

Disability: the quest for reform

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1 INTRODUCTION

People with disabilities form an important minority within society. Notwithstanding this, disability rights have been a concept long ignored throughout the world. Fortunately, a new awareness of disability issues and rights has started to emerge. This is illustrated by various international instruments – for example the UN Standard Rules on the Equalisation of Opportunities for Persons with Disabilities which came into being on 20 December 1995, where great emphasis is placed on the right of disabled people to equality. Various ILO Conventions and Recommendations dealing with disabled people have also been adopted. For instance, the Vocational Rehabilitation and Employment (Disabled Persons) Recommendation (No 159) together with Rehabilitation and Employment (Disabled Persons) Recommendation (No 186) deal with the vocational training of people with disabilities, promote their integration into the open labour market and strive to ensure equality of treatment for disabled workers.

No reliable statistics on the nature and prevalence of disability in South Africa currently exist.¹ Estimates are that between 5 per cent and 12 per cent of South Africans are moderately to severely disabled. Statistics further show that only one in five disabled people is economically active and that the majority depend on social welfare and family support (Grogan 1996:2). The aim of social security law must be to embrace people with disabilities as part of mainstream society by allowing them equal opportunities and not by increasing dependency on social welfare grants.

People with disabilities in South Africa face high levels of inequality and discrimination. Many laws still deny people with disabilities their fundamental human rights. Both the White Paper for Social Welfare² and the White Paper on an Integrated National Disability Strategy³ acknowledge that South Africa's social security system has in the past not operated in the interest of people with disabilities.

1.1 Defining disability

The first problem that presents itself is the definition of "disability",⁴ for although it would seem that it was one of the first social risks to be

1 This is due to the fact that different definitions of disability are used, different survey techniques are implemented and a poor service infrastructure exists.

2 Government Notice 1108 in *Government Gazette* 18166 of 8 August 1997.

3 Of November 1997 – www.polity.org.za/govdocs/white_papers/disability1.html.

4 This particular risk is also referred to by some as "invalidity". See eg ILO 1989:73 and Pieters 1993:64.

identified and provided for, exactly what this risk entails may differ from system to system. In fact, it would appear that there is no general statutory definition of the term "disability" and much depends on the context within which it is used.⁵

The ILO concludes that a distinction may be drawn between three concepts of disability, namely:

- *Physical disability*, which means "the total or partial loss of any part of the body, or of any physical or mental faculty, irrespective of the economic or occupational consequences of that loss."
- *Occupational disability*, which means, "the loss of earning capacity resulting from the inability to follow the occupation previously exercised by the person concerned."
- *General disability*, which means "the loss of earning capacity resulting from the inability to take up any of the possibilities open to the person concerned in the general labour market, even those which might involve a change in occupation and possibly some sacrifice of professional or social status." (ILO 1989:74)

An important point to take note of is that none of the above definitions refers to the *cause* of the disability. A system in which disability is defined with reference to a limited number of possible *causes* of disability could, on the one hand, result in a system where many disabled people enjoy no coverage as the disability that they are suffering from did not result from one of the enumerated causes, or, on the other hand, result in a very fragmented system in an effort to provide coverage to all those who are disabled.

All the above definitions have in common that they make use of a medical and/or occupational, as opposed to a social, concept of disability. The same would apply to the specific labour⁶ and social security laws⁷ of South Africa, which define disability with reference to a particular medical model of disability. This model focuses on the effect the impairment has on the ability to attain success and be promoted or accommodated in the workplace. No mention is made of the role that structural and attitudinal barriers play in excluding people with disabilities from the open labour market.

5 In 1889 the first invalidity insurance schemes for wage earners were introduced in the old German Empire: ILO 1989:73.

6 For example, the Social Assistance Act 59 of 1992 contains a definition to determine entitlement to disability grants.

7 Section 1 of the Employment Equity Act 55 of 1998 (EEA) defines disabled people as "people who have long-term or recurring physical or mental impairments which substantially limit their prospects of entry into or advancement in employment".

8 Section 1 of the Social Assistance Act 59 of 1992 defines a disabled person as a person older than 18 years who has a physical or mental disability of longer than six months' duration, which makes him or her unfit to provide sufficiently for his/her own maintenance.

9 The "social model" of disability is based on the premise that the integration of disabled people entails the removal of physical and attitudinal barriers and not on "normalisation" or cure. Internationally there is a move away from the medical model to the acceptance of the social model – (Waddington 1995:60).

1.2 Protection against “disability”

The contingency of “disability” is usually provided for by way of a disability benefit. In many systems a close affinity exists between disability and old age benefits, and provision for these risks may often be found in the same statutory fund. The ILO also grouped these three contingencies together in the Invalidity, Old-Age and Survivors’ Benefits Convention 128 of 1967. This results in the disability benefit being regarded as an “early pension” (ILO 1989:73).

This method of assessing disability and the effect thereof on earning capacity can be criticised in that its point of departure is an able-bodied, employed person who became disabled through accident, injury or disease and which therefore makes no provision for the person who was born disabled or who became disabled before he or she had an opportunity to enter the labour market.

2 DESCRIPTION OF AND COMMENTS ON THE SOUTH AFRICAN SYSTEM

2.1 Constitutional and legislative framework

In the South African social security system protection against the contingency of disability is provided through the Constitution, primarily via the anti-discrimination clause, which protects *all* people against direct and indirect discrimination. Disability is mentioned as one of the arbitrary grounds. However, people with disabilities are not specifically and separately defined as a protected class as is the case in, for example, Germany.¹⁰

Labour law protection is provided for in, amongst others, the Labour Relations Act 66 of 1995 (LRA) and the Employment Equity Act 55 of 1998 (EEA). The LRA prohibits the unfair dismissal of a person merely because the person is disabled.¹¹ The EEA is of particular importance for disabled people as it prohibits unfair discrimination in “any employment policy or practice” against disabled people (s 6) and provides for affirmative action measures in favour of people with disabilities, which include “making reasonable accommodation for people from the designated (ie historically disadvantaged) groups to ensure that they enjoy equal opportunities”,¹² the setting of numerical goals to address the under-representation of these groups in the workplace, and the training and development of people from these groups.

The type of protection afforded in terms of the best-known pieces of social security legislation in this respect, the Compensation for Occupational Injuries and Diseases Act 130 of 1993, also known as

¹⁰ See a 3(3)(2) of the German Constitution.

¹¹ Declaring this to be an automatically unfair dismissal (s 187(1)(f)), as opposed to a dismissal based on the employee’s incapacity, which could potentially be a fair dismissal.

¹² S 15(2)(c). People with disabilities form one of the designated groups. “Reasonable accommodation” is defined as “any modification or adjustment to a job or to the working environment that will enable a person from a designated group to have access to or participate in or advance in employment” (s 1).

COIDA, and the Road Accident Fund Act 56 of 1996, can be classified as social insurance.¹³ A number of problems exist in respect of the level of protection afforded by these acts, affecting disabled people as well.

One must not lose sight of the fact, however, that disability is also covered in terms of the Social Assistance Act 59 of 1992. Below the focus will fall on the protection afforded against disability in terms of the Social Assistance Act, while brief mention of the supporting function of the Skills Development Act 97 of 1998 will also be made.

2.2 Provision for disability in terms of the Social Assistance Act

The Social Assistance Act provides for the payment of a number of grants. The most important of these with reference to people with disabilities is the "social grant" payable to aged persons, *disabled persons* and war veterans (s 2(a)).¹⁴ In addition, a "grant-in-aid" is provided for (s 2(b)). Lastly, provision is made for a care-dependency grant (s 2(f)), payable to the parent or foster parent of a care-dependent child. The aim of these two latter grants is to assist in the payment for a person to look after the child or adult.

A *disabled person* is defined in terms of this Act as:

"any person who has attained the prescribed age and is, owing to his or her 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." (s 1)

Section 3 stipulates the conditions under which a *disabled person* will qualify for a social grant, namely:

- he/she is resident in the Republic at the time of the application for the particular grant;
- he/she is a South African citizen; and
- he/she complies with the prescribed conditions.

Conditions that have to be fulfilled in order to apply successfully for a social grant based on disability are that the person must be between the ages of 18 and 65 years for men or 18 and 60 years for women¹⁵ and that the means of the applicant do not exceed a certain amount, which will have the effect that only those who are needy will qualify for the payment of this grant.¹⁶

13 The interaction between COIDA and the Occupational Health and Safety Act 85 of 1993 is a clear example of how social security structures should seek to prevent the occurrence of risks first; compensation should only follow if prevention or reparation was not possible.

14 The grouping together of disabled and aged persons is found in a number of other jurisdictions. See par 1.2 above.

15 A care-dependency grant is payable in respect of disabled persons between the ages of 1 and 18 years. Men over the age of 65 years and women over the age of 60 years could qualify for a social (old age) grant.

16 The application of a means test is an indication that the social grant can be considered as a social assistance benefit.

A grant-in-aid is payable in addition to a social grant to or on behalf of any person who is in such a physical or mental condition that he or she requires regular attendance by any other person (s 2(b)).

A care-dependency grant is payable to the parent or foster parent of a *care-dependent child*, provided that:

- both the parent or foster parent and child are resident in the Republic at the time of application;
- both the parent and child (in the case of a parent receiving the grant) are South African citizens;
- the prescribed conditions are complied with.

A care dependent child is defined in terms of the Social Assistance Act as “a child between the ages of one and 18 years who requires and receives permanent home care due to his or her severe mental or physical disability.”

2.3 Provision for disability in terms of the Skills Development Act

The Skills Development Act repealed the Manpower Training Act 56 of 1981, the Guidance and Placement Act 62 of 1981 and the Local Government Training Act 41 of 1985. The Act does not provide for the payment of compensation in cases of disability but can rather be seen as a social security mechanism of “reparation”, accommodation or integration. The underlying idea is to combat social risks, for example unemployment, by providing for the re-training of workers in case of unemployment rather than mere compensation. To a certain extent the Act also makes provision for people with disabilities, the aim being to integrate them into the labour market and enable them to become self-supportive rather than relying on the payment of disability benefits.

3 SHORTFALLS AND PROBLEMATIC AREAS

3.1 Conditions for qualifying for a social (disability) grant and definition of disabled person

3.1.1 Citizenship

Section 5(c) of the Social Assistance Act clearly stipulates that only South African citizens are entitled to qualify for the payment of a social grant. This would seem contrary to section 27(1)(c) of the Constitution, which provides that “*Everyone* has the right to have access to social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.” (own emphasis) It would also seem contrary to international standards, for example the Social Security (Minimum Standards) Convention No 102 of 1952 of the ILO, which requires equality of treatment for national and non-national residents.

3.1.2 Inability to provide for maintenance

An applicant must be able to prove that he or she is disabled to such an extent that he/she is unfit to obtain the means needed to enable him or her to provide for his or her maintenance.¹⁷ This leaves a wide measure of

17 In terms of the definition of “disabled person” in s 1 of the Social Assistance Act.

discretion in the hands of officials. The success of an application may ultimately depend on whose desk it landed on. This is clearly an undesirable situation.

Another problem presented by this condition is whether current labour market conditions should be taken into consideration when assessing the applicant's ability to provide for him-/herself. South Africa is experiencing severe structural unemployment, which will definitely impact on the success of people with disabilities in finding employment. Should current levels of unemployment be kept in mind, it would probably not be very difficult to prove that a disabled person is unable to find employment and thus to support him- or herself.

3.1.3 Application of the means test

It is submitted in the White Paper for Social Welfare that the application of the means test in order to determine to whom social (disability) grants should be paid, penalises and demotivates disabled people who have private savings or who take up employment, which is often only temporary (White Paper:32). It also leaves much room for abuse on the part of applicants who fail to reveal existing sources of income. The means test is not always properly applied, the consequences of which some provinces are now beginning to experience (Van der Berg 1998:41).

3.2 Lack of holistic approach

3.2.1 Emphasis on compensation

Despite provisions in the Skills Development Act which indicate a growing awareness of the fact that people with disabilities have limited access to the labour market and that this is an issue which should be addressed, the emphasis is still, to a large extent, on compensation, or the paying of grants to people with disabilities. This could have severe financial implications in the long-term, especially in a country with limited resources.

3.2.2 Limited coverage

Provision is made for disability compensation in terms of both COIDA and the Social Assistance Act. Both these acts only make provision for limited "categories" of disabled persons. COIDA only serves to protect those who became disabled as a result of an occupational injury or disease, whereas the Social Assistance Act only makes provision for the payment of grants to the "needy" disabled. Should a person be born disabled, or become disabled through a cause other than occupational injury or disease, and that person has access to more means than stipulated in terms of the Social Assistance Act, such a disabled person will not have access to any compensatory measure of social security as no provision is made for a universal benefit for people with disabilities.

3.2.3 Inadequate welfare services in some areas

It can be said that discrimination has been eliminated to a large extent as far as benefit levels of social transfers or grants are concerned. Social

welfare services, however, are seen by some to be underfunded (Van der Berg 1998:40), the impact of which will be felt mostly by those in poor, rural areas. This would entail inequality of treatment between city-dwellers and those in rural areas.

3.2.4 The need for legislative co-ordination and a comprehensive strategy

It is evident that little co-ordination exists between different pieces of legislation such as the Road Accident Fund Act, the Compensation for Occupational Injuries and Diseases Act, the various labour laws and social assistance programmes. This is apparent in view of the possibility of taking up several forms of income support under the various systems, the different definitions (or lack of definitions) used and the absence of a clear, co-ordinated vision on the part of the legislature of a comprehensive approach towards the treatment and protection of people with disabilities.

3.3 Impact of multi-dimensional changes

It is a well-known fact that South Africa is experiencing extensive structural unemployment. This could result in an increased take-up of disability benefits, as it may be the only mechanism against poverty alleviation available to unemployed people who do not qualify for old-age social grants or child care grants.

The HIV/AIDS epidemic will impact on a broad range of social security measures. One of those that could be affected is the disability grant as more and more people could become too ill to continue working, which entails that they should qualify for the social (disability) grant provided they comply with the means test. This could place much higher demands on the social (disability) grant than what was originally envisaged. However, due to its terminal nature, AIDS may not lead to an explosion of claims for long-term disability grants.

4 SUGGESTIONS ON HOW TO IMPROVE

4.1 Citizenship

It is clear that access to social (disability) grants is not available to the non-national disabled person. Whether this could possibly be justified in terms of the general limitation clause in the Constitution (s 36) remains debatable. It should be kept in mind, however, that inequality of treatment for national and non-national residents beyond certain limits is not acceptable in terms of international standards.

4.2 Purpose of disability benefit

A disability benefit should afford recognition to the fact that disabled persons have special needs and should be granted benefits on the basis that their special needs should be provided for. It is submitted that these

18 These grants are also provided for in terms of the Social Assistance Act.

needs are not restricted to income-replacement and pure medical needs. They also include arrangements or benefits which are necessary to place the disabled person in a position to function properly as a matter of daily living – for example, the provision of a wheelchair in the case of a paralysed person. These special benefits are sometimes referred to as situational costs.

Another problem is that the social (disability) grant may tend to have become a measure for alleviation of poverty rather than a measure to provide for the special needs of people with disabilities. Given the absence of a safety net of social assistance and high unemployment figures this is understandable, but not necessarily acceptable, as it could lead to the fraudulent take-up of benefits by those who are not in fact disabled or not disabled to such an extent that they require special assistance.

4.3 Means test

The means test is often criticised as a disincentive to obtain employment (Van der Berg 1994:66; White Paper 1997:32). Furthermore, the fact that the means test is not applied in a uniform manner could result in the arbitrary awarding of disability benefits.

Officials applying the means test should be properly trained and adequate safeguards against non-disclosure of information or provision of false information should be included. Van der Berg suggests, for example, strict penalties in the case of deliberate attempts to conceal information in order to obtain a social grant (1994:54).

4.4 Capacity

The social (disability) grant could only fulfill its function if fully-trained staff are available in various areas. Underdeveloped welfare services in rural areas and staff that are not properly trained could prove fatal to realising the purpose of the disability benefit.

4.5 HIV/AIDS epidemic

If one assumes that the take-up rates remain the same as current levels and that AIDS deaths will be preceded by a period of six months of 100% disablement, AIDS-related take-up for the disability grant and care-dependency grant will be constrained by the relatively short period of disablement preceding AIDS death and the long processing time of these grants.¹⁹

4.6 A social model (as opposed to a medical) model of disability

The inadequacies of a purely medical approach to and definition of disability have been discussed above.²⁰ This is recognised by government in the *White Paper on an Integrated National Disability Strategy*. The proposal made in this White Paper to adopt a social definition rather than

19 Schierhour and Söderlund 1999.

20 See par 1.1 above.

a purely medical formulation should be supported since a social model of disability supports the premise that the integration of people with disabilities entails the removal of physical and attitudinal barriers and not only cure. The necessary legislative changes should therefore be brought about to reflect this.

5 GOALS TO CONSIDER

5.1 Change in emphasis

It has to be stated that steps are being taken in the direction of rehabilitation and re-integration rather than just compensation as far as social benefits are concerned. These are only the first steps, however, and from both a financial and policy point of view this is a process that should be encouraged actively. Establishing programmes focused on the re-integration of people with disabilities into full social participation could provide long-term benefits for all members of society.

5.2 Social safety net

The need for a universal safety net of social assistance in South Africa cannot be over-emphasised. Without such a mechanism existing measures, such as the social (disability) grant, may be abused and could eventually be prevented from serving the purpose for which they were intended. This need is becoming more and more apparent in the light of high unemployment figures, structural unemployment and the spreading of the HIV/AIDS epidemic.

5.3 Holistic approach

Current and future problems with regard to social security benefits, and the disability benefit in particular, can only be addressed successfully if a holistic approach is followed. Emphasis should be put on the purpose that is being pursued, rather than on institutions and mechanisms. Extensive co-operation between stakeholders (in particular disabled people themselves) and various government departments is essential.

5.4 Endorsement and implementation of current initiatives

The *White Paper for Social Welfare* foresees the formulation of a policy on social security for people with disabilities. The Government has undertaken to endorse the World Programme of Action concerning Disabled Persons, the UN Standard Rules and the UN Charter on Rights for People with Mental Handicaps (White Paper 1997:22).

The White Paper on an Integrated National Disability Strategy represents a major change in government thinking on disability issues in accordance with international developments. A wide range of issues, such as public transport, employment, accessible communication, integrated education and the restructuring of social security benefits are addressed. The document states that the present social security legislative framework and its administration tend to be discriminatory towards people with

disabilities. It sets as the objective a social security system that meets the needs of disabled people and includes an appropriate assessment method, accessible information and pay-out facilities, proper administration, effective feedback mechanisms and a co-ordinated social security safety net (White Paper:Ch 2). To meet this objective the problems experienced with state disability grants, compensation for injuries at work and road accident compensation also need to be addressed.

The CASE Report (Schneider and Marshall 1998) recommends ways to attain the objectives set out in the White Paper on an Integrated National Disability Strategy. To overcome the exclusion of people with disabilities the document recommends a comprehensive strategy on social security. It stresses the need for inter-departmental efforts as well as public and private sector commitment. It further argues in favour of a social model of disability, suggesting that the criteria for establishing eligibility should go beyond medical diagnosis. Disability is seen as a result of the social environment's failure to adjust to the needs of this minority group. Retraining and vocational rehabilitation are seen as important mechanisms in dealing with diminished functional capacity.

6 CONCLUSION

Social security covers a wide variety of measures that provide benefits in the event of "an individual's earning power permanently ceasing, being interrupted, never developing, or being exercised only at unacceptable social cost and such person being unable to prevent poverty." (White Paper for Social Welfare 1997:Chapter 7 par 1) Both the White Paper for Social Welfare and the White Paper on an Integrated Approach to Disability Strategy acknowledge the fact that South Africa's social security system has in the past not operated in the interest of people with disabilities. The legislative framework as well as the implementation of the social security system need to be addressed when discussing social security reform and both the government and private sector will have to accept responsibility in addressing the goal of an equitable social security system. Such a system should be aimed not only at compensation but also at the prevention of disability, help at recovering from disability and the resulting loss of income, as well as reintegration of people into society ensuring access to employment and other social activities. Only for those who cannot provide for themselves, a social security net, which is just and accessible, will have to be made available.

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