

# **ACCESS TO JUSTICE FOR PEOPLE WITH DISABILITIES IN LESOTHO:**

## **A comprehensive study on provisions which may be used to argue for accommodations for people with disabilities in the justice system**

May 2019

### ***About the Lesotho National Federation of Organisations of the Disabled***

The Lesotho National Federation of Organisations of the Disabled (LNFOD) is an umbrella body of organisations representing people with disabilities in Lesotho. LNFOD's vision is to build a Basotho society that is accessible and inclusive of all people and that enables and empowers people with disabilities to enjoy their social, economic, cultural and political rights on an equal basis with others and to reach their full potential in all aspects of development. LNFOD's mission is to advocate for, promote and defend the rights of people with disabilities and their families through the provision of training materials and emotional support and by representing their needs to government, development partners and the wider community.

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### ***Executive summary***

Research shows that people with disabilities encounter the justice system just like anyone else in society. They interact with the criminal justice system both as complainants and as accused persons and with the civil justice system as plaintiffs and as defendants. While it is indisputable that people with disabilities do interact with the justice system in different capacities, it does not always mean that they access justice on an equal basis with others. This is because their participation in the justice system is often

ineffective due to the various barriers to effective participation which they face and the inadequate responses to these barriers.

The barriers which people with disabilities face vary depending on the type of disability that one has. For example, persons with speech and hearing impairments often face communication barriers whilst persons with physical disabilities often face accessibility barriers. Justice personnel respond to these barriers in various ways, many of which are inadequate. In some cases, they respond correctly by trying to provide accommodations and in other cases, they respond by providing well-intentioned but “inappropriate” support. The varying responses are informed and driven by misconceptions about people with disabilities which are often the result of inadequate knowledge on the subject.

The legislative framework also exhibits differences in approach in that there are laws which can be used to combat inequality and discrimination. For example, the Constitution states that all people are equal before the law and are entitled to the equal protection of the law. At the same time, there are laws containing provisions which act as a barrier to equal access to justice. One such provision is section 219 of the Criminal Procedure and Evidence Act which states that persons with mental disabilities are not competent to act as witnesses in court.

Without effective participation, one cannot be said to have accessed justice on an equal basis with others. The removal of barriers to effective participation is therefore, a prerequisite for ensuring access to justice on an equal basis with others. One of the ways to overcome the barriers to effective participation is through the provision of accommodations in the justice system. The provision of accommodations is a new and emerging practice around the world, not just in Lesotho. There is a need to develop this practice further in order to ensure that people with disabilities can access justice on an equal basis with others. The aim of the research and this report is to ascertain whether or not the legal framework in Lesotho contains any provisions which may be used to argue for the provision of accommodations for persons with disabilities in the justice system.

This report makes 5 main recommendations which are:

1. Improve knowledge on accommodations amongst people working in the administration of justice

2. Develop skills amongst lawyers and prosecutors on how to argue for accommodations using the existing laws
3. Effect legislative reform on accommodations
4. Ensure that sign language interpreters are available at the police station and at court
5. Conduct a study on the reasons for the prevalence of sexual offences in Lesotho

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## **Acronyms and Abbreviations**

AAC	Augmentative and Alternative Communication
CGPU	Child and Gender Protection Unit
CPEA	Criminal Evidence and Procedure Act
CPWA	Children's Protection and Welfare Act
DPO	Disabled People's Organisation
HCR	High Court Rules
IDAL	Intellectual Disability Association of Lesotho
ITPA	Investigation and Testimony Procedural Act (Accommodations for Persons with Mental or Intellectual Disabilities)
LNAPD	Lesotho National Association of the Physically Disabled
LNFOD	Lesotho National Federation of Organisations of the Disabled
LSMHPPF	Lesotho Society of Mentally Handicapped Persons, Parents and Families
PCA	Penal Code Act
SCR	Subordinate Court Rules
SOA	Sexual Offences Act
UNCRPD	United Nations Convention on the Rights of Persons with Disabilities

## 1 Introduction

The Lesotho National Federation of Organisations of the Disabled (LNFOD) conducted a research study to firstly, determine the barriers to effective participation by people with disabilities in the justice system and secondly, to ascertain whether there are any legal provisions which may be used to argue for the provision of accommodations to people with disabilities in the justice system in Lesotho.<sup>1</sup> The purpose of the research study is to ensure that people with disabilities access justice on an equal basis with others. In this report, access to justice means effective participation at all stages in the justice system by people with disabilities.<sup>2</sup> A person can be said to have accessed justice on an equal basis with others if they have been given the opportunity to participate effectively at all stages in the justice system without suffering disadvantage because of disability. Effective participation requires the removal of all barriers, including communication, attitudinal, environmental and legal barriers.

One of the ways to remove barriers to effective participation is through the provision of accommodations. The term “accommodations” refers to any “necessary and appropriate **modification or adjustment**.”<sup>3</sup> An example of an accommodation is the use of a sign language interpreter to interpret what a witness with speech and hearing impairments is saying to the police or the court and what the police or the court is saying to him/her. The provision of a sign language interpreter is a way of overcoming a communication barrier. It is also a modification or adjustment to the usual way of communicating verbally, hence, it is an accommodation. The purpose of providing accommodations is to simply level the

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<sup>1</sup> The term “justice system” as used in this report refers both to the criminal justice system as well as the civil justice system. The barriers to effective participation for people with disabilities are the same regardless of whether the person is participating in the criminal justice system or in the civil justice system. Similarly, the accommodations which a person needs will be the same in both the criminal justice system and the civil justice system.

<sup>2</sup> See article 13 United Nations Convention on the Rights of Persons with Disabilities (UNCRPD) and article 13 the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Persons with Disabilities in Africa (African Disability Protocol). Throughout this report, reference will be made, where necessary, to both the UNCRPD, which is the global human rights treaty dealing with the rights of people with disabilities, and the African Disability Protocol, which is the African regional human rights treaty dealing with the same subject. It should be noted however, that the African Disability Protocol which was adopted by the African Union on 29 January 2018 is not yet in force because it has not yet received the fifteen ratifications necessary for it to come into force (article 38(1)). Nevertheless, reference shall be made to this instrument because once in force it will be the regional standard for the protection of the rights of people with disabilities in Africa. For that reason, it is worth noting its provisions.

<sup>3</sup> Article 2 UNCRPD and article 1 African Disability Protocol.

playing field (enable participation on an equal basis) by removing the barriers to effective participation.

The provision of accommodations at the different stages in the justice system is a new practice all over the world, including in Lesotho. An enabling legal framework providing specifically for the provision of accommodations for people with disabilities in the justice system has not yet been developed. However, there may be provisions which are already in existence within the legislative framework in Lesotho which may be used to support the provision of accommodations in the justice system. It is important to identify any such provisions because the justice system is governed by rules and procedures which are found in legislative Acts, case law (legal precedent) and rules of court regulating the proceedings in the different courts. Accommodations must therefore be provided in accordance with the laws of the land. Accordingly, this research study was conducted to identify legal provisions which may be used to support the provision of accommodations to people with disabilities in the justice system with the objective of strengthening the capacity of law enforcement agencies and courts to better accommodate people with disabilities.

## 2 Methodology

The research study was carried out by the research team from the 25<sup>th</sup> of March to the 6<sup>th</sup> of May 2019 using two main methods:

- I. Data collection through questionnaires completed by key stakeholders
- II. Desktop review of relevant Acts

### 2.1 Data collection through questionnaires completed by key stakeholders

Data was collected from key stakeholders<sup>4</sup> (hereinafter referred to as respondents) through detailed questionnaires. The respondents were asked to complete some questionnaires titled “Study on legislative framework for the provision of accommodations for persons with disabilities in Lesotho.”<sup>5</sup> The research team used questionnaires to collect information on:

- i) The specific barriers which the respondents encountered when handling cases involving people with disabilities
- ii) Laws which have the effect of being a barrier to people with disabilities accessing justice on an equal basis with others
- iii) Laws which can be used to argue for accommodations for people with disabilities
- iv) Recommendations from the respondents on how to accommodate people with disabilities in the justice system

The researcher designed two questionnaires, one for respondents who may deal directly with cases involving people with disabilities during the course of their duties such as court officials and personnel from DPOs.<sup>6</sup> The second questionnaire was designed for respondents who do not interact directly with people with disabilities in the course of their duties but may have knowledge on the legislative framework such as personnel from the Law Reform Commission.<sup>7</sup> Both questionnaires largely contain similar questions. The only difference is that the first questionnaire contains questions relating to the experience which the respondents had when handling a case involving a person with a disability whereas, the second questionnaire focuses on the laws and does not

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<sup>4</sup> The key stakeholders include personnel working in the administration of justice, personnel working in the relevant government ministries, and personnel from DPOs.

<sup>5</sup> See appendix 1 and appendix 2.

<sup>6</sup> See appendix 1.

<sup>7</sup> See appendix 2.



contain any questions relating to the experience of dealing with cases involving people with disabilities. The questionnaires were completed by the following respondents:

**Table 1: List of respondents**

<b>Position</b>	<b>Organisation/Institution</b>
1. Crown Counsel	Ministry of Law and Constitutional Affairs
2. Crown Counsel	Ministry of Law and Constitutional Affairs
3. Senior Crown Counsel	Ministry of Law and Constitutional Affairs
1. Police officer (Inspector)	Lesotho Mounted Police Service, Child and Gender Protection Unit (CGPU)
2. Police officer (rank undisclosed)	Lesotho Mounted Police Service, Child and Gender Protection Unit (CGPU)
3. Police Officer (Senior Inspector)	Lesotho Mounted Police Service, Child and Gender Protection Unit (CGPU)
1. Acting Judge, High Court	Ministry of Justice, Human Rights and Correctional Services, Judiciary
2. Judge, High Court	Ministry of Justice, Human Rights and Correctional Services, Judiciary
3. Judge, High Court	Ministry of Justice, Human Rights and Correctional Services, Judiciary
4. Judge, High Court	Ministry of Justice, Human Rights and Correctional Services, Judiciary
5. Judge, High Court	Ministry of Justice, Human Rights and Correctional Services, Judiciary
1. Magistrate	Ministry of Justice, Human Rights and Correctional Services, Judiciary
1. Judge's clerk	Ministry of Justice, Human Rights and Correctional Services, Judiciary
1. Assistant Registrar	Ministry of Justice, Human Rights and Correctional Services
2. Assistant Registrar	Ministry of Justice, Human Rights and Correctional Services

1. Lawyer in private practice	MJ Khiba Legal Practice
2. Lawyer in private practice	Lephatsa Attorneys & Consultants
3. Lawyer in private practice	Setiojoane Chambers
4. Lawyer in private practice	Nthontho Attorneys
1. Legal Researcher, Lesotho Law Reform Commission	Ministry of Law and Constitutional Affairs
2. Legal Researcher, Lesotho Law Reform Commission	Ministry of Law and Constitutional Affairs
1. Legal aid counsel	Ministry of Law and Constitutional Affairs, Department of Legal Aid
2. Legal aid counsel	Ministry of Law and Constitutional Affairs, Department of Legal Aid
1. Social Worker	Mohlomi Mental Hospital
1. Chief Officer	Ministry of Justice, Human Rights and Correctional Services
2. Chief Officer	Ministry of Justice, Human Rights and Correctional Services
3. Correctional Officer	Ministry of Justice, Human Rights and Correctional Services
1. Deputy Parliamentary Counsel	Ministry of Justice, Human Rights and Correctional Services– Office of Parliamentary Counsel
1. Vice Chairperson	Lesotho National Association of the Physically Disabled (LNAPD)
2. Member	Lesotho National Association of the Physically Disabled (LNAPD)
3. Secretary General	Intellectual Disability Association of Lesotho (IDAL)
1. Undisclosed	Undisclosed

A total of 32 questionnaires were completed.

## **2.2 Desktop review of relevant Acts**

A desktop review of the relevant Acts was also carried out with the aim of ascertaining whether there are any provisions which can be used to support providing accommodations in the justice system to people with disabilities. The following Acts were reviewed<sup>8</sup>:

1. The Constitution of Lesotho 1993
2. The Sexual Offences Act 2003
3. The Criminal Procedure and Evidence Act No. 9 of 1981
4. The Penal Code Act 2010
5. Children's Protection and Welfare Act no. 7 of 2011
6. The Mental Health Law No. 7 of 1964
7. The Subordinate Court Rules 1996
8. The High Court Rules No. 9 of 1980

The findings from the questionnaires completed by the respondents and the desktop research form the basis of this report and have informed the list of recommendations which are included in this report.

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<sup>8</sup> This list contains all the Acts which were reviewed. However, not all of them contained provisions that can be used in support of accommodations.

### 3 Key foundational concepts: Disability

#### 3.1 What is disability?

Disability has been understood differently over time. In the past, disability was understood as something which is innate in the individual with impairment. In other words, the fact that one has an impairment means that one has a disability. For example, a person with a speech impairment is regarded as a person with a disability simply because they have a speech impairment. The disability is therefore innate in the individual with impairment. This understanding of disability is known as the medical model of disability.

In recent years however, there has been a shift in focus from individual impairment which is innate in the person to factors which are external to the person such as environmental and attitudinal barriers. This way of understanding disability as a social construct is known as the social model of disability. According to this model, disability is the result of the interaction between a person with impairment and attitudinal and environmental barriers.<sup>9</sup> Having an impairment does not in itself make one disabled. Disability only arises as a result of the interaction between a person with impairment (internal factors) and an environment which does not accommodate the person and presents attitudinal and environmental barriers (external factors). For example a person with a physical disability who uses a wheel chair can get around quite well on their own for as long as they are in an environment with level surfaces. Having the impairment and requiring the use of a wheelchair in itself does not make them disabled in the sense of being unable to get around. However, if that person then needs to access a building which is only accessible through stairs and has no wheel chair ramps or lifts, then that is the moment the person becomes disabled. The disability has not been caused only by the fact that the person has an impairment; it has also been caused by the external environment, in this case, the building which is inaccessible by wheelchair. If the building had wheel chair ramps and lifts, then the wheelchair user would have been able to access it without much difficulty. The disability then only arises through the interaction between the person with impairment and the inaccessible environment, in this case the building.

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<sup>9</sup> Preamble paragraph e of the UNCRPD and article 1 of the African Disability Protocol.

The social model differs from the medical model of disability in that unlike the medical model, it recognises the role played by the environment in disadvantaging people with disabilities. The importance of recognising the role of external factors lies in the fact that if the external factors are part of the problem, then it follows that they are also part of the solution.

### **3.2 The different types of disabilities**

People may have different types of disabilities, including:<sup>10</sup>

- Physical disabilities
- Sensory disabilities (including visual impairment, speech and hearing impairment)
- Psychosocial disabilities
- Intellectual disabilities
- Communication disabilities and
- Albinism

#### **3.2.1 Physical disabilities**

People with physical disabilities may have difficulties with movement and mobility, and can often experience problems entering private and public spaces, including police stations and courts of law. Sometimes, people with physical disabilities can be identified through the assistive devices they use; such as, wheelchairs, canes and crutches. However, a person's disability may not always be visible and a lack of assistive devices does not mean that no physical disability exists.

#### **3.2.2 Sensory disabilities**

People with sensory disabilities may have sight, speech or hearing impairments.

##### *Sight impairments*

People with sight impairments include those who are partially sighted as well as those who cannot see at all. Some people with sight impairments may use assistive devices such as spectacles. Others may move independently using guide dogs or canes, or they may be supported by someone who guides them when they move from place to places. Some

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<sup>10</sup> See article 1 UNCRPD and article 1 African Disability Protocol. It is important to bear in mind that disability is an evolving concept (preamble paragraph e UNCRPD) and what constitutes disability may change over time. For example, albinism has only recently been recognised as a disability. This list is therefore not an exclusive and a closed one.

people with sight impairments may not use assistive devices at all and may walk hesitantly and appear to be feeling their way around.

### *Hearing impairments*

People with hearing impairments include those who are hard of hearing and those who cannot hear at all. People with hearing impairments may use hearing aids or use sign language to communicate, however, they may not always use assistive devices and may find it hard to hear what is being said, especially in a noisy environment. Hearing impairments may not be immediately obvious; sometimes a person's speech may sound slurred because they have learnt to pronounce words without hearing them being pronounced properly.

### *Speech impairments*

People with speech impairments include those who cannot speak at all and those with difficulty speaking. People with speech impairments may use sign language to communicate with others.

## **3.2.3 Psychosocial disabilities**

People with mental health problems are increasingly being referred to as people with psychosocial disabilities. The term "psychosocial disability" reflects the challenges that people face both from the difficulties they experience as a result of their condition as well as the negative societal attitudes frequently displayed towards them. Language used to describe people with psychosocial disabilities, such as "idiot", "imbecile", and "mad" is both outdated and offensive, and should not be used under any circumstances.

## **3.2.4 Intellectual disabilities**

An intellectual disability affects an individual's learning, communication and ability to perform everyday activities. The disability may be present at birth or may develop during childhood. People with intellectual disabilities often have limited language ability, including comprehension and communication skills and, if they are not given the right support in the criminal justice context, various challenges may arise. For example, a person may appear to have agreed to an instruction and then not carry it out because they did not fully understand what was being asked of them. In stressful situations, such as an encounter with a police officer, a person's ability to understand and to communicate

may lessen. The provision of the right support is therefore important to avoid misinterpreting the difficulties arising from the disability.

### **3.2.5 Communication disabilities**

People with communication disabilities have difficulty with one or more aspects of communication. Difficulties can occur from childhood such as a stammer, or arise from intellectual or other disabilities. Communication disabilities may, therefore, be short term or life-long. Communication disabilities are sometimes referred to as speech, language and communication needs or communication difficulties.

## 4 Understanding the barriers to accessing justice in Lesotho

### 4.1 Introduction

The national law in any given domestic legal system, such as that in Lesotho, exists in order to safeguard against conduct which infringes upon the rights of others. If a person is wronged by another, they typically turn to the justice system for redress. The particular branch of the justice system which they turn to is dependent upon the nature of the wrong.

The criminal law is a branch of national law which labels certain actions as crimes which are punishable by the state.<sup>11</sup> Therefore, if a person suffers a wrong which is labelled by law as a criminal offence, then they would turn to the criminal justice system for redress. For example, in Lesotho, the criminal law is established in the Penal Code Act.<sup>12</sup> This Act establishes the code of criminal law in Lesotho. The Penal Code Act labels various acts as criminal acts including theft,<sup>13</sup> defamation,<sup>14</sup> and assault,<sup>15</sup> to mention but a few and defines the different criminal offences. A person against whom an act constituting a crime has been committed, therefore, will turn to the criminal justice system for redress.

The civil law is a branch of national law which seeks to provide redress where a person's civil rights have been infringed. Examples of instances when a person might turn to the civil justice system is when their contractual rights have been breached or they would like to sue for personal injury. Unlike the criminal justice system, the punishments in the civil justice system are not custodial, instead, they are monetary in that the party which is found liable may be asked to pay a certain amount of money to the plaintiff.<sup>16</sup>

Both the criminal and the civil justice systems are an integral part of vindicating the rights of citizens. Most people therefore, will at some point in their lives encounter either the criminal justice system or the civil justice system in one capacity or another. This includes people with disabilities. In fact the likelihood of people with disabilities participating in the justice system is compounded by the fact that they are disproportionately vulnerable

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<sup>11</sup> Jonathan Burchell, *Principles of Criminal Law* (Lansdowne: Juta & Company Limited, 2005) at 1.

<sup>12</sup> Penal Code Act 2010 (PCA).

<sup>13</sup> Section 57 PCA.

<sup>14</sup> Section 104 PCA.

<sup>15</sup> Section 30 PCA.

<sup>16</sup> See the Subordinate Court Rules 1996 (SCR) and the High Court Rules 1980 (HCR) which contain some of the civil procedures in Lesotho.



to different forms of rights violations<sup>17</sup> and will therefore participate in either the criminal justice system as complainants<sup>18</sup> or in the civil justice system as plaintiffs, respectively.<sup>19</sup> People with disabilities may also be “overly-represented”<sup>20</sup> in criminal proceedings as accused persons.<sup>21</sup> They may also participate in the civil justice system as defendants.<sup>22</sup>

The fact that a person complains that another has committed a criminal or civil wrong against them does not automatically mean that the law will agree with them and punish the accused person or defendant. The law requires that a trial be conducted to determine the question of guilt. The trial will be conducted before a magistrate or judge whose role can be likened to that of an impartial “umpire” because they listen to the evidence that is adduced by both parties, ensure that procedural rules are followed and pronounce a verdict/judgment at the end of the trial.<sup>23</sup> The witnesses in a trial testify about all that they know concerning the case before the court.<sup>24</sup> The witness testimony can be so important that the outcome of the case is dependent on it.<sup>25</sup> Therefore, the ability of a witness to effectively narrate all that they know concerning the case is crucial. In fact, it is so crucial that the term “access to justice” is related not just to whether or not one participates in the justice process, but to the quality of that participation.

#### **4.2 Access to justice as effective participation**

Historically, the term “access to justice” has been closely linked to the outcome of a case/trial. The United Nations Convention on the Rights of Persons with Disabilities (UNCRPD) is unique in that it is the first international human rights treaty to contain a

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<sup>17</sup> Sharon Primor and Na’ama Lerner, “The Right of Persons with Intellectual, Psychosocial and Communication Disabilities to Access to Justice: Accommodations in the Criminal Process” Bizchut, The Israel Human Rights Center for People with Disabilities at 3.

<sup>18</sup> People who have had a crime committed against them are referred to as “complainants” in the criminal justice system.

<sup>19</sup> The term “plaintiff” refers to a person who brings a civil case before a civil court in order to seek a remedy for civil wrongs committed against them.

<sup>20</sup> Primor and Lerner (note 17 above).

<sup>21</sup> The term “accused persons” in the criminal justice system refers to a person who is accused of having committed a crime but has not yet been convicted of the crime. See Schetzer, L. “Access to Justice and Legal Needs: A Project to Identify Legal Needs, Pathways and Barriers for Disadvantaged People in NSW. Stage 1, Public consultations from <http://www.lawfoundation.net.au>.

<sup>22</sup> A “defendant” in the civil justice system is someone against whom a civil suit has been instigated.

<sup>23</sup> Peet M Bekker et al, *Criminal Procedure Handbook*, 6th edition, (Lansdowne: Juta & Company Ltd, 1994) at 14.

<sup>24</sup> Louise Ellison, *The Adversarial Process and the Vulnerable Witness* (Oxford: Oxford University Press, 2001) at 1.

<sup>25</sup> As above.

substantive right of access to justice.<sup>26</sup> This is not to say that the concept did not exist prior to the coming into force of the UNCPRD in May 2008, rather, the concept is usually framed in international human rights law as the right to an effective remedy.<sup>27</sup> This also highlights an emphasis on the outcome. It is not unusual therefore, that when one hears the term “access to justice” they immediately think about the outcome of a case. According to this perception, justice for a complainant in a criminal trial, for example, is obtaining a conviction at the end of the trial whilst justice for the accused person is getting acquitted at the end of the trial. The emphasis is on the outcome of the trial.

In formulating the right to access justice, the drafters of the UNCPRD did not place emphasis on the outcome of the justice process. Instead, they placed an emphasis on the quality of the participation by referring to the right as “**effective**” access to justice **on an equal basis** with others.<sup>28</sup> If access to justice can be effective, it follows that it can also be ineffective. What matters, therefore, according to the UNCPRD, is the quality of one’s participation in the justice system as opposed to fact of participation. Consider for example, a person with speech and hearing impairments who is tried for a crime and is not provided with a sign language interpreter. Although he participated in the trial, his participation was not effective because he could not communicate effectively during the process and therefore, he did not access justice.

Further evidence of the UNCPRD’s emphasis on the quality of the participation may be seen in the phrase “on an equal basis with others.”<sup>29</sup> Participating on an equal basis with others implies that people with disabilities should not face disadvantages on the basis of disability. They should participate with as much freedom and effectiveness as any other person.

The requirement for the provision of procedural and age-appropriate accommodations “in order to **facilitate their effective role** as direct and indirect participants”<sup>30</sup> is further evidence of the emphasis on the quality of participation. The word “effective” is used once again to indicate that they must discharge their role effectively without hindrance or

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<sup>26</sup> Stephanie Ortoleva, “Inaccessible Justice: Human Rights, Persons with Disabilities and the Legal System” (2010 – 2011) 17 ILSA J Int’l & Comp L 281 at 292.

<sup>27</sup> See eg the *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171, art 2(3) (a), (entered into force 23 March 1976) [ICCPR].

<sup>28</sup> Article 13 (1) and (2) UNCPRD.

<sup>29</sup> Article 13 (1) UNCPRD.

<sup>30</sup> Article 13 (1) UNCPRD.

barrier in order for them to access justice on an equal basis with others. The UNCRPD also places a duty on States Parties to provide accommodations in order to make sure that the quality of participation in the justice system is high/effective. The denial of reasonable accommodations actually amounts to disability discrimination.<sup>31</sup> This reiterates the importance of the quality of the participation.

Having established the importance of effective participation what remains to be seen is whether people with disabilities in Lesotho participate effectively in the justice system.

### **4.3 Research findings: Barriers to effective participation in Lesotho**

The research study was carried out to establish whether people with disabilities in Lesotho access justice on an equal basis with others and if not, what the barriers to effective participation are. Personnel from the justice system were asked to complete questionnaires to determine this.<sup>32</sup> The findings are as follows:

- a) Most of the respondents had handled at least one case involving a person with a disability*

The respondents were first asked if they have ever handled cases involving people with disabilities. Of the 16 respondents who work in the administration of justice, 15 stated that they had handled a case involving a person with a disability.<sup>33</sup> Only one person indicated that he had never handled a case involving a person with a disability.<sup>34</sup>

- b) Most of the cases involved people with hearing impairments*

The 15 respondents had handled cases involving people with different types of disabilities as laid out in table 2 below.

**Table 2: Types of disabilities**

<b>Type of Disability</b>	<b>Number of individuals</b>
Hearing impairment	5
Intellectual disability	4
Physical disability	4

<sup>31</sup> Article 2 UNCRPD.

<sup>32</sup> See appendices 1 and 2.

<sup>33</sup> The 15 respondents consist of police officers, judges, a judge's clerk, a magistrate, lawyers in private practice and personnel from DPOs.

<sup>34</sup> This was a lawyer in private practice.

Visual impairment	1
Multiple Disabilities (mental disability– exact type unspecified, and speech impairment)	1
<b>Total</b>	<b>15</b>

Most of the cases involved people with hearing impairments. There were 5 cases handled involving people with hearing impairments. Cases involving people with intellectual disabilities and people with physical disabilities were also high. 4 cases involved people with intellectual disabilities and 4 cases involving people with physical disabilities were reported. Cases involving people with visual impairments were fewer in number with only one respondent reporting having handled a case involving a person with visual impairment. Similarly, only one respondent reported having handled a case involving a person with multiple disabilities (mental disability, exact type not specified, and speech impairment).

*c) The highest number of cases were criminal cases*

The respondents were also asked to specify the branch of law involved in the cases (ie criminal law/civil law).

**Table 3: Types of cases**

Type of case	Number
Criminal cases	11
Civil Cases	4
<b>Total</b>	<b>15</b>

The majority of the cases which the respondents reported were criminal cases. Out of a total of 15 reported cases, 11 were criminal cases and 4 were civil cases.

*d) The majority of the criminal cases involved sexual offences and half of the civil cases involved labour disputes*

The respondents were also asked to specify the nature of the charge/civil claim forming the subject of the cases they handled and they responded as shown in table 4 below:

**Table 4: Nature of charge/civil claim**

Branch of law/type of case	Total number of cases	Nature of charge/claim
Criminal	11	9 Sexual offence cases 1 fraud case 1 Murder case
Civil	4	2 labour disputes 1 personal injury claim 1 succession and land rights claim
<b>Total</b>	<b>15</b>	

9 of the 11 reported criminal offences were sexual offences, 1 was a fraud case and the other was a murder case. Two of the four civil cases were labour cases involving unfair dismissal and disability discrimination. One was a civil case involving a personal injury claim. The other was also a civil dispute involving succession and land rights.

*e) The majority of people with disabilities encounter the justice system as complainants/plaintiffs*

Respondents were asked to state whether the person with a disability was the complainant/accused person/plaintiff/defendant. Their responses were as follows:

**Table 5: The capacities in which people with disabilities interact with the justice system**

Branch of law/type of case	Total number of cases	Number of Complainants/Plaintiffs	Number of accused persons/defendants
Criminal Law	11	9	2
Civil Law	4	4	0
<b>Total</b>	<b>15</b>		

Out of the 11 criminal cases reported by the respondents, 9 cases involved people with disabilities who were complainants and four cases involved people with disabilities who

were accused persons. Of the 4 civil cases reported, all 4 cases involved plaintiffs with disabilities. This shows that the majority of people with disabilities encounter the justice system as complainants/plaintiffs. This is in line with research which shows that people with disabilities are disproportionately vulnerable to violence and discrimination.<sup>35</sup>

*f) People with disabilities are complainants mainly in sexual offence cases and are plaintiffs mainly in labour cases*

In order to establish the type of offences in which people with disabilities were complainants/plaintiffs and/or accused persons/defendants, the respondents were asked to specify the nature of the charge/claim when stating numbers of complainants/plaintiffs and accused persons/defendants. The data collected from the respondents shows the following:

**Table 6: Number of cases in which people with disabilities were complainants/plaintiffs/accused persons/defendants**

Branch of law/type of case	Total number of cases	Number of Complainants/ Plaintiffs	Nature of charge /civil claim involved	Number of accused persons/ defendants	Nature of charge/ civil claim involved
Criminal Law	11	9	9 Sexual Offence cases	2	1 Fraud case 1 murder case
Civil Law	4	4	2 labour cases 1 personal injury claim 1 succession and land	0	Nil

<sup>35</sup> Ortoleva (note 26 above) at 285.

			rights dispute		
<b>Total</b>	<b>15</b>				

Data collected from the questionnaires shows that people with disabilities encounter the criminal justice system mainly as complainants and that they are complainants mainly in sexual offence cases. Out of a total of 11 reported criminal cases, 9 of those cases involved people with disabilities who were complainants and all 9 were complainants in sexual offence cases. Only 2 of the criminal cases involved people with disabilities who were accused persons and the data collected does not reveal any patterns as far as accused persons with disabilities are concerned. 1 of the 2 cases involving persons with disabilities who were accused persons involved a fraud charge and the other a murder charge.

Data also shows that half of the people with disabilities who encounter the civil justice system do so as plaintiffs. In half of these cases, a labour dispute was involved. Out of a total of 4 reported civil cases, 2 cases were labour cases. The other two involved a personal injury claim and a succession dispute involving land rights.

*g) Most of the respondents experienced communication barriers when handling these cases*

The respondents were asked to state the challenges they encountered whilst handling these cases. These challenges are the barriers to effective participation. The respondents answered as follows:<sup>36</sup>

***Table 6: Types of challenges/barriers encountered***

<b>Challenge/barrier</b>	<b>Number of cases</b>
Communication	8
Legal	2
Environmental (Mobility and accessibility)	3
Identification (attitudinal)	1

<sup>36</sup> Generally the barriers to effective access to justice include communication barriers, environmental barriers, legal barriers and attitudinal barriers.

No challenges reported	1
<b>Total</b>	<b>15</b>

Most of the respondents encountered a communication challenge when handling these cases. Out of a total of 15 cases, a communication barrier was encountered in 8 of these cases. The challenge/barrier which is faced is closely related to the nature of one's disability. For example, people with physical disabilities may have difficulty with mobility/movement as a result of the disability. Therefore, the challenge that is likely to be encountered is one of accessibility in that due to the difficulties in movement and mobility associated with the disability, a person with a physical disability is likely to have challenges with accessing certain inaccessible spaces or buildings. It is therefore not surprising that because most of the cases handled involved people with speech and hearing impairments, that communication would be a challenge/barrier. In most of the cases in which communication was a barrier, there were no sign language interpreters. In one of the cases, there was a sign language interpreter but the complainant was not conversant with official sign language. They had developed their own brand of home-grown sign language and it was difficult to find an interpreter who could communicate using this brand of sign language. In another case, the complainant was hard of hearing, had no hearing aids and there was no sign language interpreter available to assist which made communication a challenge.

Legal barriers were encountered less frequently, in only 2 of the 15 reported cases. One of the respondents, who is a member of a DPO, reported that there was a legal barrier/challenge in the case they handled in that the complainant, who is a person with intellectual disability, could not testify because he was deemed unfit to testify pursuant to section 219 of the Criminal Procedure and Evidence Act. Similarly, one of the judges who completed a questionnaire indicated that he handled an appeal in which the appellant argued that the trial court had erred in accepting and relying on the evidence of the complainant at trial because the complainant was not competent to testify pursuant to section 219 of the Criminal Procedure and Evidence Act.

Environmental (mobility and accessibility) barriers were also encountered less frequently in 3 of the 15 reported cases. One respondent, who is a lawyer in private practice, reported that the challenge he faced was that his client had a physical disability,



was bedridden and a wheelchair user. Two of the judges reported that they had handled cases involving persons with physical disabilities and that the challenge they faced was one of accessibility.

In 1 out of the 15 cases reported, the respondent, who is a police officer, stated that the challenge he faced with a visually impaired complainant was that of identifying the alleged perpetrator. It should be noted that people with visual impairments are fully capable of identifying an alleged perpetrator through means other than sight. For example, an alleged perpetrator may be identified through the voice or by touch. More often than not, there is a commonly held misconception amongst personnel in the justice system that since people with visual impairments cannot identify an alleged perpetrator through sight then that means they cannot identify them at all. As a result of this misconception, no efforts are made to identify the perpetrator through means other than sight. When this happens, there is an attitudinal barrier being driven by the misconception about people with visual impairments. Attitudinal barriers can be as damaging as any of the other barriers discussed in this report.

Only one respondent, a member of a DPO, who handled a civil case involving a person with a physical disability stated that he faced no challenges when handling this case.

*h) There was a range of responses to the different challenges, many of which were inappropriate*

Respondents were also asked to state how they handled the challenges/barriers which they faced. There was a range of responses to the different challenges/barriers, some of which were good and some of which were bad.

Some of the respondents made an attempt to accommodate the person with a disability with differing levels of success. Others responded to the challenges/barriers inappropriately. There were those who took a different approach and attempted to skip the person with a disability altogether and build a case without them based on other evidence. In the worst of cases, the response was to abandon the case altogether because of the challenges resulting from disability.

**Table 7: Range of responses to the various challenges/barriers**

<b>Response</b>	<b>Number of cases</b>
a) Cases where the person was accommodated/where there was an unsuccessful attempt to accommodate	4
b) Cases in which there were inappropriate responses	3
c) Cases in which the response was to skip the person with a disability and rely on other evidence	3
d) Cases which did not proceed due to the barriers	1
e) Undisclosed responses to challenges	4
<b>Total number of cases</b>	<b>15</b>

In 4 of the 15 reported cases, the person with a disability was either accommodated successfully or there was an unsuccessful attempt to accommodate. In 3 of the cases there were inappropriate responses to the challenges/barriers. Similarly, in 3 of the cases, the response was to skip the person with a disability and rely on other evidence. 1 case did not proceed due to the challenges/barriers arising from disability. In 4 of the 15 reported cases, the respondents did not disclose how they handled the challenges which they faced. Details of the recorded responses are laid out below:

***Cases where the person was accommodated/ where there was an attempt to accommodate***

1. In a rape case involving a person with speech and hearing impairment, the police officer handling the case faced a communication challenge. He responded to this by asking someone with sign language knowledge to help with sign language interpretation and this helped move the case forward. This is a good example of a case in which the complainant was accommodated successfully.
2. A lawyer in private practice handled a case involving a client with a physical disability who was bedridden and used a wheelchair to get around. The challenge for the client was mobility and accessibility. She could not go to the lawyer's office, or to court unassisted. The case was postponed several times because of these challenges. The lawyer responded to these challenges by consulting with her at her house and over the telephone where possible. The lawyer also asked the judge

to hold the trial downstairs. He also double checked whether the matter would proceed before bringing her to court. This is another good example where a person with a disability was successfully accommodated.

3. A member of a DPO handled a rape case involving a person with hearing impairments and faced communication challenges. The member of the DPO handled this by becoming the sign language interpreter at the police station and in court. This as an example where a person with a disability was successfully accommodated.
4. In a sexual abuse case involving a complainant with speech and hearing impairments the police officer handling the case faced a challenge with communication. He handled this by requesting a sign language interpreter from LNFOD. However, this did not help because the complainant was not conversant with the official sign language. The complainant used an informal home-grown sign language. The case is still pending. The police officer's response was correct, however it was not successful only because the complainant was not conversant with official sign language.

***Cases in which there were inappropriate responses to the challenges/barriers***

1. A judge in a fraud case involving an accused person with physical disability handled the challenge of mobility and accessibility by instructing the court orderlies to lift up the accused and move him into the dock. This is an inappropriate response as this violates the dignity of the person. An appropriate response would have been to accommodate the accused person by permitting him to testify outside of the dock.
2. A judge in a succession/land dispute involving a woman with a physical disability handled the challenge of accessibility and mobility by having the woman lifted up the stairs to the courtroom which was located on the second floor. This is an inappropriate response as this violates the dignity of the person. An appropriate response would have been to accommodate her by changing the venue of the trial and holding the trial on the ground floor which is accessible to the plaintiff.
3. In a murder trial in which the accused person was someone with an intellectual disability, the judge's clerk indicated that the main challenge was communication in that it was difficult to discern whether or not the accused person understood

the charge. This was handled by sending the accused to a mental institution for assessment. This is an inappropriate response because the assessment is done simply to determine whether or not an accused is fit to stand trial. It usually does not address the kind of accommodations he may need in order to participate effectively. An appropriate response would have been to provide accommodations for the accused during the trial.

***Cases in which the response was to skip the person with a disability and rely on other evidence<sup>37</sup>***

1. In a sexual abuse case involving a person with visual impairment, the police officer handling the case reported that there was a challenge in that the complainant could not identify the alleged perpetrator. The police officer responded to this by turning to forensic evidence (clothes and fluids) which was not enough to build a case on and the case was not taken forward due to lack of evidence. It is never a good response to skip the evidence of the person with a disability, in this case, a visual impairment. The appropriate response would have been to accommodate the complainant by allowing her to identify the accused person through other means, such as voice identification or touch.
2. Similarly, in a rape case involving a complainant with multiple disabilities (an undisclosed mental disability and a speech impairment) the judge handling the case (who was at the material time a magistrate) had a challenge communicating with the complainant. The judge relied on other evidence in the case, that is, an eye witness. A conviction resulted. As mentioned above, skipping the evidence of the person with a disability is never a good idea. All people with all disabilities can be accommodated to enable effective participation. An appropriate response would have been to look into the kind of accommodations she needs and ensure that these are provided to her, and this may require seeking expert help in some cases.
3. A lawyer in private practice handled a rape/sodomy case involving a complainant with intellectual disability (Down syndrome). The lawyer reported that he faced a

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<sup>37</sup> Relying on other evidence is not in itself a negative thing. In fact all the evidence in a case must be considered carefully. The point to note is that it is unacceptable to skip the evidence of the person with a disability and rely on other evidence simply to avoid having to accommodate the person. All the other evidence in the case should be considered after also accommodating the person with a disability.

communication challenge when dealing with the complainant. The complainant was 9 years old and could not speak on his own to give his account. He handled this challenge by trying to do without the evidence of the complainant. They did DNA tests, the case is still pending. It is reiterated that skipping the evidence of the person with a disability should never be done simply because there are challenges there. The appropriate response is determining the accommodations that he needs and ensuring that these are provided.

### ***Cases which did not proceed due to the barriers***

1. A lawyer in private practice handled a civil case (unfair dismissal) involving someone with a hearing impairment. The lawyer handling the case faced communication challenges in that the client had no assistive devices (hearing aids) and there was no sign language interpreter. The lawyer handled this by sitting close enough to the client, shouting out everything when taking instructions which he found cumbersome. The case did not proceed to trial because it was thought that the client would struggle to testify in court because of her disability since the facilities in the courts are not suitable for someone with that disability. Cases involving people with disabilities should never be abandoned because of the challenges/barriers arising from disability. To do so, is to deny someone access to justice and the right to equal protection of the law. The appropriate response is to determine the accommodations one needs and ensure that they are provided.

In summary, only 4 cases out of the 11 cases in which the responses to the challenges or barriers were recorded involved an appropriate response. In the other 7 cases, the responses were inappropriate because they did not seek to accommodate the person with a disability. The appropriate response to any challenge/barrier arising from disability is to provide accommodations.<sup>38</sup> It is also important to bear in mind that the denial of accommodations amounts to disability discrimination.<sup>39</sup>

### **4.4 Conclusion**

The data collected from the respondents through the questionnaires shows that all but 1 of the respondents working in the administration of justice had handled at least one case

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<sup>38</sup> See section of 5 of this report on accommodations.

<sup>39</sup> Article 2 UNCRPD.

involving a person with a disability. Most of the cases involved people with hearing and speech impairments. The highest number of cases were criminal cases involving sexual offences. Half of the civil cases involved labour disputes. Data collected also shows that the majority of people with disabilities encounter the justice system as complainants/plaintiffs. People with disabilities are complainants mainly in sexual offence cases and are plaintiffs mainly in labour cases. Respondents were also questioned about the challenges/barriers related to disability which they faced when handling cases involving people with disabilities. These challenges/barriers are effectively the barriers to effective participation by persons with disabilities. There are a range of barriers faced including communication, legal, attitudinal and environmental barriers. Most of the respondents however, experienced communication barriers when handling these cases. There was a range of responses to the different challenges, many of which were inappropriate. For example, lifting a person with a physical disability up the stairs. The other inappropriate responses included skipping the evidence of the person with a disability and abandoning cases involving people with disabilities because of the challenges/barriers. The appropriate responses to challenges/barriers arising from disability were made in only 4 of the cases in which accommodations were provided. The research therefore shows that people with disabilities in Lesotho largely, do not participate effectively in the justice system owing to a number of barriers including communication, legal, attitudinal and environmental barriers.

## 5 Providing accommodations to people with disabilities in Lesotho

*“This is the reality of the justice system for persons with disabilities ... since sometimes the justice system remedies inequality and discrimination, and sometimes it is the justice system itself that perpetuates that very inequality and discrimination.”<sup>40</sup>*

### 5.1 Introduction

People with disabilities have historically been subjected to inequality and discrimination in many spheres of life including in the justice system. Disability discrimination is defined the UNCRPD as:

*“any **distinction, exclusion or restriction** on the basis of disability which has the purpose or effect of **impairing or nullifying the recognition, enjoyment or exercise, on an equal basis** with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, including denial of reasonable accommodation.”<sup>41</sup>*

The definition of disability discrimination found in the African Disability Protocol is similar to the definition found in the UNCRPD.<sup>42</sup> The Constitution of Lesotho defines discrimination in a very similar way save for the fact that unlike the UNCRPD and the African Protocol, the Constitution does not recognise the denial of reasonable accommodation as discriminatory. The Constitution defines disability as follows:

*“affording **different treatment to different persons attributable wholly or mainly to their respective descriptions** by race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status **whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject** or are accorded privileges or advantages which are not accorded to persons of another such description.”<sup>43</sup>*

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<sup>40</sup> Ortoleva (note 26 above) at 285.

<sup>41</sup> Article 2 UNCRPD [emphasis mine].

<sup>42</sup> See article 1 African Disability Protocol.

<sup>43</sup> Section 18(3) Constitution of Lesotho [emphasis mine].

According to the definitions of discrimination found in the UNCPRD, the African Disability Protocol and the Constitution of Lesotho, any differential treatment on the basis of a person's status, such as disability, which has the purpose or effect of impairing the enjoyment of rights is discriminatory.

As Ortoleva correctly notes in the quote above, the law is capable of being a double-edged sword of sorts, in that it is capable of perpetuating discrimination on the one hand, and remedying discrimination on the other. A fitting example of the discriminatory effect of the law can be found in the Criminal Procedure and Evidence Act (CPEA) which states the following:

*"No person appearing or proved to be afflicted with idiocy, lunacy, or inability or labouring under any imbecility of mind arising from intoxication or otherwise whereby he is deprived of the proper use of reason, shall be competent to give evidence while so afflicted or disabled."*<sup>44</sup>

The effect of this provision is that it excludes people with psychosocial and intellectual disabilities from testifying in any legal proceedings. This provision is discriminatory in that it legitimises the differential treatment of people with psychosocial and intellectual disabilities and the effect of such exclusion is that people with disabilities cannot enjoy the right to access justice and as such cannot vindicate their rights and fundamental freedoms when they have been violated. The general rule regarding competence is that every person is competent to testify in court<sup>45</sup> provided they are not "expressly excluded by this Act from giving evidence."<sup>46</sup> Section 219 is the provision which expressly excludes people with psychosocial and intellectual disabilities from testifying in court. The CPEA proceeds to state that it is for the court to decide on the issue of competency<sup>47</sup> so courts will make a decision on a case by case basis whether the particular person is competent to testify. In effect, people with psychosocial and intellectual disabilities have to show that they are competent to testify before being permitted to testify. This is discriminatory in that no other witness's competence is put to the test even before they can be permitted to testify. In a recent landmark decision in the case of Koali Moshoeshe and others v DPP

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<sup>44</sup> Section 219 Criminal Procedure and Evidence Act (CPEA) No. 9 of 1981.

<sup>45</sup> See section 215 CPEA.

<sup>46</sup> See section 215 CPEA.

<sup>47</sup> Section 218 CPEA.



and Others<sup>48</sup> the High Court of Lesotho, sitting as the Constitutional Court, was faced with the task of deciding on the Constitutionality of section 219 CPEA. The application challenging the constitutionality of section 219 was made after a 37 year old man with intellectual disability reported to the police that he was sexually assaulted. After being examined by a medical professional he was declared unfit to stand trial and the prosecutor declined to prosecute on the strength of this report and citing section 219 CPEA. The Lesotho Society of Mentally Handicapped Persons, Parents and Families collaborated with LNFOD to challenge this decision in the Constitutional Division of the High Court. On the 28<sup>th</sup> of March 2018, the High Court of Lesotho (Constitutional Division) declared section 219 “unconstitutional as being inconsistent with sections 18 and 19 of the Constitution of Lesotho.”<sup>49</sup> Section 18 (1) of the Constitution prohibits discrimination and states that “... no law shall make any provision that is discriminatory either of itself or in its effect.” Section 19 of the Constitution protects the right to equality before the law and the equal protection of the law stating that “every person shall be entitled to equality before the law and to the equal protection of the law.” In reaching this decision, the court also made reference to article 12 of the UNCRPD which provides for the right to equal recognition before the law. Lesotho ratified the UNCRPD on 2 December 2008 and thereby agreed to be bound by its provisions, standards and norms. Lesotho has an obligation to respect, protect, fulfil and promote the rights of persons with disabilities including the right to equal recognition before the law<sup>50</sup> and the right to access to justice.<sup>51</sup> The effect of the decision in the Koali Moshoeshoe case is that persons with psychosocial and intellectual disabilities can now testify in courts of law.

One of the more potent effects of the law is that it can be used to eliminate discrimination. For example, the Constitution of Lesotho<sup>52</sup> prohibits discrimination on various grounds including “race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”<sup>53</sup> Discrimination on the basis of disability falls under the category “other status.” The Constitution also prohibits discriminatory laws<sup>54</sup>

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<sup>48</sup> Koali Moshoeshoe and others v DPP and Others (Constitutional Case/14/2017).

<sup>49</sup> As above.

<sup>50</sup> Article 12 UNCRPD.

<sup>51</sup> Article 13 UNCRPD.

<sup>52</sup> Constitution of Lesotho 1993.

<sup>53</sup> Section 18(3) Constitution of Lesotho.

<sup>54</sup> Section 18(1) Constitution of Lesotho.

and discriminatory treatment of people.<sup>55</sup> The right to equality before the law is also enshrined in the Constitution which states that every “person shall be entitled to equality before the law and to the equal protection of the law.”<sup>56</sup> The Constitution is the “supreme law of Lesotho and if any other law is inconsistent with this Constitution, that other law shall, to the extent of the inconsistency be void.”<sup>57</sup>

One of the important ways in which the law can be used to ensure participation on an equal basis by people with disabilities in the justice system is by using the law to argue for the provision of accommodations to enable effective participation.

## **5.2 What are accommodations?**

The UNCRPD and the African Disability Protocol state that one of the ways that access to justice is to be achieved is through the provision of accommodations.<sup>58</sup> The term “accommodation” refers to any “necessary and appropriate modification and adjustments.”<sup>59</sup> Any measure which alters or modifies the way things are usually done in order to enable people with disabilities to participate effectively is an accommodation. An example of an accommodation in the justice system is having lawyers and magistrates remove the robes which they usually wear in court to help the person with disability feel less intimidated. Accommodations may be necessary to enable people with disabilities to participate in different spheres of life such as in employment. They are therefore not limited to the justice system alone. Articles 13 of the UNCRPD and the African Disability Protocol require the provision of accommodations to ensure that people with disabilities access justice on an equal basis with others. Generally, the UNCRPD and the African Disability Protocol require that accommodations provided in all other spheres of life be “reasonable” in that they should not impose a “disproportionate or undue burden on the person or organisation providing the accommodations.”<sup>60</sup> However, article 13 (1) of the UNCRPD and article 13 (1) of the African Disability Protocol do not require that accommodations provided in the justice system be reasonable. The UNCRPD requires the

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<sup>55</sup> Section 18(2) Constitution of Lesotho.

<sup>56</sup> Section 19 Constitution of Lesotho.

<sup>57</sup> Section 2 Constitution of Lesotho.

<sup>58</sup> Article 13(1) UNCRPD and article 13(1) African Disability Protocol.

<sup>59</sup> Article 2 UNCRPD and article 1 African Disability Protocol. Article 2 of the UNCRPD defines accommodations as “necessary and appropriate modification and adjustments ... where needed in a 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>60</sup> Article 2 UNCRPD and article 1 African Disability Protocol.

provision of accommodations which are “procedural and age-appropriate” whilst the African Disability Protocol requires the provision of accommodations which are procedural, age and gender-appropriate. Accommodations in the justice system seek to enable people with disabilities to participate in all aspects of society, including the criminal justice system, on an equal basis with others. They are not intended to relax the rules of criminal evidence and procedure in favour of people with disabilities. Primor and Lerner describe this by saying that accommodations are not about “alleviation.”<sup>61</sup> They are intended only to equalize participation by enabling people with disabilities to participate effectively in criminal proceedings.

### **5.3 The different types of accommodations**

There are many accommodations which can be made in the criminal justice system. Generally, they can be divided into two types:<sup>62</sup>

- Accommodations to the environment
- Accommodations to do with language and content

#### **5.3.1 Accommodations to the environment**

Accommodations can be used to make modifications to the environment in which the person gives their evidence, as opposed to the actual manner in which their evidence is given.<sup>63</sup> The environment can negatively or positively affect the way a person behaves and what they say.<sup>64</sup> Unfamiliar and intimidating environments, such as police stations and courts, frequently raise levels of anxiety, which may cause the person to have difficulty concentrating, processing information and responding to questions. Conversely, by making an environment less intimidating, a person may feel less anxious and better able to communicate. Therefore, it is important to ensure that the environment in which the statement or testimony is given is as stress free as possible.

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<sup>61</sup> Primor and Lerner (note 17 above) at 7.

<sup>62</sup> R White & D Msipa “Implementing article 13 of the Convention on the Rights of Persons with Disabilities in South Africa: Reasonable accommodations for persons with communication disabilities” (2018) 6 *African Disability Rights Yearbook* 99 at 107.

<sup>63</sup> As above.

<sup>64</sup> T Menakar & 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.

Some of the accommodations that can be made to the environment include:

### ***Conducting interviews outside the police station and not in police uniform***

Some people may find the environment in a police station intimidating and stressful. One of the ways to accommodate such a person would be to conduct the police interview in a different location which is less intimidating such as the person's home.<sup>65</sup> Furthermore, some people may find a police officer wearing a police uniform intimidating. Such a person can be accommodated by having the police officer wear plain clothes instead of the police uniform.

### ***Having a support person present during interview***

It can be helpful to allow a trusted support person (friend, family member, carer or an independent person) who is known not to be involved in the case to come along with the person with a disability for moral and emotional support; this can help reduce levels of stress and anxiety. The support person must not interfere with or say anything to compromise questioning.

### **5.3.2 Accommodations to do with the language and content of a person's testimony**

These accommodations concern language and touch on the content of a person's evidence. They are concerned with the way a person understands and conveys their account and how they respond to questioning. These accommodations are usually made for people with disabilities that have an impact on cognition and/or communication. Examples of accommodations to do with language and content include:

#### ***The use of pictures***

People with communication disabilities may be accommodated through the use of pictures. The pictures may be organized according to different concepts like clothes, actions, body parts, food, etc. The person answers questions by pointing to the correct picture from the pictures laid out in front of them. For example, when trying to determine what weapon was used against the complainant, he/she might be asked to select a picture depicting the weapon the accused person used.

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<sup>65</sup> The person's home may not be ideal in certain circumstances such as where the alleged perpetrator also lives there.

### ***The use of anatomically correct dolls***

Anatomically correct dolls are dolls which have all the correct parts of the human anatomy. The male doll has all the parts of the male anatomy and the female doll has all the parts of the female anatomy. These dolls can be used to help persons to demonstrate what happened to them.

### ***The use of the alphabet on a letter board***

People who can write can be accommodated using the alphabet on a letter board. All the letters of the alphabet are written on a piece of paper and the person spells out what they want to say by pointing to the letter they want. The letter board can also be used by people who do not have the necessary motor skills to point at the desired letter. They are asked which letter they want and whether it is in the first row, second line, or second row, first line, etc. They indicate the desired letter either by nodding or closing their eyes a specified number of times to indicate 'yes'.

It is important to remember that though the different accommodations have been placed in two different categories, in reality, one individual may need both types of accommodations in order to participate effectively. The accommodations which are provided should meet the needs of the person concerned.

## **5.4 Research findings: The law and accommodations**

As part of the research, a legislative review of the laws governing criminal and civil practice in Lesotho was carried out in order to interrogate whether there are any legislative provisions which may be used to support/argue for the provision of accommodations for people with disabilities.

A number of laws were reviewed including:

1. The Constitution of Lesotho 1993
2. The Sexual Offences Act 2003
3. The Criminal Procedure and Evidence Act No. 9 of 1981
4. The Penal Code Act 2010
5. The Mental Health Law No. 7 of 1964
6. The Subordinate Court Rules 1996
7. The High Court Rules No. 9 of 1980
8. Children's Protection and Welfare Act no. 7 of 2011

Personnel from the relevant government ministries also participated in the study by filling out questionnaires.<sup>66</sup>

The main findings from the review are as follows:

a) *The law in Lesotho provides for some accommodations*<sup>67</sup>

The accommodations which are already provided for include the following:

#### Accommodations to the environment

##### *1) Holding proceedings in camera*

An accommodation which is provided for in the law in Lesotho is the holding of proceedings in camera. This is an accommodation to the environment. Generally, the criminal law requires that witnesses in criminal trials give their evidence in open court.<sup>68</sup> However, there are some exceptions to this rule found in the Sexual Offences Act (SOA),<sup>69</sup> the CPEA and the Children's protection and Welfare Act (CPWA).<sup>70</sup> These Acts contain provisions allowing proceedings to be held "in camera" which means behind closed doors and in the presence only of the necessary personnel. The SOA states that:

"In criminal proceedings under this Act, the court before which such proceedings are held shall, to the extent authorised by the provisions of section 12 of the Constitution, direct that any person whose presence is not necessary at such proceedings, not be present, unless the complainant and the accused otherwise request."<sup>71</sup>

The CPEA also provides that proceedings may be held in camera. It states that the court may direct "every person whose presence is not necessary in connection with the trial or any person or class of person mentioned in the request, not to be permitted to be present thereat."<sup>72</sup>

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<sup>66</sup> See appendix 2. For a full list of the respondents who participated, see section 2 of this report on Methodology.

<sup>67</sup> The accommodations provided for in the laws in Lesotho are all laid out in legislation governing criminal justice.

<sup>68</sup> Section 173(1) CPEA.

<sup>69</sup> Sexual Offences Act No.3 of 2003 (SOA).

<sup>70</sup> Children's Protection and Welfare Act No.7 of 2011 (CPWA).

<sup>71</sup> Section 23(1) Sexual Offences Act.

<sup>72</sup> Section 173(5) CPEA.

The Children's Protection and Welfare Act requires that legal proceedings involving children take place in camera.<sup>73</sup>

### *2) Giving evidence via CCTV*

An accommodation to the environment which is provided for by the CPWA only in circumstances where an intermediary has been appointed is the giving of evidence via CCTV. The CPWA states that:

"If a court appoints an intermediary under subsection (1), the court may direct that the relevant witness may give his evidence at any place ...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, that intermediary as well as that witness during his testimony."<sup>74</sup>

This accommodation should be made for a witness who is likely to be intimidated by giving testimony in the presence of the accused. The accused person along with the court personnel will be in the main court room watching the witness give evidence on a TV screen via CCTV. The witness will be in another room with the intermediary and will not see nor hear the people in the main courtroom. The intermediary will hear the questions through headphones and relay the questions in an appropriate manner to the witness.

### *3) Modifying the venue*

An accommodation to the environment which is permitted by law is modifying the venue to make it suitable for the witness. In cases where an intermediary has been appointed, the court may direct that the witness testify in a place which is:

- "formally arranged to set that witness at ease"<sup>75</sup>
- "so situated that any person whose presence may upset that witness, is outside the sight and hearing of that witness"<sup>76</sup>

### *4) Holding proceedings in an informal manner/setting*

An accommodation to the environment which is also provided for is the holding of proceedings in an informal manner/setting. Traditionally, trials take place in a very

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<sup>73</sup> Section 138(2) CPWA.

<sup>74</sup> Section 146(4) (c) CPWA.

<sup>75</sup> Section 146(4) (a) CPWA.

<sup>76</sup> Section 146 (4) (b) CPWA.

formal setting and in a formal manner. However, this general rule may be modified in certain circumstances such as where the witness is a child. The law states that the “proceedings of a Children's Court shall, with regard to a child's procedural rights, be conducted in an informal manner to encourage the maximum participation of a child, his parent or guardian and other child.”<sup>77</sup>

#### Accommodations to do with language and content

##### *5) Cross-examination through the court*

Another accommodation which may be found in the law is cross-examination through the court. This is an accommodation to do with language and content. Cross-examination is an essential part of a trial. Its purpose is to allow the court to test the veracity or authenticity of the witness's evidence. Ordinarily, in a trial, cross-examination is done by one of the lawyers. However, an exception exists in which the court conducts the cross-examination. The SOA permits cross-examination of a witness under the age of eighteen to take place through the court stating that:

“the cross-examination of any witness under the age of 18 years shall take place only through the judicial officer, who shall restate the questions put to such witness or, in the judicial officer's discretion, simplify or rephrase such questions.”<sup>78</sup>

This is similar to conducting questioning through an intermediary.

##### *6) Giving testimony through an intermediary*

The Children's Protection and Welfare Act (CPWA) provides for another accommodation to do with language and content which is the giving of testimony through an intermediary. The CPWA states that:

“Where proceedings involving children are pending before any court and it appears to such court that it would expose any witness under the age of eighteen years to undue mental stress or suffering if he testifies at such proceedings, the court may, subject to

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<sup>77</sup> Section 138(3) CPWA.

<sup>78</sup> Section 24 SOA.



subsection (5) appoint a competent person as an intermediary in order to enable such witness to give evidence through an intermediary.”<sup>79</sup>

When an intermediary has been appointed, all examination, cross-examination and re-examination shall be done through the intermediary, except for examination by the court.<sup>80</sup> The intermediary is permitted to “convey the general purport of any question to the relevant witness.”<sup>81</sup>

#### *7) Holding proceedings in a language one understands/providing interpretation*

An accommodation to do with language and content found in the law in Lesotho is the holding proceedings in a language one understands/providing interpretation. The right to a fair trial which is enshrined in section 12 of the Constitution requires that every person who is charged with a criminal offence “be informed as soon as reasonably practicable, in **a language that he understands** and in adequate detail, of the nature of the offence charged.”<sup>82</sup> Furthermore, every person charged with a criminal offence shall “be permitted to have without payment the assistance of an interpreter if he cannot understand the language used at the trial of the charge.”<sup>83</sup> The CPWA also states that in the children’s court, a child shall be “permitted to speak in his own language with the assistance, where necessary, of an interpreter and the presiding officer shall ensure that they are addressed in a language that they understand.”<sup>84</sup> The UNCRPD defines language as including “spoken and signed languages and other forms of non-spoken languages.”<sup>85</sup> Therefore, the Constitutional requirement for proceedings to take place in a language one understands also means that people who speak sign language have a right to sign language interpretation.

The above accommodations are an important starting point in that they provide a basis upon which an argument may be made in support of providing accommodations to people with disabilities in the justice system in Lesotho. It should be noted however that these accommodations are subject to certain limitations.

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<sup>79</sup> Section 146(1) CPWA.

<sup>80</sup> Section 140(2) CPWA.

<sup>81</sup> Section 146(3) CPWA.

<sup>82</sup> Section 12(2) (b) Constitution of Lesotho.

<sup>83</sup> Section 12 (2) (f) Constitution of Lesotho.

<sup>84</sup> Section 138(5) CPWA.

<sup>85</sup> Article 2 UNCRPD.

*b) The accommodations are limited in terms of who may make use of them*

An important finding of the legislative review was that though there are some accommodations which are in the law, these accommodations are limited in terms of the people they were intended to benefit. Most of the accommodations in the law can be found in the CPWA such as:

- Holding proceedings in camera<sup>86</sup>
- Giving evidence via CCTV<sup>87</sup>
- Modifying the venue<sup>88</sup>
- Holding proceedings in an informal manner<sup>89</sup>
- Giving testimony through an intermediary<sup>90</sup>
- Interpretation of proceedings into a language one understands<sup>91</sup>

The CPWA is an Act “to consolidate and reform the laws relating to the protection and welfare of children and to provide for incidental matters.”<sup>92</sup> The Act defines a child as someone who is below the age of 18 years.<sup>93</sup> Therefore, all the accommodations provided for in the CPWA can only be utilised by people below the age of 18 years including children with disabilities who are also included in the Act.<sup>94</sup> People above the age of 18 years cannot make use of these accommodations and this is a limitation because it leaves out a lot of people who need these accommodations in order to participate effectively in the justice system.

The accommodations provided for in the SOA which are holding proceedings in camera<sup>95</sup> and conducting cross-examination through the court<sup>96</sup> are also limited in terms of the people who can make use of them. The accommodations are limited only to sexual offence cases so if someone with a disability is testifying in a case which is not a sexual offence case, they cannot make use of these accommodations. Conducting cross-examination

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<sup>86</sup> Section 138 (2) CPWA.

<sup>87</sup> Section 146 (4) (c) CPWA.

<sup>88</sup> Section 146(4) (a) and (b) CPWA.

<sup>89</sup> Section 138 (3) CPWA.

<sup>90</sup> Section 146 (1) CPWA.

<sup>91</sup> Section 138 (5) CPWA.

<sup>92</sup> CPWA, long title.

<sup>93</sup> Section 3 CPWA.

<sup>94</sup> See section 3 of the CPWA for a definition of a child with a disability.

<sup>95</sup> Section 23 (1) SOA.

<sup>96</sup> Section 24 SOA.

through the court is not only limited to sexual offence cases, but is also limited to people under the age of 18 years.<sup>97</sup> This further limits the people who can make use of this accommodation.

Similarly, the accommodation provided for in the CPEA which is the holding of proceedings in camera<sup>98</sup> is limited in that it can only be used in situations involving indecent act.<sup>99</sup>

Whilst it is indeed commendable that these laws make provision for accommodations, they are limited in terms of the people who can make use of them.

*c) The accommodations are limited in terms of the type of accommodations*

The desk review also showed that another limitation in the accommodations found in the laws relates to the types of accommodations that people with disabilities need in order to participate effectively in the justice system. The two types of accommodations, that is, accommodations to the environment and accommodations to do with language and content work differently. Accommodations to the environment function by ensuring that the environment in which someone gives testimony is as comfortable and stress-free as possible. Accommodations to do with the language and content of someone's evidence, on the other hand, work by ensuring that the person understands the question that is put to them and is able to effectively relay their account to the court. The former type of accommodations can be used by someone who has no difficulty with communication but is vulnerable and may find a formal environment intimidating whilst the latter type of accommodations are necessary for people who have communication difficulties. In some cases a person may require both types of accommodations. Most of the accommodations provided for in the laws are accommodations to the environment. There are only three accommodations to do with language and content which were identified, that is giving evidence through an intermediary, cross-examination through the court and giving evidence in a language one understands. A limit in the types of accommodations provided for effectively excludes people with certain disabilities, such as intellectual disabilities who have difficulties with concepts such as dates and time, from having the types of

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<sup>97</sup> See Section 24 SOA.

<sup>98</sup> Section 70 (5) CPEA.

<sup>99</sup> Section 70 (5) CPEA.

accommodations they need in order to effectively participate. People with intellectual and psychosocial disabilities very often need both types of accommodations.

d) *The accommodations were not made specifically with people with disabilities in mind*

None of the accommodations identified were made specifically with people with disabilities in mind. Perhaps this explains why there was no law identified which makes provision for sign language interpretation in the justice system. This also explains why there are fewer accommodations to do with the language and content of someone's testimony. If people with disabilities are to be effectively accommodated in the justice system, there needs to be a more targeted approach to accommodations. There needs to be provisions in the law which are formulated specifically with people with disabilities in mind. It can be instructive on this point, to consider how other jurisdictions have handled this.

Israel enacted an Act dealing specifically with accommodations for persons with disabilities in the justice system. In view of the fact that people with intellectual, psychosocial and mental disabilities face unique challenges/barriers in the justice system, Israel enacted a law in 2005 which makes the provision of accommodations to both witnesses and accused persons in the justice system mandatory at the police investigation stage and at the trial stage.<sup>100</sup> The Act provides, amongst other things, for the making of the following accommodations:

1. Giving testimony in the accused person's absence, but in the presence of his lawyer.<sup>101</sup>
2. Allowing the witness to testify behind a partition.<sup>102</sup>
3. Testifying outside the witness stand.<sup>103</sup>
4. The removal of formal attire.<sup>104</sup>
5. Giving testimony in the judge's chambers.<sup>105</sup>
6. Allowing the witness to testify outside the "court hall".<sup>106</sup>

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<sup>100</sup> Investigation and Testimony Procedural Act (Accommodations for Persons with Mental or Intellectual Disabilities) 5776-2005 (ITPA)

<sup>101</sup> Section 22(1) ITPA.

<sup>102</sup> Section 22(2) ITPA.

<sup>103</sup> Section 22(3) ITPA.

<sup>104</sup> Section 22(4) ITPA.

<sup>105</sup> Section 22(5) ITPA.

<sup>106</sup> Section 22(6) ITPA.

7. Employing the use of Augmentative and Alternative Communication, which includes people's assistance, "computerized aids, communication panels, photos, symbols, letters or words."<sup>107</sup>

8. Allowing the witness to testify while accompanied.<sup>108</sup>

9. 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>109</sup>

The ITPA provides both for accommodations to the environment such as the removal of formal attire<sup>110</sup> and accommodations to do with the language and content of a person's testimony such as the use of Augmentative and Alternative Communication (AAC).<sup>111</sup> The approach taken in Israel was best summarized by Primor and Lerner who stated it thus:

"Every person with a disability, both defendant and witness, should be entitled to an array of accommodations, depending on his or her individual requirements. The decision as to which accommodations will be provided during a trial should be predetermined at the beginning of the trial. The court's decision to this effect should be based on expert witness testimony."<sup>112</sup>

An alternative approach would be to have a provision within the general law dealing with the administration of criminal justice such as the CPEA for example, which provides for accommodations for people with disabilities.

## **5.5 Conclusion**

There were a number of findings made from the legislative review. The first finding is that there are some accommodations which are provided for in Lesotho. The law provides for different accommodations including the holding of proceedings in camera, cross-examination through the court, the use of intermediaries, giving evidence via CCTV, modifying the venue, holding proceedings in an informal manner/setting and holding proceedings in a language one understands/providing interpretation. The second finding from the legislative review is that the accommodations are limited in terms of who may take advantage of them. The laws limit the people who may make use of the accommodations by age and nature of offence. The third finding is that the

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<sup>107</sup> Section 22(7) ITPA.

<sup>108</sup> Section 22(8) ITPA.

<sup>109</sup> Section 22(9) ITPA.

<sup>110</sup> Section 22(4) ITPA.

<sup>111</sup> Section 22(7) ITPA).

<sup>112</sup> Primor and Lerner (note 17 above) at 10.

accommodations are limited in terms of type. There are more accommodations to the environment and fewer accommodations to do with the language and content of someone's testimony. The fourth finding is that the accommodations were not made specifically with people with disabilities in mind. Nevertheless, the accommodations provided for in the law are an important starting point because they provide a basis upon which an argument may be made on the basis of equality to avail these accommodations to people with disabilities. Ultimately, however, it would be ideal to provide in law for accommodations which are specifically intended for use by people with disabilities.

## 6 Recommendations

In view of the research findings highlighted in this report, the following recommendations are made:

### **a) Improve knowledge amongst people working in the administration of justice about accommodations**

The research study shows that there is a significant knowledge gap amongst people working in the administration of justice regarding accommodations. Most of the respondents who participated in the study had handled at least one case involving a person with a disability and they all reported facing different kinds of challenges/barriers in handling these cases. Their responses to these challenges indicate a lack of knowledge on accommodating people with disabilities. Many of the responses were inappropriate such as lifting someone up the stairs, attempting to skip the evidence of the person with a disability or abandoning the case altogether. This shows a lack of knowledge about how to properly accommodate people with disabilities in the justice system. It is suggested that knowledge be imparted to personnel working in the administration of justice in two ways:

- Conducting training/capacity building workshops on providing accommodations in the justice system
- Developing manuals on accommodations which can be used as reference materials by justice personnel
- Include Disability Rights in the curriculum for law schools so that all lawyers receive this training whilst in law school.

### **b) Develop skills amongst lawyers and prosecutors on how to argue for accommodations**

The study shows that there are some accommodations which are provided for in the legislative framework in Lesotho. Many of the respondents who completed the questionnaires were not aware of these accommodations. They were also not aware of the Koali Moshoeshe decision which declares section 219 of the CPEA unconstitutional and states that people with intellectual and psychosocial disabilities may act as witnesses in court. There is therefore a need to raise awareness about these provisions which can

be used immediately and to develop skills amongst lawyers and prosecutors on how to argue for accommodations using the provisions in the law. This can be done by:

- Developing a manual
- Conducting a litigation workshop around this issue

### **c) Legislative reform on accommodations**

The research shows that there is need for legislative reform. Although there are some accommodations provided for in the law, these limit the people who can make use of these accommodations by age and type offence. The accommodations are also limited in that they do not provide for many accommodations to do with the language and content of someone's testimony. These limitations are also as a result of the fact that the existing accommodations were not formulated with people with disabilities in mind. There is therefore, a need to reform the legislation in Lesotho and develop legislation providing specifically for accommodations which may be used by people with disabilities. The accommodations should not be limited by age, offence type or any other limitation. Specifically, sign language interpretation should be expressly provided for since this is missing in the current legislation. As the laws are being developed to make provision for these accommodations, expertise should also be developed simultaneously amongst sign language interpreters and experts who can provide accommodations in the justice system.

Advocacy should also be conducted to include provisions on accommodations specifically designed for people with disabilities in the Bill on disability which is currently before Parliament in Lesotho.

### **d) Ensure that sign language interpreters are available at the police station and at court**

The research study indicated that most of the cases which were handled by the respondents involved people with hearing and speech impairments and in most of the cases, sign language interpreters were not readily available and had to be sought out from various places. Sign language should be recognised as an official language in Lesotho. Furthermore, there should be provision made in the law stating that sign language interpretation is a right which people with hearing and speech impairments must be



provided with as they interact with the justice system. A programme should also be put in place to ensure that sign language interpreters are readily available at the police stations and the courts.

**e) Conduct a study on the reasons for the prevalence of sexual offences in Lesotho**

The study reveals that the highest number of cases which were handled by the respondents were criminal cases and that people with disabilities encounter the criminal justice system mainly as complainants in sexual offence cases. There is a need to conduct further research into this to determine what the contributing factors for the prevalence of sexual offences against people with disabilities is. Such a study would then inform an appropriate intervention into the issue. There is currently an ongoing National Situation Analysis which provides a good opportunity to collect data on the prevalence of sexual violence cases.

**6.1 Conclusion**

These recommendations are intended to address some of the challenges to effective participation in the justice system which came to light in the research study. Some can be implemented in the short term whilst others can only be implemented in the long term. Ultimately however, each of these recommendations, if implemented, should help improve effective access to justice for people with disabilities in Lesotho.

## Sources Consulted

### International Human Rights Treaties

- United Nations Convention on the Rights of Persons with Disabilities (UNCRPD)
- International Covenant on Civil and Political Rights (ICCPR)

### Regional Human Rights Instruments

- Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa (African Disability Protocol)

### Domestic Legislation

- The Constitution of Lesotho 1993
- The Sexual Offences Act 2003
- The Criminal Procedure and Evidence Act No. 9 of 1981
- The Penal Code Act 2010
- Children's Protection and Welfare Act no. 7 of 2011
- The Mental Health Law No. 7 of 1964
- The Subordinate Court Rules 1996
- The High Court Rules No. 9 of 1980

### Foreign Legislation

#### Israel

- Investigation and Testimony Procedural Act (Accommodations for Persons with Mental or Intellectual Disabilities)

### Domestic Caselaw

- Koali Moshoeshoe and others v DPP and Others (Constitutional Case/14/2017).

### Journal Articles

- Stephanie Ortoleva, "Inaccessible Justice: Human Rights, Persons with Disabilities and the Legal System" (2010 – 2011) 17 ILSA J Int'l & Comp L 281.
- R White & D Msipa "Implementing article 13 of the Convention on the Rights of Persons with Disabilities in South Africa: Reasonable accommodations for persons with communication disabilities" (2018) 6 *African Disability Rights Yearbook* 99.
- T Menakar & 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.

## **Books**

- Jonathan Burchell, *Principles of Criminal Law* (Lansdowne: Juta & Company Limited, 2005)
- Peet M Bekker et al, *Criminal Procedure Handbook*, 6th edition, (Lansdowne: Juta & Company Ltd, 1994)
- Louise Ellison, *The Adversarial Process and the Vulnerable Witness* (Oxford: Oxford University Press, 2001)

## **NGO Reports/Publications**

- Sharon Primor and Na'ama Lerner, "The Right of Persons with Intellectual, Psychosocial and Communication Disabilities to Access to Justice: Accommodations in the Criminal Process" Bizchut, The Israel Human Rights Center for People with Disabilities

## Appendix 1: Questionnaire 1

### Study on legislative framework for the provision of accommodations for persons with disabilities in Lesotho: Questionnaire for courts and DPOs

#### Instructions

Please answer the following questions in as much detail as you can. If there is insufficient space on the form, please continue to answer the questions on an additional paper and attach any such papers to this questionnaire.

This questionnaire is part of a wider research project to find out what barriers/challenges persons with disabilities face in acting as witnesses in criminal courts in Lesotho with the aim of formulating ways of providing supports to enable their effective participation as witnesses. In order to do this, your knowledge and experience in this area would be most useful.

Thank you in advance for your cooperation!

<b>Name (Optional)</b>
<b>Which organization/department do you work for?</b>
<b>What position do you hold in that organization/department? (Optional)</b>
<b>Have you ever handled a case involving a person with a disability?</b>
<b>What disability did they have?</b>
<b>What are the brief facts of the case?</b>

**What challenges did you face in handling this case?**

**How did you handle these challenges?**

**What was the outcome of the case?**

**Are there any laws, procedures or rules of court in Lesotho which contain provisions which address the participation of persons with disabilities in the justice system?**

**Name these laws**

**What do the legal provisions say?**

**Are there any rules, procedures, legislation or practices in Lesotho which act as a barrier to persons with disabilities accessing justice on an equal basis with others? If so which ones are they and how do they act as a barrier?**

**Is there any legislation in Lesotho which provides for special measures for vulnerable witnesses in general? If so, what is the legislation and what types of measures does it provide for?**

**Can any of these measures be used for the benefit of persons with disabilities? Why? /why not?**

**Do you have any recommendations on how persons with disabilities might be supported to enable their effective participation as witnesses in court?**

The end!



## Appendix 2: Questionnaire 2

### Study on legislative framework for the provision of accommodations for persons with disabilities in Lesotho: Questionnaire for Government Departments

#### Instructions

Please answer the following questions in as much detail as you can. If there is insufficient space on the form, please continue to answer the questions on an additional paper and attach any such papers to this questionnaire.

The questionnaire is part of a wider research project to find out what barriers/challenges persons with disabilities face in acting as witnesses in criminal courts in Lesotho with the aim of formulating ways of providing supports to enable their effective participation as witnesses. In order to do this, your knowledge and experience in this area would be most useful.

Thank you in advance for your cooperation!

<b>Name (Optional)</b>
<b>Which Government Department do you work for?</b>
<b>What position do you hold in that Department? (Optional)</b>
<b>Are there any laws, procedures or rules of court in Lesotho which contain provisions which address the participation of persons with disabilities in the justice system?</b>
<b>Name these laws</b>

**What do the legal provisions say?**

**Are there any rules, procedures, legislation or practices in Lesotho which act as a barrier to persons with disabilities accessing justice on an equal basis with others?  
If so which ones are they and how do they act as a barrier?**

**Is there any legislation in Lesotho which provides for special measures for vulnerable witnesses in general? If so, what is the legislation and what types of measures does it provide for?**

**Can any of these measures be used for the benefit of persons with disabilities? Why? /why not?**

**Do you have any recommendations on how persons with disabilities might be supported to enable their effective participation as witnesses in court?**


*Thank you!*