and gestures to testify in court.<sup>101</sup> However, for many persons with communication disabilities due to significant physical disabilities, the use of unaided communication systems (including SASL) is not a possibility.

#### 4.1.2 Aided communication

Aided systems may be defined as systems that require external assistance to produce a message, and also fall on a continuum of linguistic features similar to unaided systems, ranging from symbol sets on the one end (without linguistic features) to symbol systems (with linguistic features).<sup>102</sup> Traditional orthography (for example, letters of the alphabet) is an example of a symbol system. Literate individuals with a communication disability could generate their own messages using the alphabet, but this would not assist the majority of persons with communication disabilities to access the criminal justice system, due to the high illiteracy rates in the South African population.<sup>103</sup> Braille is another example of a tactile symbol system for reading and writing which is typically used by persons with visual disabilities, but this also requires the individual to be literate and, hence, the theoretical argument reverts to the issue of illiteracy of individuals with disabilities.<sup>104</sup> Bliss symbols are also an example of a symbol system as it is a conceptually-based graphic symbol system with linguistic rules.<sup>105</sup> It has successfully been used in a South African court case but unfortunately is not commonly used in South Africa.<sup>106</sup> On the other side of the aided continuum, symbol sets consist of a predetermined number of symbols with low abstractness and limited linguistic features. The difference between symbol sets and symbol systems is that symbol sets consist of a defined number of symbols that have no rules for expansion or generating new messages, such as Picture Communication Symbols (PCS) or *Bildstöd*.<sup>107</sup> Therefore, messages can only be compiled by selecting symbols from the pre-selected set without generating a new message.<sup>108</sup>

100 J Bornman & K Tonsing 'Augmentative and alternative communication' in E Landsberg et al (eds) *Addressing barriers to learning: A South African perspective* (2015) 186-210.

101 *R v Ranikolo* 1954 (3) SA 255 (0).

102 Bornman & Tonsing (n 100).

103 NE Groce & P Bakshi 'Illiteracy among adults with disabilities in the developing world: An unexplored area of concern' (2009) *Leonard Cheshire Disability and Inclusive Development Centre* 1.

104 Beukelman & Mirenda (n 97).

105 As above.

106 F Toefy 'Communication board used in South African courts' (1994) 12 *Communicating Together* 19.

107 Bildstod is a website that can be accessed to create picture-based material for information and communication. Bildstod.se is a free resource created by DART – Centre for AAC and AT in the project KomHIT in Sweden, financially supported by the Swedish Inheritance Fund.

108 Beukelman & Mirenda (n 97).

This is in stark contrast to symbol systems (for instance, traditional orthography or Braille) that have the capacity to allow for maximum communication and enable individuals to compose their own messages.

Apart from illiterate persons who could benefit from the use of graphic symbol sets, so could pre-literate persons. Pre-literate persons (individuals who are young or who might not yet have been exposed to literacy and who might still acquire literacy skills) often use graphic symbols that do not require literacy skills. Unfortunately, most of the commonly-used graphic symbol collections are symbol sets and thus do not have a linguistic basis and do not initiate generative systems. Vocabulary from these sets needs to be preselected. It is important for pre-literate individuals with communication disabilities to have access to alternative means to represent messages and concepts to communication.<sup>109</sup> Therefore, an aided AAC system that uses a graphic symbol set such as PCS or *Bilstöd* could possibly be a viable option in the criminal justice system. It could thus assist both illiterate and pre-literate persons with communication disabilities to participate with others in their environment as the meaning of many of the symbols and line drawings is easy to understand.<sup>110</sup> However, pre-selected vocabulary also has specific implications in the court system, since the vocabulary will be selected from a pre-determined symbol set and will not be generated, as would have been possible when a symbol system such as traditional orthography or Braille had been used. However, this implication could be solved by adding multiple choices and categories in the pre-determined symbol set.<sup>111</sup>

The vocabulary required to access the court system could, therefore, be selected and represented in the form of pictures or graphics symbols that could be displayed as a communication board or book, or programmed into a specific speech-generating device such as a tablet with specific AAC software.<sup>112</sup>

109 K Drager et al 'Effects of AAC interventions on communication and language for young children with complex communication needs' (2010) 3 *Journal of Paediatric Rehabilitation Medicine* 303-310, <https://doi.org/10.3233/PRM-2010-0141> (accessed 21 July 2017).

110 S Dada et al 'The iconicity of picture communication symbols for children with English additional language and mild intellectual disability' (2013) 29 *Augmentative and Alternative Communication* 360, <https://doi.org/10.3109/07434618.2013.849753> (accessed 10 August 2017).

111 White, Bornman & Johnson (n 1) 1-14.

112 J Caron et al 'Operational demands of AAC mobile technology applications on programming vocabulary and engagement during professional and child interactions' (2016) 32 *Augmentative and Alternative Communication* 12, <https://doi.org/10.3109/07434618.2015.1126636> (accessed 8 August 2017).

## 4.2 Assistive technology

Aided AAC systems range from low technology (for example symbol-based communication boards, writing, and partner-assisted scanning) to high-technology systems such as speech-generating devices.<sup>113</sup> Low technology is an inexpensive, paper-based and easily obtainable communication system.<sup>114</sup> High technology systems include both AAC dedicated devices (developed specifically for communication purposes), such as the TOBII eye-controlled speech generating device, as well as non-dedicated devices such as the iPad or other tablets, which can be used for communication purposes when programmed with specific communication software and applications.<sup>115</sup> Both dedicated and non-dedicated systems require pre-selected vocabulary that will be included in the display, hence the vocabulary selection is always viewed as an important consideration in the process of AAC implementation.<sup>116</sup> Assistive technology plays a major role in assisting persons with communication disabilities in communicating, since graphic symbols can be displayed through technology.<sup>117</sup> The rapid expansion of technology has created many new possibilities for persons with communication disabilities. The use of both low-technology and high-technology systems with graphic symbols to assist persons with communication disabilities to access the criminal justice system still needs to be advocated more, as many individuals with disabilities in the South African context are pre-literate or illiterate due to limited formal schooling and need alternative communication methods to tell their story.<sup>118</sup>

## 4.3 Expert testimony

An important accommodation which should be provided to enable persons with communication disabilities to participate in legal proceedings on an equal basis with others is the use of expert witnesses who have specialist knowledge on AAC.<sup>119</sup> In their testimony, the AAC expert could explain

113 Beukelman & Mirenda (n 97).

114 As above.

115 D McNaughton & J Light 'The iPad and mobile technology revolution: Benefits and challenges for individuals who require augmentative and alternative communication' (2013) 29 *Augmentative and Alternative Communication* 107, <https://doi.org/10.3109/07434618.2013.784930> (accessed 8 August 2017).

116 White, Bornman & Johnson (n 1).

117 J Caron et al 'Operational demands of AAC mobile technology applications on programming vocabulary and engagement during professional and child interactions' (2016) 32 *Augmentative and Alternative Communication* 12, <https://doi.org/10.3109/07434618.2015.1126636> (accessed 25 Oct 2017).

118 D Donohue & J Bornman 'The challenges of realising inclusive education in South Africa' (2014) 34 *South African Journal of Education* 1, <https://doi.org/10.15700/201412071114> (accessed 21 August 2017).

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

to the judge or presiding officer the role of AAC and how the witness with a communication disability will use AAC to testify.<sup>120</sup>

#### **4.4 Strategies to help persons with communication disabilities**

This section describes ways in which to help enable effective communication for individuals who have communication disabilities, including those with intellectual and cognitive disabilities. What follows is an introduction and is not exhaustive.

##### **4.4.1 Attention and concentration**

Persons with communication disabilities may experience attention and concentration difficulties, especially in stressful situations such as giving testimony in court.<sup>121</sup> Concentration difficulties may contribute to the person with a communication disability to be unable to fully participate or engage in the legal proceedings.<sup>122</sup> The following strategies may assist a person with a communication disability in terms of their attention and concentration:

- Taking regular breaks and conducting various meetings and interviews in a comfortable environment may help to reduce stress and support effective communication.<sup>123</sup>
- Having a familiar communication partner present, who is not involved in the legal case, such as a family member or close friend, may help the individual feel at ease and supported. Feeling comfortable and supported can help reduce anxiety levels and make it easier for individuals with communication disabilities to understand what is being asked of them.<sup>124</sup>
- Attempting to reduce background noise and distractions as this can have a negative impact on the individual's concentration, especially if they are using alternative methods of communication (for example a communication device).<sup>125</sup>

##### **4.4.2 Vocabulary and concepts**

Persons with communication disabilities may find it difficult to express themselves due to a limited vocabulary. Identifying vocabulary under certain categories such as 'who', 'what', 'when', 'where', 'how' and

120 As above.

121 Bornman et al (n 9).

122 As above.

123 R White, J Bornman & E Johnson 'From silence to justice: Implications for persons with little or no functional speech accessing the criminal justice system' (2018) 31 *Acta Criminologica: Southern African Journal of Criminology* 19

124 As above.

125 Beukelman & Mirenda (n 97).

'emotions' could assist individuals to participate in the legal proceedings, such as by giving testimony.<sup>126</sup> Individuals with communication disabilities may also struggle with abstract concepts such as colours and time.<sup>127</sup> This means that they may not be able to explain or answer questions about when the crime took place or what colour clothing the perpetrator was wearing. It is important to try to simplify conceptual questions, for example, questions such as 'did the event occur after or before or after your birthday', or 'before or after church' or 'was it day or night'. These questions are more concrete and intelligible.<sup>128</sup>

#### 4.4.3 *Expressive and receptive language skills*

It is important during the legal proceedings to assist an individual with a communication disability with their expressive and receptive language skills. Receptive language is the ability to understand words and language and expressive language is the ability to use words and language. Below are a few strategies to assist a person with a communication disability with their expressive and receptive language skills:

- It is important to always address the person with a communication disability by name and wait for the individual to make eye contact, after which one can assume to have the attention of the individual.<sup>129</sup>
- Before the start of the any legal proceedings or giving testimony in court, it should be explained to the person with a communication disability the process that is about to take place and why they are needed to participate in the legal proceedings and give testimony.<sup>130</sup>
- Simple and common words should be used and legal jargon avoided. If one does use legal terminology such as bail, intimidation or conviction, the person with a communication disability should be asked whether they understand and, if not, it should be explained to them.<sup>131</sup>
- Short and simple sentences should be used that focus on one specific question or topic.<sup>132</sup>
- The individual with a communication disability should regularly be asked whether they understand or whether they need further explanation, and whether they need to take a break.<sup>133</sup>

126 White, Bornman & Johnson (n 1) 1.

127 As above.

128 J McAfee 'Assisting victims and witnesses with disabilities in the criminal justice system: A curriculum for law enforcement personnel (2002) The Institute of Disabilities: The Pennsylvania State University.

129 Beukelman & Mirenda (n 97).

130 J Bornman 'Accessing justice via key role players: A view from South Africa' in DN Bryen & J Bornman (eds) *Stop violence against people with disabilities! An international resource* (2014) 41-76.

131 White, Bornman & Johnson (n 1).

132 As above.

133 White, Bornman & Johnson (n 123).

- A person with a communication disability needs time to communicate their message or answer especially when using a communication board or device. Be patient and slow down the pace of the questions. This process may be lengthy, but if interruptions occur, the individual's thought processes may be disrupted, and the question may have to be repeated.<sup>134</sup>
- Appropriate questioning techniques should be used, for example, asking yes/no questions or closed-ended questions such as 'did the event occur in the evening'.<sup>135</sup> As mentioned previously, it is important to use AAC strategies such as communication boards or devices with pre-selected vocabulary if the person with a communication disability is having difficulty in using oral speech.<sup>136</sup>

#### 4.4.4 Visual communication aids

Persons with communication disabilities often find it difficult to express themselves orally, and visual communication aids can assist these individuals to communicate and participate effectively.<sup>137</sup> Strategies such as drawings and a communication tool called 'Talking Mats' can be used.

- Drawings: The person with a communication disability may be able to draw what they are unable to say or express through speech. Large sheets of paper often encourage these individuals to draw, and drawings may include where the event occurred (bedroom, church) or who the perpetrator was.<sup>138</sup>
- Talking Mats: Talking Mats is an interactive communication resource that uses three sets of picture communication symbols – topics, options and a visual scale (to allow individuals to indicate their feelings about each option) – and a space on which to display them. Talking Mats can allow the person with a communication disability to indicate when they are experiencing high levels of emotion such as anxiety or stress during the legal proceedings. Once the topic is chosen, for example, 'thoughts and feelings', the individual is given the options one at a time and asked to think about what they feel about each option. They can then place the symbol under the appropriate visual scale symbol to indicate what they feel.<sup>139</sup> Research has identified Talking Mats as an effective tool for communication and to help the individual with a communication disability to express their thoughts, furthermore the visual resource can help the individual to reflect and express what is important to them at a specific time for example, during the legal proceedings.<sup>140</sup>

134 As above.

135 As above.

136 White, Bornman & Johnson (n 1).

137 White, Bornman & Johnson (n 123).

138 Bornman (n 130).

139 J Murphy 'Talking mats: Speech and language research in practice' (1998) *Speech and language therapy in practice* 14.

140 L Cameron & R Matthews 'More than pictures: developing an accessible resource' (2017) *Tizard Learning Disability Review* 22.

## 5 Conclusion

Persons with communication disabilities experience many barriers to effectively participating in the criminal justice system. In the absence of appropriate accommodations, their ability to effectively participate in the criminal justice system may be seriously impaired. The CRPD bestows on all persons with disabilities the right to access justice on an equal basis with others. According to the CRPD, access to justice is to be achieved in two ways, namely, by the provision of accommodations and the training of judicial personnel. South African legislation does provide some accommodations, but their impact is reduced because of the fact that many provisions apply only to children and many are accommodations relating to the environment. There is only one provision dealing with accommodations to do with communication. This greatly disadvantages persons with communication disabilities in South Africa. The South African legislation also fails to make provision for the training of judicial personnel, and this further disadvantages persons with communication disabilities. According to the human rights model, access to justice is a right which persons with communication disabilities must enjoy. Therefore, there is a need to ensure that South African legislation, as a priority, provides accommodations for persons with communication disabilities and provides training for judicial officers in order to ensure that persons with communication disabilities in South Africa can access justice on an equal basis with others.