

Gender-based violence against women with psychosocial and intellectual disabilities in South Africa: Promoting access to justice

**Committee on the Rights of Persons with Disabilities
Half-Day of General Discussion on Women and Girls with Disabilities
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centre for **DISABILITY**
LAW and POLICY



Cape Mental Health

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1. INTRODUCTION

This submission has been prepared in response to the invitation by the Committee on the Rights of Persons with Disabilities to submit information for purposes of its Half-Day of General Discussion on women and girls with disabilities, to be held on 17 April 2013.¹

The Convention on the Rights of Persons with Disabilities [CRPD] forms the normative basis of this submission. South Africa ratified the Convention in 2007 without any reservations; its initial country report currently awaits completion. An underlying aim throughout this document is therefore to consider factors and difficulties that may affect the fulfilment of South Africa's obligations under the CRPD.²

We set out the general legal framework relating to gender-based violence against women with intellectual disabilities and psychosocial³ disabilities in South Africa and also report on the preliminary findings of a research and advocacy project⁴ jointly undertaken by three partners: the **Centre for Disability Law and Policy** at the University of the Western Cape,⁵ the **Cape Mental Health Society**⁶ and the **Gender, Health and Justice Unit** at the University of Cape Town.⁷

¹ See **Statement on the half day of general discussion on women and girls with disabilities, adopted by the Committee on the Rights of Persons with Disabilities at its eighth session (17-28 September 2012)** UN Doc CRPD/C/8/3 dated 15 October 2012.

² See Art 35.5 of the CRPD.

³ The term 'psychosocial' is used here to refer to the interaction between the psychological and social/cultural components of this disability. The psychological component refers to ways of thinking, processing experiences and perceptions of the world. The social/cultural component refers to societal and cultural limits for behaviour that interact with the psychological aspect as well as the stigma that society attaches to label people as disabled - World Network of Users and Survivors of Psychiatry **Implementation Manual for the United Nations Convention on the Rights of Persons with Disabilities** (February 2008) at 9.

⁴ Supported (in part) by a grant from the Open Society Foundations.

⁵ The Centre for Disability Law and Policy (CDLP) was established at the Faculty of Law of the University of the Western Cape in 2009 with excellence in research, training and teaching in disability law as its main goal. The practical implementation of the CRPD in South Africa (and in the broader African context) forms the central focus of the CDLP's work.

⁶ The Cape Mental Health Society, established in 1913, is a non-profit organisation offering a range of community-based programmes and landmark advocacy initiatives for the development and rights of people with intellectual and psychiatric disabilities and for the promotion of mental health. See www.capementalhealth.co.za.

⁷ The Gender, Health and Justice Research Unit at the University of Cape Town's Faculty of Health Sciences conducts progressive research in the area of women's rights. The Unit is dedicated to improving access to health and justice services for survivors of gender-based violence. See www.ghjru.uct.ac.za.

2. GENERAL BACKGROUND

The problem of gender-based violence has in recent years received much attention in South Africa. However, violence committed against women with disabilities⁸ is one aspect that has been neglected almost entirely. As a result, little information is available on the nature and extent of violence against women with disabilities,⁹ apart from the results of one small-scale exploratory study published in 2005.¹⁰

Anecdotal evidence from several southern African countries indicates that disabled women experiencing gender-based violence have inadequate access to support services from the gender-based violence sector, including appropriate information resources setting out their rights, as well as poor access to the criminal justice system itself. Women reportedly experience both physical and communicational limitations¹¹ as well as procedural and evidentiary¹² limitations of access to justice.

The question of sexual violence against women with intellectual disabilities in South Africa was drawn into stark relief in April 2012 when the gang-rape of a 17-year old woman in Soweto with an intellectual disability made international media headlines.¹³ The perpetrators filmed the rape on a cell-phone and the recording was broadly distributed. Seven men, including a 13-year old boy, were subsequently arrested.¹⁴

⁸ This submission uses the term 'women with disabilities' and 'disabled women' interchangeably.

⁹ As far as could be established, police crime statistics on rape, domestic violence and other offences relating to gender-based violence are not at present disaggregated to indicate whether the victim (or perpetrator) was a person with a disability.

¹⁰ E Naidu et al (2005) *On the Margins: Violence against Women with Disabilities*. This study focused on women with physical and sensory disabilities and expressly excluded women with intellectual and psychosocial disabilities.

¹¹ Physical limitations include limited access to court buildings, police stations and other facilities. See S Ortoleva & H Lewis *Forgotten Sisters: A Report on Violence against Women with Disabilities: An Overview of its Nature, Scope, Causes and Consequences* (2012) at 59-67. Communicational limitations include a lack of sign language interpreters to take witness statements or interpret during testimony in court - Ortoleva & Lewis (above) Sec II at 6.

¹² Procedural limitations include investigative and judicial procedures that do not accommodate the needs of persons with disabilities - see International Disability Alliance CRPD Forum *Contribution to the Office of the UN HCHR Thematic Study to Enhance an Understanding of the CRPD* (September 2008) at para 2.a. Evidentiary limitations include rules that limit or exclude the capacity of persons with disability to give testimony; see Ortoleva & Lewis (above) Sec II at 3-5.

¹³ N Mabuse 'Shocking rape video goes viral in South Africa' *CNN* (19 April 2012) [<http://www.cnn.com/2012/04/18/world/africa/south-africa-rape-video/index.html?iref=allsearch>].

¹⁴ Anon 'Gang rape accused back in court' *news24.com* (25 April 2012) [<http://www.news24.com/SouthAfrica/News/Gang-rape-accused-back-in-court-20120425>].

One of the disturbing features of this case was that the complainant had apparently been sexually assaulted before, but the police allegedly did not take any action.¹⁵

This incident, horrific as it was, drew a great deal of attention to the manner in which the criminal justice system (here, specifically the police) responds to violence against persons with intellectual disabilities.¹⁶ At present, the matter is awaiting trial.

3. LEGAL AND POLICY FRAMEWORK

3.1 Constitutional provisions

The South African Constitution¹⁷ contains an extensive Bill of Rights, which guarantees everyone the right to equality,¹⁸ to dignity,¹⁹ and to be free from all forms of violence from either public or private sources.²⁰ Furthermore, section 7(2) of the Constitution requires the state to “respect, protect, promote and fulfil the rights in the Bill of Rights’.

These provisions, and specifically the constitutional protection of the right to be free from violence, have led to the development of a progressive body of South African case law dealing with the issue of state obligations to respond to gender-based violence.²¹ The emergence of this jurisprudence has also corresponded with significant advances in setting the standard for international and regional human rights law, including the refinement of the ‘due diligence’ standard.²²

¹⁵ Mabuse (above).

¹⁶ Anon ‘Another mentally disabled Soweto teen “failed by justice system”’ *City Press* (25 April 2012) [<http://www.citypress.co.za/news/another-mentally-disabled-soweto-teen-failed-by-justice-system-20120425/>]; K Maugham ‘Silence of the lambs’ *Daily Maverick* (23 April 2012) [<http://www.dailymaverick.co.za/opinionista/2012-04-23-silence-of-the-lambs/#.UVyAP1es2Sq>].

¹⁷ Constitution of the Republic of South Africa Act 108 of 1996

¹⁸ Sec 9.

¹⁹ Sec 10.

²⁰ Sec 12(1)(c).

²¹ See: *S v Baloyi* 2000 (1) SACR 81 (CC); *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC); 2001 (10) BCLR 995 (CC); *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA); *Van Eeden v Minister of Safety and Security* 2002 (4) AllSA 346 (SCA); *S v Ferreira* 2004 (2) SACR 454 (SCA); *Rail Commuters Action Group v Transnet* 2005 (2) SA 359 (CC); *S v Engelbrecht* 2005 (2) SACR 41 (WLD); *K v Minister of Safety and Security* 2005 (6) SA 419 (CC); *Minister of Safety and Security v Hamilton* (2) SA 216 (SCA); *Omar v Government of the RSA* 2006 (2) SA 289 (CC); *Masiya v Director of Public Prosecutions (Pretoria)* 2007 (5) SA 30 (CC).

²² See Y Ertürk *Report of the Special Rapporteur on Violence against Women, Its Causes and Consequences: The Due Diligence Standard as a Tool for the Elimination of Violence against Women* UN Doc E/CN/2006/61 (dated 20 January 2006).

3.2 Legislation

South African law addresses gender-based violence mainly through three laws, i.e. –

(a) Domestic Violence Act 116 of 1998

This Act sets out the procedure for a victim of domestic violence to apply for a protection order against the perpetrator to prevent future acts of violence. ‘Domestic violence’ is defined broadly to include: physical abuse, harassment, emotional, verbal and psychological abuse, intimidation, sexual abuse, economic abuse, among others.²³ In order to obtain a protection order, the complainant must show that she is in a domestic relationship with the perpetrator; this ‘domestic relationship’ is similarly defined broadly in the Act to include married and cohabiting partners,²⁴ dating, romantic and ‘perceived’ relationships of any duration, and situations where the complainant and the perpetrator share a residence (without necessarily being in a romantic or sexual relationship).²⁵

The Domestic Violence Act does not specifically address the question of disability, except where it provides that a person with a ‘material interest in the well-being of the complainant’ (footnote?) may apply for a protection order on her behalf. Such an application must usually be brought with the complainant’s written consent; however the Act includes exceptions to this general rule, such as where the complainant is a minor child or a person with a mental disability.²⁶

Furthermore, the broad definition of a ‘domestic relationship’ implies that a complainant with a disability living in a residential facility would be able to apply for a protection order against a perpetrator sharing that facility with her.

²³ See definition of ‘domestic violence’ in sec 1 of the Domestic Violence Act.

²⁴ This may include partners of the opposite or same sex. South African law recognises civil unions between same-sex partners with the same legal consequences as marriage.

²⁵ The term ‘residence’ is defined in sec 1 to include ‘institutions for children, the elderly and the disabled’.

²⁶ Sec 4(3)(b). This exception only affects the application for the protection order. Where the perpetrator opposes the issuing of a protection order, and the court conducts a hearing to decide whether the order should be issued, the disabled complainant will still have to testify in court, unless there are other witnesses available.

(b) The Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007

This Act (generally known as the ‘Sexual Offences Act’) aims to codify the common law relating to sexual offences and to enact a number of new offences dealing with sexual violence.

The offence of rape is defined as ‘unlawfully and intentionally committing an act of sexual penetration with another person without his or her consent’. The Act includes a list of circumstances where the complainant would not freely and voluntarily agree to an act of sexual penetration; these include where the complainant is incapable in law of appreciating the nature of the sexual act due to the fact that she is, at the time of the commission of the sexual act, ‘a person who is mentally disabled’.

This concept of a ‘person who is mentally disabled’ is accorded a specific meaning for the purposes of the Act,²⁷ i.e. a person ‘affected by any mental disability, including any disorder or disability of the mind’, to the extent that he or she, at the time of the alleged commission of the offence in question, was -

- (a) unable to appreciate the nature and reasonably foreseeable consequences of a sexual act;
- (b) able to appreciate the nature and reasonably foreseeable consequences of such an act, but unable to act in accordance with that appreciation;
- (c) unable to resist the commission of any such act; or
- (d) unable to communicate his or her unwillingness to participate in any such act.

These provisions should be read with sec 57(2), which states that a person who is mentally disabled (again, as defined in the Act) is incapable of consenting to a sexual act.

This definition of rape, and the analogous one of the offence of sexual assault,²⁸ should be read with chapter 4 of the Act, which sets out a number of sexual offences against persons who are ‘mentally disabled’, including sexual exploitation and exposure to or display of pornography.

The Sexual Offences Act further mandates the introduction of an extensive ‘policy framework’ to guide its implementation. The National Commissioner of Police must

²⁷ Sec 1.

²⁸ The offence of ‘sexual assault’ encapsulates instances of sexual violation where there is no ano-genital penetration, for example, where the perpetrator touches the victim’s breasts or forces his penis into her mouth. The SOA lists a broad range of sexual acts that would fall within the ambit of this offence (sec 1).

issue instructions on a range of issues, including the manner in which the report of a sexual offence is to be dealt with by members of the South African Police Service (SAPS).²⁹ Similarly, the National Director of Public Prosecutions must issue directives to prosecutors on issues relating to the prosecution of sexual offences.³⁰

The ***National Instruction on Sexual Offences*** provides commendably detailed information to police officials regarding victim assistance.³¹ It states, for example, that while taking statements from victims and their families, police officials must at all times act in a professional manner and be sensitive towards the emotions of victims and families.³² The SAPS member must be patient with the victim to allow him or her to explain what happened during the alleged commission of the offence without unnecessary interruptions. The police official may never be judgmental while interacting with the victim, irrespective of the circumstances surrounding the offence.

The National Instruction expressly deals with victims with 'mental disabilities'³³ in two instances. In respect of the medico-legal examination, it instructs investigating officers to obtain written consent for the examination in terms of sec 32 of the Mental Health Care Act³⁴ where victims of sexual violence are unable to consent 'due to mental illness'.

Secondly, under the section entitled 'Victim After-care',³⁵ the Instruction contains the following paragraph:

'If the investigating officer encounters difficulty when dealing with a mentally disabled person, the matter must be discussed with Legal Services as the procedure may necessitate an urgent application to the High Court.'

Unfortunately the Instruction does not provide any further details on what such a 'difficulty' may entail, or what the purpose of an urgent application to the High Court may be.³⁶

²⁹ Sec 66(1)(a)(i).

³⁰ Sec 66(2)(a).

³¹ National Instruction 3/2008 Sexual Offences (Government Notice No. 865 published in Government Gazette 31330 dated 15 August 2008) Section 5.

³² Sec 5 para 5.

³³ The Instruction apparently does not make a distinction between intellectual and psychosocial disabilities.

³⁴ Sec 32 of the Mental Health Care Act allows for the involuntary treatment of 'mental health users'. It is questionable whether this provision in its current form is in compliance with the CRPD.

³⁵ Section 19.

³⁶ South African common law makes provision for the appointment of a curator by the High Court where a person, due to psychosocial disability or other grounds, is found to be 'incapable of managing their own affairs' (the so-called *de lunatico inquirendo*). This may include the appointment of a curator *ad litem*, who may conduct civil litigation on behalf of the person concerned. It is not clear whether this is what is intended by the Instruction. It

The **National Director of Public Prosecution** has issued a set of directives as required in terms of the Sexual Offences Act. These directives firstly prescribe the general approach in sexual offence matters and notes that a primary function of all prosecutors is to reduce the trauma caused by the complainant's contact with the criminal justice system by following a victim-centered approach.³⁷

The Directive states that the physical, emotional and psychological well-being of the complainant must be given priority. All efforts should be made to reduce the secondary victimisation of complainants and other witnesses. In addition all complainants should be treated with compassion and respect. Prosecutors should call for the judicial process to be responsive to the needs of the complainant. Throughout the entire process, the views and concerns of the complainant should be considered. Prosecutors are reminded that they have 'a specific protective role towards these complainants'.

The Directive further instructs prosecutors that children and 'mentally disabled persons' are particularly vulnerable therefore, if they are the complainants in sexual offence cases, additional efforts should be made to ensure special safeguards and care.³⁸ However, the specific directives dealing with procedural measures (discussed below) do not give prosecutors any further guidelines on how these safeguards should be provided.

(c) Criminal Procedure Act 51 of 1977

The Criminal Procedure Act 51 of 1977 [CPA] contains a number of provisions which are of particular relevance in sexual violence matters.³⁹ These include a number of procedural measures aimed at provided witnesses with protection in respect of the criminal trial,⁴⁰ as well as evidential rules such as the (in)admissibility of evidence regarding the previous sexual history of the complainant.⁴¹

should be noted in this regard that the South African law of supported decision-making is currently undergoing review by the South African Law Reform Commission and its report, including a bill proposing law reform, is imminent.

³⁷ Directive 1 para 3.

³⁸ Para 4.

³⁹ The CPA is an Act of general application and not limited to sexual violence cases.

⁴⁰ The CPA makes provision for a number of protective measures, including trial *in camera* (sec 153); a prohibition on publishing the identity of the complainant (sec 154); giving evidence through closed circuit television system rather than in the courtroom in the presence of the accused (sec 158); giving evidence through an intermediary (sec 170A). These measures are not implemented 'automatically' in sexual offence cases; the prosecution must bring an application, which will be considered by the court based on prescribed criteria.

⁴¹ Sec 227 of the CPA.

South African criminal law does not as a matter of course exclude the testimony of a witness with an intellectual disability or psychosocial disability. As a general rule, all witnesses are required to give evidence under oath.⁴² However, section 164 of the CPA provides that a person ‘who is found not to understand the nature and import of the oath or the affirmation’ may be allowed to give evidence without taking the oath or making the affirmation, provided that such a person must instead be ‘admonished’ by the presiding officer to speak the truth.

In practice, this often implies that when the competence of a testifying witness is in doubt (for example, due to the fact that the witness is a young child or a person with an intellectual disability), the presiding officer may allow the testimony to go ahead (after having duly warned the witness according to section 164). The magistrate or judge will then make the ultimate decision about competence only after having heard the witness’s evidence as a whole and evaluate their response to questions from the prosecution and cross-examination by the defence. This approach is evidently fairer than one where there is a strict ‘threshold’ test of competence applied as a precondition before a witness may commence giving evidence.

Despite this apparently progressive approach, sec 194 of the CPA may still exclude evidence of a person with an intellectual or psychosocial disability ‘upfront’:

‘No person appearing or proved to be afflicted with mental illness or to be labouring under any imbecility of mind due to intoxication or drugs or the like, and who is thereby deprived of the proper use of his reason, shall be competent to give evidence while so afflicted or disabled.’

Aside from the fact that the language used (‘imbecility of mind’) is not acceptable, we argue that the provision should be amended to remove any reference to disability. The notion of ‘proper use of his [sic] reason’ is a problematic one in the context of Article 12 (read with Article 13) of the CRPD. While one cannot disagree with the principle that persons who are under the influence of alcohol or other substances should be found incompetent to give evidence, the question of competence should not be decided on the basis of disability.

⁴² Sec 162 of the CPA. Witnesses who object to taking the oath, for example, for religious reasons, must instead make an affirmation in terms of section 163.

3.3 Summary

The South African Constitution and the case law that has developed around the duties of the state to respond to gender-based violence lay the foundation for a strong legislative and policy framework to enable the criminal justice system (and society more broadly) to respond to violence against women with disabilities. However, as pointed out above, current legislation and accompanying directives to police and prosecutors fall short of firstly 'mainstreaming' disability in their provisions (as required in the CRPD) and secondly to provide for the specialised accommodations that may be required to improve access to justice. We have also pointed out instances where existing provisions discriminate on the basis of disability or otherwise fail to comply with the CRPD.

We therefore recommend that specific law and policy reform should be undertaken to address the areas outlined above.⁴³

4. OVERVIEW OF RESEARCH PROJECT

4.1 Introduction

Against this background, the Centre for Disability Law and Policy, in partnership with the Cape Mental Health Society and the Gender, Health and Justice Research Unit initiated a research project in 2012 aimed at -

- Gathering knowledge on the barriers that make the South African criminal justice system less accessible to women with disabilities experiencing gender-based violence, with specific reference to women with intellectual disabilities and with psychosocial disabilities;
- Gathering knowledge on examples of existing 'good practices' in addressing these barriers; and
- Formulating recommendations to improve access to justice for disabled women experiencing gender-based violence in South Africa;

The overall goal of the project is to promote the realisation of the rights of women with disabilities in South Africa to access justice, gender equality and freedom from

⁴³ See Art 4(1)(b) of the CRPD.

violence as guaranteed in the CRPD, international human rights law⁴⁴ and the South African Constitution.

This project opted to emphasise the position of *women with intellectual disabilities and psychosocial disabilities*. In our experience, these groups are often overlooked in both research and advocacy activities but more importantly, they bear the brunt of unspoken disability-based prejudice on the part of police and court officials, including the judiciary.

4.2 Research activities

Because of its exploratory nature, the research project focused on three provinces, i.e. the Western Cape, Gauteng, and Kwazulu-Natal.⁴⁵ In the Western Cape and Gauteng we focused on urban areas, whereas KwaZulu-Natal included rural areas as well.

Researchers conducted approximately 57 interviews with representatives from organisations that directly provide services to women with disabilities as well as those that provide “indirect” services (such as organisations for women who have experienced gender-based violence, whose clients may occasionally include women with disabilities). We also held focus group discussions with women with psychosocial disabilities to examine their perceptions of the barriers that may be experienced when victims approach the police and courts.

The focus of the interviews was to gather information about the barriers encountered by women with disabilities who have experienced gender-based violence when they approach the criminal justice system, to discover how service providers and other stakeholders have responded to these barriers and to compile their recommendations for addressing these obstacles in future.

In this respect, one of the key points of comparison between Western Cape and the other research sites has been the *Sexual Assault Victim Empowerment* (known as ‘SAVE’) programme established by the Cape Mental Health Society to provide

⁴⁴ This body of international law includes the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and in the African context the *Protocol to the African Charter on the Rights of Women in Africa* - see in this regard Ortoleva & Lewis (above) at 47-49. In southern Africa, the *Southern African Development Community [SADC] Protocol on Gender and Development* (adopted at the SADC Summit of Heads of Government in Johannesburg, South Africa, on 17 August 2008) is noteworthy. Part Six of the SADC Protocol (Articles 20 to 25) deals in depth with gender-based violence and State obligations to address such violence. In contrast to the strong provisions on gender-based violence, Article 9, which addresses disability, is fairly weak.

⁴⁵ South Africa is divided into nine provinces, each with its own premier, legislature and executive council. Please see map in Annexure A.

assessment, support and court preparation services to persons with intellectual disabilities who have been the victims of sexual assault.

The SAVE programme, which has been in operation since the early 1990s, has been evaluated and shown to be successful in facilitating access to justice for persons with intellectual disabilities.⁴⁶ This is achieved through –

- the administering of psychometric tests and evaluation of the victim's competence to act as witness;⁴⁷
- evaluation of the victim's capacity to consent to sexual intercourse;⁴⁸
- the compilation of a court report;⁴⁹ and
- the provision of expert evidence in court.⁵⁰

In addition, the programme trains members of the South African Police Service and public prosecutors to develop the skills they need to conduct interviews with complainants with intellectual disabilities with greater sensitivity to and understanding of their special needs.

It should be noted that this programme, which is by its nature 'cost-intensive' in terms of requiring specialised staff such as social workers and psychologists is currently administered and funded (through fund-raising initiatives) by the Cape Mental Health Society.

Given the demonstrable success of this programme, this research project accordingly aims to investigate the feasibility of setting up the SAVE programme in additional sites beyond the Western Cape province, where it currently operates.

⁴⁶ See e.g. BJ Dickman et al 'Complainants with learning disabilities in sexual abuse cases: a 10-year review of a psycho-legal project in Cape Town, South Africa' *British Journal of Learning Disabilities* 138 (2005); B Dickman et al "How could she possibly manage in court?" An intervention programme assisting complainants with intellectual disability in sexual assault cases in the Western Cape' in B Watermeyer et al (eds) *Disability and Social Change* (2006).

⁴⁷ See discussion above of sec 164 of the CPA.

⁴⁸ See discussion above of the definition of 'person who is mentally disabled' in the SOA. Expert evidence (for example, from a psychologist who conducted this evaluation of the complainant's capacity) is important for the State to show that the complainant resorts in the ambit of the definition, especially where this may be contested by the defence.

⁴⁹ This report is compiled to inform the prosecutor of the expert's evaluation and may also under certain circumstances be used as evidence in court.

⁵⁰ This expert evidence may cover a range of areas, including the complainant's competence to testify; her capacity to consent to sexual intercourse; the likely emotional consequences if she had to testify in the presence of the accused (this is required where the State brings an application for one of the procedural measures such as closed-circuit TV to be utilised;) and the emotional and other effects of the violence on the complainant.

4.3 Selected findings

(a) Under-reporting of cases

Researchers found it noteworthy that in all the provinces, even in the Western Cape, the number of cases presented to the service-providing organisations participating in the research – other than Cape Mental Health Society - was very low. This was an unexpected finding, bearing in mind our projection that women with disabilities are at higher risk of gender-based violence.⁵¹ (While we expected the number of cases reported to *the police* to be relatively low, our hypothesis was that there would be a larger number of cases seen at the service-providing organisations.)

There appears to be numerous reasons why so few cases of violence against women with intellectual and psychosocial disabilities are reported to organisations that deal with disabilities, or gender-based violence. These reasons tend to be related to self-stigmatisation, where the victim blames herself or doubts her worth; communicational difficulties in the disclosure of the abuse; and victims being reliant on care, and hence requiring the cooperation and assistance of other people to access these services.

(b) Effect of Court Preparation Programmes⁵²

One of the significant differences we found between the three provinces is the way in which service providers dealt with cases of gender-based violence against women with intellectual and psychosocial disabilities. In the Western Cape we found that the SAVE programme plays a crucial role in court preparation and assessments, as could be expected; however, at the same time, this programme and other support services provided by the Cape Mental Health Society form a ‘safety net’ of referrals (by police officers, prosecutors and other service providers). It is furthermore our assessment that the existence of this programme serves to raise awareness among criminal justice

⁵¹ See eg Ortoleva & Lewis (above) at 38; K Nordström ‘Forgotten again – violence against women’ *Human Rights Africa* [Quarterly Newsletter of the Secretariat of the African Decade of Persons with Disabilities] Number 1, 2007; Human Rights Watch *As if We Weren’t Human: Discrimination and Violence against Women with Disabilities in Northern Uganda* (2010) at 34-35. See however the interesting findings from a pilot study conducted in Malawi: MH Kvam & SH Braathen *Violence and Abuse against Women with Disabilities in Malawi* (2006) at 48-49.

⁵² The SAVE programme includes much more than court preparation (for example, counselling for the victim and her family after the initial incident, support during the criminal trial and follow-up counselling after the trial if required) as well as training and capacity-building components with criminal justice personnel; we use the term ‘court preparation programme’ here in the interest of brevity to denote this full range of services.

personnel that there may be good prospects of successful prosecution in cases of gender-based violence against women with intellectual disabilities (whereas these cases may possibly be withdrawn at an early stage at other sites).

We have noted that organisations in the gender-based violence sector in the Western Cape are aware of and exposed to disability issues, and also benefit from a strong and established referral network across gender-based violence and disability service providers, and share expertise and information where it is relevant. It may be an overly simplistic analysis to ascribe the differences that we have observed solely to the operation of the SAVE programme in the Western Cape: additional factors to be considered are the general perception that certain services operate more smoothly in the Western Cape province than in other provinces and the presence of a visible and energetic ‘umbrella body’ of disability organisations.⁵³ It is nevertheless clear that the services provided by the Cape Mental Health Society, specifically the SAVE programme, are central to the different outcomes observed in the Western Cape.

In KwaZulu-Natal one organisation has a programme similar to SAVE, although some of the formalised features were absent.⁵⁴ Similar to the Cape Town programme, the benefits of this programme are apparent. The organisation has developed a relationship with specialist police investigators and court prosecutors at a sexual offences court and this relationship appears to work well. For example, the organisation works closely with the court and receives regular referrals from police and prosecutors. It assists the police in taking client statements and also provides services to the client following the initial incident or in conclusion of the court case.

However, in the rest of KwaZulu-Natal and in Gauteng, the position is disconcerting, with researchers having been unable to identify dedicated programmes providing specialised services to adult women similar to the SAVE programme. Attempts had been made in Gauteng to accommodate women with intellectual disabilities in services provided for children, but without dedicated fund-raising and attention to programme planning, these initiatives have recently disintegrated, given that ‘children’s services’ are already inadequate to accommodate children themselves.

(c) Understanding of intellectual and psychosocial disabilities

⁵³ The Western Cape Network on Disability.

⁵⁴ For example, the organisation does not have the same access to trained psychologists to do assessments of complainants with intellectual disabilities as its Western Cape counterpart. This in turn may have an impact on the outcome of court cases: see discussion above of the central role played by such assessment in the preparation and presentation of the State’s case.

It is our observation that within service provision specifically, misconceptions and a poor understanding of intellectual and psychosocial disabilities impact on the levels of support and assistance that women with these disabilities receive when seeking assistance, including for gender-based violence. Many practitioners, even within the disability sector, did not demonstrate a clear understanding of psychosocial disability and/or intellectual disability, and many struggled to differentiate one from the other. Where service providers were able to indicate the difference between the two kinds of disability, their explanations were often very simplistic. Popular misconceptions relating to persons with intellectual disabilities (who are largely viewed as childlike and helpless), and persons with psychosocial disabilities, (who are often seen as antisocial and destructive) resonated throughout the responses of research participants. It was not difficult to discern how these beliefs may impact on service provision.

(d) Access to justice

While the Western Cape (or more accurately, the Cape Town metropolitan area) is a marked exception, research participants generally reported that firstly, they knew of very few cases that were reported to the police; secondly, they were aware of even fewer cases where a prosecution (whether successful or not) had followed.

The reasons for these cases failing even at the first hurdle (i.e. where cases are reported to the police) have been listed, amongst others, as difficulties in communicating in order to give a statement, insensitive treatment by police and perceptions on the part of the police that especially women with intellectual disabilities would not make credible witnesses. Ironically, there appears to be a strong perception even among service providers that without ‘DNA evidence’ linking a suspect to the alleged crime, there can never be a conviction – which is of course not necessarily the case. However, this appears to be a myth that is strongly perpetuated by police officials.

We were further concerned by the observations from women with psychosocial disabilities, conveyed in the focus group discussions, that they would not go to the police if they were the victims of crime. This distrust was based on their previous experiences of the police as unsympathetic and insensitive; in most cases this related to incidents where the police had engaged with them as a result of their disability (for example, where family members had requested the police to intervene due to perceived inappropriate behaviour on the part of the person with a psychosocial disability). This was borne out by individual interviewees who recounted several instances where members of the SAPS had responded inappropriately to ‘disability-related’ incidents.

When it comes to court proceedings, it was interesting to note that service providers have divergent opinions about the competence of women with intellectual disabilities to give evidence. For instance, certain research participants expressed confidence that their clients would consistently recount the same version of events, whereas others emphasised the fact that clients change their versions over time. (Admittedly, not all respondents speaking about this aspect were well-versed in court preparation or worked directly with clients testifying in court.)

A prevailing theme, both in terms of the police investigation and the court process, is the importance of tenacity in 'following up' and pursuing the case: more than one research participant explained that if complainants with intellectual or psychosocial disabilities or those supporting them did not persist in tracking their cases through the system, 'nothing would happen'.

4.4 Recommendations

Researchers gained the impression that in many instances, either women with disabilities themselves or their families had made the decision that they would not in any way benefit from approaching the criminal justice system or that the daily demands of 'getting on with life' needed to receive precedence. It may also be that women with disabilities consider social or economic empowerment (such as an income-generating activity), in order to be able to leave an abusive situation, to be more of a priority than approaching the justice system.

This may be one of the most significant findings of the study: that women with disabilities, and particularly women with intellectual and psychosocial disabilities, in many instances appear to be so far removed from the legal system (literally and figuratively) that the question of access to justice is not seen as a priority.

As a precondition for promoting the right to access to justice, it will be important to explore, with women with disabilities, how they conceptualise the benefits and disadvantages of approaching the legal system to pursue their right to access to justice; and which strategies they currently regard as helpful when they experience gender-based violence.

These questions will also have to be explored with service-providing organisations, given that they may play an important role in changing perceptions about the legal system and facilitating (or hindering) access to justice. Our findings further indicate that there is a need for capacity-building with service-providing organisations in the

disability sector about the criminal justice process and the requirements for a successful prosecution.

It has been argued that the broad social objectives of the justice process (such as deterrence) are compromised when persons with disabilities are unable to effectively participate in the criminal process.⁵⁵ While the decision whether or not to approach the legal system ultimately remains a personal one, there are accordingly broader societal imperatives in ensuring that when women with disabilities who have experienced gender-based violence do turn to the legal system to enforce and protect their rights, they are assured of an appropriate response.

We have also formulated the following specific recommendations:⁵⁶

Focusing on the state -

- (a) Disability should be ***comprehensively*** and ***meaningfully*** integrated into all aspects of the broad government response to gender-based violence.⁵⁷ As required by Article 4(3) of the CRPD, it is essential that women with disabilities and their representative organisations should effectively participate in this ‘mainstreaming’ process.
- (b) The possibilities of expanding the SAVE programme to other provinces (and to persons with psychosocial disabilities) should be considered as a matter of urgency. The Cape Mental Health Society has developed protocols, training manuals and other material to facilitate such expansion. Importantly, this assessment of expansion should be seen against the backdrop of the commitments undertaken by the South African government upon its ratification of the CRPD, most notably Articles 5, 6 and 13.
- (c) Research participants almost unanimously called for the training of personnel across the criminal justice system, with a specific focus on police, prosecutors and magistrates. The promotion of training ‘for those working in the field of administration of justice’ is also an obligation resting on the state in terms of Article 13.2 of the CRPD. We recommend that such training should include

⁵⁵ S Primor & N Lerner ***The Right of Persons with Intellectual, Psychosocial and Communication Disabilities to Access to Justice: Accommodations in the Criminal Process*** at 6.

⁵⁶ These recommendations should be read with those set out in the report on violence against women with disabilities by Ms Rashida Manjoo, Special Rapporteur on Violence against Women, its Causes and Consequences (UN Doc A/67/277 dated 3 August 2012) at para 98.

⁵⁷ See Art 4(1)(c) of the CRPD.

disability-specific training as well as training on the relevant provisions of the 2007 Sexual Offences Act.

- (d) Research participants emphasised the lack of shelters and other places of safety accessible to women with disabilities generally and women with intellectual and psychosocial disabilities more specifically. It is now well understood internationally that a lack of access to appropriate housing option leave woman at greater risk of further gender-based violence; international human rights law is also increasingly recognising obligations on the state to provide access to housing as an aspect of its duties to respond to gender-based violence.⁵⁸ In this regard, the lack of appropriate and accessible shelter facilities is a matter of concern.
- (e) Efforts should be made to develop the current system of crime statistics to disaggregate records to indicate gender and disability, where appropriate.⁵⁹

Focusing on civil society –

- a) There appears to be little inter-action between disability organisations and gender-based violence organisations. It is important to improve this interface, both for purposes of sharing resources and to improve referral mechanisms.
- b) Both gender-based violence and disability organisations have noted that they would benefit from training on the Sexual Offences Act and on service provision to people with disabilities. This was confirmed by the observations of researchers.

5. CONCLUSION

The research team is currently in the process of compiling its final research report, which will be broadly disseminated, with copies also being made available to this Committee.

As a concluding consideration, it should be borne in mind that this study excludes the right to access to justice of women with disabilities *other* than intellectual and

⁵⁸ See M Kothari ***Report by the Special Rapporteur on Adequate Housing: Women and Adequate Housing*** UN Doc E/CN.4/2006/118 (dated 27 February 2006); H Combrinck ***Living in Security, Peace and Dignity: The Right to have Access to Housing of Women who are Victims of Gender-Based Violence*** (2009) 1-2; 30-31.

⁵⁹ See Art 31 of the CRPD.

psychosocial disabilities;⁶⁰ it also excludes *men* with disabilities who have experienced violence, although our findings suggest that the issue of sexual violence against men and boys with disabilities should be examined more closely. An additional aspect that we have identified for further investigation is the pernicious intersection between gender-based violence, HIV and AIDS and disability in South Africa.

Much work therefore remains to be done in order to gain a fuller understanding of violence, disability and access to justice in South Africa and to realise the right of *all* women to live free from gender-based violence.

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⁶⁰ In our experience, there are still gaps in respect of the environmental accessibility of police stations and court buildings. In a case brought by Esthe Muller (a practicing attorney and wheelchair user) against the Departments of Justice and Public Works in 2004 in the Equality Court in terms of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, the departments gave an undertaking to progressively make all courts nationally accessible over a period of five years. In terms of this undertaking, all court buildings should therefore in principle by now be accessible. However, this is not yet the case. See also Ortoleva & Lewis (above) Sec II at 2.

ANNEXURE A

PROVINCES OF SOUTH AFRICA

