

An SAHRC Policy Paper

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DISABILITY

Introduction

The situation faced by people with disabilities in South Africa is one, which is characterised by extreme levels of inequality and discrimination. Social, economic and political barriers interact to create conditions of underdevelopment, marginalisation and unequal access to resources enjoyed by the rest of the population.

One of the central factors, which has contributed to the conditions described above, is the failure of our society to recognise the rights of disabled people as equal to those of able-bodied people. Moreover, policies and practices adopted by the apartheid government served not only to ignore these rights, but also to set up and maintain mechanisms which contributed to further abuse and discrimination.

With the advent of democracy in our country, the introduction of the Bill of Rights, the establishment of the Human Rights Commission and the authority of the Constitutional Court, an infrastructure has been created to address past inequalities and to ensure that the rights of all people, including disabled people, are protected.

As the key mechanism set up to protect and promote human rights in South Africa, the Human Rights Commission has a responsibility to ensure that previously marginalised groups are not discriminated against. To do this, it is necessary for the Commission to develop a clear understanding of the specific ways in which the rights of such groups have been, and continue to be, violated and to implement measures designed to remove those factors responsible for continued discrimination. It is imperative that the Commission play a central role in facilitating the implementation of positive measures designed to increase access by previously marginalised groups to the rights contained in the Constitution.

This policy, therefore, provides a framework, which outlines the key areas of concern for people with disabilities and thus the key areas of focus for the Commission. It provides policy guidelines to address those concerns and

specifies the role, which the Commission needs to play in ensuring access by people with disabilities, to all basic human rights.

Policy Guidelines

Definition of disability

Extremely inadequate and inappropriate definitions of disability used in the past, have not only resulted in a limited understanding of disability, but have also contributed to the inequalities and discrimination faced by disabled people. Previous definitions have been limited to medical models which stress the physiological differences between the disabled person and other people in society. Such definitions have failed to recognise the nature of the individual's interaction with society and the diversity of the human condition.

The United Nations *Standard Rules on the Equalisation of Opportunities for People with Disabilities*, which incorporates the World Health Organisation's definitions as they appear in the *World Programme of Action Concerning Disabled Persons*, defines disability in the following way:

The term "disability" summarises a great number of different functional limitations occurring in any population in any country of the world. People may be disabled by physical, intellectual or sensory impairment, medical conditions or mental illness. Such impairments, conditions or illnesses may be permanent or transitory in nature.

This definition is explained in relation to the definition of handicap, which expresses the social barriers which lead to the discrimination of all people who are disabled by the impairments, conditions and illnesses referred to above. 'Handicap' is described as follows:

The term 'handicap' means the loss or limitation of opportunities to take part in the life of the community on an equal level with others. It describes the encounter between the person with a disability and the environment. The purpose of the term is to emphasise the focus on the shortcomings in the environment and in many organised activities in society, for example, information, communication and education, which prevent persons with disabilities from participating on equal terms.

The Constitution¹

The Constitution provides the central foundation from which the policies and programmes of the Commission are derived. In this respect, there are two

important aspects of the Constitution, which are especially important in the observance of, respect for, and protection of the rights of people with disabilities.

- ♦ **Application of the Constitution:** It is important to note that the Bill of Rights enshrines the rights of all people in the country. This means that the rights of people with disabilities are afforded equal status and recognition with the rights of all other people. Furthermore, the Constitution's applicability extends to natural and juristic persons as well as to all organs of state, the executive, the judiciary, the legislature and to all law. Thus the application of the rights of people with disabilities extends to protection from discrimination within both the public and private spheres.
- ♦ **Equality Clause:** *Section 9(3) of The Bill of Rights* specifically prohibits direct and indirect discrimination against anyone on the basis of disability - by both the state and individuals. The Constitution, therefore, not only recognises disability as a basis for discrimination which warrants particular attention, but it also implies that the denial of any other right contained in the Constitution, on the basis of disability, constitutes a violation. It is important to recognise that the Constitution accepts that discrimination against a person on the basis of their disability is automatically unfair, unless a case can be made by the body/individual concerned that the discrimination was fair. The onus to prove unfair discrimination does not, therefore, rest with the disabled person.

*Standard Rules on the Equalisation of Opportunities for People with Disabilities*²

In order to effectively understand and interpret the application of fundamental rights to people with disabilities, the Commission should be guided in its deliberations by the United Nation's *Standard Rules on the Equalisation of Opportunities for Persons with Disabilities*. *The Rules* outline the minimum requirements which need to be met to explain the member state's interdependence between fundamental rights and equal opportunities.

The responsibilities incumbent on member states of the United Nations in relation to the implementation of *the Rules* are specified in the document. They read as follows: "Although *the Rules* are not compulsory, they can become international customary rules when they are applied by a great number of states with the intention of respecting a rule in international law. They imply a strong moral and political commitment on behalf of states to take action for the equalisation of opportunities for persons with disabilities. Important principles for responsibility, action and cooperation are indicated. Areas of decisive importance for the quality of life and for the achievement of full participation and equality are pointed out. *The Rules* offer an instrument for policy-making and action to persons with

disabilities and their organisations. They provide a basis for technical and economic cooperation among states, the United Nations and other international organisations. As a member country of the United Nations and thus a signatory to *the Rules*, South Africa has accepted the responsibilities resulting from the adoption of *the Rules* by the General Assembly.

In providing a framework for action to create equal opportunities, *the Rules* specify that in order for “*girls, boys, women and men with disabilities, as members of their societies, (to) exercise the same rights and obligations as others,*” member states have a moral and political obligation to remove the barriers which prevent “*persons with disabilities from exercising their rights and freedoms and (make) it difficult for them to participate fully in the activities of their societies.*” The political and moral foundation for *the Rules* is based on the following human rights instruments:

- ♦ The International Bill of Rights, comprising the Universal Declaration of Human Rights;
- ♦ The International Covenant on Economic, Social and Cultural Rights;
- ♦ The International Covenant on Civil and Political Rights;
- ♦ The Convention on the Rights of the Child;
- ♦ The Convention on the Elimination of All Forms of Discrimination Against Women;
- ♦ The World Programme of Action Concerning Disabled Persons.

The Rules therefore imply that the creation of equal opportunities for people with disabilities is an extension of the realisation of their fundamental rights as equal participants and members of the society. They state that “*The principle of equal rights implies that the needs of each and every individual are of equal importance, that those needs must be made the basis for the planning of societies, and that all resources must be employed in such a way as to ensure that every individual has equal opportunity for participation.*”³

Disability Rights Charters

Over the years a number of documents have been developed by people with disabilities in South Africa which express the aspirations and demands of a wide range of disabled people with different needs and experiences. *The Disability Rights Charter of South Africa*, developed during 1991 and 1992 by Lawyers for Human Rights and Disabled People South Africa, through a lengthy process of

consultation with disabled people, asserts the rights of all people with disabilities in South Africa who have experienced similar forms of discrimination and marginalisation. *The Charter*, therefore, expresses basic political and socio-economic rights which have been denied the majority of disabled people.

Various sectors within the disability community have also been involved in developing charters which reflect the needs and concerns of people with specific kinds of disabilities. These documents are particularly important in highlighting how people with different disabilities experience discrimination in different ways, and are key in facilitating a comprehensive understanding of the nature of human rights abuses against disabled people.

Key areas of focus

Legislation

Legislation in our country not only fails to protect the rights of people with disabilities, it often actively discriminates against them. Whilst recently drafted legislative changes have attempted to address some of the more obvious discriminatory elements, it is disturbing to note that past discriminatory legislation remain on our statute books and amended and new legislation continues to directly or indirectly discriminate against people with disabilities. Similarly, legislation which fails to meet standards and principles enshrined in international human rights instruments persists.

There are four main areas within the law which contribute to discrimination against disabled people. In focusing on these, it is important to realise that people with different disabilities are differently affected and the nature of the discrimination is not always obvious to legislators and policy makers.

1. Statutes

There are laws on our statute books which provide for processes and mechanisms which actively discriminate against people with disabilities by denying them rights which are afforded to able-bodied people in our society.

2. Interpretation of regulations

Discrimination against a disabled person is not always obvious from merely reading a statute but occurs when the law is put into practice and interpreted. In many cases, discrimination takes place at both national and provincial level, through the application of particular regulations governing the statute or the interpretation of regulations and statutory provisions by government officials.

3. Inappropriate administration

Discrimination can result from laws which are intended to protect the rights of people with disabilities, but which are ineffectively and inappropriately administered or monitored. Therefore, where legislation does exist, it is not enforced and properly monitored, resulting in continued discrimination and abuse.

4. New legislation

Although the Constitution provides greater legislative protection for disabled people, new legislation needs to be developed aimed at protecting and promoting the rights of people with disabilities.

Socio-economic rights

The new Constitution recognises that key socio-economic rights, such as the right to education, are part of the fundamental rights which should be enjoyed by all citizens. In the past, the denial of basic socio-economic rights to the majority of disabled people has resulted in widespread poverty, unemployment and dependence on meagre social security benefits for survival among disabled people and their families.

While poverty and underdevelopment are not conditions which are only experienced by disabled people in South Africa, it is important to realise that the apartheid system created barriers for disabled people further limiting their access to the poor resources which existed for the majority. Barriers to employment, education, health care, welfare services, housing, transport and social security continue to prevent disabled people from accessing the benefits of social and economic reconstruction. Programmes designed to facilitate development frequently continue to reinforce barriers which marginalise disabled people.

The removal of barriers which prevent disabled people from accessing basic socio-economic rights remains the most important challenge to the creation of a society in which people with disabilities enjoy opportunities equal to those of the rest of population.

Self-representation and dignity

In the past disability was regarded as a purely 'health and welfare issue' with disabled people being seen as individuals in need of 'care'. Such perceptions were reinforced by a social, political and economic infrastructure which marginalised people with disabilities and entrenched their status as lower than second class citizens. One of the ways in which such perceptions were perpetuated and inequalities entrenched was through the failure of decision-makers to consult with disabled people themselves. Decisions were made using

the interpretation of disabled people's needs by able bodied people whose knowledge and awareness of disability was often extremely limited.

A key principle which is fundamental to the realisation of the rights of people with disabilities, is a recognition of the right of disabled people to represent themselves in all processes of decision-making which affect them in any way. Such a principle includes the right of mentally disabled people to be represented by advocates such as a parent or friend.

The principle of self-representation not only remains fundamental to realising the rights of people with disabilities, it is also an essential strategy to remove marginalisation and ensure that the needs of disabled people are included with those of the whole population.

Vulnerable groups

It is important to realise that there are categories of people with disabilities who are particularly vulnerable and are subject to more acute forms of discrimination and abuse. In this regard, specific attention needs to be paid to the rights of women with disabilities, disabled children, disabled people living in rural areas, and elderly people with disabilities. While new policies and programmes now recognise the particularly harsh effects of the apartheid system on women, children, rural people and the elderly, many of them continue to ignore the specific needs of people with disabilities in these categories.

Attention to more vulnerable groups of disabled people also needs to include a recognition of the effects of political and criminal violence on the nature and extent of disability in South Africa. Violence in our country has not only resulted in an increased number of disabled people, it has also undermined access to services and facilities which are necessary for basic needs to be met and for fundamental rights to be realised.

One of the most important areas requiring attention is access to information. The nature and extent of the barriers which prevent disabled people from accessing information range from inadequate transport systems to participate in public information forums, to public communication systems which fail to provide information in braille or for people using sign language. These barriers can prevent people with disabilities from being informed, accessing services, and participating in the mainstream of society. These barriers are not always obvious to able-bodied decision-makers and policy specialists.

The role of the Commission

In order for the Commission to fulfil its obligations to all disabled people in South Africa, it is necessary for it to play a central role in interpreting the rights of the Constitution in relation to disabled people. Therefore:

- ♦ The Commission should set up appropriate mechanisms and processes to consult with organisations of disabled people and appropriate structures to facilitate their participation in all processes of decision-making which will affect them in any way.
- ♦ The process of interpretation will also involve raising the awareness and understanding of the Commissioners themselves. They will undertake research into particular areas of concern and increase the knowledge base of the Commission around disability.
- ♦ The Commission should be instrumental in spear-heading the removal of barriers which prevent disabled people from accessing fundamental rights. It is clearly within the scope of the Commission's powers, functions and duties, as outlined in *the Human Rights Commission Act (No. 54 of 1994)*, to take direct action to remove barriers which exist through legislation and policy, social attitudes and institutional practices.
- ♦ The Commission should set in motion a process to investigate access to information by engaging in extensive consultation with organisations of disabled people and organisations providing services to people with disabilities. It is particularly important that the process begins with consultations with people and organisations from deaf and blind communities. It may examine the nature and extent of the barriers and possible strategies for removal. It is also imperative that the relevant government departments are included in the process.
- ♦ The Commission will set up mechanisms to monitor human rights abuses against people with disabilities and the effectiveness of the strategies adopted to eradicate these. It will be necessary for the Commission to facilitate feedback through consultation with disabled people and their organisations.
- ♦ The Commission will develop and implement an appropriate education programme with a focus on disability rights. Such a programme should be designed to raise public awareness, challenge existing stereotypes, remove negative perceptions and equip members of the public and government officials with the skills necessary to deal appropriately with disability issues.

In order to effectively implement the above, a Commissioner shall take specific responsibility for disability issues, and will actively participate in and liaise with the national collaborative disability structure set up and maintained by the government and the non-governmental disability sector.

In February 1996, the government published its *Green Paper on an Integrated National Disability Strategy for South Africa*. The Disability Desk in the office of the Executive Deputy President has recently completed an extensive process of consultation on *the Green Paper* through public hearings with disabled people and people working in this area. The Desk is presently in the process of developing a white paper on disability which would be published in the near future. The Commission shall carefully review the contents of the white paper and develop appropriate strategies for intervention based on a critical understanding of the paper and the extent to which it will contribute to realising the rights of people with disabilities.

The Commission should be instrumental in monitoring the implementation of commitments made in the white paper and supporting the process of change.

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- ⁱ1. The text referred to here is taken from the Constitution of the Republic of South Africa 1996, first adopted by the Constitutional Assembly on 8 May 1996, and finally adopted on 4 Feb 1997, Page 2
 2. Standard Rules on the Equalisation of Disabled Persons, United Nations. Adopted by General Assembly at 48th Session on 20 December 1993 (Resolution 48/96), Page 3.
 3. *Ibid.* Page 4.