

Universal Periodic Review

Submission of the Centre for the Study of AIDS for the review of the Republic of South Africa

Introduction

The submission is based on the findings of the Tswelopele Project run by the Centre for the Study of AIDS (CSA), a non-governmental organisation based at the University of Pretoria. The Tswelopele Project covers the semi rural community of Hammanskraal, 40 km north of Pretoria, in the province of Gauteng. The project has researched experiences of HIV stigma, discrimination and awareness of human rights (2004), conducted training and capacity building on human rights (2005 - 2006), and finally set up a paralegal advice centre to address human rights violations, mobilise the local communities on rights issues, network with key stakeholders and conduct lobbying and advocacy on health rights (2006 – 2007).

This submission will firstly provide a general overview of the human rights situation in the Hammanskraal community as related to HIV and AIDS. Secondly, the submission will show how the state has failed to give effect to socio-economic rights with specific reference to the right to social security.

General overview of human rights violations in the Hammanskraal community

Our work in the Hammanskraal community has revealed that:

- stigma and discrimination against people living with HIV or presumed to be living with HIV is widespread in the community.
- people often do not know what their rights are, or what institutions are there to help them – in fact, the people and institutions that are in place are seen as problematic rather than a source of assistance or a source to seek redress and assistance in the case of human rights violations.
- institutions and the Constitution are not within the reach of “ordinary” people
- people who are already marginalised – for example, women; people living with HIV and AIDS (PLHA); and those living in poverty – have difficulty accessing justice.

- there is a need to make “rights real” for vulnerable groups, through increasing access to justice – real access to human rights institutions, the courts, and legal and administrative redress.
- even when people have access to the various institutions such as the courts and the police, “justice” is not served and they do not get assistance and/or are discriminated against by the very institutions that are supposed to assist
- ongoing interventions targeting both community members and duty-bearers such as social workers and health care workers, are needed to help people to assert and claim their rights – using a rights based approach – rather than waiting for their rights to be provided at the discretion of the State.

HIV and socio-economic rights in South Africa: Failure with regard to the right to social security

Although South Africa has only signed the ICESCR and is therefore not legally bound by the Covenant, the State is obliged to refrain from acts that would defeat the object and purpose of such the Treaty. South Africa has also ratified two other treaties, the Convention on the Rights of the Child (CRC) and the Convention on the Elimination of All forms of Discrimination Against Women (CEDAW) which do refer specifically to social and economic rights. Further the South African constitution itself contains social and economic rights and provides that the courts when interpreting provisions in the Bill of Rights, ‘must’ consider international law. This refers to binding and non-binding international legal instruments such as the treaties and the general comments made by the supervisory bodies. This section of the paper argues that South Africa is faltering in meeting its obligation to respect, protect, promote and fulfil its human rights obligations. Using examples from projects carried out by the CSA, we will illustrate this using the right to social security.

The right to social security

Article 26 of the CRC, article 14(c) of CEDAW and article 9 of the ICESCR all recognise the right to benefit from social security. South Africa is also a State party to several regional treaties that provide for the right to social security. Section 27(1)(c) of the South Africa Constitution states that ‘[e]veryone has the right to have access to social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.’ Section 27(2) states that ‘[t]he state must

take reasonable legislative and other measures, within available resources, to achieve the progressive realisation of each of the rights.'

In terms of the Social Assistance Act¹ an HIV-positive person will qualify for a disability grant only if his or her illness precludes employment. The current policy of the Department of Social Development, however, is unclear. It seems to provide benefits to a person with HIV only if the person has a CD4 cell count below 200 or who suffers from a major opportunistic infection.²

Our work shows that the right to social security is problematic in three areas in the Hammanskraal and Temba areas:

a) Access and Information

People are not fully aware of how to access the grant or even how the system operates. Some people believed that the grant could be accessed immediately once one tested HIV positive.

Secondly even if one does know about the grant and qualifies under the required criteria. The process of getting the grant was considered cumbersome and long with administrative delays

b) Criteria

One systemic problem that has been highlighted in our research in the Hammanskraal and Temba areas and other research elsewhere is that individuals who receive ART and become well may disqualify themselves from disability grants. In cases where the family breadwinner contracts HIV and becomes sick, a choice must be made between pursuing ART and refusing ARVs in order to remain eligible for disability grants that support the family.³

¹ Social Assistance Act 59 of 1992.

² See for example ALP 'Disability Grants'
<<http://www.alp.org.za/modules.php?op=modload&name=News&file=article&sid=77>>
(accessed 26 November 2007).

³ See F Zuberi 'HIV/AIDS stigma and human rights - A localised study of Hammanskraal communities. A Report of the Tswelopele Research Project of the CSA' 2004., S Clark 'ARVs versus social grants: the dilemma of the poor' (March 2006) *ALQ* 28-30., C Hardy 'Choosing anti-retrovirals or choosing grants: Preliminary research on HIV and Social security'
<<http://alp.org.za/dedi20a.yourserver.co.za/images/upload/Grants%20&%20HIV.doc>>.

The social security system in South Africa is premised on the assumption that every person who seeks employment in South Africa is able to find it, and would thus be in a position to provide for his or her own needs as well as that of dependants. The state generally only intervenes to assist those who cannot work because of their age, disability or temporary unemployment. This assumption is clearly flawed where the unemployment rate is estimated to be between 25 and 40 per cent. Superimposed on this situation is the devastation that the AIDS epidemic brings.

Research conducted by the Henry J Kaiser Foundation and the Health Systems Trust demonstrated that HIV/AIDS had the most damaging consequences on the poorest of South Africans and how 'in already poor households HIV/AIDS is the tipping point from poverty into destitution'. People living with HIV/AIDS (PWAs) are entitled to social assistance in the form of a disability grant if they reach a stage of AIDS-disease progression where a doctor or assessment panel is convinced that they are unable to work.

South Africa has made HAART available to those who need it through the State health system since 2003. This means that considerably more PLWHAs who rely on the public health sector have access to life-saving medicines. It also means PLWHAs who take HAART and become well, are in danger of losing a grant that, in many cases, provides access to basic (life-saving) services and food not only for themselves, but often for their extended families. This is due to the fact that the criteria laid down by the Social Assistance Act 13 of 2004 and its Regulations only extend the disability grant to people who by virtue of their disability are incapable of entering the job market. Thus if a PLWA manages her condition with HAART, she will no longer qualify for a disability grant. A number of PWAs whose health has improved because of HAART are thus in the unenviable situation of having to choose between income and health.⁴

c) Substance/Quatum

The amount of the grant changes every year and depends on your income and assets. In 2006, the maximum grant was R820.00 per month. There are some concerns that the substance of the right even where it is accessed is indeed inadequate

⁴ M Richer, 'The right to social security of people living with HIV and AIDS in the context of public sector provision of Highly Active Antiretroviral therapy' (2006)

People living with HIV may also qualify for social relief of distress grants under the Social Assistance Act. This scheme provides for temporary assistance (not more than 3 months) to individuals, most often in the form of coupons. A person qualifies for social distress grants if he or she is medically unfit to work and does not qualify for another grant.

South Africa is currently considering introducing a Basic Income Grant (BIG) to address the shortcomings in the social assistance system.⁵ Enhancing the fight against HIV and AIDS is identified as a benefit of the proposed grant. It is anticipated that such a grant would reach those most affected by HIV and AIDS, such as young adults who currently have very little access to social grants. It is however, important that the process to address the current problems be considered as an urgent matter as the current situation (requirements of the Act) is inconsistent not only with the constitution but is also a failure by the state within available resources, to achieve the progressive realisation of the rights of PLWHA to access to social security.

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⁵ See 'South Africans for a Basic Income Grant'
http://www.drc.org.za/docs/Background_Brie.ng.doc (accessed 1 August 2006).