Ref: MM/MB

20 May 2015

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Special Rapporteur on the Rights of Persons with Disabilities

 Geneva

**BY EMAIL**: to sr.disability@ohchr.org

**RE: THE RIGHT OF PERSONS WITH DISABILITIES TO SOCIAL PROTECTION**

1. We refer to your invitation to provide input the questionnaire attached on the right of persons with disabilities to social protection. We hereby submit our inputs on the draft general comment and trust that they will be favourably received. We are grateful for, and welcome this opportunity to contribute to the General Comment.

**INTRODUCTION TO THE LEGAL RESOURCES CENTRE (“LRC”)**

1. The LRC is a national public interest, non-profit law clinic in South Africa that was founded in 1979. The LRC has since its inception shown a commitment to work towards a fully democratic society underpinned by respect for the rule of law and constitutional democracy. The LRC uses the law as an instrument of justice to facilitate the vulnerable and marginalised to assert and develop their rights; promote gender and racial equality and oppose all forms of unfair discrimination; as well as to contribute to the development of human rights jurisprudence and to the social and economic transformation of society.
2. The LRC, through its Equality and Non-Discrimination project (“the project”), focuses on empowering marginalised and vulnerable groups by utilising creative and effective solutions to achieve its aims. These include using a range of strategies including impact litigation, law reform initiatives, participation in development processes, education and networking within and outside of South Africa. Within the arena of equality and non-discrimination, the LRC has viewed the rights of vulnerable and marginalised persons including disabled persons, sexual minorities, women, children, refugees and sex workers as being integral to the pursuit of social justice. It is in this context that we seek to ensure that the existing legal apparatus available and in development are appropriately cognisant of the rights and realities of vulnerable and marginalised groups. We believe that this will ensure that their experiences of discrimination and prejudice are reduced and eventually diminished. Furthermore, we believe that the national, regional and international laws are collaboratively an instrumental tool in securing substantive equality for vulnerable individuals. Through strategic litigation, the LRC has played a pivotal role instrumental in developing a strong jurisprudence for equality and non-discrimination in South Africa.

**RESPONSES TO THE QUESTIONNAIRE ON THE RIGHT OF PERSONS WITH DISABILITIES TO SOCIAL PROTECTION**

**Question 1:**

*Please provide information in relation to the existence, in your country or context of work, of legislation and policies concerning mainstream and/or specific social protection programmes with regard to persons with disabilities, including:*

* *Institutional framework in charge of its implementation;*
* *Legislative, administrative, judiciary and/or other measures aiming to ensure access of persons with disabilities to mainstream social protection programmes (e.g., poverty reduction, social insurance, health care, public work, housing);*
* *Creation of disability-specific programmes (such as disability pensions, mobility grants or others);*
* *Fiscal adjustments or other similar measures*
1. In South Africa, there is no Cabinet Ministry that is singularly and exclusively responsible for people with disabilities. In 2009, the South African government established the Department of Women, Children and Persons with Disabilities. This Department was “*established to emphasize the need for equity and access to development opportunities for vulnerable groups in South African society.*”[[1]](#footnote-1) In 2014, following national elections, the focus of this Department was changed and no explanation was given for the re-assignment of the portfolios. In terms of the Cabinet announcement, “*The functions related to support for people with disabilities and children, [were to] be transferred to the Department of Social Development*.”[[2]](#footnote-2) Indeed, policies relating to social assistance with regard to persons with disabilities are regulated by the Department of Social Development. Linked to this, is the role of the Department of Health in the process of assessing, diagnosing and treating disabilities. Also, the Department of Labour is mandated to coordinate and monitor commitments to inclusive employment practices. These three Departments have separate Cabinet ministers exercising executive authority. Significantly, their portfolios are dedicated to the mainstream subject matter: for example, the Minister for Health is entrusted with all government work that impact on health matters. This approach means that disability does not receive a primary focus. In terms of this model, disability issues are therefore fragmented.
2. The fragmented nature of the services and policies available to disabled persons was also noted by the South African government in their Baseline Country Report to the UNCRPD.[[3]](#footnote-3) The report specifically acknowledges that “*weaknesses in the governance machinery of the State, and capacity constraints and lack of co-ordination within the disability sector, have detracted from a systematic approach to the implementation of the UNCRPD. The continued vulnerability of persons with disabilities, particularly children with disabilities as well as persons with psychosocial disabilities, residing in rural villages, requires more vigorous and better co-ordinated and targeted intervention*.”
3. In South Africa, there is no national legislation which details the protections available to persons with disabilities. Rather, there are various policies which detail government’s guidelines concerning the rights of persons with disabilities, including social protection. Notably, the Integrated National Disability Strategy (1997) that attempts to address the multidimensional inequalities that persons with disabilities suffer and is aimed at mainstreaming disability and stop marginalization on the ground of disability, and the White Paper on Social Welfare (1997) that highlights the needs of both government and non-governmental organizations to create equal opportunities for persons with disabilities and develop relevant programs to enhance their independence and integration into the mainstream of society.
4. South Africa recognizes that the intersection of disability and poverty has had and continues to have serious impact on disabled persons. The existing relation between high incidences of disability and poverty are highlighted in the National Development Plan (2012). People with disabilities face several discriminatory barriers and cumulative disadvantages that contribute to their marginalization from social and economic activities. There is a higher proportion of disabled people amongst the very poor and an increase of families living at poverty level as a result of disability. They are therefore recognized as a more vulnerable group at greater risk and disability as a cross-cutting issue that needs to be integrated and mainstreamed across social development practices and into existing departmental policies, strategies, and programs.
5. More recently the Department of Social Development published a White Paper on the mainstreaming of the right of persons with disabilities to equality and dignity.[[4]](#footnote-4) Once approved the Department of Social Development envisages that this policy “*will update the White Paper on an Integrated National Disability Strategy (INDS), and will integrate the obligations contained in the UN Convention on the Rights of Persons with Disabilities (UNCRPD) as well as the provisions of the Continental Plan of Action for the African Decade of Persons with Disabilities with South African legislation and policy frameworks and the National Development Plan 2030*.”
6. The Department of Social Development has also classified this draft policy as “*the first cross-cutting step towards domesticating the UNCRPD and will inform a major legislative and policy review across all government departments and municipalities, as well as the development of transversal disability rights legislation*.” What this policy will achieve remains to be seen as it is in the primary stages of development.
7. Section 27 of the Constitution of South Africa (1996) recognizes social security as a basic right, stating that *“everyone has the right … to social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.”* Section 27 (2) specifies that the state must take reasonable measures, within its available resources, to achieve the progressive realization of the right of access to social security and social assistance. Section 9 (3) recognizes disability as one of the protected categories in the entrenchment of the right to equality. Flowing from this entrenchment in a supreme Constitution, South Africa has laws which provide separately for disability rights protection for example, the Employment Equity Act 55 of 1998, the Promotion of Equality and the Prevention of Unfair Discrimination Act 4 of 2000.
8. The national Department of Social Development’s Policy on Disability is meant to guide and inform the mainstreaming of disability in the development and implementation of all policies, strategies and the integrated service delivery program of the Department throughout all the country. According to the Policy, disability must be mainstreamed into the following three programs of the Department of Social Development: the Social Security Program (with the provision of financial grants to the poor and vulnerable, such as people with disabilities), the Social Welfare Program (through the implementation of activities in partnership with other role players for the provision of developmental social welfare services that support people with disabilities in a manner that reduces poverty and vulnerability) and the Community Development Program (though the implementation of activities that enhance and increase the capacity of communities to respond to their own needs).
9. Social protection in South Africa focuses on providing cash transfers to vulnerable groups to ensure equal opportunities and the respect of human dignity. People with disabilities are most likely to be unemployed which means that grants are often the main source of income in their households. The National Development Plan (2012) recognises the need for social protection measures to “*support those most in need, including children, people with disabilities and the elderly and promote active participation in the economy and society for those who are unemployed and under-employed through labour market activation measures, employment services, income support programmes and other services to sustain and improve quality of life*”.

**Social assistance**

1. Persons with disabilities qualify for a disability grant. In terms of the Social Assistance Act 13 of 2004, a person is eligible for a disability grant if because of his or her disability is *“unable to enter the open labour market or to support himself or herself in light of his or her skills and ability to work”.* The person must be unable to attend work for at least six months. The grant will become permanent if the disability continues for more than a year and can rise to a maximum of R1 410 per month. The grant is administered by the South African Social Security Agency.
2. In terms of the Social Assistance Act 13 of 2004, biological or foster parents and primary caregivers who look after children (under the age of 18) who are disabled and who require and receive permanent care or support services are eligible for a Care Dependency Grant. The Care Dependency Grant amounts to R1 260 per month.
3. In terms of the same Act people with disabilities qualify for other social assistance grants such as child support grants, grants-in-aid (persons who require regular attendance by other persons), foster care grants, war veterans grants, social relief of distress grants and grant for older persons.
4. The Compensation for Occupational Injuries and Diseases Act of 1993 regulates the rights of workers with occupation related injuries or diseases to compensation. This Act provides for compensation for occupational related injuries from temporary disability up to varying degrees of permanent disability.
5. According to the National Development Plan (2012), 6% of the working-age population receives disability grants. However, it highlights that exclusion errors affect mainly the poorest, and more particularly persons with disabilities living on farms, remote rural areas and poorly accessible informal settlements. It is therefore essential to ensure access to social protection to all - persons with disabilities that qualify.

**Adequate housing**

1. Persons with disabilities with an income inferior to R3 500 and satisfying other relevant criteria indicated in the National Housing Code are eligible for government subsidies. The subsidies aim to help persons with disabilities with specific needs related to the impairment and the barriers experienced. It is recognized that inequalities between rural and urban areas persist and that persons with disabilities living in informal settlements face numerous disadvantages as they do not have access to other basic services, including water and sanitation. According to the initial country report on the implementation on the Convention on the Rights of Persons with Disabilities, a total of 25 361 individuals with disabilities applied and qualified for the housing subsidy between 2008 and 2012. Nevertheless, only 203 beneficiaries obtained the subsidy in 2008 – 2009 and 299 in 2011 – 2012.

**Health care**

1. The right to every individual to access health care systems is enshrined in Section 27 of the Constitution. All health services at the primary level of care are free. Persons with disabilities who meet nationally determined criteria for eligibility based on household income, are able to access free health care and rehabilitation services at a hospital level in the public sector. Government funded hospitals provide assistive devices for persons with disabilities.
2. The National Health Act 61 of 2003, the Mental Health Care Act 17 of 2002, the Sterilisation Act 44 of 1998 and the Medical Schemes Act 131 of 1998 and related policies and protocols regulate health care in South Africa. Subsection 2 (c )(iv) of the National Health Act identifies persons with disabilities as a specific group whose constitutional right of access to health care must be protected, respected and fulfilled. Moreover, subsection 70(1) requires that research give priority to the needs of persons with disabilities and subsection 73 (2)(a) that the latter contribute to the prevention of disability.

1. Section 24(2)(e) of the Medical Schemes Act which provides for the registration, control and protection of medical schemes, rules out unfair discrimination on the grounds of disability.

**Inclusive employment practices**

1. Inclusive employment practices are coordinated by the Department of Labour and stipulated in a number of legislation and policies, including the Employment Equity Act 55 of 1998, the Broad-Based Black Economic Empowerment Act 53 of 2003, the Labour Relations Act 66 of 1995 (LRA), the National Development Plan (2012) and the Public Service Amendment Act 13 of 1996. The legislation aims for the attainment of a 2% target for persons with disabilities in the public service and stipulates that employers must develop and submit annual employment equity plans and reports reflecting self-determined targets for employment of persons with disabilities. However, it is recognized that a divide exists between the terms of the policies and its implementation due to the lack of access to the built environment and public transport, the interrelatedness between poverty and disability, as well as persistent attitudinal and communication barriers. Indicators measuring access to employment by persons with disabilities confirm this lack of progress. Indeed, the initial country report on the implementation on the Convention on the Rights of Persons with Disabilities highlights that in the public sector in March 2012 only 4 830 persons with disabilities out of a total workforce of 1 316 564 were employed. This amounts to 0.3% of the total workforce, a ratio that is far from the 2% mandated by the legislation. The lack of reasonable accommodation and misconceptions and stigma about the capabilities of persons with disabilities to carry out certain jobs remain key obstacles to employment opportunities.
2. Three organizations for persons with disabilities have received subsidies from the Department of Labour to support the placement of persons with disabilities in the open labour market between 2008 and 2011 (viz the National Council for Persons with Physical Disability South Africa (NCPPDSA), DeafSA and the South African National Council for the Blind (SANCB).
3. The Expanded Public Works Programme (EPWP) aims to provide poverty and income relief through temporary work for the unemployed to carry out socially useful activities. The Community Work Programme (CWP) gives participants work for a minimum of two days a week or eight days a month providing an employment safety net. The EPWP and the CWP have set a target of 2% of beneficiaries with disabilities, which amounts to a total of 110 000 persons for 2009 - 2014. However, both programs have constantly failed to achieve the target mentioned with 0.45% for the period of 2010 – 2011, and 0.18% for 2011 – 2012.

**Tax benefits and deductions**

1. For people with disabilities or with disabled dependents, as well as older people, all medical scheme contributions and out-of-pocket medical expenses are tax deductible. Also, the South African Revenue Services’ (SARS) tax guide on the deduction of medical, physical impairment and disability expenses lists several expenses related to disability that can be claimed (for example, travel and other related expenses, technology to enable persons with disabilities to perform daily activities, service animals).
2. Qualifying expenditure in this context is described as any expenditure that is prescribed by the Commissioner (other than expenditure recoverable by the taxpayer or his or her spouse) necessarily incurred and paid by the taxpayer in consequence of any physical impairment or disability suffered by the taxpayer, his or her spouse or child, or any dependant of the taxpayer. To qualify this expenditure must be in consequence of a physical impairment suffered by the taxpayer, his or her spouse, his or her child, the child of his or her spouse or any of his or her dependants. The expense will only qualify if it was necessarily incurred and paid by the taxpayer.
3. Section 18(d) of the Income Tax Act 58 of 1962 does not define the term “physical impairment”. However, the guide on disability and tax describes it in the context of section 18(1)(d) as an impairment that is less restraining than a “disability."[[5]](#footnote-5) Some of the examples of physical impairments include poor eyesight; hearing problems; paralysis of a portion of the body; and brain dysfunctions such as dyslexia, hyperactivity or lack of concentration.

**Question 2:**

*Please provide information on how persons with disabilities are consulted and actively involved in the design, implementation and monitoring of social protection programmes in your country or context of work.*

1. In the process of law making, draft laws are released to the public for comment. NGOs representing the interests of persons with disabilities have the opportunity to make input on draft laws in this process.
2. Organisations that provide services to people with disabilities often raise the concern that government’s programmes are not holistic in that not all organisations are consulted to provide input. The perception is that some sectors feel marginalised in the process of making a contribution to the formulation of government policies.

**Question 3:**

*Please provide information in relation to difficulties and good practices on the design, implementation and monitoring of mainstream and/or specific social protection programmes with regard to persons with disabilities, including:*

*Conditions of accessibility and the provision of reasonable accommodation;*

1. We address accessibility and reasonable accommodation in the workplace. Both government and private sector employers are still working towards creating an accessible environment (physical access and providing other interventions to ensure accessible technology aids). The same applies with reasonable accommodation in the workplace. While we have laws that address the principles applicable to reasonable accommodation, employers in practise are not always making provision for reasonable accommodation. For example, a state-employed police officer lost vision in both her eyes following an illness. At no stage was she consulted about re-skilling and alternative job placement. Processes were followed to have her medically boarded off. After her termination of employment she received information about an NGO providing services to blind people and she made contact. It was only at this late stage that she received orientation and mobility training. She also subsequently enrolled at a college run by the NGO and undertook courses towards re-skilling her for employment. She bore the costs of the training out of her pocket.

*Difficulties experienced by persons with disabilities and their families in fulfilling requirements and/or conditions for accessing social protection programmes;*

1. Persons with physical disabilities often have difficulties accessing local government offices at which disability grant applications are processed. The offices are often situated far away from the rural villages. The lack of suitable transport remains a problem for persons with disabilities who live in rural areas and they are forced to carry the costs of private transport to access the Department of Social Development’s offices. We have received reports that government provides mobile offices in some areas but this has not completely alleviated the problem.
2. In many rural areas, there is still no running water. We have been made aware of a situation reported to us by a partner organisation that poor blind people in rural areas were paying neighbours to fetch water for them from the well. The NGO intervened and provided training to the people who were blind and as a result of this intervention, they were able to independently go to the well to draw the water.

*Existence of complaint or appeal mechanisms*

1. In terms of Section 18 of the Social Assistance Act 13 of 2004 an applicant can, within 90 days, appeal the decision made by the South African Social Security Agency regarding the provision of a grant. He or she has to justify why the Minister should change its decision.

**Question 4:**

*Please provide any information or data available in your country or context of work, disaggregated by impairment, sex, age or ethnic origin if possible, in relation to:*

*Coverage of social protection programmes by persons with disabilities;*

1. The lack of adequate, relevant and recent data on disability issues in the country remains a challenge. The last national census was conducted in 2011 by Statistics South Africa (StatsSA)[[6]](#footnote-6). This report is the most comprehensive report available regarding data in relation to persons with disabilities in South Africa.
2. According to the 2011 census 2 870 130 persons were disabled in South Africa in 2011, which leads to a national disability prevalence rate of 7,5%. From the latter, 1,2 million persons were beneficiaries of the disability grant, 114 993 received care dependency grants, and 536 747 persons accessed a grant-in-aid between 2011 and 2012. The number of allocations of the disability grant decreased of 218 079 compared to the 1 416 210 allocated in 2008 – 2009. However, care dependency grants were allocated to 7 928 persons more in 2011 – 2012 compared to 2008 – 2009. Finally, it should be noted that the grant-in-aid increased its numbers of recipients of 490 678 from one period to the other.
3. Regarding housing subsidies, a total of 25 361 people with disabilities applied and qualified between 2008 and 2012. However, only 203 beneficiaries obtained the additional amount to cover reasonable accommodation measures in 2010 – 2011 and 299 in 2011 – 2012.

*Rates of poverty among persons with disabilities;*

1. The 2011 Census shows that persons with disabilities earn a lower income than persons without disabilities. Also, persons with mild disabilities earn a higher income than persons with severe disabilities. For instance, somebody that has severe difficulty in walking or climbing stairs will earn an average income of R22 526 whereas a person without a disability will earn R36 742. Thus, disparities regarding incomes persist.
2. It is worth noting that, according to the same report, a higher number of households headed by persons with disabilities had no access to pipe water (13,4%) compared to those headed by persons without disabilities (8,2%) and the national average (8,8%). It is recognized that it is a challenge for persons with disabilities to access water from other sources, particularly if the water source is far from their house.
3. While the national disability prevalence rate amounts to 7,5%, persons with disabilities accounted for approximately 0,8% of the total number of the workforce during the period of 2011 – 2012. Moreover, more than 60% of employees with disabilities occupied semi-skilled, unskilled or temporary positions during the same period. It is a well-known fact that unemployment and under-employment rates are higher amongst persons with disabilities as compared to persons without disabilities.

*Additional costs or expenses related to disability*

1. There are no statistics available concerning additional costs or expenses related to disability. However it is recognized that persons with disabilities have to bear important additional expenses, particularly regarding assisting devices.

**Question 5:**

*Please provide information in relation to the eligibility criteria used, in your country or context of work, for accessing mainstream and/or specific social protection programmes with regard to persons with disabilities, including:*

*Definition of disability and disability assessments used for eligibility determination*

1. There are different definitions for disability which makes the production of statistics difficult. For instance, in the 2011 Census report, disability was defined as “*difficulties encountered in functioning due to body impairments or activity limitation, with or without assistive devices*”.
2. For eligibility purposes regarding social grants, in terms of section 9 of the Social Assistance Act 13 of 2004, a person is disabled and eligible for a disability grant if he or she *“is owing to a physical or mental disability, unfit to obtain by virtue of any service, employment or profession the means needed to enable him or her to provide for his or her maintenance”.*
3. For the purposes of SARS, a disabled person is a person with a “*moderate to severe limitation of a person’s ability to function or perform daily activities as a result of a physical, sensory, communication, intellectual or mental impairment, if the limitation (a) has lasted or has a prognosis of lasting more than a year; and (b) is diagnosed by a duly registered medical practitioner in accordance with criteria prescribed by the Commissioner*.”[[7]](#footnote-7)
4. For employment purposes, disability is defined as “*people who have a long-term or recurring physical or mental impairment which substantially limits their prospects of entry into, or advancement in, employment*”.

*Consistency of the eligibility criteria among different social protection programmes*

1. Prior to litigation undertaken by the LRC, refugees were not eligible to receive social grants. After the LRC filed papers in the court in Hassan *and Others v Minister of Social Development and Others* the Department agreed to include refugees in the group of persons eligible to receive disability and other social grants.

*Use of income and/or poverty thresholds*

1. Levels of income of the beneficiaries and poverty thresholds are used to determine the value of a social grant to disabled persons.
2. In terms of the Social Assistance Act 13 of 2004 (Annexure A), the formula for the determination of the amount of a disability grant to be paid to the beneficiary is the following :

**D = 1,6A – 0,4B**

Where A corresponds to the maximum social grant payable per annum as approved by the Minister, B to the annual income of the applicant and D to the annual social grant amount payable, which must not exceed the amount equal to A.

1. In terms of the Social Assistance Act 13 of 2004 (Annexure D), a care dependency grant is not payable if the income of the applicant exceeds the following income threshold:

**A = B x 10**

Where A corresponds to the annual income threshold and B to the annual value of the care dependency grant determined by the Minister.

1. In terms of the National Housing Code, persons with disabilities with an income less than R3 500 are eligible for government subsidies in order to access adequate housing.
2. Please do not hesitate to contact the writers should you have any queries or questions.

*ENDS*

Prepared by

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1. See https://pmg.org.za/committee-meeting/16573/ accessed on 19 March 2015. [↑](#footnote-ref-1)
2. See <http://www.thepresidency.gov.za/pebble.asp?relid=17453>, accessed on 19 March 2015. [↑](#footnote-ref-2)
3. Initial country report to the United Nations on the implementation of the Convention on the Rights of Persons with Disabilities 2008 – 2012 at pg 80. [↑](#footnote-ref-3)
4. General Notice 129 of 2015, Government Gazette no 38471, 16 February 2015. [↑](#footnote-ref-4)
5. Guide on the Determination of Medical Tax Credits and Allowances (Issue 5) at <http://www.sars.gov.za/AllDocs/OpsDocs/Guides/LAPD-IT-G07%20-%20Guide%20on%20Deduction%20of%20Medical%20Physical%20Impairment%20and%20Disability%20Expenses%20-%20External%20Guide.pdf> [↑](#footnote-ref-5)
6. Census 2011, Profile of persons with disabilities in South Africa: http://beta2.statssa.gov.za/publications/Report-03-01-59/Report-03-01-592011.pdf [↑](#footnote-ref-6)
7. Section 18(d) of the Income Tax Act. [↑](#footnote-ref-7)