

Promoting the socio-economic rights of older persons
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The Older Persons Act¹: Reflections on the process

Good morning

I would like to thank the organisers of today's workshop for inviting me to provide this Opening Statement. The Older Persons Act provides a solid framework for the promotion and protection of not all but many socio-economic rights of older persons in South Africa and it is therefore an apt place to begin today's workshop by reflecting on the process that led to the creation of this piece of legislation.

The Older Persons Bill took many years to draft. The South African Human Rights Commission, recognizing the need to encourage the older persons sector to participate in the process, embarked on a country wide process gathering the inputs of over 300 stakeholders. The Commission also hosted a number of workshops and brainstorming sessions looking at specific clauses in the Bill. Two days of public hearings were held at the end of August 2005². This process led to a number of significant changes being made to the Bill.

It was clear from engagement with the Portfolio Committee on Social Development that the members of the Committee were listening to what they were being told. The best example of this relates to the inclusion in the Act of programmes concerning HIV/Aids and the elderly. On the second day of the hearings, a children's organisation,

¹ Older Persons Act 13/2006

² The following organisations and institutions participated in the parliamentary public hearings on 30 and 31 August 2005: Cape Jewish Seniors, Ikamva Labantu, CGE, Black Sash, Highlands House, Joint Council of Churches, Alzheimer's SA, Western Cape Region, Resources Aimed at the Prevention of Child Abuse and Neglect, Luipaardsvlei Tehuis vir Bejaards, South African Catholic Bishops Conference, Grandmothers against Poverty and AIDS, Western Cape Provincial Health Department, Leprosy Mission of SA,

RAPCAN, came and spoke about the burden of child care that falls on the elderly in South Africa due to the impact of HIV/AIDS. However, it was two grandmothers from the organisation Grandmothers against Poverty and Aids in Khayelitsha, Mrs Fisher and Mrs Sohena who really caught the attention of members. Mrs Sohena, speaking in Xhosa, with no script, told Parliament directly what it was like to be a grandmother who has witnessed her children die and must now raise her grandchildren. These two grandmothers spoke to of problems experienced at clinics, such as standing in long queues without shelter in winter and getting wet and hungry, the experience of crime in townships by the elderly and the slow response from police when elder abuse was reported, and the lack of affordable accommodation for the elderly, especially for those who are looking after their grandchildren.

These presentations, combined with all the others over the two days, led to a flood of questions from MPs. A few days after the hearings on 9 September 2005, members of parliament made their dissatisfaction known with the bill. The poor drafting quality was highlighted, the focus on facilities rather than community based care, the lack of a coordination strategy and the constitutionality of the Bill given the age differential were all mentioned.

Another meeting took place on 12 October 2005 with the Department and there was even a serious discussion on 16 November 2005 on whether to withdraw the Bill in its entirety or continue in efforts to fix the bill up. The latter course was decided on and the Bill was eventually finalized in March 2006.

Possibly the most significant change to the Bill was the sequencing of the legislation in order that it reflects the ageing process, namely living in the community with limited support through to the need to live in residential facilities occasioned by the need for specialised frail care.

This was a marked change from the Aged Persons Act of 1967 which focussed squarely on the provision of residential facilities to older persons. It must be remembered that in 1967 the legislation was drafted to benefit the white population of which Afrikaans speaking white persons had an unusually high incidence of placing their elderly

in residential facilities. Erasing the vestiges of the 1967 Act in order to ensure that the new legislation would address the imbalances of the past was not a straightforward or easy task further complicated by the poor drafting of the initial drafts of the Bill.

The Older Persons Act makes provision for some wonderful community-based programmes that promote the human rights and in particular the socio economic rights of older persons. For example, these programmes address economic empowerment³; promotion of skills and capacity of older person to sustan livelihoods⁴; provision of nutritionally balanced meals to needy older persons⁵; provision of hygienic and physical care of older persons⁶ and provision of health care to frail older persons and other older persons determined by the Minister⁷, amongst others. These programmes would give effect to the right to have access to health care services⁸; and the rights of access to sufficient food and water⁹ which is enshrined in our Constitution and mirrored in the International Covenant on Economic Social and Cultural Rights which recognises the right to work¹⁰, the rights of everyone to an adequate standard of living¹¹ and the right to enjoyment of the highest attainable standard of physical and mental health¹².

The Act is also notable for explicitly condemning and criminalising all forms of elder abuse, requiring mandatory reporting of elder abuse and providing for services and remedies in those instances where abuse has occurred.

The Older Persons Act looks somewhat different from the Bill that was presented to Parliament. However, there are also sections in the Bill that do not conform with some of the recommendations that were made by the Commission and the many civil society organisations that took part in the process.

³ Section 2(a)

⁴ Section 2(f)

⁵ Section (2)(e)

⁶ Section 3(a)

⁷ Section 3(f)

⁸ Section 27(1)(a)

⁹ Section 27(1)(b)

¹⁰ Article 6

¹¹ Article 11

¹² Article 12

The 60/65 age differential

The Older Persons Act contains a fundamental flaw, namely that it discriminates between men and women on the basis of age. In terms of the definitions section “older person” means a person who, in the case of a male, is 65 years of age or older and, in the case of a female is 60 years of age or older¹³. Despite it being pointed out to Parliament that the age differential is contrary to the equality clause in the Constitution, Parliament proceeded to pass the legislation. At that stage the age differential still existed with regards to the qualifying age for a state Old Age Grant. It took the commencement of litigation in the Pretoria High Court¹⁴ in 2007 challenging the Social Assistance Act of 2004 too set in action a course of events that would change this.

The then Minister of Finance, Trevor Manuel announced in February 2008 that the qualifying age for old age grants would be reduced incrementally and that by 2010 all persons 60 years and over would qualify for a state old age grant. Since this victory, there has been silence on the continuing age discrimination against men. Essentially, the Act is only applicable to men who are 65 years and older and women who are 60 years and older.

Thus a man between the ages of 60 and 65 cannot benefit in terms of the Act to any services established in terms of Chapter 2 which seeks to create an enabling and supportive environment for older persons, or programmes established in terms of Chapter 3 which supports community based care and support services for older persons. Furthermore, the provisions aimed to protect older persons from abuse and provide remedies are also not applicable to men between the ages of 60 and 65.

A second area of concern and of interest to today workshop are the provisions that seek to protect older persons from elder abuse, particularly when this takes place within the context of their home.

¹³ Section 1

¹⁴Christian Roberts and Others vs Minister of Social Development and Others (Case No. 32838/2005), Pretoria High Court 2007

Protecting the elderly from abuse where they live

Over and above the provisions of the Domestic Violence Act, the Older Persons Act provides additional remedies for instances when an older persons is abused in her home.

However some of the remedies and corresponding procedures that are in the Act have been on the statute books since 1967 when the Aged Persons Act was first passed. During the Commissions consultations with stakeholders we did not come across a single person who knew of these provisions or their use. These provisions - now contained in sections 28 and 29 of the Act - provide for a magistrates court enquiry in instances of alleged elder abuse.

Other than a slight amendment to the name of the section in the final Act¹⁵ which thereby allows the section to be used against all persons who abuse the elderly and not just persons who accommodate and care for the elderly. So with minor changes to the name of the section, these provisions remain on our statute books¹⁶. It will be interesting to see whether these provisions are ever used.

These provisions are mentioned as they impact on the right to housing. In the UNs General Comment on the Right to adequate Housing, the right to housing is interpreted as “...the right to live somewhere in security, peace and dignity.”¹⁷

¹⁵ Clauses 14 (Procedure for bringing person who accommodates or cares for older person before magistrate) and 15 (Enquiry into accommodation or care of older person)

¹⁶

In the Act you now have section 28 Procedure for bringing alleged abuser of older person or frail person before magistrate

Section 29 Enquiry into alleged abuse of older persons or frail person

¹⁷ 7. In the Committee's view, the right to housing should not be interpreted in a narrow or restrictive sense which equates it with, for example, the shelter provided by merely having a roof over one's head or views shelter exclusively as a commodity. Rather it should be seen as the right to live somewhere in security, peace and dignity. This is appropriate for at least two reasons. In the first place, the right to housing is integrally linked to other human rights and to the fundamental principles upon which the Covenant is premised. This "the inherent dignity of the human person" from which the rights in the Covenant are said to derive requires that the term "housing" be interpreted so as to take account of a variety of other considerations, most importantly that the right to housing should be ensured to all persons irrespective of income or access to economic resources. Secondly, the reference in article 11 (1) must be read as referring not just to housing but to adequate housing. As both the Commission on Human Settlements and the Global Strategy for Shelter to the Year 2000 have stated: "Adequate shelter means ... adequate privacy, adequate space, adequate security, adequate lighting and ventilation, adequate basic infrastructure and adequate location with regard to work and basic facilities - all at

The General Comment goes further to state that "Adequate shelter means ... adequate privacy, adequate space, adequate security, adequate lighting and ventilation, adequate basic infrastructure and adequate location with regard to work and basic facilities - all at a reasonable cost". Clearly there is still much that need to be achieved in relation to the provisions of adequate housing to our elderly.

Conclusion

In conclusion, there is much that still needs to be done for the elderly in South Africa. It is important that we use the international human rights instruments to assist us in articulating what needs to be done for our elderly. We need to infuse a strong human rights based approach towards caring for the elderly. Such an approach based on the principles of equity, participation and accountability will go a long way in ensuring that we reach these goals sooner.

Thank you